

**Non – Recognition of Unlawful Situations as Customary International Law:
A Case-based Approach**

by

Nguyen Quoc Tan Trung
LLM, University of Westminster, Merit International Scholarship, 2017
LLB, Ho Chi Minh City University of Law, Faculty Valedictorian, 2014

A Dissertation Submitted in Partial Fulfilment of the
Requirements for the Degree of
DOCTOR OF PHILOSOPHY
in the Faculty of Law and Society

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University of Victoria

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We acknowledge and respect the Lək'wəḡən (Songhees and Esquimalt) Peoples on whose territory the university stands, and the Lək'wəḡən and W̱SÁNEĆ Peoples whose historical relationships with the land continue to this day.

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Abstract

Non-recognition, resembling the ancient legal principle *ex injuria jus non oritur* (Rights shall not derive from an illegal act), is supposedly an organic and inherent concept of public international law, if not the intuition of law in general. The objective of non-recognition is simple: it amounts to a refusal of recognition of any attempts to create a title of rights or consolidate a situation as a legal reality because what leads to it is contrary to international law. In the words of the late ICJ judge Hersch Lauterpacht, non-recognition is to “prevent the validation of what is a legal nullity”. In practice, non-recognition can include actions such as declarations, the exclusion from an organisation, and non-cooperation with the perpetrator in certain aspects of international life that might imply the acquiescence of such unlawful situations and even severance in other multilateral and bilateral ties with the perpetrator.

Non-recognition indeed has manifested its utilities and powers in some instances, including the non-recognition campaigns against South Africa’s apartheid regime and their attempts to internationalise the system and Israel’s occupation of Palestinian territories. However, many scholars and statespeople also argue against non-recognition, citing its empirical inconsistency and operational incoherence. Others insist that *ex jactis jus oritur* (effectiveness), a principle emphasising accepting the law-creating influence of facts, would overshadow non-recognition in a corporeal practice of international politics. The cases of Ethiopia, Tibet, Goa, Afghanistan and especially the infamous contemporary cases of Kosovo and Crimea, to name a few, are major talking points of this argument.

This dissertation is a systematic investigation of non-recognition. From exploring the possible theoretical roots of non-recognition in East-West international philosophicalisation to its historical development and then forming a tangible idea of non-recognition through the case studies database, I argue that not only is non-recognition already a custom in international law, but its behavioural foundation has been more relevant in the history of Confucious international order rather than the often-assumed Westphalian international order.

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All remaining mistakes in the dissertation are mine, but some could be blamed on Minh.

1. Introduction

Twenty years into the 21st century, wars, unjust acts against humanity and strong belief in “realist” unequal international relations are still rampant. As I was working on this dissertation, in February 2022, the Russian Federation under Vladimir Putin, after years of denying Ukrainians the rights of self-determination, political independence and territorial integrity, invaded Ukraine with little or no consideration for a legal justification.

At a meeting of the United Nations Security Council on February 17, 2022,¹ the Russian representative hurled accusations that the Zelenskyy government is “the puppet Government of Ukraine.” Citing the reluctance of Kyiv to hand over the sovereignty of Donetsk and Luhansk to Moscow, the Russian representative scornfully described the Ukrainians as “stubborn.” Russia insists that it is mistaken to regard the Kyiv government as an independent entity or to claim that Ukraine is independent since Ukraine is now “a colony of a collective West.” The representative also asserted that the West’s allegation that Russia was going to attack Ukraine was “baseless” and “aggressive” anti-Russian rhetoric. Exactly seven days after denying that they were preparing to invade Ukraine, the Russian army crossed Ukrainian borders and assaulted the country on every front. As Mr Hoxha, the Albanian representative, remarked at the UNSC meeting on February 23, 2022: “Russia has been saying one thing and doing the opposite.”²

Worse, at the same meeting, Russia declared that the Organization for Security and Cooperation and the Europe Special Monitoring Mission to Ukraine had recorded nearly 2,000 ceasefire violations, including almost 1,500 explosions, as if it was Ukraine that had attacked the Donetsk and Luhansk non-government-controlled regions. In reality, the report of the Special Monitoring Mission to Ukraine could only verify that multiple Ukrainian government-controlled areas were being shelled in Kherson, Odesa, Kharkiv and many other places, that explosions could be heard, and that civilians were queuing for food and medicines.³ Russia then listed the justifications for its “special military operation” as: invitations by the unlawful governments of Donetsk and Luhansk; assistance to people allegedly subjected to eight years of “genocide;” and a plan to demilitarise and de-nazify Ukraine.⁴

In response to Russia’s unfounded claims and arbitrary actions, the international community has acted in a consistent, comprehensive, and decisive manner. Although there was no official

¹ UNSC, ‘8968th Meeting Minute Concerning the Letter Dated 13 April 2014 from the Permanent Representative of the Russian Federation to the United Nations, UN Docs S/PV.8968’ <<https://digitallibrary.un.org/record/3958813>> accessed 15 April 2024.

² UNSC, ‘8974th Meeting Minute Concerning the Letter Dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations, UN Docs S/PV.8974’ <<https://digitallibrary.un.org/record/3959147>> accessed 15 April 2024.

³ OSCE, ‘Special Monitoring Mission to Ukraine, Daily Report 43/2022’ (Organization for Security and Cooperation in Europe 2022) <<https://www.osce.org/files/2022-02-24%20Daily%20Report.pdf?itok=39275>>.

⁴ ‘Russian Federation Announces “Special Military Operation” in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict | UN Press’ <<https://press.un.org/en/2022/sc14803.doc.htm>> accessed 27 September 2023.

resolution criticising Russia's aggression on the stage of the Security Council due to Russia's veto power, an overwhelming majority of the Council actively condemned Russia, with 11 votes supporting the resolution, three abstentions, and only the Russians themselves voting against it.⁵ The General Assembly also acted promptly under the Uniting for Peace resolution,⁶ defining Russia's so-called "special military operation" in Ukraine as "aggression", deploring it in the strongest terms and reaffirming a commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognised borders and extending to its territorial waters.⁷ The same procedure has been carried out in other specialised agencies of the United Nations.

On the other hand, various international organisations, as well as nation-states, have used their power to carry out economic sanctions against Russia and to provide military assistance to Ukraine. International entities of every kind have joined the fight against Russia's attempt to create a situation of *fait accompli* in Ukraine. FIFA and UEFA, the influential international football organisations, decided that all Russian teams, whether national representative teams or club teams, would be suspended from participation in both FIFA (Federation Internationale de Football Association) and UEFA (Union of European Football Associations) competitions.⁸ In their statements, the organisations confirmed that they were fully united and in full solidarity with all those suffering the effects of the Ukraine conflict. The International Olympic Committee and the International Paralympic Committee have also considered the matter and reached the conclusion that the government of Russia had breached its Olympic Truce, as had the government of Belarus, Russia's accomplice in the aggression.⁹ Consequently, both Committees urged International Sports Federations and organisers of sports events worldwide to do everything in their power to ensure that no athlete or sports official from Russia or Belarus would be allowed to take part under the name of Russia or Belarus. The purpose was to allow them to participate only as neutral individuals. However, after learning that Russia's intention was to completely destroy the lawful government of Kyiv and facing intense pressure worldwide, all Russian and Belarusian athletes were banned from participation in games organised by both Committees.¹⁰ Organisers of sports such as basketball, hockey, and track events have also imposed blanket bans on Russians and Belarusians. Major cultural and

⁵ UNSC, 'Draft Resolution on Aggression by the Russian Federation against Ukraine in Violation of the Charter of the United Nations, UN Docs S/2022/155' <<https://digitallibrary.un.org/record/3958806?ln=en&v=pdf>> accessed 15 April 2024.

⁶ UN General Assembly, Uniting for peace, 3 November 1950, A/RES/377, available at [https://www.un.org/en/sc/repertoire/otherdocs/GAres377A\(v\).pdf](https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf)

⁷ UNGA, 'Res ES-11/1 on "Aggression against Ukraine" UN Docs A/RES/ES-11/1' <<https://digitallibrary.un.org/record/3965290>> accessed 15 March 2023.

⁸ FIFA, "FIFA/UEFA Suspend Russian Clubs and National Teams from All Competitions" (FIFA) <<https://www.fifa.com/tournaments/mens/worldcup/qatar2022/media-releases/fifa-uefa-suspend-russian-clubs-and-national-teams-from-all-competitions>> accessed April 11, 2022

⁹ IOC, "IOC EB Recommends No Participation of Russian and Belarusian Athletes and Officials - Olympic News" (International Olympic Committee March 16, 2022) <<https://olympics.com/ioc/news/ioc-eb-recommends-no-participation-of-russian-and-belarusian-athletes-and-officials>> accessed April 11, 2022

¹⁰ Associated Press, "Russian, Belarusian Athletes Banned from Winter Paralympic Games as IPC Reverses Ruling" (ESPN March 3, 2022) <https://www.espn.com/olympics/story/_/id/33410388/russian-belarusian-athletes-banned-winter-paralympic-games> accessed April 11, 2022

sporting events and activities have been removed from Russia, including the Champions League Final,¹¹ the Formula 1 Grand Prix,¹² and even Disney films and the Eurovision Contest.¹³ Putin's personal titles, such as the Honorary President and Ambassador of the International Judo Federation and his honorary black belt in Tae Kwon Do were also stripped from him.¹⁴ Russia, for now, faces relative legal isolation, with even their closest allies legally distancing themselves from Russia's legal narrative, asserting along the lines of the emergency resolution of UNGA that: "no territorial acquisition resulting from the threat or use of force shall be recognised as legal."

This is not the first time collective non-recognition of an unlawful situation has been employed by the international community. However, as political discussions became increasingly heated, one vital general question of international law was overlooked, viz: Did States and international actors who participated in the non-recognition campaign against Russia's aggression (and many other unlawful events) and their subsequent repercussions act as they did out of compassion and to show "solidarity" for Ukrainians? Or was it because they felt a legal obligation to do so? Answering these questions is a paramount task for the future development of international law concerning the duty of non-recognition – the central research question of This dissertation.

1.1. One hundred years before now

Resembling the ancient yet familiar legal principle that legal rights shall not derive from an illegal act, (often referred to as the Latin legal principle - *ex injuria jus non oritur*), it was not hard for the principle of non-recognition of unlawful situations to gain a normative momentum in international law. On the surface level, as early as 1890, the Washington International Conference of American States publicly supported the idea that cessions of territory resulting from threats of war or the occupation of armed force should be null and void.¹⁵ Commonly known as the First International Conference of American States, the conference provided a

¹¹ UEFA, "2022 UEFA Champions League Final to Be Held at Stade De France in Paris" (UEFA March 15, 2022) <<https://www.uefa.com/news/0272-14876a9f349c-c61e3670721f-1000--stade-de-france-to-stage-final/>>; accessed April 11, 2022

¹² F1, "Formula 1 Statement on the Russian Grand Prix: Formula 1" (Formula 1 February 25, 2022) <<https://www.formula1.com/en/latest/article.formula-1-statement-on-the-russian-grand-prix.4S39V28GpAH5ESb8LksW0J.html>>; accessed April 11, 2022

¹³ Pallotta F, "Disney Will Stop Releasing Films in Russia" (CNN March 1, 2022) <<https://www.cnn.com/2022/02/28/media/disney-russia-movies/index.html>> accessed April 11, 2022 and

¹⁴ "Official Announcement from World Taekwondo" (WorldTaekwondo.org) <<http://worldtaekwondo.org/wtnews/view.html?nid=138702>>; accessed April 11, 2022 and International Judo Federation, "Official Announcement of the International Judo Federation" (IJF.org February 27, 2022) <<https://www.ijf.org/news/show/official-announcement-of-the-international-judo-federation>> accessed April 11, 2022

¹⁵ Leonard, T. M. (2012). First international conference of American states, Washington, 1889. In the Encyclopedia of U.S.-Latin American Relations (pp. 347-347). CQ Press, <https://dx.doi.org/10.4135/9781608717613.n318> and Ian Brownlie, 'The Principle of Non-Recognition' in Ian Brownlie (ed), *International Law and the Use of Force by States* (Oxford University Press 1963) <<https://doi.org/10.1093/acprof:oso/9780198251583.003.0025>> accessed 9 May 2023., 410

forum for countries in the Americas to introduce, for the first time, their concept of equality between states and the position that military conquest should generate no territorial rights.

Subsequently, the principle of non-recognition repeatedly made its appearance in international instruments. From the Kellogg—Briand Pact¹⁶ and the Covenant of the League of Nations¹⁷ to the Anti-war Treaty of Non-aggression and Conciliation,¹⁸ states either did implicitly “undertake to respect and preserve as against external aggression”¹⁹ or explicitly committed themselves not to recognise any territorial arrangement, occupation or acquisition of territories not obtained by “peaceful means.”²⁰

Although some scholars believed at the time that the signatories of these documents never intended to create a common legal obligation for international actors,²¹ their “goodwill” regarding international relations eventually inspired its response to the creation of the State of Manchukuo. When the Chinese government appealed for the involvement of the League of Nations to resolve this Far East crisis, a convincing majority of the League’s Assembly declared that “it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.”²² Regarded by scholars as the Stimson Doctrine and created as a response to the Manchuria crisis in 1932-1933,²³ a historical “fact” which will also be challenged thoroughly in this dissertation, non-recognition was expected to become an emerging rule of customary international law. And it is reasonable to believe that it has all the potential elements to become the backbone of an international rule of law.

Not all international conflicts receive the same attention from influential international organisations (such as the historic League of Nations and the contemporary United Nations), and even if they do, coercive restoration is very unlikely to happen. This is particularly true since states that are willing to violate international laws and produce unlawful situations are usually world superpowers (or at least have friends who are) and will be capable of maintaining situations of wrongdoing for an extended period. The division of labour, willingness and interests between the permanent members of the UNSC and other developing states in conflicted legal situations has been succinctly examined in several studies, which in turn highlights the problem of double standard in situations that are “falling below the Security

¹⁶ General Treaty for Renunciation of War as an Instrument of National Policy (adopted 28 August 1928, entered into force 24 June 1929) 94 LNTS 57.

¹⁷ Covenant of the League of Nations (adopted 29 April 1919, entered into force 10 January 1920)

¹⁸ Anti-War Treaty of Non-aggression and Conciliation (adopted 10 October 1933) 163 LNTS 393

¹⁹ Article 10, The Covenant (n 17)

²⁰ Article 2, Anti-war Treaty (n 18)

²¹ Brownlie, ‘The Principle of Non-Recognition’ (n 15), 411

²² League of Nations Official Journal Spec. Supp. 120, 14, 15, 16

²³ Stimson Doctrine is named after US Secretary of State Henry Stimson, which the dissertation will explain why it does not entirely agree with this name.

Council radar”.²⁴ To prevent effectiveness (*ex jactis jus oritur*) from prevailing against legality (*ex injuria jus non oritur*), non-recognition of illicit outcomes is, arguably, the best peaceful way to “punish” the unlawful acts of states.

Non-recognition was increasingly popular in the Charter era of the United Nations. The 1970 Declaration on Friendly Relations and Cooperation, one of the most vital documents constituting customary international law, stated *inter alia* that “No territorial acquisition resulting from the threat or use of force shall be recognised as legal.”²⁵ The General Assembly Resolution on the Definition of Aggression advanced the notion of non-recognition by referring to “special advantage,”²⁶ asserting that the principle is not limited to the condemnation of “territorial acquisition.” The ICJ’s voice in the cases of Legal Consequences for States of the Continued Presence of South Africa in Namibia;²⁷ the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory;²⁸ and the complement to Article 41 of ARSIWA,²⁹ should be sufficient to establish the existence of the principle of non-recognition in international law.

With these foundations, international political organs have frequently called upon States not to recognise illegal situations, such as Israel’s occupation of East Jerusalem and others; the legacy of South Africa’s apartheid policy and the Bantustan debates; the unlawful establishment of the Turkish Republic of Northern Cyprus and many more. These incidents raised such questions as the legality of the annexation of territory, the installation of governments by an illegal foreign occupying power, the legality of the presence and administration of an occupying power, and even the legitimacy of internal human rights violations.

Unfortunately, the practical impact of non-recognition was also inconsistent and sometimes seemed not to exist. Ethiopia, Tibet, Bangladesh, Goa, the South China Sea disputes, Afghanistan and especially the infamous contemporary cases of Kosovo and the Crimea (to name a few), allegedly show that a *fait accompli* condition is becoming worryingly familiar in modern politics. The links connecting an organic, coherent, and intelligible development of the principle of non-recognition are arguably not sufficiently strong for international scholars to reach any concrete conclusions.

²⁴ Jane Boulden, ‘Double Standards, Distance and Disengagement: Collective Legitimization in the Post-Cold War Security Council’ (2006) 37 Security Dialogue <<https://journals-sagepub-com.ezproxy.library.uvic.ca/doi/abs/10.1177/0967010606069063>> accessed 16 April 2024., 419

Gabriel M Lentner, ‘The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism’ (2020) 20 International Criminal Law Review 251.

²⁵ Principle 11, UNGA Res 2625 [1970] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625

²⁶ Article 5, UNGA Res 3314 [1974] *Definition of Aggression*, Un Doc A/RES/331

²⁷ Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion) [1970] ICJ Rep 16

²⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 2004 136

²⁹ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) Supplement No. 10 (A/56/10)

1.2. Positions of Leading Authors Concerning the Principle of Non-recognition

There are a few authors who have participated in non-recognition discourse, all of whom have their unique approaches to the topic. This sub-section is intended to be the literature overview of the non-recognition, but readers might wonder why it is so short. The unfortunate reason is that not many scholars see non-recognition as a serious concept that could contribute substantially to the development of international law. Over three years of reading and researching non-recognition, I encountered roughly 30 works (books, book sections and articles included) that have non-recognition as their partial research focus. Non-recognition is not the primary focus of any of them, except for one international relations study. The most prominent scholarly piece concerning non-recognition that appears in almost all later works is of the late ICJ judge Lauterpacht, and even this is just a twenty-page book section. The literature situation might allow spacious room for this dissertation to explore, but it also means a long walk in the dark for us.

Enrico Milano, in the comprehensive work *Unlawful Territorial Situations in International Law*, digs deep into the discussion of the legal aspects of unlawful situations relating to territoriality. Milano introduces the concept of invalidity, which is distinguished from a wrongful act, as this is the point where the unlawfulness of the situation starts to cause problems. He then discusses unlawful situations in terms of key concerns and building blocks, including the relationship between effectiveness, legality and legitimacy. Unfortunately, in contrast to his detailed treatment of effectiveness and legality, he pays very little attention to the role of legitimacy in international law - or to the non-recognition principle. Moreover, while neutral about the principle, Milano is strict with the scope of his objectives. For example, he makes a distinction between governmental illegitimacy and the unlawfulness of a territorial situation,³⁰ even though both could be the results of illegal acts and therefore require the application of non-recognition. In short, Milano's research is indeed the "go-to" research for understanding the consequences of the Iraq war and of unlawful territorial situations in general. However, the gap that this research seeks to fill does not necessarily deal with the application and future of the non-recognition principle *per se*.

John Dugard is a supporter of UN action in the area of non-recognition. He regards the principle as being founded upon a legal principle of international law, rather than on mere political expediency, as it was often portrayed at the time. Yet his enthusiasm for the principle, as displayed in *Recognition and the United Nations*,³¹ is only within the frame of the collective actions of specific organs of the UN. Limited by the historical context at the time of publication (1987), Dugard's argumentations were heavily influenced by the decolonisation movement and Cold War politics, which do not necessarily characterise the current needs and practices of non-recognition principle. Another vital point to note is that Dugard seemed to regard "non-recognition" as a concept opposite to "recognition"; or at least he categorised them within the same spectrum – a proposition that I believe is already outdated in the context of the contemporary international legal system.

³⁰ Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Martinus Nijhoff 2006, 8

³¹ John Dugard, *Recognition and the United Nations* (Cambridge Grotious 1987)

Judge Lauterpacht of the International Court of Justice, on the other hand, acknowledges the importance of the principle to international legal order. Lauterpacht could be considered the most enthusiastic supporter of the institutionalisation of non-recognition. He does, however, discuss concerns about the way it is subject to “considerable strain” and “wide exceptions.”³² Possible exceptions would include the element of self-determination, racial discrimination, apartheid, or the breaches of basic principles of international humanitarian law.³³ Some argue that he believes an unlawful situation may be “cured” or validated over time through a gradual process of waiver, acquiescence, and prescription. However, as we will see in later sections, this is a misread of his argument since Lauterpacht was completely in favour of applying non-recognition as a legal duty in international law.

Recently, there have been attempts to codify the non-recognition rule for states. Notably, in 2001, the International Law Commission’s (ILC) Articles on The Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) declares that “no State shall recognise as lawful a situation created by a serious breach...nor render aid or assistance in maintaining that situation.” Similarly, the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) in 2022 (“ILC Draft Conclusions”) even intended to build up the duty of non-recognition as part of the international *jus cogens*. However, despite the ILC’s monumental efforts to establish third-party States’ obligations, the requirements that stem from the obligation remain unclear, as do the circumstances in which the obligation arises.

Other key positions in scholarship have predominantly challenged the necessity, the practicality and sometimes even the relevance of the principle in international law. Ian Brownlie, for example, takes the view that the necessity of applying the principle occurs only in rare cases, since unlawful situations can only be legitimised as a result of very long-term possession or through the general acquiescence of the international community.³⁴ The implication here is that there is no need to dedicate a legal framework for such a *rara avis* of a principle.

Hans Blix explains that the obligation means no formal admission may be made of the legality of an unlawful situation as described.³⁵ But it also allows States to determine for themselves to what extent their practical cooperation and normal relation would be carried out without the implication that a formal admission of the legality of the situation has been given, unless there is a uniform international reaction, led by the United Nations or regional organisations.

Stefan Talmon, in a publication named *The Fundamental Rules of the International Legal Order*, also expresses his doubt as to whether the principle will ever be fully developed with regard to serious breaches of some of the *jus cogens* norms. According to his thesis, unless a

³² H Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947), 420-430

³³ James Crawford, Alain Pellet, Simon Olleson (eds.) *The Law of International Responsibility* (OUP), 679

³⁴ Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press. 1963), 422

³⁵ Stefan Talmon, ‘The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?’ in Christian Tomuschat, Jean Marc Thouvenin (eds.) *The Fundamental Rules of the International Legal Order* (BRILL, 2006), 110

factual situation takes the form of a legal claim that is intended to have an *erga omnes* effect, it is meaningless to ask for the implementation of the non-recognition principle. And even then, he argues, the latter's scope of application would be rather limited.³⁶

Overall, sceptical responses over this “barren duty” have been present ever since its inception.³⁷ With the directions taken by leading authors, as explained above, scholarly discussion on the duty of non-recognition seems to conclude at the point where both nation-states and academia are still reluctant to develop relevant criteria beyond concrete cases.

1.3. Research Questions:

By the time the Russian forces carried out the so-called referendums in four occupied provinces of Ukraine, the UNGA with Resolution ES-11/4, the UNGA had reaffirmed:

“..... the principle of customary international law, as restated in its resolution 2625 (XXV) of October 24, 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”, that no territorial acquisition resulting from the threat or use of force shall be recognised as legal.”

Resolution ES-11/4 is definitely a Grotian moment³⁸ of the duty non-recognition of unlawful territorial acquisition. Yet, the uncertainty surrounding the duty of non-recognition remains. Some problems include:

- “*The problem with the scope of breached norms*”
Even if we recognise the customary status of non-recognition in terms of violation concerning territorial acquisition, the duty of non-recognition has been used and discussed in a much more diverse set of situations, including the creation of a new state, regime change, human rights violations and more. Can non-recognition be a part of those cases?
- “*The problem with collective and centralised determination*”
Returning to some of our discussion points regarding the international responses to the Russian invasion of Ukraine, there are issues with authority and identification. While it is true that the international community, in general, hopes to isolate Russia as much as possible and on as many international planes as possible, the implementation has been somewhat chaotic. There are states that participate in the declaration of law against Russia but refuse to join the Western sanctions framework. Some condemn Russia but feel that sports, culture and academic boycotts against Russia are an excessive response.

³⁶ Stefan Talmon, ‘The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?’, *The Fundamental Rules of the International Legal Order* (Brill 2006) <<https://doi.org/10.1163/ej.9789004149816.i-472.33>>.

³⁷ See the comments and observations submitted by the United Kingdom on Art. 18 of the Draft Declaration on Rights and Duties of States, A/CN.4/2 (15 December 1948), 111.

³⁸ Michael P Scharf, ‘Grotian Moments: The Concept’ (2021) 42 *Grotiana* 193.

In this environment, is non-recognition just another discretionary option in the hands of nation-states?

- *“The problem with the content”*

Continuing the previous point about the collective determination of unlawful situations, if we do not recognise any authoritative collective mechanism to identify the breaches and the situations, there will be no unified understanding of the content of non-recognition. What exactly does the duty of non-recognition entail? Is it just a symbolic declaration? Or coordinated responses in aspects of international life? Or does it always encompass outright economic sanctions?

Due to its allegedly contradictory practices, disputed scholarly directions and limited public attention, the status of the duty of non-recognition still has an uncertain place in the international legal system. Bearing in mind the aforementioned problems, the biggest research question of the dissertation is simple:

Is the practice of non-recognition a part of international customary law? And if it is, how should it be operationalised?

To answer the research question, I propose to investigate several sub-questions:

- 1) *How can we understand the principle of non-recognition in the historical, philosophical and practical contexts of international law?*
- 2) *Have States’ practices and opinio juris been as inconsistent and fragile as scholars usually claim?*
- 3) *What should the “ideal practice” of non-recognition look like?*

At this stage, I hypothesise that the principle of non-recognition is an integral part of international customary law with an influential impact on the thinking, behaviour, discussions, and reactions of nation-states.

- 1) The roots of non-recognition rest in the philosophy of international law and justice. Although often assumed under the name of the Stimson Doctrine, non-recognition has robust third-world approaches to international law and has now developed substantially.
- 2) Moreover, a deeper and more detailed look into the practice of States with proper regard to the contextual and historical differences will show us that the pattern of non-recognition is much more comprehensive than we had previously imagined.
- 3) Finally, I do not envision the “ideal practice” of non-recognition as if it were a “treaty obligation” with defined mechanisms and “predictable” results.

Within these research questions and research environment, I am mindful of the linguistic differences between the “principle” of non-recognition, the “duty” of non-recognition”, the “campaign” of non-recognition, and the “practice” of non-recognition. However, historically, these terms have been used liberally in the literature because they do not reflect different conceptual connotations but rather different stages and forms of non-recognition. This dissertation follows the same approach, although it adds some rules for clarity and readability.

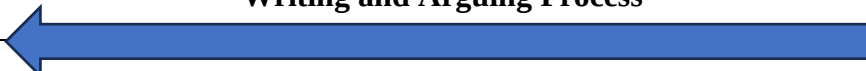
The “principle” of non-recognition is used when we talk about non-recognition within the theoretical/legal realms, discussing its possible philosophical foundation or its legal components. The term “campaign” of non-recognition has all of the theoretical properties of non-recognition as in the “principle”, but using the language of Collins Dictionary,³⁹ wants to shift the focus to the set of activities that international/national actors carry out over a period of time in order to achieve the “principle” of non-recognition. In other words, non-recognition “campaign” is the full manifestation of the “principle” of non-recognition. The activities include any forms of non-recognition that have been used, invented, or adopted by the actors, while the international/national actors here could be any political entity that has specific authority to participate in the said forms of non-recognition. For instance, national courts could possibly be involved in the process if there is a legitimate national legal dispute about such a question. As we will see in the case studies chapter, however, it is the national government, international organisations, and other international agencies... that are often tasked with the power of non-recognition.

The “practice” of non-recognition, on the other hand, could be used to refer to any specific action taken by authoritative actors (UNGA’s declaration, UNESCO’s rejection of a cultural heritage application, or votes from the government...), but could also refer to the general application of the “principle”. Terms like “state’s practice” of non-recognition play a dominant role in the terminology of this dissertation. Finally, the “duty” of non-recognition often signifies the obligation and responsibility to not recognise the unlawful situation and its consequences when the practice (or campaign) of non-recognition has been legitimised through international processes.

Table 1.3. Map of thinking and working processes

Reading and Thinking Process 			
Technicality of Non-recognition	Research Question	Detailed questions	Hypotheses
<i>The problem with breached norms</i>	<i>Is the practice of non-recognition a part of international customary law?</i>	<i>How can we understand the principle of non-recognition in the historical, philosophical and practical contexts of international law?</i>	The roots of non-recognition rest in the philosophy of international law and justice. (1)

³⁹ “‘Campaign’ Definition and Meaning | Collins English Dictionary” (24 June 2024) <<https://www.collinsdictionary.com/dictionary/english/campaign>> accessed 24 June 2024.

<i>The problem with collective determination</i>	<i>And if it is, how should it operate?</i>	<i>Have States’ practices and opinio juris been as inconsistent and fragile as scholars usually claim?</i>	The pattern of non-recognition is much more comprehensive than we had previously imagined (2)
<i>The problem with content</i>		<i>What should the “ideal practice” of non-recognition look like?</i>	Non-recognition is not a substantive “treaty obligation” (3)
Writing and Arguing Process 			

1.4. Methodology

Methodological approach

The research has both a positive and normative nature. This dual nature is reflected in the detailed research questions cited above. The first two research questions are positive and convey the hope of re-constructing and rationalising the practice of the non-recognition principle. The intention is to use existing rules and their effects and the practices of states in their historical and political contexts to position non-recognition in a legal frame and subsequently explain the empirical discrepancy and its magnitude in relation to the international rule of law. The final research question deals with normative nature (the "what should..."), since it tries to use the available data as presented in the dissertation to "imagine" the best way to understand and practice the principle of non-recognition.

These questions indicate both inductive and deductive research directions and a highly theoretical-conceptual study, for which descriptive, empirical/qualitative, and analytical approaches are the most suitable.⁴⁰ They can be used in describing, interpreting, contextualising, constructing/reconstructing, gaining in-depth insight and reaching a conclusion on the legal phenomena of the non-recognition principle.

However, in each chapter, readers can find the different methodological priorities.

Chapter 2, *A Treatise on Customary International Law*, is relatively pure analytical research on legal theories. The chapter is, therefore, a systematic examination of different sets of beliefs and assumptions concerning international law, and customary international law specifically.

⁴⁰ Maggie Kiel-Morse, 'Research Guides: Legal Dissertation: Research and Writing Guide: Home' <<https://law.indiana.libguides.com/dissertationguide/home>> accessed 9 January 2024.

Chapter 3, *Non-recognition: Conception and Contexts*, on the other hand, is a mixed study of the theory, the history, and the “black letters law” of non-recognition. Consequently, readers can find here that expository research (descriptive) is being prioritised with the support of analytical tools.

Chapter 4 - *Deconstructing State Practices* – is the backbone of the thesis, and is a collection of case studies. This is my contribution to the empirical/qualitative study of non-recognition with unique primary information being utilised.

Chapters 5 and 6 - *The Principle of Non-recognition of Unlawful Situations: An Established Custom? and the Ideal Model of Non-recognition* – combine all arguments, information and observations in previous chapters to imagine a better way to understand non-recognition as a part of international law.

Research methods

Since the purpose of the dissertation is to identify non-recognition as customary international law, the research method that dominates this dissertation is, in a way, the method to identify custom: why I choose one particular technique to collect/analyse data depends on how this technique compliments the custom’s identification process. In this sense, the case study is my first choice. Although the case study method seems to be inevitable for a CIL study, the dissertation claims that other studies have yet to explore non-recognition practice to its fullest and that they have not considered all aspects relevant to a specific non-recognition practice.

As we will revisit in Chapter 2, some authors insist that understanding and identifying CIL can only be done qualitatively, starting with lists of cases, numbers of states that voted or voiced opinions to support a norm, and other thresholds. Such a method of framing CIL is often called the “strict inductive approach” in international law,⁴¹ and in my opinion, reduces the complexity of non-recognition practice into inorganic criteria, which sometimes could miss important contexts and information that are vital to one particular case. Others suggest using a series of descriptive “Grotian moments” in history to identify and explain CIL,⁴² which would be helpful if we consider the foundational norms of international law. This approach is similar to the idea of “a deductive process that begins with general statements of rules”,⁴³ for which will be used as a set of criteria to find supporting cases. Concerning non-recognition, however, this approach might not provide a strong enough argument, as the literature already problematises the alleged inconsistency of the practice. On the surface, the structure of this dissertation might suggest that I have taken the latter path. In Chapter 3, we talk about the concepts and contexts of non-recognition, then move to the case studies in Chapter 4 right after. But this interpretation will result in misunderstandings of the dissertation’s intentions.

⁴¹ Alberto Alvarez-Jiménez, ‘METHODS FOR THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE INTERNATIONAL COURT OF JUSTICE’S JURISPRUDENCE: 2000–2009’ (2011) 60 *International & Comparative Law Quarterly* 681.

⁴² Tom Sparks and Mark Somos, ‘Grotian Moments: An Introduction’ (2021) 42 *Grotiana* 179.

⁴³ Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757.

With Chapter 3 (especially Section 3.2), although the dissertation sets out to explore every aspect of non-recognition as a legal concept (which is deductive in nature), it tries to avoid the conformist traps and only hopes to examine the current state of non-recognition's codification, its problems and related debates. In the language of former ICJ chief Peter Tomka, this type of investigation serves "to provide confirmation" that a particular belief in the rule exists,⁴⁴ but there are no pre-supposed thresholds or criteria for non-recognition. Instead, there are questions, which can only be answered by a detailed investigation of practices (which is inductive in nature). The case study method shines in this regard.

Contrary to the qualitatively inductive and descriptively deductive methods, the case study approach does not only generate an in-depth, complete, and multi-faceted understanding of each individual case but also does not deprive us of the chance to find and consolidate relevant patterns of non-recognition, as long as we invest and cover a substantial amount of cases with enough magnitude and state's participation. In other words, the case study method enables us to dig deeper into the political, historical, and legal context of each unlawful situation, its internal and external elements and discern how such a situation provokes an international response of non-recognition. Such in-depth analysis, in turn, allows us to ponder the unique background of every case, preventing the shallow generalisations and assumptions that sometimes appear in the thin literature of non-recognition.

Additionally, but not less important, the historical method is also crucial to this subject. Since we are dealing with customary international law, the dissertation is obliged to carry out an investigation of the history of non-recognition practice. While the history of the modern principle of non-recognition is only around 100 years old, each period manifests distinctive political issues, legal priorities and international conflicts. The failure to appreciate different perspectives of political affiliations and the regional legal order of each historical era could result in confused and misleading results in the attempt to understand and appreciate the actual weight of non-recognition in international practice. By identifying, locating, evaluating and synthesising data from the past that are related to non-recognition, the dissertation hopes to frame non-recognition in an up-to-date and holistic continuity of international law and the system of collective security.

Rationale of data collection

The dissertation endeavours to rationalise and understand the inherent problems of non-recognition practices and will try to build a comprehensive database of unlawful situations and the following international responses. Therefore, the dissertation examines, collects, and categorises the information based on primary and secondary resources of international law. The database will be extremely useful in finding patterns and generalising trends of non-recognition practices.

Indeed, I do not intend to cover all alleged unlawful situations (which result from acts that are contrary to international law, leaving hanging the question on the titles or rights created by

⁴⁴ Peter Tomka, 'Custom and the International Court of Justice' <<https://heinonline.org/HOL/P?h=hein.journals/lpict12&i=204>> accessed 4 July 2024.

such acts) and all subsequent possible non-recognition campaigns. Using the three technical aspects of non-recognition mentioned above, my brief preliminary investigation already results in a list of over 30 possible cases, which would create a massive volume if no intervention is made in the case selection process.

The Japanese annexation of Korea (1910)	The Manchuria crisis (1931-1933)	The Chaco war and disputed territorial annexations (1932-1935_	The Italian conquer and annexation of Ethiopia (1935-1938)	The German annexation of Austria and Sudetenland and Munich agreement (1938)	The Soviet Union annexation of Finnish territories (1940)	The Soviet Union occupation of Baltic states (1944)
Chinese annexation of Tibet (1951)	Indian annexation of Goa, Daman and Diu (1960)	Indo-Pakistani War and the creation of Bangladesh (1971)	Indonesian invasion and occupation of East Timor (1975-1999)	The creation of Israel (1948)	The Israeli occupation of Palestine and other Arab territories (1968-2024)	The Israeli construction of the wall surrounding West Bank (2000-2024)
South Africa's apartheid regime (1946-1994)	South African occupation of Namibia (South West Africa) (1915-1990)	The Soviet Union's occupation of Czechoslovakia (1968)	The creation of Turkish Republic of Northern Cyprus (1983-2024)	The North Vietnam's intervention in Lao (1958)	The North Vietnam's annexation of South Vietnam (1975)	The Vietnam's occupation of Cambodia (1979-1989)
The Tanzanian intervention in Uganda (1979)	The Iraqi invasion and annexation of Kuwait (1990)	The Russian intervention in Moldova and the problem of Transnistria (1992)	The NATO's intervention in Serbia and the question of Kosovo (1999)	The U.S. invasion of Afghanistan (2001)	The U.S. invasion of Iraq (2003)	The Russian intervention in Abkhazia and South Ossetia (2008)
The Russian annexation of Crimea and other Ukrainian territories (2014-2024)	The Chinese occupation and claims in South China Sea (1949-2024)	The Nagorno-Karabakh conflict...				

After consideration, the research will only analyse eight cases. These cases include:

Table 1.4. Categorisation of researched cases

a. The Manchuria crisis	Pre-Charter non-recognition
b. The Italian invasion of Ethiopia	
c. The Israeli occupation of Palestinian territories	Landmark case
d. The China's annexation of Tibet	Asian experiences of non-recognition
e. The Indian invasion of Goa	
f. Vietnam's Intervention in Cambodia	
g. The apartheid regime of South Africa	Landmark case
h. Russian invasion of Ukraine	Landmark case

The reduction of the research pool does not compromise the findings and objectivity of the research since the case selection process consciously and actively chooses cases that are representative and fall outside the research's hypothetical conformity and bias.

First and foremost, I cover all major cases that have become pillars for understanding non-recognition practice. From the Israeli occupation of Palestinian territories to the fight against the apartheid regime of South Africa and then the Russian invasion of Ukraine, these cases set the standards for exploring both theoretical and practical non-recognition. Considering the prolonged history of both support and challenges to the practice of non-recognition in these cases, the dissertation will inevitably find many of the essential legal innovations involved in the implementation of non-recognition while also acknowledging and addressing the debates that have arisen from them.

On the other hand, the dissertation also goes back to cover the crucial but often overlooked contribution of pre-Charter non-recognition manifested in the case of Manchuria and Ethiopia. Although the literature tends to see non-recognition applied in Manchuria and Ethiopia as complete failures, this dissertation argues that the non-recognition campaigns in Manchuria and Ethiopia were exceptional for their time. The campaigns not only provided vital legal continuity for the post-Charter order, but they also made the case for the intricate and organic nature of non-recognition as a part of modern international law, in which the breakdown of non-recognition is the destruction of the entire system. On the other hand, the fact that the first two cases of non-recognition came from the advocacy of second-class members of the League of Nations might hint at a particular root in the developing world of non-recognition.

Finally, the dissertation also highlights non-recognition practices in the Indo-Pacific. Both realist and post-colonialist theorists often depict Asia as passively and unwillingly at the receiving end of international law. However, with regard to the concept of non-recognition, the contributions made in this region will be shown, thus contributing to the universalist argument of non-recognition. By including the most challenging cases in Asia concerning non-recognition (all of which are considered “proofs” that non-recognition does not exist by the literature).

- Primary sources for the study of the principle of non-recognition following the directions suggested by the research are readily available. At the national level, documents include official protests/statements from the spokespersons or a state’s Ministry of Foreign Affairs, official communique to other countries or international organisations, and votes in specific international resolutions and national legislative bodies.

The dissertation will also consider adjudication, judgments, decisions, advisory opinions and other commentaries on unlawful situations and the principle of non-recognition of international tribunals. Documents issued by international organisations provide resolutions and decisions on the non-recognition of a particular legal phenomenon or sanctions on states or groups of states in response to unlawful acts. Even vetoed resolutions of the Security Council could be helpful.

- Secondary sources

These sources include leading texts, as mentioned briefly in the literature review section. In addition, hundreds of articles and books can be found in the dissertation and have been extremely valuable to the research. They provide updated scholarly debates and discussions on the duty of non-recognition. However, five books are particularly vital to my outlook, the thinking process, and the scholarly affiliations:

- a. Breaux S. *Humanitarian Intervention: The United Nations and Collective Responsibility* (Cameron May 2005)
- b. Lauterpacht H. *Recognition in International Law* (AMS Press Inc 1978)
- c. O’Mahoney J. *Denying the Spoils of War: The Politics of Invasion and Non-Recognition* (Edinburgh University Press 2018)
- d. Christian Reus-Smit, *The Moral Purpose of the State* (Princeton University Press 1999)
- e. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995)

Draft structure

Following this introduction, the dissertation will be organised as follows:

Chapter 2. A Treatise on Customary International Law

Before arguing that the duty of non-recognition is a legitimate part of international law under the status of customary international law, the dissertation needs to find a solid ground for the identification process of CIL, i.e., how can international social norms be counted as custom? However, as the dissertation gradually formed, thanks to the University of Victoria's Law and Society interdisciplinary approach, it became clear that it was also necessary to address conceptual enigmas and theoretical attacks against the idea of customary international law.

This chapter is vital to the progression of this dissertation because it confirms the legality of the General Assembly's involvement in the formation of customs, the Security Council's seemingly unlimited power in this regard, and the impacts of international tribunals, including the International Court of Justice and others, with their interpretation and implementation.

Moreover, it delves into the theoretical debates concerning CIL. From pushing back the ideas of "forum shopping" and exposing the overestimation of "statist rationalism," to exploring the concept of "relative consent," the idea of "collective morality," the "constructivist approach to CIL," and "international legal process theories", this chapter explains the theoretical influence of how and why I choose any specific approach in studying and identifying non-recognition as CIL.

Chapter 3. Non-recognition: Conception and Contexts

After consolidating a unified theoretical foundation of customary international law to analyse and examine the customary status of the duty of non-recognition, the dissertation then scrutinises non-recognition itself. With three main sub-sections, "Non-recognition and the Theory of Rule-maintenance", "Non-recognition as a Modern Legal Concept", and "Non-recognition and the Emerging Post-colonial School", we are basically performing an autopsy on different parts of non-recognition to gain a holistic view of the norms.

This chapter, in my view, is exciting, as I found that the concept of "not recognising" an unorthodox reality that goes against specific interstate rules and principles gained a much stronger foothold in the East Asian Confucian international order, contrary to the assumptions of European scholars regarding this order. On the other hand, the technicality of the duty of non-recognition is also examined in detail, and all the remaining alleged hindrances to non-recognition achieving the status of custom are presented as they are.

The dissertation also addresses another critical outside challenge to international law in general, i.e., post-colonial approaches. Under this increasingly popular lens, international law is considered a remnant of exploitative colonialism and imperialism. The chapter explores how these approaches challenge the existing system of international order; my own view is discussed; and the reasons why non-recognition is not a part of such outdated practices are explained.

Chapter 4. Deconstructing State Practices

“Deconstructing State Practices” is the most ambitious section of the study.

This section gathers information to build the first detailed database on the practices of the duty of non-recognition as a concept of international law. The dissertation plans to use the case-study approach to highlight all important aspects, not only of landmark unlawful situations, but also situations that have been unable to produce any meaningful international action, with reference to history, political contexts, developments in the international arena, the parties involved, or even the conflict of laws. In other words, the chapter takes into account the technical issues of non-recognition, uses the existing framework to identify CIL, and attempts to devise the best common framework in which to study the cases. This framework of the chapter is as follows:

- a. Preliminary political-legal analysis
- b. Legal debates
- c. Identifying unlawful situations
- d. The application of non-recognition campaign(s)

I believe that this “chassis” allows our case studies to cover all the aspects of history, politics, and other hidden facts that are often overlooked in other studies of the duty of non-recognition.

Concerning their connection with our research questions, the information gathered in “Preliminary political-legal analysis” and the “Legal debates” contribute to our tasks to understand the principle of non-recognition in the historical, philosophical and practical contexts of international law. For example, without knowing that the 13th Dalai Lama accepted to be a vital part of Communist China’s apparatus (the Tibet case study), or without acknowledging the worldwide legal enthusiasm for decolonisation in the 1960s (in the Goa case study), or without exploring Japan’s wordlessness during the debates at the League of Nations (in the Manchuria case study), or how the international legal process accessed the situation in Cambodia ... several works on non-recognition have missed the chance to see non-recognition in its legal continuity and possibilities.

On the other hand, the sections “Identifying unlawful situations” and “The application of non-recognition campaign(s)” allow the research to address the research question on the inconsistency and fragility of state practices and *opinio juris* on non-recognition. If non-recognition is truly impractical, then the contradictions between the processes of identifying the unlawfulness of one state’s conduct and the processes of not recognising the unlawfulness (if there are any, depending on the former processes) must be clear and certain, with no logical legal explanation for them. Our sections carry out an in-depth study of these processes and put the observation to the test.

Chapter 5. The Principle of Non-recognition of Unlawful Situations: All the Traits of an Established Custom?

This chapter is the most assertive in the thesis, as it attempts to weave together all the aforementioned data, cases, arguments and theories into the most important argument: the duty

of non-recognition is a part of customary international law, as shown in the practice of states and *opinio juris*.

The three strongest nexuses of arguments for applying customary status to the duty of non-recognition are:

- a. The consistency of non-recognition in its “*due process*”

The chapter argues that applying international legal process theory to the study of cases of non-recognition shows that the duty of non-recognition is surprisingly predictable and achievable.

- b. The consistency of non-recognition in its *contents*

The chapter argues that the contents of the duty of non-recognition are there with precise effectiveness and as intended. The section also introduces four types of possible manifestations of non-recognition that authoritative entities with the right process will decide.

- c. The consistency of non-recognition in the *opinio juris* of states

Finding supporting evidence for the claim that the idea of non-recognition is indeed perceived and accepted as law (or *opinio juris*) is the most challenging task. The section utilises contemporary practices and the foundational theories of the dissertation to support the argument that the *opinio juris* surrounding the duty of non-recognition is established. The evidence can be found logically in four types of international actors.

Chapter 6. Conclusion: A Model for Non-recognition

In this short chapter, I offer my final vision to understand non-recognition as a functioning legal principle of international law.

2. A Treatise on Customary International Law

This dissertation studies the principle of non-recognition, which exists mainly through the expressive acts of states, international organisations and other agencies. Therefore, collecting information on each incident and examining how these actors believe, behave and express their worldviews is a major part of the thesis. This is what normally forms a study on customary international law.

Contemporary textbooks of public international law, such as those of L.F.L. Oppenheim,⁴⁵ James Crawford,⁴⁶ Ian Brownlie,⁴⁷ Alina Kaczorowska,⁴⁸ Anthony Cassimatis,⁴⁹ and Cecily Rose,⁵⁰ all treat customary international law as common sense. But this certitude quickly fades when we move into interdisciplinary studies, with post-colonial studies, third-world approaches to international law, and the contemporary realist political sciences/international relations. Theoretical and political resistance to public international law should not be taken lightly if I hope to keep this research relevant and in touch with academic developments worldwide. Therefore, in this chapter, I wish to discuss and defend customary international law, especially when dealing with political scientists and international relations theorists, who often reject the essence of customary international law and public international law in general. More importantly, obtaining theoretical knowledge and defining the guiding theories for the identification of customary international law also provide me with critical tools to identify non-recognition itself as custom.

Before going down the rabbit hole of theoretical debates, scepticism, and even prejudices against customary international law (hereinafter “CIL”) and international law in general, we should first and foremost acknowledge the foundational and vital existence of CIL as the backbone of the entire international legal system. Within the sphere of international law study, custom is not a plain theory of morality, wishful thinking, or legal utopianism.⁵¹ It is the guiding force of the codification process of the entire “behave and believe” system of international law. As was noted by Oppenheim after he had examined decades of international law literature, customs are actually the original source of international law in general.⁵² Oppenheim’s observation has been verified and manifested throughout the history of modern international relations, as custom has survived countless nationalist revolutions and international conflicts, and continues to play a dominant role in every discourse of the study of world order. Overall,

⁴⁵ *Oppenheim’s International Law: Volume 1 Peace* (Oxford University Press) <<https://opil.ouplaw.com/display/10.1093/law/9780582302457.001.0001/law-9780582302457>> accessed 12 March 2023.

⁴⁶ James Crawford, *Brownlie’s Principles of Public International Law* (9th edition, Oxford University Press 2019).

⁴⁷ Ian Brownlie, *Principles of Public International Law* (6th edition, Oxford University Press 2003).

⁴⁸ Alina Kaczorowska-Ireland, *Public International Law* (5th edition, Routledge 2015).

⁴⁹ Anthony Cassimatis, *Public International Law* (Oxford University Press Australia & New Zealand 2021).

⁵⁰ Cecily Rose, *An Introduction to Public International Law* (New edition, Cambridge University Press 2022).

⁵¹ Matthew Nicholson, ‘Re-Situating Utopia’ (2018) 1 Brill Research Perspectives in International Legal Theory and Practice 1.

⁵² *Oppenheim’s International Law: Volume 1 Peace* (n 45).

CIL, its contemporary existence, and its future prospects have always been seen as a desirable feature of international law by almost every international institution.

2.1. The Omnipresence of Custom in the System of International Law

2.1.1. The Channel of the General Assembly

As early as 1952, the General Assembly of the United Nations (“UNGA”) was actively involved in the task of making the evidence of CIL more readily available. With the mandate of Resolution 602,⁵³ the UNGA authorised and sponsored special rapporteurs and the International Law Commission to carry out studies and collect evidence of CIL. Almost a year later, the Report of the Sixth Committee of the UNGA and the International Law Commission, with Rapporteur E. Wikborg, suggested the publication and consolidation of “a United Nations juridical yearbook”, “an index to the League of Nations Treaty Series”, “a list of supplementary treaty collection”, and “a repertoire of the practice of the Security Council.”⁵⁴ These publications give us some ideas of how the UNGA, and the International Law Commission perceived the traces, the direction, and the possible sources of international customs. Documents and political discussions from the early era of the United Nations provide us with a solid affirmation of the common aspiration for CIL.

Recently, the extensive works of the International Law Commission (“ILC”) and the Special Rapporteur Michael Wood, spanning almost a decade on the formation, evidence and identification of CIL, were adopted by the UNGA in 2018.⁵⁵ The document – Resolution on the Identification of Customary International Law (“Resolution on CIL”) – is arguably the first and the most important collection to provide an understanding of customary law in the international legal system. It acknowledges the basic scholarly understanding of custom, such as CIL is formed by two constituent elements: (1) general practice, and (2) that which is accepted as law (*opinio juris*). It also further establishes the recognition of academic arguments concerning the requirement of “practice” and the requirement of “accepted as law”, from specific significant materials for identifying customs to addressing the question of forms of evidence of *opinio juris*.

The report provides a certain level of predictability to the literature on CIL. There might be arguments over the question of whether the codification of rules on custom identification by the ILC amounts to an actual legal codification. However, the fact that the report and related documents were adopted “without a vote” by all the States of the General Assembly at least provides us with a normative understanding of the acknowledgement of the existence of CIL

⁵³ UNGA, ‘Res 602 on “Ways and Means for Making the Evidence of Customary International Law More Readily Available” UN Docs A/RES/602(VI)’ <<https://digitallibrary.un.org/record/211235>> accessed 2 July 2023.

⁵⁴ UNGA, ‘Res 686 on Ways and Means for Making the Evidence of Customary International Law More Readily Available UN Docs A/RES/686(VII)’ <<https://digitallibrary.un.org/record/211257>> accessed 16 April 2024.

⁵⁵ See more from the first report <<https://digitallibrary.un.org/record/751888?ln=en>>, to the fifth report <<https://digitallibrary.un.org/record/1631127?ln=en>> and the final text adopted by UNGA <<https://digitallibrary.un.org/record/1660343?ln=en>> accessed 2 July 2023.

by the international community.⁵⁶ The document also offers momentum in the right direction in exploring the formation and identification of CIL.

There are, as is to be expected, challenges to the approach of the ILC and the Special Rapporteur. Rossana Deplano, for example, is not convinced that the document does an adequate job of differentiating and providing exact weight to the “practices of States” and “practices of international organisations.”⁵⁷ Some technical aspects of the resolution are still being examined and discussed.⁵⁸ Nevertheless, there have never been debates about the validity and authority of the Resolution on CIL. What is noted in the resolution are all uncontested facts that find abundant confirmation in national and international practice regarding the existence and role of CIL in international law. Obviously, an entire political structure of a community of States cannot agree to adopt an international document on how a body of international law shall be identified and codified (in this case, the international customs) and then claim that such a body is not meant to be law. This type of explanation is illogical and counter-intuitive.

Concerning the role of the General Assembly in the identification of CIL, the General Assembly can do more than acknowledge the role and the “fact” of CIL: It can also be both the “repository” and the independent organ that identifies and consolidates CIL. This observation follows Conclusion 4.1/4.2, Conclusion 6 and Conclusion 12 of the Resolution on CIL. The UNGA is the “repository” of state practice and *opinio juris* because, according to Conclusion 6, “diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference [...]” are all parts of the collectable practice of states. These activities can be observed and gathered anywhere a State is active. But in this international era, the meetings of the UNGA, the letters, communiques and other communications that states use to interact with each other, and most importantly, UNGA resolutions, are practically the primary means of understanding how States try to communicate their ideas, what legal stance they have, or how they perceive a norm. The rich, readily available, categorised, easy-to-find and serious nature of state practice within the environment of the General Assembly makes it the go-to place for studying state practice and their legal opinions.⁵⁹

On the other hand, the General Assembly can also (arguably) represent the United Nations itself and contribute directly to CIL. Historically, the UNGA’s documents, including the Universal Declaration of Human Rights and the Declaration on Friendly Relations among States, are strongly seen by states and authors as the manifestation of the UNGA’s power (as a

⁵⁶ UNGA, ‘Res 73/203 on Identification of Customary International Law UN Docs A/RES/73/203’ <<https://digitallibrary.un.org/record/1660631>> accessed 3 December 2023.

⁵⁷ Rossana Deplano, ‘Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law’ (2017) 14 International Organizations Law Review 227.

⁵⁸ Charles C Jalloh, ‘Identification of Customary International Law, Statement of the Chairperson of the Drafting Committee’ (24 November 2020) <<https://papers.ssrn.com/abstract=3737098>> accessed 2 July 2023.

⁵⁹ Brian D Lepard (ed), ‘The Role of United Nations General Assembly Resolutions as Evidence of *Opinio Juris*’, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010) <<https://www.cambridge.org/core/books/customary-international-law/role-of-united-nations-general-assembly-resolutions-as-evidence-of-opinio-juris/C01FA6036CC837BFF3D8F64AF0745159>> accessed 16 April 2024.

whole) in creating rules of customary law.⁶⁰ This observation fits the note from Conclusion 12 of the Resolution on CIL, where it is confirmed that a “resolution adopted by an international organisation or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.”

With the aforementioned acknowledgements, we note concerns about the non-binding nature of UNGA resolutions. As suggested by former ICJ judge Stephen M. Schwebel, the members of the General Assembly typically vote in response to political rather than legal considerations. They vote because it is unpopular to vote otherwise and they do not conceive of themselves as creating or changing international law.⁶¹ And as tellingly summarised by Professor Arangio Ruiz, UNGA meetings and voting records cannot alone create CIL because states “don’t mean it.”⁶²

However, in many international disputes, we must acknowledge that the UNGA spoke with a highly confident and determined voice as if they were making and implementing “the law.” One cannot peruse many of the resolutions that were adopted or read the absolute and determined language of the UNGA in many international disputes or see the immense pressure that the UNGA can create in many political deadlocks involving major powers and still think that states (especially newly independent, developing states that emerged after 1945) have only embraced the “recommendatory” power of the UNGA.

As noted by many authors, there was, during the 1960s and 1970s, a fundamental shift in the power structure of the United Nations, and the UNGA emerged as an authority on many issues,⁶³ especially in terms of decolonisation, national liberation wars, and human rights. In the case of South Africa’s occupation of Namibia,⁶⁴ the International Court of Justice (“ICJ”) confirmed that the UNGA had the power to alter or terminate the Mandate (over Namibia). Its referral in

⁶⁰ Samuel Moyn and Umut Özsu, ‘The Historical Origins and Setting of the Friendly Relations Declaration’ in Jorge E. Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020) <<https://www.cambridge.org/core/books/un-friendly-relations-declaration-at-50/historical-origins-and-setting-of-the-friendly-relations-declaration/4E061CDDA531A8FC0F3D0B2A104D90A8>> accessed 2 July 2023.

⁶¹ Schwebel, Stephen M. “The Effect of Resolutions of the U.N. General Assembly on CIL.” *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 73, 1979, pp. 301–09, <http://www.jstor.org/stable/25658015>. Accessed 5 Apr. 2022, 302 – 303

⁶² Gaetano Arangio-Ruiz, ‘The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations with an Appendix on the Concept of International Law and the Theory of International Organisation (Volume 137)’, *Collected Courses of the Hague Academy of International Law* (Brill 1972) <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028602441_06> accessed 2 July 2023., 457

⁶³ Gabriella Rosner Lande, ‘The Changing Effectiveness of General Assembly Resolutions’ (1964) 58 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 162.

Rebecca Barber, ‘The Evolving Role of the General Assembly Vis-à-Vis the Security Council in the Maintenance of Peace’ (2023) 25 *Journal of International Peacekeeping* 305.

⁶⁴ International Court of Justice, ‘Advisory Opinion on “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”’ <<https://www.icj-cij.org/case/53>>.

Resolution 2145 (XXI) to the UNSC for more action was mainly because the UNGA lacked the necessary coercive powers to ensure the withdrawal of South Africa from the Territory. But anyway, with this advisory opinion, the ICJ reminded States that it is incorrect to assume that the General Assembly is only vested with recommendatory powers. On the contrary, the Assembly clearly has the authority to adopt resolutions that make determinations or have operative designs in specific cases within its competence.⁶⁵ Over the years, international campaigns against the Apartheid regime became more sophisticated and legislative-like. For example, with the Resolution on the Programme of Action against Apartheid (A/RES/31/6[J]), the UNGA “rejected” the declaration of independence of Transkei and other Bantustans; “established” a United Nations Trust Fund for South Africa; “requested” and put pressure on other members of the Security Council, including the United States, the United Kingdoms and France, to establish an arms embargo against the government of South Africa; to announce an international sports boycott against South African “apartheid” teams; to denounce and give direction regarding economic collaboration between member states and the “racist regime”, and much more.⁶⁶ It is hard to deny the fact that hundreds of resolutions of the UNGA targeting the apartheid regime in South Africa played the defining role in pushing CIL against apartheid and also the codification of the International Convention on the Elimination of All Forms of Racial Discrimination.⁶⁷

UNGA’s approaches to the implementation of international law, as well as its inviolable and universal “principles” (such as the obligation to decolonise or the sanctions against institutional racism and racial discrimination), are sometimes so strong, determined and overwhelmingly definitive that States have no other choice but to accept and follow it as law. Therefore, norms and discussions developed by the UNGA should never be underestimated when considering the source of customary law. It is even possible to say that there have been many instances (which will be revisited in our case studies) in which the UNGA has acted decisively in the name of the law. The UNGA’s documents play an increasingly critical role in the formation of norms and laws in cases of political deadlock created by the rivalry of world powers.

2.1.2. The Security Council’s unlimited power in the formation of custom

Unlike the debatable nature of the UNGA’s “world legislative organ” status, the power of the Security Council (UNSC) is undeniable. The UNSC is currently the investigator, the arbitrator and the enforcer of the entire international legal system. As long as the UNSC remains united on a particular political or legal issue, the norms and practices created by the institution can immediately confirm or establish the foundation for the further development of CIL.⁶⁸ These

⁶⁵ *ibid.*, para 105.

⁶⁶ UNGA, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ <<https://digitallibrary.un.org/record/637263>> accessed 15 September 2022.

⁶⁷ Miles Jackson, ‘THE DEFINITION OF APARTHEID IN CUSTOMARY INTERNATIONAL LAW AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION’ (2022) 71 *International & Comparative Law Quarterly* 831.

⁶⁸ Marc Perrin De Brichambaut, ‘The Role of the United Nations Security Council in the International Legal System’ in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2001) <<https://doi.org/10.1093/acprof:oso/9780199244027.003.0014>> accessed 28 September 2023.

powers are clearly defined in Chapter V (especially Article 25), Chapter VI, and Chapter VII of the United Nations Charter.

The members of the UNSC are well aware of this power, which is probably why they rarely mention CIL explicitly. Research into the history of the UNSC from 1946 onwards found that only 26 resolutions mentioned the concept of CIL in a direct manner. The first-ever UNSC resolution to mention CIL directly was Resolution 620 (1988), in a discussion of the use of chemical weapons in the conflict between Iraq and the Islamic Republic of Iran.⁶⁹ Here, the UNSC unanimously condemned the use of such weapons and authorised the Secretary-General to carry out prompt investigations in response to allegations brought to his attention. The foundation for such recommendations included the 1925 Geneva Protocol and of course, “other relevant rules of CIL.” While there are many aspects to explore on how the UNSC continued to employ the language of custom in this case, the acknowledgement of this institution concerning CIL and its role in dealing with the norm of the prohibition of chemical weapons provides the legal authority to other international actors to further materialise and consolidate the content of international customs dealing with chemical weapons.

Even more interesting, in 2008 – the year with the most mentions of the term “customary international law” in UNSC resolutions (a total of four resolutions) – when addressing the increasing threat of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia, the UNSC employed several intrusive measures to combat armed robbery and piracy inside the territorial waters of the state of Somalia, in view of the lack of governing capacity of the current Somalian Transitional Federal Government.⁷⁰ These resolutions, however, were sufficiently self-aware and careful with the implementation of UNSC power, to specifically underscore that measures used in the Somalia case “shall not be considered as establishing CIL”. Such awareness confirms the fact that the Security Council is in full acknowledgment of the continuing development of CIL. This series of resolutions also implies that, as long as the Security Council does not individually and explicitly distinguish the magisterial solution in their resolutions with a legal norm, the practices of the Security Council, in general, can be considered evidence of emerging norms of CIL.⁷¹

UNSC resolutions are among the most trusted sources for affirming the establishment, codification, or emergence of international legal norms. They are so important that there are

Michael Wood and Eran Stθοeger, *The UN Security Council and International Law* (Cambridge University Press 2022) <<https://www.cambridge.org/core/books/un-security-council-and-international-law/BE04DD1A1853420882F54ECF3EB7920B>> accessed 28 September 2023.

⁶⁹ UNSC, ‘Res 620 on “on Chemical Weapons Use in the Conflict between Iraq and the Islamic Republic of Iran” UN Docs S/RES/620(1988)’ <<https://digitallibrary.un.org/record/44865>> accessed 2 July 2023.

⁷⁰ UNSC, ‘Res 1846 on “acts of Piracy and Armed Robbery against Vessels in Territorial Waters and the High Seas off the Coast of Somalia” UN Docs S/RES/1846(2008)’ <<https://digitallibrary.un.org/record/642811>> accessed 2 July 2023.

⁷¹ See also comments from Fox, Gregory H., Kristen E. Boon, and Isaac Jenkins. ‘The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of CIL’, *The American University Law Review*, vol. 67/no. 3, (2018), pp. 649-731. Also Stephen Mathias, *The Work of the International Law Commission on Identification of CIL: A View from the Perspective of the Office of Legal Affairs*, 15 CHINESE. INT’L L. 17, 27 (2016) (discussing the language of Resolution 1816).

The Council included identical language in a resolution on Libya. See S.C. Res. 2146, 9 (Mar. 19, 2014)

dedicated studies that explore how these resolutions appeal to particular persons or entities, (such as one member, some members, all members, or other UN organs); the appropriate vocabulary to reflect norms and beliefs (shall, should, demand, condemn, stress, underline, note, etc); and subject matter (could it be *ultra vires* compared to the power provided by the UN charter); and therefore, studying the legal implications or intentions of each.⁷² Indeed, as noted by the famous article of Jane Boulden, the UN (and particularly the UNSC) is “a political actor with political goals”.⁷³ International lawyers should not cling to the unrealistic idea that the UNSC can perform a forever mandate of impartiality. Yet, she also reminds us that sometimes, partiality helps the UNSC fulfil its responsibility of maintaining international peace and security. In our case, it maybe about pushing the boundary of international law and CIL. The illusion of “partiality” and “impartiality” does not matter if the implementation of the UNSC’s mandate is coherent, predictable, and ultimately serves the final goals and objectives of international law.

Notwithstanding the above, we also need to note that unless a consensus of all members (or at least their acquiescence) is achievable, the veto power of permanent members of the Security Council severely prevents the advancement of CIL. From the first-ever veto on a draft resolution regarding the withdrawal of foreign troops from Lebanon and Syria (S/PV.23), cast by the Soviet Union (USSR), the use and abuse of the veto has been recorded over 300 times.⁷⁴ Each of the vetoes cast might protect a different legal perspective, the interests of a particular permanent members in the conflict in which they find themselves involved, or sometimes it may simply concern “a friend in need” (which obviously would be Israel in the case of US vetoes). Nevertheless, the veto is usually considered the end of any further legal discussion by the most powerful institution of the international community.

Despite the legal difficulty of the veto vote, third-world countries, however, progressive Western diplomats and NGOs...⁷⁵ have slowly evolved and adapted their practices following decades of criticism and challenges from scholars. For instance, departures from the veto regime, such as the General Assembly’s “Uniting for Peace” resolution (an American initiative), have been, in retrospect, viewed by many in the foreign affairs establishment with mixed feelings. Now, it has become more tolerable, relevant and even necessary.⁷⁶

⁷² See more from Oberg, MD. ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’, *European Journal of International Law*, vol. 16/no. 5, (2005), pp. 879-906.

Efthymios Papastavridis, ‘Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis’ (2007) 56 *The International and Comparative Law Quarterly* 83.

⁷³ Jane Boulden, ‘Mandates Matter: An Exploration of Impartiality in United Nations Operations’ (2005) 11 *Global Governance* 147.

⁷⁴ See the record of veto votes here: <<https://research.un.org/en/docs/sc/quick>> accessed 2 July 2023.

⁷⁵ See more from The UN Security Council: From the Cold War to the 21st Century, edited by David M. Malone / Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes Book by Jennifer Trahan / U. N. Security Council Reform and the Right of Veto: A Constitutional Perspective Book by B. Fassbender

⁷⁶ Andrew J Carswell, ‘Unlocking the UN Security Council: The Uniting for Peace Resolution’ (2013) 18 *Journal of Conflict and Security Law* 453.

Michael P Scharf, ‘Power Shift: The Return of the Uniting for Peace Resolution’ (1 March 2023) <<https://papers.ssrn.com/abstract=4197306>> accessed 2 July 2023.

Recently, another landmark resolution was adopted by the General Assembly named “Standing mandate for a General Assembly debate when a veto is cast in the Security Council.”⁷⁷ The resolution directly and officially disputes the untouchability of the veto power of the UNSC’s permanent members. Technically, the resolution requests that within ten working days of the casting of a veto by one or more permanent members of the Security Council, the UNGA can debate the circumstances in which the veto was cast. It also invites the Security Council to submit a special report to the General Assembly on the use of the veto in question. The resolution is an invention of a soft mechanism to afford the UNGA a medium to discuss, debate, and ultimately defy the legitimacy of the veto vote. More importantly, with the ability to “submit a special report,” the majority of the Security Council now also has the opportunity to revisit, re-establish and re-consolidate their legal arguments and propositions, possibly in an normative resolution of the UNGA, rather than in a dead “draft resolution.”

Such unprecedented power of both the majority of UNGA and the majority of the Security Council, arguably, transforms the norm-making process of the United Nations institutions. The uncertainty of a legal norm or any failed attempt to straighten the record of international principles will not, from now on, be marked by a veto. This is what we can call the shift to a “majoritarian” system of UNSC,⁷⁸ for it transposes the majority decision dynamics of the General Assembly to the Security Council, ignoring the veto, and ascribing prescriptive and authorising power to proposals supported by a majority in the Council even though formally ineffective.

Indeed, acknowledging the lawfulness of the veto, distasteful as it may be, may be necessary for the ongoing viability, if not existence, of the current international order. Yet, a veto wielded at the discretion of these powerful states, solely for their own political interests, should not interfere with the confirmation of any progress in international legal thinking and development. This is exactly what we will see in many of the cases studied, including the Russian invasion of Ukraine, where Russia’s veto power could not prevent the consistent production of normative resolutions by the General Assembly.

2.1.3. The International Court of Justice and Other International Tribunals

A brief introduction of how the two most representative authorities of the international community perceived CIL allows us to put into perspective various arguments of scholars who insist that CIL is nothing more than an extension of colonial coercion, the expression of “hegemonic” Western ideologies, and worst, a widening of the influence of capitalism on the part of those scholars who support it.⁷⁹ Most of these beliefs galvanise unnecessary criticism

⁷⁷ UNGA, ‘Res 76/262 on “Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council” UN Docs A/RES/76/262’ <<https://digitallibrary.un.org/record/3971417>> accessed 2 July 2023.

⁷⁸ W Michael Reisman, ‘The Legal Effect of Vetoed Resolutions’ (1980) 74 *The American Journal of International Law* 904.

⁷⁹ Anthony Carty, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986).

Jean d’Aspremont, ‘The Decay of Modern Customary International Law in Spite of Scholarly Heroism’ in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2015*

toward Western jurisprudence and assumptions concerning the inherent “Westernness” of international law. In reality, however, it has often been the third-world countries who are most determined to push the frontier of customary international law, even with only the support of UNGA resolutions. Establishing this understanding, we can see that the works of the International Court of Justice, the International Criminal Court (“ICC”) and many other international tribunals (such as the criminal tribunals for Yugoslavia or Rwanda) do nothing more than affirm, elaborate, and detail the collective wishes of the democratic international community.

In the case of *Nicaragua v United States of America*, for instance, it was Nicaragua, a developing country, that insisted on the customary nature of its legal claim to bypass the reservation of the United States in several other international treaties, an argument in which the ICJ agreed that: “principles, recognised as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.”⁸⁰ With the judgment on the case's merit in 1986, the court again re-asserted the possible separation between the codification of a customary rule in a specific multilateral treaty and the continuing development of the customary rule itself. These were the foundation for the ICJ’s conclusion on the violations of the United States of America of the customary norms “not to intervene in the affairs of another State,” “not to use force against another State,” “not to violate the sovereignty of another State,” and “not to interrupt peaceful maritime commerce.” The active and comprehensive use of the language of customary international law to resolve a major dispute between Nicaragua and a world powerhouse like the USA, even though there were already treaties and treaty obligations/reservations entailed for both parties, suggests the preparedness and willingness of the world court to directly recognise and deal with the content of customary international law, just as with treaty law.

It is also interesting to note that the ICJ statute is the primary reference to customary international law as a source of international law in general. The statute defines customary international law in Article 38(1)(b) as “a general practice accepted as law”. However, the relationship between CIL and ICJ is not resolved or explained in the statute. Nevertheless, over the years, ICJ has been the major curator of international norms, by explaining their connotations, settling academic debates about international legal concepts, and ultimately elevating certain norms to the status of custom. This task has been seen as a part of the ICJ’s “mission”, admitted by many former judges. Judge Humphrey Waldock contends that the ICJ is capable, if given sufficient opportunities, of making a valuable contribution to settling disputes and developing international law. He notes the progressive development that the court

(Oxford University Press 2016) <<https://doi.org/10.1093/acprof:oso/9780190647759.003.0002>> accessed 2 July 2023.

⁸⁰ Judgment of 26 November 1984 Jurisdiction of the Court and Admissibility of the Application Procedure(s): Questions of jurisdiction and/or admissibility <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>, para 73

has produced for the modern law of the sea even with CIL language without departing from the court's judicial character.⁸¹

While there will still be heated debates and discussions about the legitimacy and appropriateness of the role of ICJ (and many other international tribunals) in identifying customary law, the first thing we could agree on is that the work of these tribunals has been consistent, contributive and indisputably final. With ICJ, we can acknowledge the corpus of law concerning maritime delimitation, norm-settlement of the contentions on the use of force, the concept of self-help or response to low-level unlawful military activity, freedom of the sea, the world's water resources, territorial titles, certain rules of the law of occupation, and the place of *uti possidetis* in the boundary disputes of current international law have all been established by the court.⁸² An analysis of Niels Petersen identifies 95 instances in 48 decisions, from the *Corfu Channel* case (1949) to *Costa Rica v. Nicaragua* case (2015), where the Court positively confirmed the existence of a customary norm.⁸³

We also should not underestimate the role of many other international tribunals, most notably the International Criminal Court (established by the ICC Rome Statute), the International Tribunal for the former Yugoslavia ("ICTY"), and the International Tribunal for Rwanda ("ICTR") (both established by UNSC resolutions).⁸⁴ For instance, in the famous *Tadić* case,

⁸¹ Humphrey Waldock, 'The International Court of Justice as Seen from Bar and Bench' (1984) 54 *British Yearbook of International Law* 1., 4

⁸² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

- The right to defend oneself is considered a customary norm, and it has been established in the Nicaragua Case, 1986 I.C.J. Rep. 14, 94, para. 176, that Article 51 of the U.N. Charter recognizes this pre-existing norm by referring to states' "inherent right" to self-defence.
- The use of force in self-defense must be necessary and proportional, as stated in the Nicaragua Case (1986) I.C.J. Rep. 14, 94, para. 176.
- According to the Nuclear Weapons Advisory Opinion, 1996 I.C.J. Rep. 226, 245, para. 41, the principle of self-defense allows only those measures that are proportional to the armed attack and necessary to counter it. This is a well-established rule in customary international law.
- The affirmation that the "submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of CIL"; Oil Platforms Case, 2003 I.C.J. Rep. 161, 187, para. 51
- The inadmissibility of territorial changes by using forces in Wall Advisory Opinion, 2004 I.C.J. Rep. 136, 182, para. 117.

⁸³ Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 *European Journal of International Law* 357.

Niels Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' in Brian D Lepar (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/reexamining-customary-international-law/role-of-consent-and-uncertainty-in-the-formation-of-customary-international-law/99F1567E322A1D40A6098C055D9B3D98>> accessed 15 March 2023.

⁸⁴ UNSC, 'Res 827 on "establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" UN Docs S/RES/827(1993)' <<https://digitallibrary.un.org/record/166567>> accessed 28 September 2023. UNSC, 'Res 955 on "on Establishment of an International Tribunal for Rwanda and Adoption of the Statute of the Tribunal" UN Docs S/RES/955(1994)' <<https://digitallibrary.un.org/record/198038>> accessed 28 September 2023.

the ICTY argued that common Article 3 of the Geneva Conventions, positioning the minimum core of mandatory rules of international humanitarian law, reflects customary international law.⁸⁵ On the other hand, the ICTR confirmed that the Genocide Convention is undeniably considered to be part of customary international law.⁸⁶ The evidence that the court provides includes the opinion of the International Court of Justice on the provisions of the Genocide Convention and the United Nations Secretary-General in his Report on the Establishment of the International Criminal Tribunal for the former Yugoslavia. One interesting observation from Konderla is that both of these tribunals expressly refer to the customary norms as a source for their judgments, so as to avoid violating the principle of *nullum crimen sine lege* if a party to the conflict did not adhere to a specific treaty.⁸⁷

However, what is more surprising is that the trials and judgments of the two tribunals have been able to make some “elevation” of many norms to the level of customary international law,⁸⁸ without facing any challenge, confrontation, or non-compliance announcement from possible “persistent objectors.” The first explanation is that the UNSC authorised the ICTY and ICTR - the law-making organ of the United Nations – and, therefore, the authoritativeness of these tribunals’ findings. Another possible explanation is that States have always considered these norms as a part of customary international law. Nevertheless, with the authorisation and the enforcement power of the UNSC, there is little doubt that the findings and argumentations of tribunals concerning customary norms have the blessing of the most powerful organ in the international area.

That being said, international scholars still have conflicting views on this approach.⁸⁹ Notably, authors like Stephen Choi and Mitu Gulati argue that the ICJ has continued to disregard the traditional understanding of the concept when identifying customary norms.⁹⁰ For example,

⁸⁵ Delalić (n 8) para 143 (emphasis added). 10 Prosecutor v Dusko Tadić a/k/a “Dule” (Judgement) IT-94-1-T (7 May 1997) para 577.

⁸⁶ Prosecutor v Akayesu (Judgement) ICTR-96-4-T (2 September 1998) para 495; see also: Prosecutor v Kayishema and Ruzindana (Judgement) ICTR-95-1-T (21 May 1999), para 88.

⁸⁷ Joanna Konderla, ‘International Customary Law in the Jurisprudence of the ICTY and the ICTR’ (2018) 8 Wrocław Review of Law, Administration & Economics 287.

⁸⁸ Roozbeh (Rudy) B Baker, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ (2010) 21 European Journal of International Law 173.

Roman Boed, ‘Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda’ (2002) 13 Criminal Law Forum 293.

⁸⁹ Baker (n 88).

Rudolf H Geiger, ‘Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) <<https://doi.org/10.1093/acprof:oso/9780199588817.003.0043>> accessed 2 July 2023.

Gleider Hernandez, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014). Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 European Journal of International Law 417.

⁹⁰ Stephen J Choi and Mitu Gulati, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016)

their study analyses 175 different customary international law determinations by international tribunals, and they find that there are only 32 citations of statements by government officials. Presenting similar evidence, the authors then conclude that the ICJ has failed consistently when establishing proper customs, in accordance with the traditional meaning of the term.

Other scholars disagree with this hostility toward the court. Although Stefan Talmon believes that the ICJ “has simply asserted the rules that it applies in the majority of cases,”⁹¹ he also insightfully explains that although customary international law is generally established through induction (through collecting states’ practice and the evidence of their “opinions”), deductive methods can be used for normative, functional and analogical reasoning. For instance, in the Arrest Warrant case, the Court extends full immunity from criminal jurisdiction and inviolability to cover the Minister for Foreign Affairs, as it is the only way to make sense of the functions and similar powers that a Minister of Foreign Affairs possesses compared to a head of state.⁹² Although it allows a significant expansion of the norms, the intention here is to clarify a concept already a part of customary international law.

It is important to note that state practice is not always reliable. It could become jeopardised. More diplomatic interaction, argument and confrontations could lead to members’ hostility and destabilise the system. Sometimes, it is ideal to leave the question to an international tribunal that will engage with the problem in a thorough, relatively impartial and legally insightful manner. Sometimes, even the states expect the court to guide the implementation of the norm. Rejecting the role of the courts completely would eliminate the elements of judicial innovation that keep a legal system moving forward.

But what about judicial activism? Can we trust international courts not to create new norms arbitrarily? Niels Petersen offers a profound explanation of why the ICJ and many other international tribunals will neither go too far with their custom identification task nor bring activism into the court reasonings. He rightly points out that even though the ICJ judges have only weak legal constraints, they face significant institutional constraints.⁹³ Most of their judgments try to gain legitimacy and preserve their judicial authority. Any misstep, frequent non-compliance, or repeated protest from other states as case interveners can damage the reputation of the Court and thus weaken its institutional position. Therefore, although the primary identification mechanism of the court is the reference to treaties and UNGA resolutions, the ICJ also painstakingly looks for States’ consent in the disputed case, thus the change of general acceptance for the decision.

It is true that, in most ICJ cases, the judges conclude that a norm is a custom, not because they deem it needs to be a custom, but because the states involved recognise it as such. In the

<<https://www.cambridge.org/core/books/customs-future/customary-international-law-how-do-courts-do-it/C6A32B28F7204AB26D0221C9976F961D>> accessed 29 August 2022.

⁹¹ Talmon, ‘Determining Customary International Law’ (n 89), 441

⁹² Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, available at: <https://www.refworld.org/cases,ICJ,3c6cd39b4.html> [accessed 29 September 2023]

⁹³ Petersen, ‘The International Court of Justice and the Judicial Politics of Identifying Customary International Law’ (n 83), 369

Nicaragua case, the court did not summon the concept of the prohibition on the use of force and non-intervention out of thin air and then call them customary international law. It considered these concepts customary because “that there is, in fact, evidence ... of a considerable degree of agreement between the Parties as to the content of the customary international law” relating to the customary status of the concepts.⁹⁴ Similarly, in the Corfu Channel case, Albania did not challenge the existence of such a customary right of passage.⁹⁵ There was no dispute considering the customary nature of the norm “right of passage.” The problem lay in the interpretation of the norm, as Albania denied that the Corfu Channel was a part of international straits.

Overall, we can agree that there are still disputes among states and also within academia about the process and criteria of identifying customs of international law by international tribunals. Yet, we should also acknowledge the general acceptance of states and many international organisations about the power of these tribunals to identify customs. More importantly, most customary norms identified by these tribunals have not been challenged or defied by any international actors. Without judicially identified customs, there will be many cases where international law and the relations between states become dysfunctional, and the content of specific international customs becomes unclear.

2.2. Some conceptual enigmas: A critical observation

After establishing an assertion on the omnipresence and practical outreach of customary international law, let us confront some conceptual enigmas which could be vital in identifying and explaining CIL. Generally, there are two focused conundrums: (1) CIL is not actually binding law, and (2) There is no proper way to determine the existence of *opinio juris* – the central concept of CIL. The rejection of CIL as law has been held for decades by political scientists and scholars of international relations.⁹⁶ The seminal works of Stein,⁹⁷ Goldsmith and Posner,⁹⁸ have long perpetuated the idea that customary norms in international law are just “regimes” temporarily built upon political interests. According to these authors, the compilation of CIL rules is nothing more than a collection of convenient and pragmatic conventions that states usually abide by because it benefits them, although they are under no obligation to do so. In this section, we will go through some arguments that I believe clearly misunderstand what CIL is and should be.

⁹⁴ Judgment of 26 November 1984 Jurisdiction of the Court and Admissibility of the Application Procedure(s): Questions of jurisdiction and/or admissibility <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>, para 184.

⁹⁵ Corfu Channel, United Kingdom v Albania, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949, para 28

⁹⁶ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010).

⁹⁷ Arthur A Stein, ‘Coordination and Collaboration: Regimes in an Anarchic World’ (1982) 36 International Organization 299.

⁹⁸ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2006)., 42–43

2.2.1. CIL is not “forum shopping”

Such reasoning might have resulted from the confusion and unsettled questions surrounding the obligation of customary international law: Why does a state have to follow CIL? Is it because of prior consent? Consent is the basic element of international law, but not always so. Andrew Guzman discussed this issue some time ago. In his words, “perceiving a legal requirement is not at all the same as consenting to that requirement”.⁹⁹ Of course, the idea of consent in international law is so strong that many commentators seek for a middle ground with the concept of “inferred consent” or “persistent objector”.¹⁰⁰ Yet, in some cases, no matter how a state persistently objects to the existence of a norm, its option to free itself from the obligation counts for little to nothing if that norm reaches the status of *jus cogens* and can create *erga omnes* obligations.

Imagine a modern state that insists it does not see the norms against piracy as CIL and proceeds to sponsor a pirate fleet within its territorial sea; or that a state officially declares its objections to basic rules of humanitarian law - such as the distinction between combatants and civilians - and then carries out massacres against civilians in its occupied territories. It is implausible that this state can be effectively free from the obligations of these CILs and the consequences of its violations. Or that its declaration has any legal validity at all among the community of nations.

Or do states follow CIL because CIL is exclusively formed through a democratic process of law-making among states that all states should follow? This is also not necessarily the case. As is shown by the history of several norm-making processes, CIL has naturally flowed from the countries that have the capacity to carry out the practices themselves. For example, in Jean Allain’s book *Slavery in International Law*, Great Britain is described as the lone practitioner in the abolitionist movement against slavery (especially in the realm of international law). In contrast, most American, European and even African countries in the early 18th century found the practice both unobjectionable and indispensable to their economies.¹⁰¹ Ranging from bilateral treaties between the Crown and several primary outlets of the Atlantic slave trade network (such as the Sultan of Zanzibar) to Britain’s own practice within the national judicial system, the illegality of the slave trade and of slavery itself was built up without the consistent participation of the entire international community. It took Britain over half of the century to convince thirty-one states to join the network of bilateral treaties that aimed ultimately to abolish slavery. While Britain’s domestic courts emphasised “the principle of justice and humanity,” the treaties focused on the Royal Navy’s “right to visit to suppress,” thus granting it *de facto* power to police the high seas. The topic of abolitionism floated around in international legal discourses for two centuries, with Britain as the main force behind it. It was

⁹⁹ Andrew T Guzman, ‘The Consent Problem in International Law’ [2011] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1862354>> accessed 15 November 2022.

¹⁰⁰ Michael Byers, ‘Custom, Power, and the Power of Rules’ (1995) 17 Michigan Journal of International Law 109.

Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1st edition, Springer 1997), 18-22.

¹⁰¹ Jean Allain, ‘Slavery in International Law: Of Human Exploitation and Trafficking’, *Slavery in International Law* (Brill Nijhoff 2012) <<https://brill.com/display/title/18831>> accessed 5 July 2023., 59 – 70.

not until 1926 that an actual definition of slavery was formulated in an international document (the Slavery Convention of 1926) under the auspices of the League of Nations.¹⁰²

I can also provide two more cases to support this approach: the Campaign for Nuclear Disarmament and the consolidation of international space law. After the Second World War, a nuclear armoury was the privileged possession of militarily advanced nations, namely the Soviet Union, Britain and the United States. The stories, the norms, and the legal narrative of nuclear disarmament were, therefore, for these powers alone to interpret. The Campaign for Nuclear Disarmament was first established in the United Kingdom in 1958,¹⁰³ when most of the world was still struggling with the problems of independence and modernisation. During the Cold War, nuclear discourse was almost exclusively between the USA and the Soviet Union. The Treaty on the Non-Proliferation of Nuclear Weapons, celebrated by all as a landmark international treaty, was written in the legal language of the superpowers and initiated only when they were happy with the final draft.¹⁰⁴ Yet, the international community has long embraced the norms established by these documents.

As suggested by authors including McDougal, Mendelson, and Swaine, the initial act of “compliance” with a social norm (either domestically or internationally) can be understood as an offer of order or as an act of leadership.¹⁰⁵ The offer and acceptance indeed generally take the form of practice, but this model also does not require us to take a position on the amount of practice that will be necessary to constitute either an offer or an acceptance. In short, the answer to these sceptical questions is “no”. CIL is not a shopping forum where states can freely pick and choose what they regard as in accordance with their temporary interests. Rather, I would like to argue that just like conventional law (both internationally and domestically), CIL has some elements of automatic social obligation arising from participation in a community. This is, again, not a novel revelation. In 2010, Roozbeh B. Baker challenged what he called the “traditional-minded” scholarship of international law about CIL.¹⁰⁶ He insisted that the time of push-back from some states and scholars against the new way of identifying customary norms is over.

2.2.2. What “international arena” are we expecting?

For a more moderate interpretation, I would like to support the notion that for a custom to be identified, state practice does not need to be perfectly consistent, and *opinio juris* does not need to be tested by an approval rate of 2/3 or 3/4 of the members of the international community.

¹⁰² ‘Slavery Convention’ (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention>> accessed 5 July 2023.

¹⁰³ Jodi Burkett, ‘The Campaign for Nuclear Disarmament and Changing Attitudes towards the Earth in the Nuclear Age’ (2012) 45 The British Journal for the History of Science 625.

¹⁰⁴ ‘Treaty on the Non-Proliferation of Nuclear Weapons - Main Page’ <<https://legal.un.org/avl/ha/tnpt/tnpt.html>> accessed 5 July 2023.

¹⁰⁵ Myres S. McDougal, *Studies in World Public Order* (New Haven Studies in International Law and World Public Order 1987).

George Norman and Joel P Trachtman, ‘The Customary International Law Game’ (2005) 99 American Journal of International Law 541.

¹⁰⁶ Baker (n 88).

This kind of approach is still passionately pursued by authors like Stephen Choi when he says that to identify customary law requires “superhuman research skills” and is “implausible”, since there are roughly 200 states in the world and affirmative evidence of the practice of at least a quarter of this number is required over a long period of time.¹⁰⁷ Yet somehow, Choi and like-minded scholars also refuse to utilise the votes and opinions expressed in UNGA resolutions, meetings and communications, as they deem this rich, relatively robust, abundantly available and authoritative database to be only “aspirational.”

Where should we look, then? The problem with this approach is that these authors have never considered the tone, the assertiveness and ultimately, the legal results that UNGA resolutions in many cases were able to bring forward, especially when customary law is concerned. Briefly utilising the India’s “invasion” of Goa as an example: the UNGA was the platform used to isolate Portugal and ultimately settle the dispute, but the related UNGA resolutions rarely mentioned treaty law. Even the UN Charter did not appear as the core argument. It was, however, the “principles” of Resolution 1514 (XV) of December 14, 1960, entitled “Declaration on the Granting of Independence to Colonial Countries and Peoples”, and other regimes established solely through the power of UNGA that aided their argument on the “decolonisation obligations” of the former empires. On this occasion (as in many others), although the right to self-determination (a treaty right) can be presented as the centre of the debate, Resolution 1514, alongside the narrative of “decolonisation obligations”, has been consistently and explicitly considered as the legal justification for international pressure against Portugal in general and many other former imperial powers, such as the United Kingdom and France. This view has been confirmed by the ICJ, again recently, with the question on the legal consequences of the separation of the Chagos Archipelago from Mauritius.¹⁰⁸ In this case, the court asserted that it was customary rules that were at issue considering the law on self-determination in the UN Charter and Resolution 1514, where state practice and *opinio juris* “are consolidated and confirmed”.¹⁰⁹

Authors who don’t trust in customary international law generally would not care what the ICJ has to say about the formation of CIL. But they also need to realise that states rarely randomly talk about CIL and international legal obligations outside the platform of the UN. Even more interestingly, they have never hinted at their opinions about many old and indisputable customary legal rules. The United States has never expressed clearly that they perceive the “decolonisation obligation” interpretation of the principle of self-determination as CIL. And frankly, decolonisation is not even a treaty obligation. Does that mean therefore that this principle does not bind the United States? Does it mean the United States can legally practise imperialism? The People’s Republic of China has never recognised that the use of force in self-defence must be necessary and proportional as a principle of CIL. Such clarification has not been codified into the UN Charter or any other universal international instrument. Should we

¹⁰⁷ Choi and Gulati (n 90), 8

¹⁰⁸ International Court of Justice, ‘Advisory Opinion on the “Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965”’ <<https://www.icj-cij.org/case/169>>.

¹⁰⁹ *ibid.*, para 142.

interpret this as China having the right to pre-mature self-defence and attack Taiwan when it sees fit?

To study international relations and international law, we cannot just remove or discredit the only platforms that are actively collecting and building the database on states' opinions (these include the UNGA, the UNSC and many other UN agencies). In addition, there is no point in denying the influence of international tribunals - the only branch of international law with the expertise and the opportunity to clarify and interpret international law consistently and promptly. Complaining that there is no way to gather information on the formation of CIL but nevertheless rejecting all the fora that matter in common international life is a counter-intuitive and unproductive process of argumentation.

It should be fully acknowledged that the CIL has its weaknesses. Prominent legal philosophers have long discussed, and sometimes even doubted, whether customary international norms qualify as a part of "law" or of a "legal system". For example, one of the most prominent legal philosophers of the 20th century, H.L.A. Hart, emphasised that, in international law, the absence of a universal "rule of recognition" concerning the validity of international law norms makes it hard to consider international law, in general, a fully-fledged legal system.¹¹⁰ However, even with the heavily positivist nature of Hart's legal position, he observed that "States should behave as they have customarily behaved", and this empty repetition does "observe certain standards of conduct as obligatory rules."¹¹¹ Hart published the *Concept of Law* in 1961, so understandably, the international environment at the time did not allow him to reach any further conclusions on the nature and the possible development of CIL. Sixty years after the publication of the seminal book, and sixty years after Resolution 1514 was viewed as a non-binding aspirational document with no legal power over the practice of states, we can confidently assert that things have changed drastically.

2.2.3. CIL as a part of the human mind

CIL, after all, connects to the values of tradition, stability, fairness, good faith, and equity. It is the guiding light between right and wrong, even in times of conflict. To appeal to the custom of international law is to reject the allure of opportunistic behaviour; it, reflects not only the relations between states but also on how humanity has evolved, how our perception of fairness has been perfected, and how domestic politics has eventually adapted to the universal narrative of justice and human emancipation. As a result, customary law principles that have been repeatedly identified by the forum of the General Assembly or the judicial power of international tribunals are never the legal innovation of any party involved. Instead, they are the projection of the collective beliefs of the lively human agents inside these institutions. This leads to one of my most essential hypotheses on the theoretical position of CIL: states cannot choose CILs based solely on self-interest.

¹¹⁰ HLA Hart and Leslie Green, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edition, Oxford University Press 2012), 226 – 231.

¹¹¹ *ibid.*

What can constitute a state's logical ability, then, to know what is in its interest? Does the ability come from the head of state? Or is it the Minister of Foreign Affairs? Or is it the logical trade-off between one state's image and the gains it has bargained for behind closed doors? Or perhaps a combination of all of these? In the crowded and conflicting political environment of the United Nations, and the political pressure against judicial organs such as the ICJ, rationality and the human capacity for consistent logical thought are not always helpful. According to a publication of the Indian Law Institute, "To say that there can exist a 'rational mind' may, however, be too simple an assertion at the philosophical level, because the argument could be that it tends to overlook the complexity of the human mind."¹¹² Indeed, the tendency to emphasise logic, rationality, and objective order tends to overlook the intense complexity of the human mind and how it perceives what the law is. We can say that law must have the "life" (intellect with sense), as well as the "soul". And although the "life" of law could be explained by legal positivism and logical positivism, alongside their obsession with scientific and logical methods of investigation, we can only gain a complete biological and philosophical view of the law by acknowledging the broader concept of the human mind resting on the conceptions of human dignity and brotherhood. There, the natural character of law in the human mind comprises peace, love and non-violence. The "life" of law could be the projection of many logical, factual, religious and other forms of truth. Therefore, no legal proposition is absolutely true, in the sense that its truth is not subject to some form of qualification. Yet, there is also no humane legal proposition that is not susceptible to the "soul" of all law - a peaceful and non-violent approach, at all times and in all places.

This is one of the few ways that we can explain why human societies all over the world have come close to a consensus on the goal-oriented concept of constitution, in which legal principles such as economic justice for all citizens, protection of all lives and accessible education for all children, etc. are being recorded, respected and aspired to, despite differences (and even contradictions) in ideology, religion, and culture. Similarly, it is also one of the few ways in which we can make sense of why war and armed conflicts have gradually become so unpopular, even though the effectiveness of modern weaponry can help powerful states to achieve their military objectives with reduced losses.

In the UNGA, where the limited nature of human understanding of international law (of the representatives) is compounded by religious, racial, social and national disharmony, and in the ICJ, where pre-judged mental barriers could cloud the judge's perception of law altogether, the fact that these human agencies have persistently, willingly and collectively upheld a "value", a "principle", a "precedent" is enough for us to assume the existence of a particular legal belief among the actors. Indeed, the interests of states may sway these actors to interpret each of these beliefs in different tones for different scenarios, but to deny its existence, one must be able to find where, when and how they directly challenge such beliefs; nor can we find the contradiction between such beliefs with other authoritative institutions of international law.

If one wants to stress that the rule of recognition of international law is lacking because of its decentralised nature, it would be easy to find one or two institutions that reject the identification of CIL principles of some other institution. Until now, however, this has not happened. Many

¹¹² Jagat Narain, 'Law and Human Mind' (1981) 23 *Journal of the Indian Law Institute* 1.

identified CILs are about international legal procedures, such as various norms relating to treaty interpretation. The substance of other CIL norms includes non-intervention, the necessity of an armed attack to justify self-defence, the law regulating the occupying force's conduct, self-determination, and rules involving freedom of the sea. None of these tries to create abrupt legal narratives or changes. Rather, the legal principles and interpretations have been gathered so universally that no one has seriously objected that they are not universal. For example, until now, no country has reportedly protested the identification of CIL by the ICJ. What we observe is that state members continue to submit their disputes to the ICJ, allowing the institution to strengthen and reassert their CIL precedents, especially in legal discourse on sea delimitation.

2.3. Theories of CIL: The Right Way for Non-recognition?

In Section 2.1., I make an educated assumption about the “omnipresent” nature of CIL. I also present and debate several trends of rejecting the current practice of CIL within the legal community in Section 2.2. But it is sensible to realise such trends come from more extensive and rooted theoretical/interdisciplinary hostility against international law in general. Therefore, I find that it would be prudent to position the dissertation's assumption on CIL in an interactive framework of other theories of customary international law. Section 2.3. is not intended to provide a comprehensive critical review of all existing theories of customary international law. Instead, the discussion focuses on categorising, to the greatest extent possible, CIL theories based on their hypotheses, purposes and main components, thus facilitating navigation through decades of debates and discussions concerning the right way to identify CIL. This section is vital for the dissertation to protect itself against the nihilistic culture against international law and CIL in particular. It also provides us with an enhanced framework to understand (and defend) non-recognition as a part of CIL.

2.3.1. Examining Consent theory, Rational-choice theory, State self-interest theory and Game theory in CIL identification

The first four theories to be discussed are arguably the most ear-catching and well-beloved theories (although not by international lawyers) concerning customary international law: Consent theory, Rational-choice theory, State self-interest theory and Game theory. However, the theoretical “father” of all these theories is arguably Realism – the current star of international relations study. Examining the explanations and theoretical suggestions of modern realist theorists such as Kenneth Neal Waltz,¹¹³ Hans Morgenthau,¹¹⁴ John Mearsheimer,¹¹⁵ and many others, we can find the roots of the four CIL theories in the system of beliefs of Realism, including:

- (1) International society is anarchic;

¹¹³ Kenneth N Waltz, *Theory of International Politics* (1st edition, Waveland Press 2010).

¹¹⁴ Hans Morgenthau, Kenneth Thompson and David Clinton, *Politics Among Nations* (7th edition, McGraw-Hill Education 2005).

¹¹⁵ John J Mearsheimer, ‘The False Promise of International Institutions’ (1994) 19 *International Security* 5. And John J Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (1st Edition, Yale University Press 2018).

- (2) The unrestrained free will of the state cannot be subordinated to any central authority;
- (3) The egoistic nature of the state, as it only wants to maximise its own interests;
- (4) The consistent rational capacity of the state, as it is capable of understanding and articulating its interests/disputes and of pursuing its policies in a comprehensive manner;
- (5) And therefore, the conclusion is that the state is the most important and authoritative actor in an international system.¹¹⁶

Looking at the literal meaning of these characteristics, there are no disputes that should be a part of the process/characteristic of CIL identification. However, the expanding discussion of these elements by a portion of academia might be more problematic than it seems.

Consent

Firstly, consent theory is the foundational theory in the field of international law. Generally, for any branch of international law to exist, consent is the first and foremost concern. Does that state sign this convention? Does that state follow this practice consistently? These are some of the questions that international scholars cannot avoid whenever they carry out a study of international law.

As early as the beginning of the 20th century, the Permanent Court of International Justice (PCIJ) declared, in the “Lotus” case, that the rules of law binding upon States “emanate from their own *free will* as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”¹¹⁷ This proposition has been repeatedly reaffirmed and re-established in standard textbooks, including those by Anthony Aust, James Leslie Brierly, Lassa Francis Lawrence Oppenheim, Louis Henkin and many others.¹¹⁸

¹¹⁶ Moshe Hirsch, ‘Game Theory, International Law, and Future Environmental Cooperation in the Middle East’ 27. In the article, Hirsch describes this nature as: (1) States are the central actors in the international system; (2) States are not subordinated to a central international authority to enforce cooperation; (3) States are egoists - they constantly try to maximize their interests; and (4) States are rational.

Jack Donnelly, *Realism and International Relations* (Cambridge University Press 2000) <<https://www.cambridge.org/core/books/realism-and-international-relations/AA4EC871B7537C202559CCD21C1E5338>> accessed 31 March 2023.

Donnelly also asserts similar qualities of realism in international law and international relations.

¹¹⁷ ‘S.S. “Lotus”, France v Turkey, Judgment, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7th September 1927, League of Nations (Historical) [LoN]; Permanent Court of International Justice (Historical) [PCIJ]’ (*Oxford Public International Law*) <<https://opil.ouplaw.com/display/10.1093/law/icgj/248pcij27.case.1/law-icgj-248pcij27>> accessed 5 July 2023.

¹¹⁸ Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) <<https://www.cambridge.org/core/books/handbook-of-international-law/479B9666071D82DBF0B59C2BF9FACBDF>> accessed 5 July 2023.

James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1963).

Oppenheim’s *International Law: Volume 1 Peace* (Oxford University Press 2023) <<https://opil.ouplaw.com/display/10.1093/law/9780582302457.001.0001/law-9780582302457>> accessed 12 March 2023.

However, does a strong foundation of consent contradict my initial take on the fading relevance of consent in the discussion of international law? Fortunately, it does not. In fact, further explanations of consent by all of the above-mentioned authors only support the proposal for the identification process of CIL that I have in mind. One famous disclaimer for the connotation of consent is that consent cannot mean “that all states must at all the time expressly consent to every part of the body of rules constituting international law.”¹¹⁹ Consent of States can be manifested directly or indirectly, by explicit statements or by tacit acquiescence. Sometimes, participating in the international society of states is itself sufficient to be regarded as an act of consent for certain rules of international law. The assertion that consent shall be presented everywhere, every time and all at once for a single international rule to be established is simply impractical.

Guzman’s addresses against the problem of consent can be somewhat provocative, but his arguments do not stray too far from the source materials on the concept of consent in international law literature. It is true that consent is necessary as it ensures legitimacy and procedural validation. The procedural validation then guarantees that a rule will serve the interests of the governed. Yet, the consent of “the governed” is neither the only indicator nor the most critical indicator of established rules in international law.¹²⁰ What is problematic, however, is that from the foundation of the general consent theory and the overestimation of the rationality of the individual state, many authors radicalise consent theory and turn it into a politically state-centred theory.

Self-interest and Game theories

The works of Goldsmith and Posner, including the 1999 famous article named “A Theory of Customary International Law” in Chicago Unbound and the book *The Limits of International Law*, have revitalised a voluminous literature on CIL theories that do not favour the legitimacy, the consolidation and the future development of customary international law at all.¹²¹ In the first chapter of the *Limits of International Law*, Goldsmith and Posner offer their theory of CIL. Here, a combination of “game theory”, “state self-interest”, and “rational choice theory” is mixed together to reach the conclusion that cooperative universal behavioural regularities – as customary law is labelled – are “illusory”.¹²²

One small note: using game theory to understand why states obey international law is not a particularly novel genre in the interdisciplinary fields of international law and political science. From “harmony” games to “assurance” games like a “stag hunt;” to dilemmas of common interest such as a “prisoners’ dilemma;” dilemmas of common aversions such as “pure” or

Louis Henkin, ‘International Law: Politics and Values’, *International Law: Politics and Values* (Brill Nijhoff 1995) <<https://brill.com/display/title/9387>> accessed 5 July 2023.

¹¹⁹ *Oppenheim’s International Law: Volume 1 Peace* (n 118), 14 – 15.

¹²⁰ Andrew T Guzman, ‘The Consent Problem in International Law’ [2011] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1862354>> accessed 15 November 2022.

¹²¹ Goldsmith and Posner (n 98).

Eric A Posner and Jack L Goldsmith, ‘A Theory of Customary International Law’ 66 *University of Chicago Law Review* 1113.

¹²² Goldsmith and Posner (n 98), 30 – 40

“non-pure” coordination problems, and “zero-sum” games..., these games are very well-known to empirical theorists when they deal with international relations and the creation of international law.¹²³ Overall, most of these theories are particularly good at explaining the emergence of specific customary rules in environmental law, fisheries and arms control. But the use of these theories to reject the legality and the influence of CIL on states' behaviour is a much more problematic proposition. In this section, I mainly focus on the works of Goldsmith and Posner, since they represent most modern approaches of the same kind while also directly discussing these theories with a connection to CIL.

First and foremost, Goldsmith and Posner claim that when the community of states collectively practice a uniform international practice, these are usually coincidences of interest. Specifically, they insist “[s]tates do not comply with CIL because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of self-interested policies on the international stage.”¹²⁴ As the book eventually explains its position, it lists examples of specific areas where customary international law is thought to be robust: diplomatic immunity, maritime jurisdiction, and the protection of coastal fishing vessels. It is noted that:

- fishing vessels are not seized in times of war because states' warships have better things to do;
- ambassadorial immunity could sometimes be ignored in the interest of a short-term domestic pay-off;
- and countries also practise control of the seas outside their customary three-mile territorial limit as long as their naval power allows them to do so.

These examples are, to a certain extent, reasonable because they depict real challenges of CIL maintenance. However, they are also insufficient to make any far-reaching claims, such as states have only the motive of furthering their own interests; or CIL norms have no influence over state actions and considerations; or the entire international community, in general, does not believe in anything called law. For example, even if we could say that “states' warships have better things to do”, this proposition does not preclude the possibility that non-intervention on civilian vessels had been respected as a custom in general. It may be true that naval powers did enjoy strategic control of sea routes outside their customary three-mile territorial sea, but such practices are based on their claims (or legal belief) to the right of freedom to navigate the high seas, not territorial claims.

Even game theorists of CIL, such as Norman and Trachtman, adopt caution when encountering Goldsmith and Posner's approach. Norman and Trachtman insist that unless Goldsmith and Posner want only to oppose natural law theories that generally view international law as the law because it is the right thing to do, their argument concerning CIL and international law in

¹²³ Mark A Chinen, ‘Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner’ 23 *Michigan Journal of International Law* 143.

¹²⁴ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2006).

general “is a non-sequitur, as legal obligation and self-interest are not mutually exclusive categories.”¹²⁵

On the other hand, Chinen digs a little deeper to show many aspects of Goldsmith and Posner's theory. For example, Chinen warns that Goldsmith and Posner's thesis does not take into account the differences between the descriptive power and the evaluative power of CIL. Even if CIL has no descriptive power and cannot prevent a state from breaking a specific customary norm, as suggested by Goldsmith and Posner, CIL still possesses the evaluative powers that other states, international organisations, courts and tribunals will use to measure, identify, determine, and even create responsibilities of that violating state. He observes that one should not lose sight of the fact that an attack on customary international law for its descriptive power is limited because of the difference between description and evaluation.¹²⁶ Therefore, according to Chinen, it is problematic for Goldsmith and Posner to criticise traditional theorists for arguing that state departures from previous commitments or behavioural regularities are excuses or exceptions to a customary legal norm. From their own game theoretic perspective, such departures are simply the actions of self-interested states. Why, then, is it wrong to speak of such departures as exceptions to legal norms or as violations of them, but right to see them as actions of self-interest? As Chinen points out, and even Goldsmith and Posner acknowledge in their book, game theory alone cannot sustain such an attack on law and CIL.¹²⁷ Game theory can only describe and explain behaviour patterns among individuals or player groups. It is unable to determine when it is appropriate to consider such behaviour as legal or illegal.

In contrast, the claim about the existence of international legal beliefs is an intuitive claim to make and it is much easier to construct. When a number of states choose to behave in one way for a reasonable amount of time, depending on the nature of the norms involved, and that they also express their belief and support (or acquiescence) for such practice, we could make an educated guess that these states hope for such rule to be recognised as a part of the governing body of international relations. There is nothing fancy in this process. Everything is presented as it is, and international lawyers merely collect the components for their arguments.

Human Agency and Morality

The problem of compliance on the international level has always been an issue because of the lack of effective enforcement mechanisms. In that respect, game theory/rationalist approaches provide no new information about the effectiveness of international law in influencing behaviour. With the arguments and concerns coming from game theorists themselves about Goldsmith and Posner's thesis, I would like to add some perspectives and arguments challenging their positions.

Firstly, the entire argument revitalised by Goldsmith and Posner concerning CIL stems from a peculiar thinking process. When we see a community that collectively agrees to the rule that they shall not kill each other, the first conclusion we draw is that everyone in that community

¹²⁵ Norman and Trachtman (n 105).

¹²⁶ Chinen (n 123), 155

¹²⁷ *ibid.*, 157

would murder each other as soon as they could - there are merely certain “motives” lurking in the background that prevent them from doing so. Consequently, there is no law that is genuinely law. In this line of dualist argument, in which a state can only follow its interests or not do so, Goldsmith and Posner refuse to give agencies of the state authentic moral personhood – a fundamental philosophical concept in all studies of humanity.

We humans have the capacity for ethics. In *The Descent of Man and Selection in Relation to Sex*, Charles Darwin wrote as follows: “I fully ... subscribe to the judgment of those writers who maintain that of all the differences between man and the lower animals the moral sense or conscience is by far the most important.”¹²⁸ More recently, Steven Pinker has written: “Morality is not just any old topic in psychology but close to our conception of the meaning of life. Moral goodness is what gives each of us the sense that we are worthy human beings”.¹²⁹ I agree that it would be naively utopian to believe that human beings always act morally. Humans can be cruel, sadistic and carry out unspeakable actions. However, our species also has a capacity to differentiate right from wrong. Moral codes are not imagination but a natural feature of human beings, emerging from countless biological and cultural evolutions.¹³⁰ With these moral codes, the sense, the conceptualisation and the ability to perceive obligatory norms naturally emerge. To say that states, through their human agency, are free from the influences of virtue, norms and legal thinking, seriously undermines a vital attribute of human nature.

On the other hand, the insistence that states cannot think and act morally leads to many premature assumptions and observations. For instance, in the article “A Theory of Customary International Law,” Goldsmith and Posner observe that a CIL on torture would be impossible to formulate. They go on to reject its merit since “many nations of the world torture their citizens”.¹³¹ Because of their presupposition that the state could only act under the sole influence of its interests and nothing else, Goldsmith and Posner conclude on CIL’s torture norms that it does not exist, prior to answering such questions as: Which part of the state practices torture? Is it a local authority’s abuse of power, or does the leadership of that state recognise torture as its general policy? Do the citizens of such states tolerate or encourage torture? Do the concerned society’s legal or moral principles accept torture as its established tradition? And then the most crucial question: Does a state (as an entity) generally benefit from torture? Goldsmith and Posner’s argument has both terminological and doctrinal problems, making it seem tautological. If we carefully ponder these questions and, in addition, refer to international treaties and other records, we can be confident that norms against torture are part of very well-regarded and institutionalised CIL norms. Authors who believe that there are always motives of self-interest behind every consensus and legal practice of states forget to

¹²⁸ Charles Darwin, John Tyler Bonner and Robert M May, *The Descent of Man, and Selection in Relation to Sex* (REV-Revised, Princeton University Press 1981) <<https://www.jstor.org/stable/j.ctt19zbz6c>> accessed 5 July 2023.

¹²⁹ Steven Pinker, ‘The Moral Instinct’ *The New York Times* (13 January 2008) <<https://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>> accessed 5 July 2023.

¹³⁰ Francisco J Ayala, ‘The Difference of Being Human: Morality’ (2010) 107 *Proceedings of the National Academy of Sciences* 9015.

¹³¹ Posner and Goldsmith (n 121).

differentiate between incident, violation, free-riding and deviant behaviour of various state agencies with the actual pattern of norms and beliefs of human society.

Identity and Expectations

Another excellent argument against the realist belief that States have unrestrained free will and can do anything to maximise their interests comes from *The Moral Purposes of the State*, authored by Christian Reus-Smit.¹³² In this book, Reus-Smit's argument revolves around Stephen Toulmin's "horizons of expectation."¹³³ Reus-Smit describes these as the deep-seated normative and ideological assumptions of each era that lead states to formulate and pursue their interests within certain boundaries.¹³⁴ They, therefore, make some forms of conduct mandatory and legally obligatory, while some other forms are unthinkable. Reus-Smit argues that realists and rationalists often wrongly focus on the anarchical structures of these interstate systems and have tried to weave them into a single narrative of historical continuity, clinging to the belief that the anarchical struggle for power has remained unchanged over millennia.

To expound his view that rationalists and realists have failed to explain the complexity of different eras of international society, Reus-Smit convincingly establishes that there are four main constitutional structures of the society of states, where each member has a unique identity, its own principle of sovereignty and systemic norm of justice. The book examines the international society of Ancient Greece, Renaissance Italy, Absolutist Europe and finally, the modern society of states, to show that there are always differences in the way sovereignty has been justified, how actors have believed legitimate states should solve problems of cooperation, and how these societies developed contrasting institutional practices.

In conclusion, Reus-Smit agrees that variants of rational choice theory and state self-interest theory do contribute to the study of state's behaviours. However, a state's unrestrained "free-will" and its so-called interests alone cannot predict when states will construct multilateral institutions to solve cooperation problems. According to Reus-Smit, there are so many more elements involved, including the interaction between international actors, their self-perceived identity, the dominant sentiment of international society of each era, and even the self-defined moral purposes of states. It is these that create each new system, not the struggle for power.

Reus-Smit's argument resonates with Judith Goldstein's observation that power alone cannot explain why modern hegemons - such as the United States - prefer the institutional system of trade multilateralism and a democratic United Nations (which is also extremely unpredictable for the hegemon). Goldstein further explains: "In the case of GATT, the asymmetry in capabilities suggests that the United States could have imposed the policy of its choosing. Still, the observation derived from this metaphor—that the United States was powerful and could

¹³² Christian Reus-Smit, *The Moral Purpose of the State* (Princeton University Press 1999) <<https://press.princeton.edu/books/hardcover/9780691027357/the-moral-purpose-of-the-state>> accessed 14 March 2023.

¹³³ Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (1st edition, University of Chicago Press 1992).

¹³⁴ Christian Reus-Smit (n 132), 32 - 33.

thus choose the rules of the game—merely begs the key question of why one set of rules for the new trade regime was preferred by the American policymakers over others.”¹³⁵

The “Irrationality” of States

Now we turn to another real-life problem that the literature supporting Rational-choice theory / State self-interest theory / Game theory has not properly addressed: Who is the “State”? For the record, Goldsmith and Posner are aware of this at the start of the entire literature supporting this theory: Who represents the state’s interests and rational capacity? And why can we assert that they always act rationally?¹³⁶ But their responses to these legitimate concerns are not very satisfactory.

To illustrate the weakness of always attributing rationality to the state and of assuming its’ capacity to know which action best suits its own interests, I suggest a brief visit to the Manchuria Incident – a case that will also be examined in our case study chapter. Without going too deep into the crisis that arguably started the pre-World War II political and legal confrontations, a critical note from the historical record is that the civil administration of Japan had tried to assimilate and live by the so-called international accommodationism.¹³⁷ From the eagerness to participate in cultural internationalism by hosting the World Sunday School Convention in 1920 and establishing a “Japanese League of Nations Association”,¹³⁸ to the commitments to rational policies of economic expansionism,¹³⁹ an Empire of Japan that was peaceful and cooperative with international norms (although still a regional bully) was not unimaginable.

This civil administration, however, was overwhelmed by waves of fashionable militarism, which had already become very appealing to the Japanese public by the end of the 1920s. The invasion and occupation of Manchuria, followed by the armed escalation in Shanghai, which both happened during 1932, were the result of the confidence of the infamous Kwangtung Army that they could simply ignore the civilian power in Tokyo. Such an observation was well-evidenced after the assassination of Prime Minister Inukai Tsuyoshi, one of the most important

¹³⁵ Judith L Goldstein and Robert Gulotty, ‘Negotiating in the Early GATT: Norms, Rules and the US Tariff Schedule’ in Bernard Hoekman, Joost Pauwelyn and Manfred Elsig (eds), *Assessing the World Trade Organization: Fit for Purpose?: Volume undefined: World Trade Forum* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/assessing-the-world-trade-organization/negotiating-in-the-early-gatt/6EFDC040B226B3C1650B7AEF27EF38C9>> accessed 14 March 2023.

¹³⁶Goldsmith and Posner (n 124), 8

¹³⁷ Ian Nish, *Japan’s Struggle with Internationalism: Japan, China, and the League of Nations, 1931-3* (Routledge 1993), 1025/07/2024 7:03:00 SA

¹³⁸ Hugh T Patrick and others, ‘The Economic Muddle of the 1920’s’ in James William Morley (ed), *The Dilemmas of Growth in Prewar Japan* (Princeton University Press 1971) <<https://www.jstor.org/stable/j.ctt13x18xv.10>> accessed 6 July 2023., 214–215.

Ann Waswo, *Japan in Crisis: Essays on Taisho Democracy* (Bernard S Silberman and others eds, First Edition, U of M Center For Japanese Studies 1999), 239 – 246.

Akira Iriye, *After Imperialism: The Search for a New Order in the Far East, 1921-1931* (Harvard University Press 1965), 26.

¹³⁹ Thomas W Burkman, *Japan and the League of Nations: Empire and World Order, 1914–1938* (University of Hawai’i Press 2008) <<https://www.jstor.org/stable/j.ctt6wqrcq>> accessed 6 July 2023.

Japanese politicians of his time, one who tried to prevent the un-sanctioned invasion of Manchuria by the Kwantung Army. After the death of Japan's "god of constitutional government," eleven extreme Japanese militarists received very light sentences due to pressure from the military and public support for the murderers.¹⁴⁰ From that point on, Japan was absorbed into a downward spiral of radical militarism, with no other administration daring to cross the line and challenge the power of Japan's military leadership. How can we identify the "interests", "rationality", and the "political entity" that represented rational behaviour in this story?

We cannot assert that Japan's short-term and long-term interests depended only on the invasion of Manchuria. Several historical studies point out some possibilities, including the possibility that Japan needed raw materials from Manchuria to fuel its growing industries, that Japan needed Manchuria to accommodate its surplus population, or that it could be Japan's sense of entitlement due to their having "sacrificed" so much to drive Russian out of Manchuria during the Russo - Japanese war of 1904 – 1905.¹⁴¹ But whatever the intention was, historians have also agreed that the superior position and advantages already secured by the Japanese over Manchuria made the incentives provided by the invasion and the instalment of a "Manchukuo state" in the area very questionable. Moreover, the increasing military population of the Kwantung Army and their independence from Tokyo's civilian control only led to more disturbing decisions made by the Japanese generals, especially the policy that allowed the opportunity for rape on a massive scale to Japanese personnel in the occupied territories.¹⁴² This only made Japanese rule over China and other South East Asian countries become unattainable.

Of course, one can argue that "perceived interest" is not "objective interest". Political entities can imagine that a particular action would benefit them while, very often, it does not. But then, in the case of Japan and the Manchuria crisis, we have convincing evidence that many other authorities inside the country realised the irrationality and the unnecessary of the invasion. Even more importantly, the invasion was only legitimised domestically thanks to a series of assassinations, mass radicalisation and opportunistic political coercion – forms of conduct that are neither predictable, attributable, or rational. A case study of the Manchuria crisis seriously impairs the idea that one single entity possesses the ultimate rationality of the State and alone pursues the State's interest, either "perceived" or "objective".

Another example we can discuss is the apartheid regime in South Africa. International scholars often view apartheid as a uniform practice of all South African institutions. However, having taken a closer look into the domestic development of this infamous system, others have noted that "institutionalised" apartheid did not always receive uniform and consistent support, even

¹⁴⁰ Tetsuo Najita, 'Inukai Tsuyoshi: Some Dilemmas in Party Development in Pre-World War II Japan' (1968) 74 *The American Historical Review* 492..

¹⁴¹ 'Invasion of Manchuria | Harry S. Truman' <<https://www.trumanlibrary.gov/education/presidential-inquiries/invasion-manchuria>> accessed 14 March 2023.

Ching-Chun Wang, *Japan's Continental Adventure* (Routledge 2010).

¹⁴² C Simon Fan, 'War Rape and "Comfort Women"', *Culture, Institution, and Development in China* (Routledge 2016).

within the State's institutions. We should also ask whether this system actually provided any advantages to the South African government in international relations.

In 1951, for example, the debates on non-white political rights went through a constitutional crisis, with the administrative side of the state forcing a legal instrument called the Separate Representation of Voters Act through Parliament, which changed the method of black representation in Parliament.¹⁴³ However, the Voter Act was passed by a simple majority and not a two-thirds majority, as the South African Act of 1909 required. This contravention was challenged before South Africa's Appeals Court. The court proved itself to be a judicial review body independent of the Parliament when it ruled that the Act was unconstitutional.¹⁴⁴ Of course, the Voter Act was only one of many institutional instalments that created the system of apartheid. Nevertheless, it is imprudent to insist that a single consciousness is shared among the state's agencies that could perceive something as a common "interest" of the state and at once collectively pursue it.

The list for case-studying this phenomenon will be long, but we could end this segment with *New York Times Co. v. United States*.¹⁴⁵ The legal battle between the U.S. government and the New York Times newspaper over the legality of the premature release of the so-called "Pentagon Papers" resulted in one of the most influential landmark cases of the U.S. legal system and is also exemplary in understanding how extreme it would be in a democratic country to say that a state's interests are easily defined, that the state is rational, or that the total representation of the state is the preserve of the administrative branch. Here, despite these papers being lawfully classified, strategically vital to the Vietnam War effort and overall public morale in finishing the war as the winner, the US Supreme Court decided that such "interest" was not the right "interest" to pursue, thus contradicting its own government.

Confidence in the state as a rational actor was damaged after the two World Wars. There remain some, however, who refuse to acknowledge the fact that states, like their human operators, are not always rational. By insisting that the state's interests are fixed and constantly intelligible and that all actions of the state are rational, Rational Choice theory, State Self-interest theory, and Game theories, while very good at explaining the initiation of the international law system, risk ignoring the complexity of national history, the changing contexts of national and cultural identities of states, its self-defined moral purposes and also the random, multifaceted development of a country with uncountable actors within one state pursuing their objectives quite independently. In the fog of so-called "interests", existing CIL norms are always the compass for modern states to understand events, frame their actions and even aspire to a better international society. Therefore, I reject the suggestion of theories that CIL has no exogenous influence on the behaviour of states.

¹⁴³ Gilbert William Frederick Dold and Christian Petrus Joubert, *The Union of South Africa: The Development of Its Laws and Constitution* (Stevens 1955), 37-101

¹⁴⁴ Richard E Bissell, *Apartheid and International Organizations* (Routledge 2019), 4

¹⁴⁵ 'New York Times Co. v. United States, 403 U.S. 713 (1971)' (*Justia Law*) <<https://supreme.justia.com/cases/federal/us/403/713/>> accessed 14 March 2023.

CIL in the Expansion of the Nation-State System

Another major claim of the realist-inspired theories regarding the formation of CIL is that the changing composition of the international community makes cooperation and coordination more difficult because there are so many conflicting interests between newly created states and the old guards of the previous international order.¹⁴⁶ This is understandable if one subscribes to the notion that, as Goldsmith and Posner state, “the payoffs from cooperation or deviation are the *sole determinants* of whether states engage in the behavioural regularities that are labelled norms of CIL.”¹⁴⁷

However, these arguments have many flaws. Non-aggression, anti-slavery, anti-racial discrimination, fair and equitable treatment between independent states, or state sovereignty are certainly not century-old ideas. They all became dominant in international discourses and turned into worldwide codification projects thanks to the outburst of newly independent states (NICs) after a series of successful decolonisation campaigns. For example, a Global South international scholar - Indian author Prakash Sinha - points out that although the NICs did not agree with every single international norm that existed before their independence and that the NICs often criticise the system of international law for being an old-fashioned phenomenon with imperialist characteristics, they nonetheless support a more just international order built upon the previous justifiable legal principles.¹⁴⁸ These countries resort to CIL norms in their disputes with other states. They utter international rules in debates in international organisations. They modify and perfect international legal concepts (including self-determination). They intentionally use international law to address injustices in the status quo. They are active participants in the proceedings of the International Law Commission, in matters such as discussing the law of state responsibility. More importantly, their utilisation of international law in many major international disputes of the decolonisation process (including campaigns against South African apartheid or pressure against Spain and Portugal's colonial possessions) has fortified the old international legal system.

Similarly, in 1971, Okon Udokang examined and noted that the large-scale emancipation of the former colonies in Africa and Asia after the Second World War and their participation in the United Nations and many other international organisations could have the most dramatic impact on the character of international law.¹⁴⁹ However, the “impact” is not about the problem of coordination and collaboration that hinders the development of international law, as some consent/state-centric theories suggested. On the contrary, international law has very quickly adopted and accommodated this new composition of the international community. The most basic legal principles in state relations, which have today become the backbone of modern international law, such as human rights and humanitarian law, were consolidated. The United

¹⁴⁶ Arthur A Stein, ‘Coordination and Collaboration: Regimes in an Anarchic World’ (1982) 36 International Organization 299., 2

¹⁴⁷ Goldsmith and Posner (n 98).

¹⁴⁸ S Prakash Sinha, ‘Perspective of the Newly Independent States on the Binding Quality of International Law’ (1965) 14 The International and Comparative Law Quarterly 121.

¹⁴⁹ Okon Udokang, ‘The Role of the New States in International Law’ (1971) 15 Archiv des Völkerrechts 145.

Nations was turned into a truly universal organisation. And the NICs always expect to play their roles in building and refining the international legal system, and not dismantling it.

Thomas Weiss stated during the 70th anniversary of the signing and entry into force of the United Nations Charter that “the establishment of the world organisation is a logical outgrowth of the wartime origins and the best guarantee of peace and prosperity”.¹⁵⁰ The existence of the United Nations, its legal system, and the cooperation between member states are not liberal window-dressing but a matter of community survival. Therefore, the era of the United Nations is the most connected, most coordinated, and most active community in creating laws and norms, obviously including customs, in the history of humankind. Although there are setbacks and certain barriers between members of the new world (which, in any case, have been there for millennia), it is illogical to perceive the forums and the laws that the United Nations offers as worse than those that existed previously. Overall, although the series of state-centrist theories do have an essential role in the formation and identification of CIL, their expansion and their grand claims on the uselessness and illusory nature of CIL are often ill-founded, with little or no support in state practice and theoretical discussions.

2.3.2. The Theoretical Foundation for Identifying CIL in the Dissertation

In the methodology section of the introduction chapter, I argued that the case study method is the best technique for collecting data on states’ practices and *opinio juris*, and identifying CIL. But the research method alone cannot assign weight and priorities to the data collected and examined, which might prevent us from realising the trends, patterns, and points of interest... within the data. This small section explains three chosen guiding theories for identifying customary international law.

A. *Affected state theory / Exception theory in the identification of CIL*

In choosing the necessary building blocks for the dissertation’s study of non-recognition, I first propose two theories in CIL identification: Affected-state theory and Exception theory. They share a common trait - scepticism over the omnipotence of the consent theory concerning CIL. As explained above, the consent theory believes that a CIL norm can only materialise if there is a general consensus of member states of the international community regarding such content. Both Affected-state theory and Exception theory, while they accept the general premise of consent theory, put the emphasis elsewhere.

For the supporter of the Affected-state theory, greater weight should be given to states that are significantly affected by a rule. A primary suggestion of this proposition we can cite is an *obiter dictum* in the North Sea Continental Shelf Case, where the ICJ proposed that: “State practice, including that of States whose interests are especially affected, should [be] both extensive and virtually uniform.”¹⁵¹ The idea is that although the practice and *opinio juris* of states need to be

¹⁵⁰ THOMAS G WEISS, ‘The United Nations: Before, during and after 1945’ (2015) 91 International Affairs 1221.

¹⁵¹ ‘North Sea Continental Shelf (Federal Republic of Germany/Netherlands)’ <<https://www.icj-cij.org/case/52>> accessed 15 March 2023.

consistent in a general sense, the international community and other trans-governmental organisations should take the practices and opinions of affected states and other involved states more seriously. In other words, “a very widespread and representative participation” might suffice as the pre-condition for the formation of customary international law, but “provided it included that of States whose interests were especially affected.”¹⁵²

Some authors who favour, or have at least shown support for, this theory include Niels Petersen, Richard R. Baxter,¹⁵³ Wolfke,¹⁵⁴ and Anthony D’Amato.¹⁵⁵ Niels Petersen, for example, realises the intuitive nature of this approach in some instances. He observes that, in considering a rule of the law of the sea, it is reasonable that the practice of land-locked countries has less influence on forming a customary rule.¹⁵⁶ This also leads us back to several of the examples discussed in the conceptual enigmas section, where I mention what eventually became customary norms - the abolition of slavery and the limitation of nuclear weapons, which were all built by only a handful of states.

To elaborate this theory further, we can bring into the discussion a related case, that of the Russian invasion of Ukraine (this case will be examined in much greater detail in the case study chapter). The principle of territorial integrity is a part of UN law, yet it is also in a stage of constant development as a part of recognised CIL. And although territorial integrity is foundational to the structure of the international legal system, the voting record of UNGA emergency resolution ES-11/1 shows that five states explicitly rejected the principle of the territorial integrity of Ukraine after the 2022 invasion.¹⁵⁷ These five states were the Russian Federation, Belarus, the Democratic People’s Republic of Korea, Eritrea, and the Syrian Arab Republic. However, using the language of the theory of affected states, the voting practice of these states would not have a severe impact on the CIL principle of the consolidation and development of territorial integrity. One apparent logical reason for this is that these states comprise a tiny portion of the international community. Another reason offered by this theory is that the Russian Federation and Belarus are, respectively, the perpetrator and the accomplice of this illegal conduct. On the other hand, the Democratic People’s Republic of Korea, Eritrea, and the Syrian Arab Republic are entirely unaffected by this conflict. None of them is seriously damaged or impacted by the rejection of the principle of territorial integrity for Ukraine. Therefore, their practice and opinions should not have a weight equal to that of Ukraine and other European states that have suffered from the problem of Russian aggression, including

¹⁵² ICJ, ‘North Sea Continental Shelf (Federal Republic of Germany/Netherlands)’ <<https://www.icj-cij.org/case/52>> accessed 15 March 2023., para 73.

¹⁵³ R R. Baxter, *Treaties and Custom (Volume 129)* (Brill 1970), 129

¹⁵⁴ Karol Wolfke, *Custom in Present International Law: Second Revised Edition* (Brill Nijhoff 1993) <<https://brill.com/view/title/9284>> accessed 18 October 2022., 78

¹⁵⁵ Anthony A D’Amato, *The Concept of Custom in International Law* (Cornell University Press 1971), 96-97

¹⁵⁶ Petersen, ‘The Role of Consent and Uncertainty in the Formation of Customary International Law’ (n 83).

¹⁵⁷ UNGA, ‘Res ES-11/1 on “Aggression against Ukraine” UN Docs A/RES/ES-11/1’ <<https://digitallibrary.un.org/record/3965290>> accessed 15 March 2023.

Georgia, the Republic of Moldova and many other regional European states that have experienced hardship due to the war, both economically and politically.¹⁵⁸

Similarly, concerning the practice of non-recognition of unlawful situations - the topic of this dissertation - there is a considerable number of states that seem indifferent to the obligation of not recognising and not maintaining unlawful situations created by Russia. In 2014, Resolution 68/262 (2014) directed UN Member States “not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol” and “to refrain from any action or dealing that might be interpreted as recognising any such altered status”. This reasonable request was passed as a UNGA resolution with only 100 votes in support, 11 votes against, and 58 abstentions.¹⁵⁹ The eleven states that explicitly opposed the obligation of non-recognition were Russia, Belarus, Armenia, Bolivia, Cuba, Nicaragua, North Korea, Sudan, Syria, Venezuela, and Zimbabwe. Except for the first two cited, none of these countries have either economic or political interests, geographical or cultural relationships, or diplomatic or territorial concerns at stake because of the status of Crimea.

Therefore, it is sensible to say that the practices and opinions of those European states that have historical ties with both countries involved, who have economic and political interests in the stability and lawful settlement of the territorial disputes and who will suffer real losses if the unlawful situation is not corrected, have more weight and legitimacy than those of a dozen countries spanning the globe and having no connection with the situation (Cuba and Bolivia are in South America, while North Korea is in Asia). Consequently, the fact that European states, and their authoritative regional organisation (which is the European Union), reached a virtual consensus on non-recognition of the Russian annexation of Crimea provides better evidence of the formation of a customary norm of non-recognition than the rejection of that norm by a random collection of states.

My interpretation of this theory closely resembles one mentioned in work of Anthony Clark Arend, entitled *Legal Rules and International Society*. Arend contends that for a rule to be proclaimed CIL, we do need exceptionally widespread perceptions of authority for such a rule. However, it “would be impossible for a rule of customary international law [...] to develop, unless those states that had a direct stake in the rule had participated.”¹⁶⁰ He then concludes that special weight should be given to the views of these states. Arend illustrates the point with a hypothetical situation where 188 states have expressed strong indications that states launching spacecraft had to file copies of the flight plan with the Secretary General of the United Nations. But with the United States and the Russian Federation refusing to accord to such a proposal - two major states that actually have the technological capacity for space

¹⁵⁸ Dumitru Minzarari, ‘The next War: How Russian Hybrid Aggression Could Threaten Moldova – European Council on Foreign Relations’ (ECFR, 29 July 2022) <<https://ecfr.eu/publication/the-next-war-how-russian-hybrid-aggression-could-threaten-moldova/>> accessed 15 March 2023.

Natia Seskuria, ‘Russia’s “Hybrid Aggression” against Georgia: The Use of Local and External Tools’ <<https://www.csis.org/analysis/russias-hybrid-aggression-against-georgia-use-local-and-external-tools>> accessed 15 March 2023.

¹⁵⁹ UNGA meeting record, 68th session: 80th plenary meeting (27 March 2014) UN Doc A/68/PV.80 <<https://digitallibrary.un.org/record/768577?ln=en>> accessed 05 September 2022.

¹⁶⁰ Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press 1999).

exploration - the legal authority and the possibility that the proposal would become a rule is exceedingly low. The same argument could be made in the case of non-recognition and other forms of isolation and sanctions against Russia. Since it is the burden of the European community to isolate Russia through its key connection with Russia in the energy, finance, culture or trade sectors, the fact that this community has accepted the losses and damages to maintain a non-recognition front against Russia creates a more reliable practice and opinion concerning the customary possibility of non-recognition compared to the “neutral” stance of many other regions in the world.

The exception theory of CIL takes even more power out of the hands of individual states, especially their “right” to reject or to form any kind of custom, as radical consent theorists insist. But what exactly is such an exception? For example, Anthony D’Amato argues that it is a defining characteristic of customary international rule that it can even bind states that do not directly consent to the rule.¹⁶¹ Unless a state is qualified to be a “persistent objector” - an exceptional title that only appears if the customary norm has just emerged and one state persistently voices its rejection - there is little to no chance that a country could enter the international community and then pick and choose which customary norms it will follow. Judge Rosalyn Higgins has an even more extreme approach to CIL. In her seminal work, *Problems and Process*, she declared that “...custom is obligation involuntarily undertaken – that is, not based on the consent of any given state. No state has a veto over the emergence of a customary norm.”¹⁶² Higgins, hence, even denied any exception to the formation of an overwhelming CIL obligation.

Another important work that rejects the over-emphasis on consent and the role of rule-breakers/perpetrators in the formation of CIL is *The Philosophy of International Law*. Its author, Fernando R. Teson, criticises consent-based theories, including modern sub-branches of game theory. Teson strongly contends that “the view that consent is the basis of an international obligation is implausible” and offers a straightforward reason: it is that states, historically, love to conclude “immoral agreements and participate in immoral customs.”¹⁶³ Teson goes on to give an eminent example, i.e., when Molotov and von Ribbentrop signed the agreement to partition Poland, “no one in his right mind” would have claimed that the agreement was legally binding. The Molotov-Ribbentrop Pact might be “good” for Nazi Germany and for the USSR (although it eventually turned out not to be good for both, and the pact quickly revealed its morally abject nature), but it is not necessarily good for everyone, and it is certainly not necessarily morally right. Teson, therefore, points out a weakness of consent/game theorists, which is that “bad people also cooperate.” Consequently, attributing the power of identifying CIL to even bad actors that show the intention to undermine and violate the rule itself is counter-intuitive.

These two theories lead us to the “Relative consent” theory, which is a term coined by me to reflect the above ideas and arguments, which will be one of the core foundations of our journey to identify non-recognition as CIL. Again, authors that directly discuss the theoretical

¹⁶¹ D’Amato (n 155), 187 - 190

¹⁶² Rosalyn Higgins (n 82), 34

¹⁶³ Fernando R. Tesón, *A Philosophy of International Law* (Routledge 2019), 92 - 93

perspectives of customary international law have never rejected the role of the consent of states. And as observed in our discussion of the resolution on “Identification of customary international law,” both state practice and *opinio juris* are manifestations of a state’s consent. However, this acknowledgement does not mean that the consent of a state in the identification of customs must reach a quantitative criterion with a fixed percentage of state leaders holding signs of “Yes” and “No”, as in the wishful imaginings of authors like Stephen J. Choi and Mitu Gulati.¹⁶⁴

Firstly, the Relative consent theory helps us to move past the “consensus” mindset when talking about CIL and instead focus on a number of affected states in different situations. The identification of CIL norms could be made through the examination of not all states because not every situation affects states the same way. As discussed above, the careful selection and categorisation of states and other international actors into predictable and comparable roles (including victim states, affected/regional states, and states acting as a collective...) is much more effective and nuanced in catching the patterns of their legal thinking and legal behaviours. Moreover, authors like Richard R. Baxter also argue that we need to reduce the complexity of the identification process when considering established practice. Understandably, the already uniform practice of states allows international actors to assume an *opinio juris* concerning one particular behaviour exists. Unless contrary evidence can be adduced, the eventual codification of this behaviour into customary norms should not be challenged only because of formality.¹⁶⁵

B. Moral/Natural law theory in CIL identification

Teson’s argument mentioned in the above paragraphs and our brief discussion of human nature and its capacity for ethics in 2.2.3. lead us to the discussions and emphasis on moral/natural law theories of international law and of CIL identification. Teson uses the concept of *ius cogen* (peremptory norm) - a recognised and established concept in international law - to prove that there is always something outside the will of the state when it accepts or does not accept an international legal rule (CIL included). In other words, no matter how rational and guided by self-interest states are, their agreement and cooperation are subject to the scrutiny of certain bigger and wider fundamental *moral* principles. It seems that according to Teson, the existence of the common sense of morality among humanity, societies, and the community of states is the exception to any consent-based concept of international law, as consensus cannot be the only basis of obligation. So, is morality also a source of customary international law? It is hard to find a direct connection between traditional theories of moral law and natural law and the formation of customary international law. Yet, there are many prominent naturalist philosophers, such as Kant, Grotius, and Locke, who have discussed and influenced the general understanding of international law.

¹⁶⁴ Stephen J Choi and Mitu Gulati, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/customs-future/customary-international-law-how-do-courts-do-it/C6A32B28F7204AB26D0221C9976F961D>> accessed 29 August 2022.

¹⁶⁵ R. Baxter (n 153), 69

Grotius, for example, argued that the law of nations is based on the law of nature.¹⁶⁶ He was also one of the first theorists who believed that states did not have to live in eternal conflict, as in Hobbes's anarchical state of nature.¹⁶⁷ They could, on the contrary, be bound by common customs set out in the law of nations, which naturally emerge from human consciousness and ethics to become the inevitable core component of international relations. In short, Grotius attempted to set up a system of ethical principles of rights to replace the doctrines of self-interest held by many ancient writers. He acknowledges that "self-love"/"self-interest" is also a part of the system of the law of nature that humans share with all other members of the animal kingdom.¹⁶⁸ However, humanity has moved beyond this primitive instinctual state. Grotius asserted that we are capable of distinguishing principles of "higher import than the things to which alone instinct first directed itself": humans *by nature* equipped with the capacities of reason, free will, sociability and, therefore, of care and love.¹⁶⁹

Concerning the connection with CIL, the modern Grotian school of international law has gone so far as to name the moments of custom crystallisation as "Grotian Moments".¹⁷⁰ According to its advocates, although identifying CIL norms can be exhausting and complicated, "Grotian Moments" help to complete the complex jigsaw puzzle of CIL.¹⁷¹ The UN General Assembly's Resolution 1514 (XV) - the Declaration on the Granting of Independence to Colonial Territories and Peoples - is seen as the Grotian Moment for the CIL norms on self-determination and decolonisation. The Nuremberg Tribunals are described as a Grotian Moment by the Prosecution of the Extraordinary Chambers in the Courts of Cambodia, concerning international criminal responsibility. The Tadić case, the invasion of Iraq, and Assad's use of chemical weapons in Syria are also called Grotian Moments, when a particular customary international law norm becomes crystallised. The Grotian influence on the identification of CIL appears to reduce the constant emphasis on states' interests and practices. Rather, at certain points in time, the normal practice of international institutions and its assumption of a legal principle is enough to establish the existence of a CIL norm.

John Locke also envisioned the moral/natural basis of international law in the 17th Century. While Locke's famous thesis on the state of nature is profoundly individualistic,¹⁷² it nevertheless supplies the conceptual and moral link between Lockean civil government and

¹⁶⁶ Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016), 50

¹⁶⁷ Reference to "Hobbes's state of nature in international law" can be found in Anthony D'Amato, 'The Theory of Customary International Law' (1988) 82 Proceedings of the Annual Meeting (American Society of International Law) 242. / R. Fawn and J. Larkins, 'International Society after the Cold War: Theoretical Interpretations and Practical Implications' in R. Fawn and J. Larkins (eds.), *International Society after the Cold War* (Basingstoke and London: MacMillan Press, 1996), pp. 2–3.

¹⁶⁸ Janne E Nijman, 'Grotius' "Rule of Law" and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword' (2019) 30 *European Journal of International Law* 1105.

¹⁶⁹ Grotius, *De iure belli ac pacis libri tres*, vol. II: The Translation, edited by Francis W. Kelsey, with the collaboration of Arthur E.R. Boak et al., and an introduction by James Brown Scott (Oxford: Clarendon Press, 1925)

¹⁷⁰ Tom Sparks and Mark Somos, 'Grotian Moments: An Introduction' (2021) 42 *Grotiana* 179.

¹⁷¹ Michael P Scharf, 'Grotian Moments: The Concept' (2021) 42 *Grotiana* 193.

¹⁷² 3Locke [1690] 1988, Second Treatise

international relations.¹⁷³ Locke agrees that promises and agreements between independent nations could not form a singular, coherent and self-sustained body of politics as it could inside a country, where the sovereignty and collective executive power of the community is transferred to a group of representative individuals (a government or legislative organ). Nevertheless, even in the absence of an “umpire” or a centralised government, Locke still suggests that moral rules operate in the “international state of nature.” Here, he also departed from the core idea of the Christian tradition of just war to insist on the moral code of self-defence and the punishment of aggression.

Examining the canonical *Perpetual Peace*, Martti Koskenniemi has suggested that Kant concludes that traditionalist writers on natural law are “miserable comforters,” whose principles and doctrines “cannot have the slightest legal force.”¹⁷⁴ However, Kant did not want to attack natural law as “unable to uphold a really ‘binding’ notion of cosmopolitan legality”.¹⁷⁵ On the contrary, Kant wants to say that although the codes of Hugo Grotius, Puffendorf, Vattel “have not—nor can have—the slightest legal force” and that states “are under no common external authority,” a natural and higher moral capacity of mankind leads rulers nevertheless to find reason and justice in the testimony of these great men. Kant explicitly argued:

“This homage which every state renders—in words at least—to the idea of right, proves that, although it may be slumbering, there is, notwithstanding, to be found in man a still higher natural moral capacity by the aid of which he will in time gain the mastery over the evil principle in his nature, the existence of which he is unable to deny. And he hopes the same of others; for otherwise the word “right” would never be uttered by states who wish to wage war [...]”¹⁷⁶

Following the Kantian approach to ethics, we can see very clearly that Kant tried to draw an analogy between the self-interest of states and human’s impulse to reject common law, to succumb to the mechanism of nature and the unstrained desires of all other species of animals. On the other hand, international law and perpetual peace between nations are equal to the human capability for morality and ethics. Therefore, the moral/natural law tradition of interpreting international law in general, and CIL in particular, departs from Thomas Aquinas’s theory of natural law, where God gives order to the chaos of creation and establishes

¹⁷³ Lee Ward, ‘Locke on the Moral Basis of International Relations’ (2006) 50 *American Journal of Political Science* 691.

¹⁷⁴ ‘Perpetual Peace, by Immanuel Kant—A Project Gutenberg eBook’ <<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>> accessed 17 October 2022.

¹⁷⁵ Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’ (2009) 15 *European Journal of International Relations* 395.

¹⁷⁶ “So the question is no longer whether perpetual peace is something real or a fiction, and whether we are not deceiving ourselves in our theoretical judgment when we assume that it is real. Instead, we must act as if it is something real, though perhaps it is not; we must work for establishing perpetual peace and the kind of constitution that seems to us most conducive to it ... And even if the complete realization of this objective always remains a pious wish, we still are not deceiving ourselves in adopting the maxim of working incessantly towards it. For this is our duty, and to admit that the moral law within us is deceptive would call forth in us the wish, which arouses our abhorrence, rather than to be rid of all reason and to regard ourselves as thrown by one’s principles into the same mechanism of nature as all the other species of animals.”

eternal/divine law that humanity must follow if it is to fulfil its destiny. It argues that international law (and CIL norms) are formed and identified through human reason, the capacity for morality as a whole and an optimistic hope for a society of liberal republics where perpetual peace could be attained.

While natural law theories are not necessarily popular in the modern identification process of customary international law, it is vital that they are learned and understood, keeping in check the overestimation of statist theories of self-interest. After all, although natural law theories might not be very effective in dealing with customs that are primarily technical, such as the “right of passage” or “three-mile territorial sea line,” they play a paramount role in many other foundational customary norms, including “self-determination,” “the prohibition of slavery,” “independent sovereignty,” or even *pacta sunt servanda*.

Indeed, ethics, morality, or natural law principles are not very popular among mainstream and mediated public discussions concerning international law. However, the language of “morality” in defining international law has never lost its voice on the international stage. According to Lepard, although each nation has its own network of ethical principles, and although he accepts the post-modernism proposition that there is no “universal truth” in morality, he rightly points out that states, through their interactions, could reach certain eminent ethical principles, which are then dubbed “unity in diversity.”¹⁷⁷

It is true that states’ behaviour often falls short of their noble expressions and committed proclamations when they are among other international actors. Yet, the fact that world leaders can actually agree on any common core of ethical principles for the further development of international law is already an exceptional achievement, especially considering the broad panorama of the political history of humanity. And this accord should not be lightly dismissed. The most frequently held position of the international naturalist theory –that universal values and the moral standing of states are attainable – are far from unrealistic if we examine them under the same lens of dynamic and reciprocal communities of states and individuals. Myres McDougal, for example, although not himself a legal naturalist, borrows the universal language of “human dignity” to point out that state officials often tolerate each others’ claims, meet the expectations of others, restrain their power and create uniform patterns of interaction to achieve the common good they have in mind.¹⁷⁸ Thomas M. Franck, on the other hand, considers fairness to be a natural expectation of the international community when it comes to international rules and obligations. As long as nations and also their domestic population can perceive international law in general, and CIL in particular, as “fair” and “legitimate”, they will voluntarily adhere to the rules without the necessity for a system of coercive compliance.¹⁷⁹

¹⁷⁷ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010).

¹⁷⁸ Myres S McDougal and Harold D Lasswell, ‘The Identification and Appraisal of Diverse Systems of Public Order’ (1959) 53 *The American Journal of International Law* 1. See more explanation and arguments in Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989) <<https://www.cambridge.org/core/books/rules-norms-and-decisions/5230DE82772EFC582C32906F1C09F7ED>> accessed 25 October 2022., 199

¹⁷⁹ *The Power of Legitimacy among Nations* (Oxford University Press 1990), 19

This does not mean that the CIL and other systems of international law automatically have a high degree of legitimacy, but it shows that forms of international law that exist and are accepted nowadays have already gone through the filters of countless ideologies, cultures and local identities before everyone willingly and democratically acknowledged the presence of the UN Charter or any other international institutions. Consequently, theorists within the natural law school of international law perceive the system of functional CIL as obtainable and, moreover, they believe that international law will be integrated into the national system of rules and values.

C. *Embracing modern approaches to a theory of international custom: Custom as constructed and process-focused*

I understand that the above discussion of schools and branches of theories of international law might not be sufficient to qualify as a comprehensive review. They are nevertheless sufficiently representative to depict the complex stages of theoretical perception concerning international law and customary international law. Some of the theories briefly discussed, such as game theories or state-interest theories, are included to show that I am very well aware that those positions are held in academia, and capable of debunking some of their critical claims. In the current stage of world politics and the ever-increasing interdisciplinary world, I have to show that I am prepared to debate in favour of the validity and the necessity of CIL and international law in general.

Technically speaking, however, modern and practical lawyers of international law do not really need to involve themselves with questions such as “Is CIL actually law?” or “Does CIL really matter?” The fact that all members of the international community, through the forum of UNGA, adopted without a vote Resolution 73/203 (2018) on the *Identification of customary international law*, at least proves that all established governments understand that CIL exists. They also acknowledge that it is one of the significant sources of the international legal system and that they are well aware that every single one of their actions and legal opinions voiced in the international areas bears weight and power for the consideration of CIL formation. This development supports Karol Wolfke’s argument, which was made some decades ago.

In 1993, Wolfke contended that understanding the motives of states and governments, or answering the question of whether states “intend” to create rules, is irrelevant, since all governments are aware that their conducts/behaviour/statements, whatever their cause, can lead to the establishment of a new customary norm.¹⁸⁰ More importantly, as we have said, it helps us to end the debates with realist/statist theorists on whether or not CIL matters or whether States generally comply with CIL. Since States themselves already recognise the existence of CIL, with fully codified knowledge of how and when an international custom will be identified, the continuing denial of these theories concerning CIL’s existence and importance in international life has become obsolete and unproductive. What is more relevant and important is how modern theories of international law can accommodate the development of CIL and improve its implementation.

¹⁸⁰ Wolfke (n 154), 66 - 67

In Harold Hongju Koh's famous review, "Why Do Nations Obey International Law?," the author utilises the case of domestic debates between the U.S. Reagan administration, the U.S. Congress, multiple former government officials and even legal scholars in the fight against the Reagan administration's proposal to "reinterpret" the bilateral Anti-Ballistic Missile Treaty (the ABM treaty - signed with the U.S.S.R.) to allow a space-based antiballistic missile system for American territorial defence. In the end, through many fora, political channels, and three administrations (Reagan's, Bush's, and Clinton's), the original ABM treaty interpretation was restored among all the U.S. agencies and bureaucracies.¹⁸¹ So why, in the end, did the US return to compliance with international law in general? Koh asserts that "standing alone, neither interest, identity, or international society provides sufficient explanation [...];" and "various theoretical explanations offered for compliance are complementary, not mutually exclusive."¹⁸² More specifically, Koh observes that "self-interest" theories essentially reduce all communities and decision-makers of a state into one inseparable entity with only some variables, such as "payoffs," "costs of compliance," "discount rates," and "transactions costs," which can only react to sanctions, not to norms and morality. These theories, although they retain relevancy in explaining legal norms concerning international trade and arms control, miss the *transnational revolution*, where non-state actors arise and pursue multiple goals/interests in complicated non-zero-sum games that will affect how a government acts in international settings, especially in sectors such as human rights, environmental law or international commercial transactions.

Combining these general views, in the excellent book *Customary International Law: A New Theory with Practical Applications*, Brian D. Lepard observes that theories of CIL have been developed in such an advanced and modern language of legal theory that any monolithic theoretical approach to CIL (such as pure self-interest theory or pure natural law theory) appears seriously outmoded. To explain the reasons that an actor might voluntarily accept norms with preemptive effect, Lepard builds upon the Value Theory of Rescher¹⁸³ and the "authority theory" of Raz,¹⁸⁴ to introduce his "empirical legitimacy criteria" comprised of three groups of values:

- 1) the self-oriented / self-interest values of an actor;
- 2) other-oriented values, which means one's consideration for other members of the international community;
- 3) principle-oriented values, which can be explained as norms which an actor perceives as universalisable principles.¹⁸⁵

¹⁸¹ Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 The Yale Law Journal 2599., 2647

¹⁸² Ibid., 2649

¹⁸³ Nicholas Rescher, *Introduction to Value Theory* (UPA 1969).

¹⁸⁴ Please see Joseph Raz, *Authority* (New York University Press 1990). And Joseph Raz, 'The Justification of Authority' in Joseph Raz (ed), *The Morality of Freedom* (Oxford University Press 1988) <<https://doi.org/10.1093/0198248075.003.0003>> accessed 20 October 2022.

¹⁸⁵ Brian D. Lepard (n 177)., 57-60

Overall, Lepard contends that actors can choose to obey authoritative norms, even when they see no interest for themselves in obeying them and when their preference would be for a different course of action. Actors can also choose to obey a norm just because it manifests their own interpretation of the moral principle of fidelity; or sometimes just to fulfil the legitimate expectations of others created by the actor's previous behaviour. Bearing in mind the presence of UNGA Resolution 73/203 (2018) on the "Identification of customary international law," the problem with theories concerning CIL now is to provide practical, effective, and also appropriate ways of identifying CIL norms, understanding their nature, and explaining how they actually work.

In this dissertation, which aims to prove that the principle of non-recognition of unlawful situations exists as a customary international law norm and that the implementation of non-recognition can be studied as an institutionalised-predictable process, it is hoped that the theories listed below will guide and support this proposition.

"The constructivist approach to CIL"

One theory that might play a vital role in our journey of exploration of the principle of non-recognition is the constructivist school of international law. Although we have not gone through any discussion that directly mentions constructivism, it is certainly hinted in the background. From the idea of collective *opinio juris* to collective morality, from state's identity to its manoeuvre at the international stage, the interactions between the agents and the structure lead us to the idea of constructivism. The school is not overwhelmingly popular with international legal scholars. Still, I believe that it provides the dialectical connection between international law and other international or non-international actors, deepening the understanding of international law as a system of norms.

In the constructivist approach, international law is not a system of legal/moral/ethical principles that all nations and all communities necessarily and unconditionally endorse. However, the participation of virtually all states in declaring, discussing, debating and consenting to normative and customary rules in one particular institutional set-up might allow constructivists to generalise about the existence of customary international law. According to this theory, such an institutional practice proves that international law, and specifically customary international law, is never a system of chaotic forum shopping and free-riding where states inherently disdain all rules and norms.

Renowned language constructivist philosopher John Searle believes that humans can assign status functions to objects through *collective intentionality*, which sets us apart from animal societies. This enables objects to have abilities beyond their physical structure alone. For Searle, understanding the functions and structure of language as a social institution is crucial, since no other institution can exist without some public system of *symbolic representation*. Searle places emphasis on "declarations."¹⁸⁶ He insists that all institutional facts depend on

¹⁸⁶ John R Searle, 'Free Will, Rationality, and Institutional Facts' in John Searle (ed), *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) <<https://doi.org/10.1093/acprof:osobl/9780195396171.003.0006>> accessed 20 June 2023.

those declarations. While other speech acts are designed with the purpose of either saying something about the world or stating an intention to change the world, declarations generate the state of affairs that constitute their “content” by the very act of enunciation. They are, thus, the only ones that can produce new institutional realities. Declarations assign collectively recognised status functions to objects or persons by the enunciation of a constitutive rule. This leads us to two important contributions to the identification of CIL by the international constructivist school.

Firstly, constructivists agree that international law was initially formed through the lens of the state’s interest. A norm, either treaty or custom, naturally arises from the practical needs of states and from other benefits such a norm could bring to the community. However, eventually, a law-based system itself becomes one of the most essential characteristics of states in the community, since the members are accustomed to such legal order. Hence, in many cases, states prefer international rules, not just because of their meticulous calculation about how compliance and non-compliance affect their rights and interests, but because habitual obedience and linguistic respect for international law turn their “declarations” into part of their reality. In Andrew Hurrell's words: “the compliance pull of international rules derives from the relationship between individual rules and the broader pattern of international relations: states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community”.¹⁸⁷ Specifically, CIL norms could also be eventually consolidated via the mechanism of the “interpretative regimes” of international law, including, but not limited to, the courts, the specialised agencies of the United Nations, or, very often of course, the General Assembly, as explained by Orakhelashvili.¹⁸⁸ The consistency of the rules and norms of the international legal system, although not always practised by all states, eventually affects the outlook and the perception of even skeptical members of the international community. A state’s non-compliance with a particular international legal norm might trigger within the discursive field a process where the scope and boundaries of the security community are re-negotiated but not abandoned. If the result is, again, the repetition of this one particular norm, constructivists might observe that its normative power should be duly respected.

On the other hand, international law, in the constructivist view, is not a system of legal norms that suddenly emerges out of nowhere and does nothing but create obligatory burdens for states. Instead, societal norms are constantly communicated between governmental, non-governmental transnational actors, and even individual citizens. These communications can generate new domestic norms that are soon externalised through international fora to compete for international legality. Yet, the communication can also seek to internalise international legal norms through various national interpretation regimes (domestic policies and actions, public opinion, the news media, and other public accountability mechanisms) and turn them into an integral part of the belief system of a nation’s population. If the law is constructed, then there

¹⁸⁷ Andrew Hurrell, ‘International Society and the Study of Regimes: A Reflective Approach’, *Regime Theory and International Relations* (Oxford University Press 1995). 59

¹⁸⁸ Alexander Orakhelashvili, ‘Interpretation of Customary Rules’ in Alexander Orakhelashvili (ed), *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) <<https://doi.org/10.1093/acprof:oso/9780199546220.003.0016>> accessed 20 October 2022.

is no use in denying the possibility that international law can become a part of the domestic belief system without the endless hustle of “inside” and “outside”, “us” and “them”; or the “non-compliance fallacy”.

Nevertheless, I agree with Guzman’s observation that constructivism in international law might be too complex to use as one complete and dominant framework for understanding and explaining international law.¹⁸⁹ However, the “constitutive relationship between agents and structures” offers the intriguing suggestion that a state’s interest and a state’s cultural/political identity are never stable, regardless of the type of government or political orientation.¹⁹⁰ All of these buzzwords could be “constructed” through one state’s interaction with other states and the activities of individuals and advocacy groups.

Well-known international constructivists such as Nicholas Onuf and Friedrich Kratochwil explain that these interactions/communications could only be carried out through communicative acts, which have various psychological impacts on the speakers. And eventually, these general, prescriptive statements, manifesting ideas and intentions of actors in one instance, become legal rules through repetition and social acceptance.¹⁹¹ Although both Onuf and Kratochwil are still heavily influenced by legal realism and positivism (as they still believe that international law has to be understood in the hierarchical forms associated with domestic legal systems), their argument about communicative acts is a perfect theoretical foundation for the investigation of CIL, especially since both state practice and *opinio juris* depend heavily on such acts.

As one of our guiding rules, the constructivist approach to CIL encourages us to focus on defining non-recognition communicative acts in as many settings as possible. It is also important to find out how these communicative acts set the tone and attitude among many other international and non-international actors, and to discern whether the views of authoritative international agencies could be legalised or internalised. International legal constructivism resonates with the old argument that “Law is not law if it always needs coercive enforcement”. There is *no* interest, identity, structure or power hierarchy within the international system as *given*. Through interaction, the identity of actors identities is shaped, shared expectations arise; and the existence of interactional international law ultimately follows. Constructivist insights

¹⁸⁹ Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) <<https://doi.org/10.1093/acprof:oso/9780195305562.001.0001>>., 20. See more explanation and arguments from Harlan G Cohen, ‘Can International Law Work? A Constructivist Expansion’ Digital Commons / University of Georgia - School of Law 40.

¹⁹⁰ Similar observations concerning constructivism in international law can be found in: Oona A Hathaway and Ariel N Lavinbuk, ‘Rationalism and Revisionism in International Law’ (2006) 119 *Harvard Law Review* 1404.

¹⁹¹ Jutta Brunnée and Stephen J Toope, ‘Constructivism and International Law’ in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (1st edn, Cambridge University Press 2012) <https://www.cambridge.org/core/product/identifier/CBO9781139107310A014/type/book_part> accessed 25 October 2022.

See also from: Onuf, Nicholas G. (1982). “Global Law-Making and Legal Thought,” in Nicholas G. Onuf (ed.), *Law-Making in the Global Community* (Durham, NC: Carolina Academic Press), pp. 1–8. And. Kratochwil, Friedrich (1989). *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press)

reveal how collaborative norm-making is possible, and it is especially effective to understand non-recognition as custom.

Since non-recognition manifests itself mostly through the realm of expressive acts of states, with supporting evidence of symbolic/administrative declarations by international organisations, exploring non-recognition under the lens of constructivism allows us to understand the process of mutual constitution between states (agents) and international organisations (structure). Specifically, exploring how victim states/regional organisations navigate the language of the international law to convince the international organisations to adopt the practice of non-recognition, and then how the international organisations universalise this practice with its agencies and power, and whether or not they act consistently within their roles through different cases... will allow us to confirm the constitutive non-recognition norm-making in the international legal system. Naturally, if the diverse interests, justifications and contestations within states' practices only produce the re-socialisation and re-constitution of non-recognition, then it is safe to assume a general belief about the existence of "the law". The constructivist approach, alongside relative consent theory, is extremely helpful in our search for non-recognition's *opinio juris*. In the words of Stéphanie Martel, the language and expression are now not just the "transparent medium of non-discursive factors situated in the background of material reality (or human cognition)",¹⁹² they themselves are the realities and beliefs of states.

International Legal Process Theories

"International legal process" theories, in general, play a crucial role in this dissertation. Although there are many prominent names (such as Myres McDougal, W. Michael Reisman, Abram Chayes, Rosalyn Higgins) with differing interpretations and many schools (New Haven School and the New International Legal Process School),¹⁹³ most of the variations of the international legal process theories agree on a common ground that international law should not be understood as a set of rules that always has to be well-codified, with the rights and obligations of every involved party spelt out specifically. Instead, international law is a world-constitutive process of authoritative decisions designed to serve particular ends and values. In the words of former ICJ judge Rosalyn Higgins - a distinguished school member: "International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules."¹⁹⁴ The idea is that, whenever an international legal norm is broken, the event triggers a political decision-making process, in which a pluralistic community of states creates the context for final decisions on the legality and consequences of a particular action.

¹⁹² Stéphanie Martel, *Enacting the Security Community: ASEAN's Never-Ending Story* (Stanford University Press 2022), 35

¹⁹³ Read more about these schools and approaches in:

Koh (n 181), 2619 - 2624

Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 *The American Journal of International Law* 334.

¹⁹⁴ Rosalyn Higgins (n 82), 267

Heavily inspired by the concept of a legal system in U.S. common law (which actually means a legal process between the courts, the lawyers, and other judicial authorities), the international legal school insists that, although substantive legal principles are still very important, they alone cannot dictate the outcomes and the effects that law has on a case by case basis.¹⁹⁵ It is the “legal process” that allocates decision-making power to either national or international decision-makers, negotiates and arranges regulatory regimes or sanctions, and retaliatory actions if necessary, and in turn restrains and organises national and individual behaviour.

With this interpretation, we could make the argument that since the political, economic, historical and cultural settings of each event are widely different, it is understandable that there is no uniform response to somewhat similar types of conduct in international law (we can even observe this phenomenon in a much stricter system of domestic law). Abram Chayes argues that international law affects political action, not by giving a neutral and top-down judicial judgment that everyone has to follow but by:

- (1) Operating as a constraint on actions;
- (2) Providing legal justification or political legitimation of action;
- (3) Establishing organisational structures, procedures and forums in which the disputes will be resolved through political power.¹⁹⁶

These ideas give us some hints on the question of why states obey international law. It is because, through this rather multilateral and purposeful “process”, states are the ones that identify violations, discuss their justifications, debate their merit, interpret the law, and reach conclusions within the pre-determined set of normative rules. To reject international law is not to deny a specific legal rule but to actually isolate oneself from the legal process that the international community uses to deal with particular legal questions and to reach political decisions. As long as nations continue to act within the regime of international law, they participate in the law-making process of the international system. Therefore, with the approach offered by legal process theory, international law is removed from its static status to become a living institution.

I understand that many scholars have strong opposition to international legal process theories as a whole. Yet, we should not reject the school’s methodological ambitions and practicality, especially in the territory of customary international law. Exploring, positioning and making sense of CIL in relation to other norms of the international legal system, according to legal process theories, is not the exposition of rules or pinpointing any specific content: rather it is the way that authoritative international actors effectively use, interpret, compare one norm with other norms, and ultimately apply them to protect society’s normative values.¹⁹⁷ In many international legal incidents related to non-recognition, including the US’s invasion of Iraq, Vietnam’s intervention in Kampuchea or India’s invasion of Goa, all the parties involved tried

¹⁹⁵ Abram Chayes, Thomas Ehrlich and Andreas F Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Little, Brown 1968).

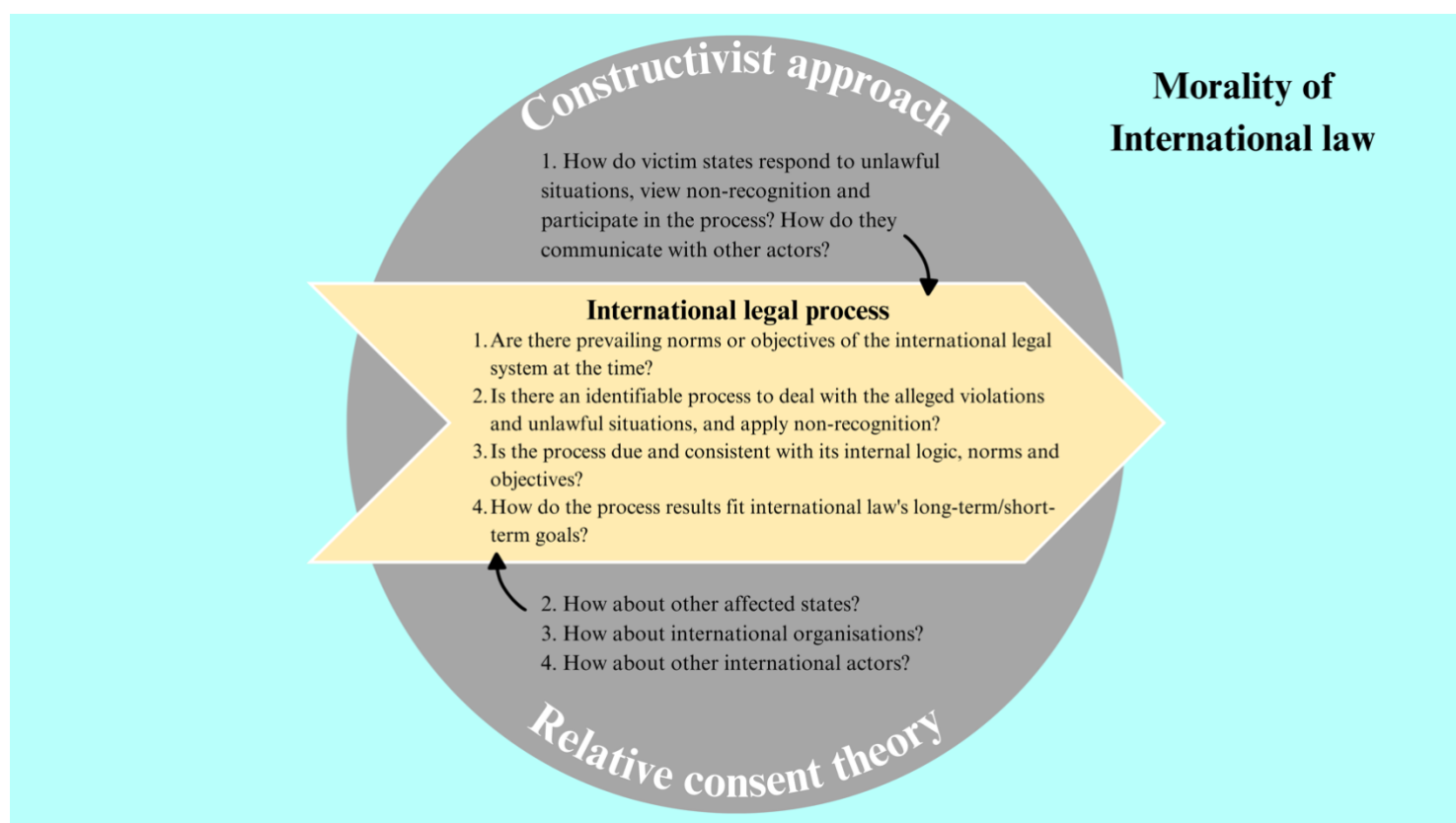
¹⁹⁶ Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (University Press of America 1987).

¹⁹⁷ O’Connell (n 197).

to frame their claims within a specific legal justification in international law, and sought to sustain and to legitimise their claims within the structure of UN institutions (UNSC and UNGA). If available, the legal opinions of the International Court of Justice were also utilised as a part of the ecosystem of the international legal process.

In identifying non-recognition as custom, legal process theories encourage readers and observers to shift their attention away from attempting to articulate international legal rules independently and then deciding how a “court” should apply them, as if they were merely parts of domestic law. However, it is more important to understand manifestations of the rules through multiple international fora; to ask how the international community actively interprets the norms; whether the focused “ends and values” are consistent and how they all connect to each other through an institutionalised process where many actors can take part in the initiatives. Consistency, under the lens of legal process theories, emphasises procedural justice and utilitarian results, not a uniform application of rules in every case. In this sense, the legal process theory provides the dissertation with a better way to collect, examine, and organise the practices of non-recognition.

Table 2. Theories for CIL



In this chapter, I have argued that customary international law is an acknowledged, well-established and organic unit of international law. There are constant references to the extensive utilisation of CIL by the ICJ, the UNG, the UNSC, and states themselves, and there would be no productive and meaningful purpose in denying the role of CIL in international life.

Concerning the theoretical approaches to explain the normative role of CIL and also to set a guideline for me in the pursuit of identification of the principle of non-recognition as a custom, I find that CIL is supported by various legal theories that are already familiar in international law. As noted, modern international interactions and ever-expanding international institutions in a more hostile environment do not favour any attempt to explain the international legal system with one individual theory. A combination of theoretical approaches, such as “relative consent” theory, natural law theory, constructivism, and legal process theory, allows for the better consideration of non-recognition practices and *opinio juris* elements. The relationship between these theories is illustrated in the figure above, including featured questions from each theory and how they are supplementarily positioned. The questions, in turn, inform my case studies, helping the dissertation to recognise the data that should be deemed meaningful in the process of identifying non-recognition as customary international law.

The international legal process theory raises important questions such as: “Are there prevailing norms or objectives of the international legal system at the time?” and “Is there an identifiable

process to deal with the alleged violations and unlawful situations, and apply non-recognition?” It also asks, “Is the process due and consistent with its own internal logic, norms and objectives?” This approach provides guidance for understanding a state's practices of non-recognition. It emphasises the importance of considering not just the final outcome of the law, but also the environments, procedures, forums, and internal logic that lead to such an outcome.

The process theory is then attested as a theoretical subset of the constructivist and relative consent approaches to customary international law to see whether or not they are harmonious and reciprocal. Specifically, the constructivist and relatively consent approaches allow us to examine discursive practices and other related conducts of international actors (with different weights and thresholds in accordance with their proximity and role in an unlawful situation) to certify the proposition of whether the consistency of states' practice of non-recognition does support the creation of states' mutually constitutive *opinio juris* of non-recognition.

All of the theories are assumed to operate within the general environment of the morality of international law as the final theoretical trial for the fit of non-recognition as CIL.

3. Non-recognition: Conception and Contexts

3.1 Non-recognition and the Theory of Rule-maintenance

Non-recognition, as we have explained briefly in the Introductory chapter, has never been a particular favourite in the literature of international law. The theoretical aspect of this duty, therefore, has never been a focal point of international legal studies. An exception is Joseph O'Mahoney's *Denying the Spoil of War: The Politics of Invasion and Nonrecognition*.¹⁹⁸ O'Mahoney's book is a rarity, in that it is, to date, the only scholarly work that specifically deals in depth with non-recognition as a serious political phenomenon, supports its application and provides it with theoretical arguments. Since the subject of my thesis is the analysis of non-recognition as a legal concept and as a duty in the system of customary international law, it is imperative to examine O'Mahoney's propositions.

It is not claimed that all theoretical foundations supporting non-recognition appear only in this book. The duty of non-recognition has appeared in a variety of names and forms in political science and international relations studies. Depictions and expressions that reflect the core elements of non-recognition include: "low-cost sanctions", "diplomatic sanctions", "symbolic sanctions", and "international isolation." Sometimes, these concepts are used interchangeably in highly political contexts - a territory I do not wish to explore in this dissertation. However, it is beyond doubt that the concepts are acknowledged as "expressive" tools in the international relations arsenal. All of them echo certain beliefs and reasonings for the application of non-recognition.

Chesterman and Pouligny, for example, find that there are particular types of sanctions designed merely to express outrage, disapproval and non-acceptance.¹⁹⁹ The imposing states do not need to have specific goals or policy objectives in mind. And although discussing strictly economic sanctions, James Barber also agrees that the secondary functions of sanctions are to express "a sense of morality" and to establish a common moral/legal stance between the states that impose them.²⁰⁰ He cites Finland's explanation in their sanctions against Rhodesia that the sanctions were a "demonstration on behalf of the equality and rights of man."

Another famous argument for the symbolic and expressive role of international sanctions comes from Ivan Eland in his seminal work *Economic Sanctions*. In a chapter entitled "Economic Sanctions as Tools of Foreign Policy", Eland states, "[I]n an anarchic and chaotic international environment, symbolic goals are important and may even be vital..."²⁰¹ Symbolic

¹⁹⁸ Joseph O'Mahoney, *Denying the Spoils of War: The Politics of Invasion and Non-Recognition* (Edinburgh University Press 2018) <<https://library.oapen.org/handle/20.500.12657/53505>> accessed 12 November 2022.

¹⁹⁹ Simon Chesterman and Béatrice Pouligny, 'Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations' (2003) 9 *Global Governance* 503.

²⁰⁰ James Barber, 'Economic Sanctions As a Policy Instrument' (1979) 55 *International Affairs* (Royal Institute of International Affairs 1944-) 367., 380 - 382.

²⁰¹ Eland Ivan, 'Economic Sanctions as Tools of Foreign Policy', *Economic Sanctions* (Routledge 2018) <<http://www.taylorfrancis.com/chapters/edit/10.4324/9780429493935-3/economic-sanctions-tools-foreign-policy-ivan-eland>> accessed 14 December 2022., 30-33

goals of sanctions, Eland explains, are neither concerned with the effectiveness of sanctions (i.e., in inflicting pain on the violating state) nor with achieving grandiose objectives (i.e., making the violating state retreat from aggression). Eland argues that President George Bush had little faith in sanctions, and there is evidence that he had no hopes that sanctions authorised by the U.N. would compel Saddam Hussein to withdraw from Kuwait. However, U.N.-authorised sanctions, along with other binding and non-binding resolutions, created the impression that Iraq's invasion of Kuwait was subject to universal condemnation, thus allowing the United States to assume the mantle of morality and justice when it led the subsequent military intervention.

Kim Nossal, another leading authority on the subject of international sanctions, also supports a reconsideration of symbolic sanctions, especially in cases where weaker economies decide to impose sanctions on bigger and stronger ones.²⁰² Painstakingly studying the sanctions employed by the Australian and Canadian governments, Nossal suggests that we should not only focus on the instrumentality of sanctions, specifically the ability to deter, compel, or subvert targeted states. States that are not among the great powers can rely on the symbolic utility of sanctions to demonstrate their moral and legal stance to both internal and external audiences, thus contributing to the reaffirmation of norms.

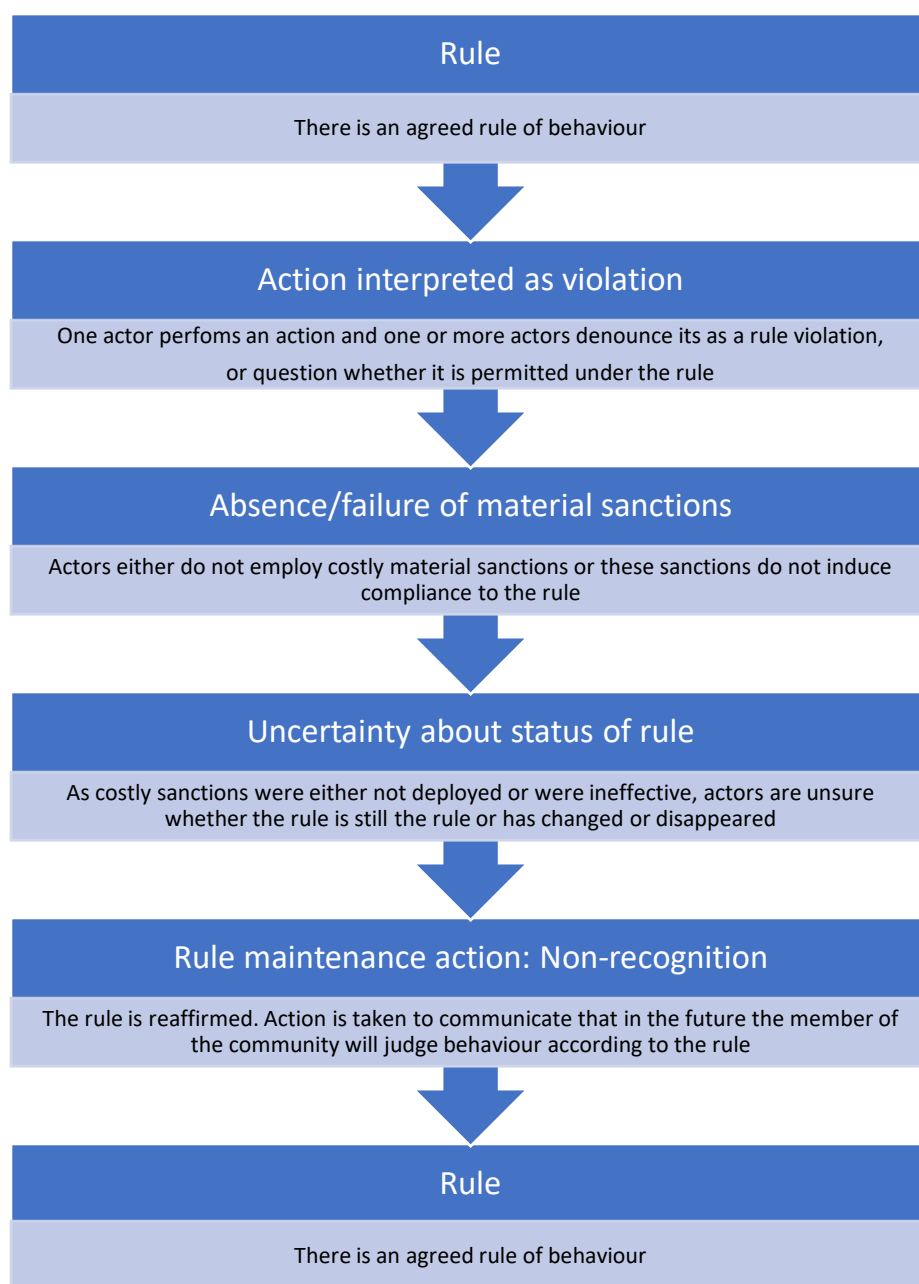
However, although rich and authoritative, the literature is not tailored to deal with the concept of non-recognition. And even though we can find support in the general idea of the international community collectively establishing and reaffirming legal norms by the use of economic sanctions, those economic sanctions should not be confused in terms of law with the duty of non-recognition (a topic that we will also revisit in this chapter). Of course, the study of non-recognition can draw some inspiration from the symbolic and norm-confirming functions of economic sanctions, but further details and mechanisms that work for non-recognition require separate and more comprehensive study. This is what makes Joseph O'Mahoney's take on non-recognition important to this dissertation. The core ideas of O'Mahoney's conception of non-recognition could be divided into two main components, which provide the guiding premise for the hypotheses of my thesis.

3.1.1. Non-recognition as a process

First and foremost, non-recognition is understood by O'Mahoney as a process, fitting one of the theoretical frameworks provided by customary international law that was discussed in Chapter Two - the theory of "international legal process". The process of non-recognition established by O'Mahoney (as shown in the table below) involves several stages, and this helps us to conceptualise and visualise non-recognition properly, without any premature assumptions about the concept. Specifically, according to O'Mahoney, there are six major stages in the process, starting with the existence of an agreed rule of behaviour in international relations.

²⁰² Kim Richard Nossal, 'The Symbolic Purposes of Sanctions: Australian and Canadian Reactions to Afghanistan' (1991) 26 *Australian Journal of Political Science* 29.

Table 3.1.1. O’Mahoney’s non-recognition political process²⁰³



However, the legitimacy, continuity and legality of such a rule are challenged by an action allegedly violating the rule, hence triggering the second stage of the process: “Action interpreted as a violation”. This also makes the “process thinking” in non-recognition much more efficient in establishing legal arguments and easier for the general audience to grasp. The international legal process approach does not assume that every allegation of rule violation is automatic and undisputed. Actions must undergo a quasi-judicial procedure to be identified as

²⁰³ O’Mahoney (n 202)., 17

a violation of the rule. Only then does the question of the non-recognition mechanism become a part of our evaluation.

Authors including Milano, in his book on *Unlawful territorial situations in international law*, often assume the illegality of an action on the basis of their own assessment and criteria. Milano deems the Indian invasion of Goa, China's occupation of Tibet and even the US-led war against Afghanistan to be actions contrary to international law,²⁰⁴ even though he has yet to examine the international collective determination of these conducts. Such contradictions in the assumptions of scholars and the ultimate decisions of international institutions lead to false condemnations of the practice of non-recognition: the application of non-recognition is often requested, even in cases where international authorities have never identified that there is any unlawful situation at all. Indeed, we might well claim that the determination of a situation as "not unlawful" is a politically motivated one. Nevertheless, the practice of non-recognition seems to require an authoritative conclusion on the legality of such conduct, and not merely on one individual's judgment of each government or community.

After conduct is interpreted as a rule violation, O'Mahoney argues that there must also be no effective "material sanction" in place to induce compliance with international rules, thereby creating confusion and possible disagreement on the perceived status of law. Finally, in O'Mahoney's proposed process, the non-recognition mechanism is employed as a way to reproduce a consensus on the status of the norm affected by the said violation. The rule is hence confirmed again. Overall, the process of thinking and the approach to non-recognition provide us with a much more rational and predictable framework to analyse and understand non-recognition. Without it, writers could mistakenly get stuck at the point of determining the legality of a situation, which often leads to the inaccurate presumption of the application of non-recognition.

3.1.2. Non-recognition's audience is the international community

Another great contribution of O'Mahoney to the theoretical perspective of non-recognition is his differentiation between the direct deterrence argument and the rule maintenance argument as the objective of non-recognition. Looking into the process of non-recognition proposed by O'Mahoney, one could raise a critique that a symbolic announcement of non-recognition of unlawfulness, and non-cooperation in several fields to avoid the implication of recognising unlawful situations or other types of international boycotts are all either mere legal formalities or are ineffective or redundant practices of political damage control for international law. According to O'Mahoney, this is clearly not the whole picture of the development and necessity of non-recognition. He argues that the cost of enforcing international norms by material sanctions and coercive enforcement is always particularly high. Free-riding behaviour, problems with the worldwide coordination of actions and the socio-economic considerations of each country are just a few named hindrances to the materialisation of direct sanctions and other means, such as UNSC-authorized armed intervention.²⁰⁵ And when all conditions for an

²⁰⁴ Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Brill Nijhoff 2005).

²⁰⁵ O'Mahoney (n 202), 16

all-out enforcement plan against unlawful situations are not in place, the symbolic sanction of non-recognition serves as “a public ritual, like the content or the emotional resonance, [and] the publicness of rituals generate common knowledge.”²⁰⁶

For O’Mahoney, this common knowledge is different from the aggregate of individual knowledge and moral beliefs of individuals about norms. A proposition is common knowledge only if “everyone knows it, everyone knows that everyone knows it, everyone knows that everyone knows that everyone knows it, and so on.”²⁰⁷ Non-recognition might not be able to instigate international legal norms forcefully. Still, it must be considered an organic part of international law, since the law itself is a process that constantly re-establishes what the rule is and how it could be interpreted. Non-recognition disapproves of rule violations and overall maintains the structure and believability of international law.

Interestingly, O’Mahoney also observes that non-recognition is in line with, or even complementary to, many important theories of international relations and international law, including rationalism and constructivism. His reference to Searle’s idea that the social world is created through “speech acts,”²⁰⁸ and Rus Smit’s thesis that international law serves as a focal point for “discursive struggles over legitimate political agency and actions”,²⁰⁹ genuinely captures the magnitude of the practice of non-recognition in the processes of international law. We have also touched on this issue in the Customary International Law chapter (Chapter 2), in which it is proposed that “non-recognition is a part of CIL” merits a safe and confident place in theories. O’Mahoney concludes his theory chapter on non-recognition theory with a brilliant observation:

“International rules and norms are constantly open to renegotiation and previous agreement is no guarantee of present or future agreement. This means that rule maintenance actions are necessary for the continuation or reproduction of what makes up legitimate governance.”²¹⁰

Overall, with a solid reference for O’Mahoney’s theory of non-recognition in international political practices, this dissertation will establish its own legal stance in rejecting the general assumption of many other international legal scholars that non-recognition is solely symbolic, and inconsequential to the development of international law.

3.1.3. A Process Theory for the Legal Duty of Non-recognition?

²⁰⁶ Joseph O’Mahoney, *Denying the Spoils of War: The Politics of Invasion and Non-Recognition* (Edinburgh University Press 2018) <<https://library.oapen.org/handle/20.500.12657/53505>> accessed 12 November 2022., 21

²⁰⁷ *ibid.*, 19-20

²⁰⁸ John R Searle, *Construction of Social Reality* (Allen Lane 1995) <<http://www.librarything.com/work/124891/reviews/127034236>>.

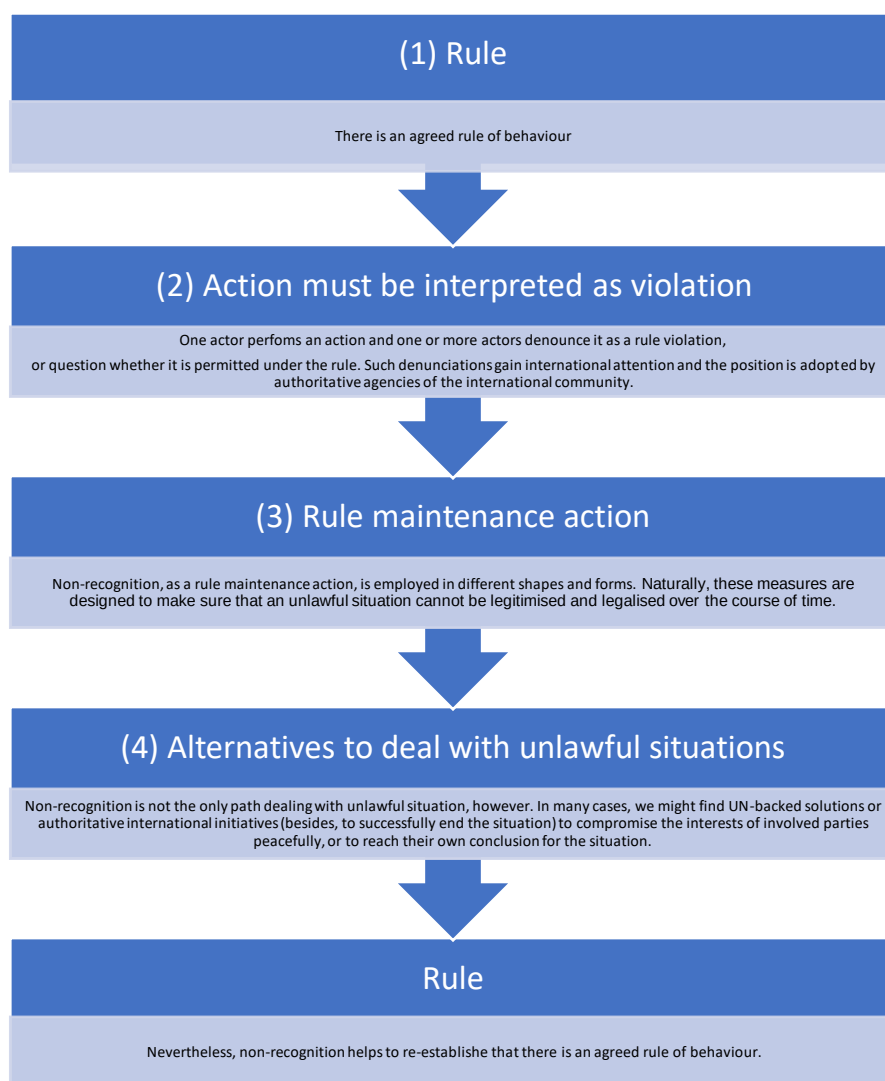
²⁰⁹ Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004) <<https://www.cambridge.org/core/books/politics-of-international-law/AB3FD697E22B70B0860481147D95C441>> accessed 18 December 2022.

²¹⁰ O’Mahoney (n 202), 23

A critical takeaway from O'Mahoney's argument that is important for the dissertation is that an authoritative announcement of the existence of an unlawful situation must be there for us to analyse the legal role of non-recognition. The duty of non-recognition cannot be implemented with just an academic assumption or hypothesis that illicit conduct exists. Indeed, we can say that there is much room for improvement regarding the way in which states and international organisations address and identify violations (with the principal international organisation in this context being the United Nations). We can also say that identifying illicit conduct is a process continuously prone to political bias and power politics. But such a challenge will drag us into the rabbit hole of never-ending scepticism and nihilism against international law, a direction that is unproductive and goes against all the theoretical foundations of this dissertation.

For the record, even in the domestic legal system with state sanctions underwritten by a monopoly in the use of force, not all criminal accusations and administrative violations are deemed to be illegal/against the law. Crooked businessmen may go unpunished in fraud or tax evasion cases, and murderers sometimes walk free without consequences. However, such cases are not grounds for the conclusion that the domestic criminal justice system does not exist. Similarly, the conduct of wrongdoers in an international setting can sometimes go unsanctioned and may not even be considered unlawful, but that does not provide sufficient reason to reject the legitimacy and legality of the duty of non-recognition.

Table 3.1.3. Non-recognition as a legal process



This dissertation builds its proposed legal process of non-recognition based on O’Mahoney’s theory, which will also help me reconcile non-recognition and the foundation of CIL in the previous chapter. However, there are also some significant differences. For example, I do not believe that non-recognition is merely a supplementary tool, to be used only after other “material sanctions” fail (the new Step 3 in the process). Lauterpacht, in 1949, had already categorised non-recognition, as the bare “minimum” of the obligation to respect and preserve basic international rules.²¹¹ In accordance with this reasoning, we should consider non-recognition as the first measure to be installed right after identifying an illicit act and an unlawful situation. Yet, non-recognition also remains the last measure to be employed if all others fail.

²¹¹ Hersch Lauterpacht, *Recognition in International Law* (AMS Press Inc 1978)., 417

Recent practices of non-recognition seem to endorse this approach. Before any other measure comes to fruition, non-recognition and the language of non-recognition are usually the first response to unlawful situations. For the so-called language of non-recognition, we simply mean the format of denouncement of the illegality of a certain form of conduct, and then the collective assurance regarding the duty of non-recognition, such as “all States, international organisations and United Nations’ specialised agencies...” “shall not recognise the situation resulting from [...]” These phrases have become extremely familiar during the first two decades of the new Millennium, appearing in all high-profile cases, including the territorial issues in Palestine (1967 - now), Crimea - Ukraine (2014 - now), and Ukraine (2022 - now). As each case will be studied in depth in Chapter 4, we need only to observe here that the announcement of non-recognition, until this point, appears simultaneously alongside the announcement of the illegality of contested conduct and situations. Asserting that non-recognition would only be used when every other material sanction fails - the last resort employed “out of a sense of helplessness”²¹² - underestimates the contemporary role and power of non-recognition.

But why is the Fourth Step included in the process? How can one advocate for non-recognition but also allow possible alternative ways to accept the unlawful situation? Non-recognition as a legal concept is designed, as far as we are concerned in this dissertation, to prevent continuous breaches and their triumph in the international environment. Automatic acquiescence or tolerance of illegality ultimately affects the validity of international law in the perception of lawbreakers, victims, and bystanders equally. Thus, non-recognition becomes organic and essential within a legal system that depends on collective enforcement. However, a collective decision to legalise an unlawful situation is also feasible within the framework of international law. It should not be interpreted as succumbing to pragmatism, *fait accompli* or realism.

As Georges Scelle commented, it is a “logical absurdity seeing that it is impossible to give legal consecration to a situation which is contrary to law”.²¹³ Sometimes, continuing the policy or obligation of non-recognition becomes unproductive and uncondusive to the general good. Therefore, Lauterpacht contends that non-recognition must be strong, so there should be no question of conveying to the international community the slightest hint of acquiescence to, or legalisation of the illegal act: wrongdoers acquire no rights. However, at the same time, non-recognition also has to prepare to provide policy adjustments and international settlements for long-lasting peace and security.²¹⁴ There are sharp distinctions between the duty of non-recognition built upon multilateralism and a sense of realities and the automatic incorporation of a breach of international law into the law of nations.

²¹² In this study, Lord Bullock and Willian Deakin specifically talk about the Manchuria crisis. However, a general observance could also be made. Lord Bullock and William Deakin, ‘The Manchurian Crisis: The European Powers and the Far East’ in Zara Steiner (ed), *The Lights that Failed: European International History 1919-1933* (Oxford University Press 2005) <<https://doi.org/10.1093/acprof:oso/9780198221142.003.0015>> accessed 9 November 2022.,

²¹³ Georges Scelle’s Preface for Charles Rousseau, *Le conflit italo-éthiopien devant le droit international* (A Pedone 1938). Translation of this text can be found in Hersch Lauterpacht, *Recognition in International Law* (AMS Press Inc 1978).

²¹⁴ Lauterpacht (n 217), 429-431

The fourth stage of non-recognition provides the necessary predictable framework. It ensures that non-recognition has to be the first point of contact for any established unlawful situation. Such non-recognition campaigns, however, do not need to be immovable. As long as the compromise is authoritative, collective and achieved with the long-lasting peace and security of the international community in mind, political and legal innovations to modify the situation for the greater good are welcome. In the case of Ukraine, to take a negative example: there were several infamous appeals calling upon Ukrainians to secure a peace deal by ceding their territory to Russia. In this case, the idea of imposing unilateral, arbitrary and outdated power politics clearly does not meet any of the aforementioned thresholds.²¹⁵

Overall, analysing, understanding, and also explaining non-recognition under the lens of international legal process theory is arguably the best choice. The theory allows a convincing narrative to reject scepticism vis-a-vis non-recognition, which often depends on one presumption of unlawfulness to challenge the consistency and legitimacy of non-recognition. O'Mahoney's work on non-recognition is so far the only theoretical work that offers important procedural standards to understand this political/legal phenomenon. Procedural standards are far superior since they are visible, trackable and predictable.

3.2. Non-recognition as a modern legal concept

3.2.1. Understanding contemporary "codification" of non-recognition

In spite of the skepticism and the many drawbacks that were mentioned in the introduction to the thesis, some progress and acknowledgements of non-recognition as a legal doctrine have been recorded recently. For example, if we peruse the procedural notes of the conference "The Case of Crimea in the Light of International Law: Its Nature and Implications" (*held in 2015 by the Polish Academy of Science, the Institute of Law Studies, and the Centre for Polish-Russian Dialogue*), familiar names such as Professor Enrico Milano, Professor Maurizio Arcari, Professor Stefan Oeter shared the same view, i.e., that non-recognition has a significant track-record and is likely to add to the development of international law.²¹⁶ Nevertheless, they seemed nowhere near to calling non-recognition a recognised norm in international law. Their reluctance is understandable since most authors only refer to the ICJ's advisory opinions and some favourable cases as their talking points. The unwillingness of scholars to explore and prove the consistency of non-recognition practices fitted the narrative of Russian scholars, such as Anatoly Kapustin, who questioned whether or not non-recognition is mandatory.²¹⁷

From 2019 onwards, the tone and confidence of a "new generation" of legal observers in regard to non-recognition have significantly improved. In an interesting article dealing with the procedural aspects of non-recognition of Russia's annexation of Crimea before international investment tribunals, Sebastian Wuschka notes that non-recognition is "well-accepted in

²¹⁵ "‘Never Going to Happen’: Ukraine Blasts Trading Land for Peace’ <<https://www.aljazeera.com/news/2022/5/26/never-going-to-happen-ukraine-blasts-trading-land-for-peace>> accessed 31 December 2022.

²¹⁶ Maria Issaeva, 'The Case of Crimea in the Light of International Law: Its Nature and Implications Conference Review Notes' (2015) 3 Russian Law Journal 1.

²¹⁷ *ibid.*, 165 - 166

general international law - at least where territorial changes as a result of an illegal use of force are concerned.”²¹⁸ However, because Wuschka’s research focuses on something else, he stops at the assumption that non-recognition is already a part of general international law. Interestingly, Wuschka relies on materials such as the ILC’s Articles on State Responsibility, the ICJ’s advisory opinion in the cases of Namibia and the Palestinian Wall, in a manner identical to that of previous supporters of the principle of non-recognition. Although the perception has changed, these documents fall short of addressing “quantitative” or “empirical” critiques that might come from scholars who are generally skeptical of international law and customary international law, such as Stephen Choi or Eric Posners(whom we have already visited in Chapter 2).

The work of Juan Francisco Escudero Espinosa in the *Chinese Journal of International Law*, published in 2022, also shows a somewhat strengthened scholarly confirmation of the legal principle of non-recognition. However, Espinosa continues to rely on similar legal documents, which could arguably be described as non-binding or non-authoritative.²¹⁹ Such lack of quantity and depth in case study approaches leads the author’s arguments off-track. After agreeing that non-recognition has gained renewed relevance, Espinosa goes on to suggest that “the contrast between reality and law prolonged over a considerable time must in the end tilt in favour of effective control, despite the principle *ex injuria jus non oritur*.”²²⁰

Nevertheless, the trend of acknowledging the legal status and significance of non-recognition maintains its momentum. Massimo Iovane, in 2022, notes that non-recognition is in the “general nature” of law, which can also be found in the tradition of private law. According to Iovane, both the General Assembly and the Security Council have consistently emphasised that forcible annexation is illegal. Furthermore, he agrees that the UN’s main organs have expressed the international community’s *opinio juris* and have reinforced the customary law obligation of non-recognition.²²¹ However, due to the limited space and resources of one single article, Iovane only briefly mentions some practices, focusing on their relevance to the international status of Jerusalem. Other than that, it is safe to say that Iovane’s main assumption about the principle of non-recognition is positive.

Generally, from 2020 to 2024, academic attention and acceptance concerning the legal status of non-recognition have increased. However, the reliance of modern scholars on the same materials that were used to both justify and undermine the relevance of the principle of non-recognition feels inadequate. More importantly, because their works are often focus on some other topic, their arguments supporting non-recognition are narrow, and the overall landscape of scholarly understanding of non-recognition has not really been extend. The problem with

²¹⁸ Sebastian Wuschka, ‘Procedural Aspects of the Obligation of Non-Recognition Before International Investment Tribunals’ in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer International Publishing 2019) <https://link.springer.com/10.1007/978-3-030-10746-8_7> accessed 7 May 2023., 131 - 132

²¹⁹ Juan Francisco Escudero Espinosa, ‘The Principle of Non-Recognition of States Arising from Serious Breaches of Peremptory Norms of International Law’ (2022) 21 *Chinese Journal of International Law* 79., 106 to 108

²²⁰ *ibid.*, 110.

²²¹ Massimo Iovane, ‘Non-Recognition of Territorial Acquisitions by the Use of Armed Force: The Status of Jerusalem before Italian Courts’ (2022) 2 *Italian Review of International and Comparative Law* 1., 16

non-recognition is that it covers excessively vast and complex international legal elements, ranging from:

- (1) the nature of the primary rule that is breached,
- (2) the relevance of collective, centralised ascertainment,
- (3) the consequences of the duty / the prohibited conduct.²²²

Each element requires extensive consideration and examination if we are to reach an acceptable understanding. And even if such understanding is achieved, the question of how the elements interact with each other and become functional in the international legal environment is not resolved. Therefore, this section is dedicated to understanding the principle's codification stage by looking into the established and authoritative interpretation of the duty of non-recognition. While providing some opinions and beliefs, this section is not intended to solve the question on the legal properties of non-recognition, which will be subsequently discussed in Chapters 4, 5, and 6.

A. Nature of the Breached Primary Rule

The authoritative codification of non-recognition is marked by two critical projects of the International Law Commission that are essential to review. As we know from the previous discussions above, an important development codifying the secondary rules of state responsibility is ARSIWA. The other is the working group of the ILC important project dealing with codifying peremptory norms of international law (*jus cogens*), the ILC Draft Conclusions.²²³

In ARSIWA, non-recognition is described as follows:

“No State shall recognise as lawful a situation created by a serious breach (within the meaning of article 40) [...] / [...] nor render aid or assistance in maintaining that situation.”²²⁴

As for the ILC Draft Conclusions, the text adopted by the 73rd session of the ILC elevated the duty of non-recognition to the status of *jus cogens* that:

²²² I agree with the legal characterisation that can be found in Marco Pertile and Sondra Faccio, ‘What We Talk about When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy’s Relocation to the Holy City’ (2020) 33 *Leiden Journal of International Law* 621., 635

²²³ International Law Commission (ILC) for work of this committee, please see <https://legal.un.org/ilc/guide/1_14.shtml> accessed 4 July 2021.

²²⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001, <<https://www.refworld.org/legal/otherinstr/ilc/2001/en/20951>> accessed 4 July 2021.

“No State shall recognise as lawful a situation created by a *serious* breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.”²²⁵

Since the ILC is the author of both documents, it is understandable that they have a consistent vision for non-recognition. In this common vision, non-recognition of an unlawful situation must start with a “serious breach” of “an obligation arising under a peremptory norm of general international law.” Consequently, finding the thresholds of seriousness and the concept of “peremptory norm” has been central to the debate on the nature of breached norms so that the latter activates the duty of non-recognition.

In Article 40.2 of ARSIWA, the “serious” threshold is met if it involves a *gross and systematic failure* by the responsible State to fulfil a particular obligation. In other words, not all violations of *jus cogens* have the requisite degree of magnitude to trigger the duty of non-recognition. Such reasoning is further explained and refined by the commentaries of ARSIWA. Its interpretation is that there could be less serious cases of *jus cogens* violations, and that it is even necessary to limit the scope of non-recognition, specifically, to only gross and systematic breaches of *jus cogens*.²²⁶ The commentaries also draw an analogy from the field of human rights, where there are different consequences to a systematic breach of human rights and other human rights violations that could be dealt with by national remedies.

Conclusion 19.3 of the Draft Conclusion’s commentaries, unfortunately, does not offer more clarification, although it was drafted 20 years after ARSIWA. Therefore, member states seem not very happy with the level of development. In the commentaries of states during the 73rd session of the International Law Commission in 2021, many representatives expressed this feeling.

For example, representatives from Colombia suggest further clarification on the criteria for defining elements of a serious breach of international law, “beyond what is stated in paragraph 3 of the Draft Conclusion.”²²⁷ The Italian delegation, on the other hand, reminded the ILC that both references to ICJ’s advisory opinion in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, grounded the identification of legal consequences for third parties on the *erga omnes* nature of the obligations breached, not the peremptory nature of the corresponding norm and/or the serious violation of those obligations/norms.²²⁸ Nevertheless, the delegation agreed that there is a “strict interconnection between *erga omnes* obligations and *jus cogens* norms”.

²²⁵ International Law Commission (ILC), ‘Texts of the ILC Draft Conclusions and Annex adopted by the Drafting Committee on second reading’ Docs A/CN.4/L.967 <https://legal.un.org/ilc/guide/1_14.shtml> accessed 12 November 2022.

²²⁶ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press 2002), 247

²²⁷ ‘Comments by Governments, “73rd Session of the International Law Commission” UN Docs A/CN.4/748’ <https://legal.un.org/ilc/guide/1_14.shtml>., 84-85

²²⁸ *ibid.*, 85 - 86

The Spanish representatives believed that seriousness is a quantitative element of the breach of peremptory norms, but its inclusion makes Conclusion 19 “less coherent”. They suggested that the “seriousness” consideration should be moved into the Draft Conclusion’s commentaries. It should be a guide for states, not an actual legal provision of the Conclusion.²²⁹

The United Kingdom delegation, on the other hand, not only agreed with Spain but also seemed to propose a version (or an interpretation) of the international legal process of non-recognition. Specifically, the United Kingdom asked the ILC to respect the importance of “flexibility” in responding to breached norms: not all States would be affected in the same way, and not all States would be in an equal position to effectively participate in the effort of “put an end” to the unlawful situation (although a non-recognition campaign would be easier to involve). This “flexibility” could mean that the identification of a “serious breach” and an “unlawful situation” will be ultimately determined by competent regional and international institutions. There was no need to provide a definitive and exhaustive list of serious breaches and unlawful situations. Overall, a small slide of the contemporary discussion on the seriousness of legal violations suggests that the discussions and consideration of this element of “seriousness” have yet to be settled.

Concerning *jus cogens*, firstly codified by the 1969 Vienna Convention, a peremptory norm of general international law is one which is: “accepted and recognised 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.”²³⁰ Scholarly discussions remain, to some extent, divided on the concept.

For some recent works, including Thomas Weatherall’s *Jus Cogens International Law and Social Contract*,²³¹ the status of *jus cogens* has been virtually decided. It is accepted by states, utilised by almost all other international organisations, and confirmed by the most prominent scholars in international law. This is a reasonable conclusion. From international armed conflict, humanitarian law and the use of force,²³² to the international fight against terrorism and the norm of the prohibition against terrorism,²³³ or even the novel *jus cogens/constitutionalism* approach to COVID-19,²³⁴ *jus cogens* has become a familiar component of international legal discourse.

On the other hand, studies such as Ulf Linderfalk’s *Understanding jus cogens in international law and international legal discourse*, continue to challenge *jus cogens* and its established

²²⁹ *ibid.*, 88

²³⁰ United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969

²³¹ Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) <<https://www.cambridge.org/core/books/jus-cogens/32B376EFC842153C03D1BAAA655548E0>> accessed 21 December 2022.

²³² Ian Brownlie, *International Law and the Use of Force by States* (1st edn, Oxford University Press).

²³³ Aniel Caro De Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill Nijhoff 2019).

²³⁴ Alain Zysset and Neus Vidal-Marti, ““Constitutionalism and Covid-19: Broadening the Lens” with Jus Cogens’ (2022) 4 *Jus Cogens* 203.

concept of international law.²³⁵ Throughout this book, Linderfalk insists that international lawyers are still hugely divided with regard to their conceptions of *jus cogens*. And while he acknowledges that scholarly focus on *jus cogens* has produced a vast literature, he observes “[their] work has not been very successful [...]”

This dissertation does not seek to explore comprehensively and in-depth the literature of *jus cogens*. However, considering *jus cogens* in the context of non-recognition, it does not seem that the content of *jus cogens* is a point of contention among states anyway. Relying on ARSIWA’s commentaries, we can find a series of norms that are believed (and proved) to be *jus cogens*, including the prohibition of aggression, the prohibitions against slavery and the slave trade, genocide, racial discrimination, apartheid, the prohibition of torture, and all basic rules of international humanitarian law. As previously mentioned, this list is not exhaustive. In Article 64 of the 1969 Vienna Convention, new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole.

Going back to the most recent discussion of UN Member States addressing the peremptory norms mentioned in the 73rd session of the International Law Commission in 2021, there was no delegation that really challenged or questioned the concept of *jus cogens*. The focus is, instead, on whether the violations of *jus cogens* norms are the actual source of unlawful situations in non-recognition. The Japanese delegation was the first to point out this inconsistency. Citing the ICJ’s advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 and then the advisory opinion of Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, they suggested that the “obligation not to recognise the illegal situation seems to have been discussed primarily in the context of territorial acquisition resulting from the threat or use of force.”²³⁶ Although the delegation did not challenge the ICL’s interpretation, they asked for more evidence of such understanding.

Still, all of the discussions presented above could be considered within the circle of “traditionalist” group when it comes to the breached norms of non-recognition. There is, however, another group that does not believe in the necessity of *jus cogens* at all. Questioning the necessity of *jus cogens* but going in a different direction was the former ICJ Judge, Rosalyn Higgins. In her concurring opinion in the ICJ’s advisory opinion on the Wall case, she rejected the necessity of a connection between the principle of non-recognition and other “uncertain” concepts, such as *jus cogens* or *erga omnes*. The judge insisted “that an illegal situation is not to be recognised or assisted by third parties is self-evident”, requiring no invocation of the uncertain concept of *erga omnes* (or *jus cogens*).²³⁷

²³⁵ Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar Publishing 2020) <<http://www.elgaronline.com/display/9781786439505/9781786439505.xml>> accessed 21 December 2022.

²³⁶ ‘Comments by Governments, “73rd Session of the International Law Commission” UN Docs A/CN.4/748’ (n 231).

²³⁷ Rosalyn Higgins Dbe Qc, ‘Separate Opinion of Judge Higgins Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion’ in Rosalyn Higgins (ed), *Themes and Theories*

Unlike Judge Higgins, I do not see *jus cogens* and *erga omnes* as uncertain. However, I also agree with the hypothesis that a situation already determined as illegal shall not be recognised or assisted by third parties, regardless of whether it is *jus cogens*, or *erga omnes*. Identifying and categorising such unlawful situations will depend on the legal considerations and the political consensus of competent international organisations - and that is not necessarily bad, as we shall see when we revisit this issue in the next section. At this point of the dissertation, there is no way to settle the differences definitively. However, keeping these arguments in mind will be very helpful in our case study and the final examination.

B. The Relevance of Collective, Centralised Ascertainment of Situations

In terms of our guiding theory of non-recognition, that of O'Mahoney, and considering the importance of an authoritative legal determination of a targeted situation, the idea of putting the identification and implementation of a legal duty in the hands of the duty bearers seems to be a failed formula. Yet no concrete answer regarding the necessity of a collective and centralised ascertainment of a situation is to be found within the related documents of ARSIWA and the Draft Conclusions (including their commentaries). While there is much discussion of the institutional practice of non-recognition within the United Nations, "states" are still perceived as the only actors in the process of non-recognition.

These questions were already raised in the Sixth Committee of the General Assembly following the final adoption of the draft articles by the ILC in 2001.²³⁸ China, for example, was concerned that it was unclear who should judge whether an internationally wrongful act constituted a serious breach. While Mongolia and Sierra Leone argued that they welcomed language that would prevent the assessment of the seriousness of a breach from being an arbitrary determination. Unfortunately, no further explanation has been provided within the forum of the ILC until now.

With the recent commentaries of ILC concerning the Draft Conclusions on peremptory norms, the role of international organisations become somewhat prominent. Comment number (19) of the Conclusion 19 reads:

“[...] if States are under an obligation not to recognise as lawful situations created by a serious breach of a peremptory norm or to assist in the maintenance of such situations, it stands to reason that international organisations are under a similar obligation.”²³⁹

However, the references to international organisations do not appear here because of their active role in the duty of non-recognition. We could interpret this comment as states translating their duty into the duty of international organisations by means of communications, votes, and

(Oxford University Press 2009) <<https://doi.org/10.1093/acprof:oso/9780198262350.003.0094>> accessed 29 August 2022., Para 31

²³⁸ Alison Pert, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2014) 30 Chinese (Taiwan) Yearbook of International Law and Affairs 48.

²³⁹ International Law Commission (ILC), 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries' UN Docs A/77/10 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf> accessed 12 November 2022.

debates within international organisations, thereby internationalising their duty. But can this development work in reverse? When an authoritative and international organisation (let's say the UN) establishes a collective duty of non-recognition through communication, can we describe such duty as the materialisation of the state's non-recognition? The answer is possibly, again, if we interpret the comment liberally. But considering the order of things as they appear in the comment, states remain the only actors in the whole process of non-recognition, and international organisations are mere "vessels" for the practice.

However, broadening the scope of discussion and looking into the duty "to bring to an end serious breaches of peremptory norms of general international law" (which is entirely different from the duty of non-recognition), we can find several supporting arguments in favour of the international organisations (or of the United Nations specifically) as the legitimate "democratic" arbitrator dealing with the illicit conduct, unlawful situations, and proper measures of non-recognition.

For example, in comment number (11) of Conclusion 19, the ILC notes:

"[...] in the face of serious breaches of peremptory norms of general international law (*jus cogens*), international organisations should act, within their respective mandates and when permitted to do so under international law, to bring to an end such breaches. Thus, where an international organisation has the discretion to act, the obligation to cooperate imposes a duty on the members of that international organisation to act with a view to the organisation exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (*jus cogens*)." ²⁴⁰

In this comment, we witness a complete reversal of view. Individual states are not in the driver's seat. Instead, international organisations (or specifically the majority of its member states) can impose a duty on individual members to end the violation, provided it is within such an organisation's discretion and in accordance with the procedural requirements of such an organisation. If we suppose that an international organisation has the authority to compel its member states to cooperate and actively bring an end to a breach of a peremptory norm of general international law; it stands to reason that this organisation already has the right to identify illicit conduct, to decide which are the unlawful situations, and to instruct its member states on how to avoid behaviours and actions that could be counted as legitimising unlawful situations. Otherwise, the functions and powers of this organisation would be self-contradictory. However, this is still not an explicit explanation of the role of international organisations and their power in the centralised procedure of ascertainment of non-recognition. The contention is resolved more or less if we look at the comments of the ICJ.

In the advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, the ICJ contended that official declarations of unlawful situations of the Security Council, whether adopted under Article 24

²⁴⁰ Ibid.

or Chapter VII of the Charter, will impose legal duties on the member states. From paragraph 111 to paragraph 116, the ICJ details:

“[...] It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognise violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf.”²⁴¹

[...] Thus, when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for the Member States to comply with that decision, including those members of the Security Council who voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.”²⁴²

While the ICJ acknowledged that it is still necessary to carefully analyse the language of a Security Council resolution to determine its binding effect, the Court also firmly established that the UNSC has the inherent authority to declare a situation unlawful. As a result, all states, whether UN members or not, are bound by the duty of non-recognition announced by the Council.

With regard to the General Assembly, the ICJ did not directly discuss its role in the non-recognition process. Nevertheless, the Court confirmed that UNGA had the power to alter or terminate the League of Nations’ territorial mandate.²⁴³ With the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ continued consolidating this proposition. The Court even extended appropriate powers to the UNGA to deal with the non-recognition of unlawful situations that could affect international peace and security. For example, the Court observed that the practice of the United Nations had clearly “evolved”.²⁴⁴ From being reluctant to deal with unlawful situations and discussing international peace and security, UNGA eventually deemed itself entitled to adopt legal views and make recommendations. In many cases, The General Assembly and the Security Council addressed the situations in parallel. While the Council focused more on the security aspects of the situation, the UNGA still considered significant topics, such as humanitarian issues, human rights, and socioeconomic questions.²⁴⁵ Interestingly, looking at

²⁴¹ This is particularly meaningful because there were arguments that unless the UNSC cite Chapter VII as the legal source of their resolutions, these resolutions do not hold any legal value.

²⁴² International Court of Justice, ‘Advisory Opinion on “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”’ (n 64), para 111 – 116

²⁴³ *ibid.*, para 105.

²⁴⁴ International Court of Justice (ICJ), ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (9 July 2004) <<https://www.icj-cij.org/en/case/131>> accessed 12 November 2022, para 28

²⁴⁵ International Court of Justice (ICJ), ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (9 July 2004) <<https://www.icj-cij.org/en/case/131>> accessed 12 November 2022., para 27 – 28

the unlawful situations that the Court mentioned to illustrate its point, including Cyprus, the Portuguese colonies, South Africa, Rhodesia and Bosnia and Herzegovina, the legal opinion on non-recognition of the UNGA and the UNSC seemed to be entirely in line with each other.

More importantly, the ICJ drew legal views and interpretations from both organs to build up its reasons against Israel's building of the Wall. The General Assembly's resolutions were consulted when the ICJ considered the right to self-determination and the legitimate rights of the Palestinians,²⁴⁶ the application of international humanitarian law in the case of Israel's occupation of Palestine,²⁴⁷ and information from UNGA-established committee (such as *the Special Committee to Investigate Israeli Practice Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*).²⁴⁸ Reference was made to the Security Council's resolutions when the Court discussed other legal aspects of international humanitarian law,²⁴⁹ legal assessment of the situations,²⁵⁰ and other measures directed against the illegal conduct of Israel in Jerusalem.²⁵¹ Combining the UNGA and the UNSC, we can be confident that the ICJ was again very determined to maintain its position that the United Nations and its organs are in charge of the non-recognition processes, including the legal determination and the consequences.

The most recent addition of ICJ advisory opinions to non-recognition literature is the opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.²⁵² In this case, the centralised ascertainment of non-recognition duty needed to address a fundamental problem: no UNSC resolution explicitly spells out the unlawful situation and the duty of non-recognition in this situation. Therefore, the advisory opinion does not mention the UNSC and its role in this non-recognition process.

However, the ICJ examined the UNGA's resolutions and endorsed the organ's power in regard to decolonisation.²⁵³ In paragraph 166, the Court cites resolutions 2232 (XXI) and 2357 (XXII) of the UNGA, which themselves cited the "purposes and principles of the Charter of the United Nations and of General Assembly Resolution 1514 (XV)", to establish the unlawfulness of the United Kingdom's conduct in their "Colonial Territories". The Court clearly applied a teleological interpretation and an evolutionary approach to explain the power of the UNGA in the non-recognition duty of the Chagos Archipelago. The final conclusion, then, was that the UNGA was in control of the completion of the decolonisation of Mauritius, and all Member States must cooperate with the UNGA's resolutions to complete the decolonisation of Mauritius, alongside the duty of non-recognition.

²⁴⁶ *ibid.*, para 118.

²⁴⁷ *ibid.*, para 98.

²⁴⁸ *ibid.*, para 133

²⁴⁹ *ibid.*, para 99

²⁵⁰ *ibid.*, para 120

²⁵¹ *ibid.*, para 122, 134

²⁵² International Court of Justice, 'Advisory Opinion on the "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965"' (n 108).

²⁵³ *ibid.*, para 173 - 179. "falls within the remit of the United Nations General Assembly..."

Pondering the evolution of UNGA, UNSC and ICJ practices – three principal organs of the United Nations – it would seem that the role of international organisations in representing states’ collective legal opinion and the necessity of a centralised ascertainment within the concept of non-recognition is well-explained. It can be concluded that the United Nations, with its representation of global states and its institutional power, can identify unlawful situations and impose the duty of non-recognition. As the ICJ explains, it can even elucidate detailed frameworks of duties, conduct, and prohibited acts to achieve the goal of non-recognition (not to mention other possible goals, such as “bringing an end” to a situation). However, even with solid legal support from the principal judicial organs of the United Nations, the debates on the centralised ascertainment procedure of non-recognition have yet to be settled among scholars.

Alison Pert’s approach to non-recognition is complex and, overall, she does not view the principle positively. However, Pert also seems to suggest that non-recognition could only be functional if there are some ways to officially pronounce the illegality and the non-recognition content.²⁵⁴ This approach could be called as the “institutionalist” approach to non-recognition. She notes that even in the most “apparently obvious cases of aggression”, inquiry and evidence must be considered authoritatively. If one argues that the non-recognition duty is “self-executing”, then we allow individual states to make their own legal judgment of the situation – a scenario that is not ideal for the international rule of law. Furthermore, Pert observes that non-recognition may differ depending on the type of unlawful situation with which the international community is dealing. This complexity makes it challenging to establish a self-executing duty of non-recognition. However, because of her skeptical view on non-recognition as a whole, Pert does not venture deep into the debates on the centralised ascertainment process of non-recognition.

Similarly, when addressing the question concerning the Italian courts’ approach to the status of Jerusalem, Massimo Iovane notes that these courts relied exclusively upon the United Nations resolutions (including UNGA resolutions, regardless of their non-binding status). With the question in a gameshow quiz was: “What is the capital of Israel?”, the legal debates led Italian tribunals to conclude that under international law, “Jerusalem” could not be considered a correct answer, legally speaking. The tribunal’s succinct review of relevant practices on the status of Jerusalem took into account both UNGA resolutions and the position of the Italian government.²⁵⁵ Iovane agrees that non-recognition and the cooperation plan for non-recognition are to be further developed in practice, mainly through the organs and institutions of the UN.

Enrico Milano is also involved in examining the centralised ascertainment of non-recognition with a strong “institutionalist” tendency, even though he supports the idea of “effectiveness”, as we previously mentioned. Milano differentiates between “binding” and “authoritative” determination,²⁵⁶ and specifies that the function of law-determination in international law can

²⁵⁴ Pert (n 242), 15-16.

²⁵⁵ Massimo Iovane, ‘Non-Recognition of Territorial Acquisitions by the Use of Armed Force: The Status of Jerusalem before Italian Courts’ (2022) 2 *Italian Review of International and Comparative Law* 1., 4-6.

²⁵⁶ Enrico Milano, ‘The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with de Facto Regimes’, 4-5.

be exercised by different actors in different ways. The UNSC retains its undisputed power in this regard. However, a judicial statement, a General Assembly resolution, or a Presidential statement would suffice for the task of non-recognition.

There are other groups that are “relativist” with regard to the issue, and they include names such as Stefan Talmon and Adam Saltzman. They are authors who do not oppose the power of the United Nations as the central body in deciding which situations are unlawful and how to practice the principle of non-recognition. However, they also have some reservations of their own with regard to how this organisation participates in the process. Talmon, for example, finds that the United Nations does have a role in the process of non-recognition.²⁵⁷ Although he contends that the activation of the duty of non-recognition rests on the assumption of international solidarity in the face of a violation of a norm of *jus cogens*, he acknowledges that the collective response “by all States” would be coordinated through the competent organs of the United Nations. Yet, Talmon does not agree that the General Assembly and its “non-binding” resolutions could “authoritatively determine the existence of a serious breach nor create an obligation not to recognise a situation as lawful.”²⁵⁸ This argument challenges findings in the ICJ’s advisory opinions, which emphasise the evolution of UNGA’s practice and its remit in settling many international issues.

On the other hand, Adam Saltzman actively proposes what he calls “the moderate approach” to non-recognition.²⁵⁹ He insists that this approach does not require every serious violation to be internationalised. Therefore, in cases where an authoritative legal and factual assessment is absent, Saltzman suggests that each State may decide for itself whether to invoke the principle. However, he seems also to support the idea that we do not need to attempt to “institutionalise third-party intervention” concerning the duty of non-recognition, thus leaving third parties free to act.

Both aforementioned groups are to be contrasted with the pure state-centric group of thinkers regarding non-recognition. Martin Dawidowicz, for example, argues that non-recognition is self-executory with no necessary involvement of UN organs.²⁶⁰ This position reflects the traditional view that resolutions, voting records and other collective documents at the UN do not account for anything other than a formality. Ian Brownlie was very confident that non-recognition is nothing more than a duty at the sole discretion of states. He famously noted: “Non-recognition is a legal assessment of a situation by individual states and not a sanction in the sense of an embargo or non-intercourse.”²⁶¹ And while Brownlie ultimately confirmed that there is an “obligation” or “duty” of non-recognition, he also adds that the duty “rests in state practice, general principles, and considerations of policy”. This relative approach to non-

²⁵⁷ Talmon, ‘The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?’ (n 36).

²⁵⁸ *ibid.*, 121, 122.

²⁵⁹ Adam Saltzman, ‘DEVELOPING THE PRINCIPLE OF NON-RECOGNITION’ 43 Ohio Northern University Law Review.

²⁶⁰ Martin Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’, *The Law of International Responsibility* (Oxford University Press 2010) <<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-484261>> accessed 6 November 2022.

²⁶¹ Brownlie, ‘The Principle of Non-Recognition’ (n 15).

recognition provides too much power in the hands of individual States and does not seem to conform to the views of the other academics discussed above.

With these different approaches to the question of the necessity of a collective, centralised ascertainment of the unlawfulness of a situation, I lean toward the power of international organisations, specifically the United Nations and its principal organs, including the UNGA and the ICJ. Arguing that non-recognition is a duty that the duty bearers – nation-states – impose on their own is another kind of chicken-and-egg dilemma: non-recognition is a duty of the state, yet it is the state that decides whether such a duty exists in the first place. The hypothesis of a centralised ascertainment in the process of non-recognition will, it is to be hoped, find support in the depiction of state practice in our case studies chapter.

C. The Content of Non-Recognition

Both ARSIWA and the Draft Resolutions are not very instructive on the content of the obligation of non-recognition of unlawful situations. Since the adoption of ARSIWA, some member states have noted their concerns. For example, Spain has 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 greatest extent possible the obligations of all States”.²⁶² In particular, Spain thinks that it is necessary to “streamline” the content of the obligation not to recognise as lawful the situation created by a breach of international law.

But the problem with content continues years later. In his separate opinion in the advisory opinion on the Wall in the Occupied Palestinian Territory, Judge Kooijmans famously stated his concern about “the obligation with no real substance”:

“I have great difficulty, however, in understanding what the duty not to recognise 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 recognise amounts, therefore, in my view to an obligation without real substance.”²⁶³

Although Judge Kooijmans voiced only a minority position, he rightly pointed out another problem when explaining the principle of non-recognition, that is, the extent of UNGA’s influence. Even if one accepts that UNGA does have the power to determine the legality of the situation and the subsequent practice of non-recognition, how can one exactly read the votes of UNGA’s resolutions? Does voting against the application of the principle of non-recognition

²⁶² Comments and observations received from Governments, UN Doc. A/CN.4/515, 19 March 2001, p. 54

²⁶³ International Court of Justice (ICJ), ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (9 July 2004) <<https://www.icj-cij.org/en/case/131>> accessed 12 November 2022., 232

mean that a country is free from the duty of non-recognition? Or does such a country have the ultimate right to say that there has been no illicit conduct in the first place?

Similarly, Talmon finds that the legal literature has not been very helpful in explaining what it means to not recognise as lawful a situation that was created by a serious breach of a *jus cogens* obligation. Many authors do not even discuss what the duty entails.²⁶⁴ The overall situation leads to confusion, as we have said, where even leading scholars like Brownlie reach an inconclusive observation that “non-recognition is a legal assessment of a situation by individual states.”²⁶⁵ Another example is when the ICJ concluded in the Nicaragua case in 1986 that the 1970 Declaration as a whole was customary (including the provision of non-recognition), Pert complains that the court “gave no explanation of the content of that duty” and that therefore “it is far from clear”.²⁶⁶

However, following our principles and the international legal process hypotheses above, I believe that the ILC is right not to include any exhaustive list of content of the duty of non-recognition. As we noted, the possible unlawful situations vary from territorial contention to human rights violations, and their seriousness seems to depend on the collective determination of principal international organisations. The content of non-recognition should not be looked upon as a descriptive list within positive international legal documents, but as the ongoing and evolving practices of states and international organisations. Consequently, we will have more to say and explore on this subject in the later chapters.

3.2.2. Non-recognition and Economic Sanctions

Although the composition and forms of non-recognition require a detailed and thorough investigation of cases, one task we must deal with at this early stage is the establishment of the relationship between non-recognition and economic sanctions. All of the information on several cases examined in this section will be presented and studied in depth in our case study chapter. However, due to the uniqueness of the misconception between non-recognition and economic sanctions, I believe that it would be worthwhile to confront the question head-on.

The confusion between the two concepts could be found in two assumptions that have been very popular among the general public (and even among political scientists):

- (1) “Economic sanctions are not effective, universal or conclusive, hence the unlawful situation is recognised”, and

²⁶⁴ Stefan Talmon, ‘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?’ in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill | Nijhoff 2006) <https://brill.com/view/book/edcoll/9789047417828/Bej.9789004149816.i-472_007.xml> accessed 9 May 2023., 107 - 110

²⁶⁵ Brownlie, ‘The Principle of Non-Recognition’ (n 15).

²⁶⁶ Alison Pert, ‘The “Duty” of Non-Recognition in Contemporary International Law: Issues and Uncertainties’ (2014) 30 Chinese (Taiwan) Yearbook of International Law and Affairs 48., 10

(2) “A country does not participate in economic sanctions, and therefore it must be accepting the unlawful situation.”

As long ago as the 1930s, the American jurist, Dr. Frederick A. Middlebush, suggested that non-recognition is basically a type of international sanction.²⁶⁷ Even more interestingly, at the very beginning of the modern era of international law, a time characterised by wars, empires and colonialism, Dr. Middlebush was insisting that non-recognition could only justify its applicability to the unlawful situation in Manchuria against the Japanese puppet-state Manchukuo if the effect of withholding recognition was made “as oppressive as possible.”

The proper practice of non-recognition, according to Dr. Middlebush, includes: (1) Complete isolation of the violating state (as far as conditions permit); (2) Action on the part of governments that must be substantially unanimous; (3) Concerted efforts to be made to avoid any compromise, and no *de facto* or temporary relations to be established with the non-recognised state. Dr Middlebush’s vision created a strict and potentially very effective version of non-recognition.

Understandably, a portion of the international community has always preferred the ideal version of Dr Middlebush. To many, non-recognition as a tool for international justice must inflict immediate pain and hardship on lawbreakers. What is the law for if we cannot prevent or punish those who perpetrate illegal acts? In the contemporary world, there is nothing so painful and inconvenient in the repertoire of non-violent international relations as economic sanctions.

This belief is reflected in the current political climate, with Eric Posner’s famous (or infamous) interpretation of the Russian intervention in Crimea being a prime example:

“1. Russia’s military intervention in Ukraine violates international law.

2. No one is going to do anything about it.”²⁶⁸

What does Posner mean when he cynically states that “no one is going to do anything”? It is more than certain that he is talking about economic sanctions and immediate pain and hardship for the lawbreakers.

A. Obsession with Economic Sanctions

The lack of interest in non-recognition literature heavily prejudices the understanding and public imagination of what a non-recognition campaign could look like. And it is true that legal historians and lawyers have overlooked many legal innovations in the practice of non-recognition and have focused on nothing but economic sanctions. The case of Manchuria, for

²⁶⁷ Frederick A Middlebush, ‘The Effect of the Non-Recognition of Manchukuo’ (1934) 28 American Political Science Review 677.

²⁶⁸ Eric Posner, ‘Russia’s Military Intervention in Ukraine: International Law Implications’ (*Personal*, 1 March 2014) <at <http://ericposner.com/russias-military-intervention-in-ukraine-international-law-implications/>> accessed 11 June 2022.

example, was full of innovations with regard to non-recognition. Judge Manley Ottmer Hudson of the Permanent Court of International Justice, commented at the time: “Never before in history has there been any comparable expression of a world judgment on a dispute between two nations.”²⁶⁹ He called the solution “epoch-making.” Although we will leave a full analysis of this case for our case study chapter, it could be argued that the League of Nations’ intention was effectively to withhold recognition of the Japanese-installed government in Manchuria after the illegal invasion and other skirmishes in 1932, while also did not lead the League to a full-blown economic war. In this campaign, non-recognition practices included the prevention of participation in conventions, postal services, transactions of Manchukuo currency and more. There was a clear separation between the non-recognition campaign aiming at the situation in Manchuria and any ongoing economic interests and trade between Japan and the League of Nations members. Unfortunately, these innovations were quickly overshadowed by the obsession with economic sanctions.

As Quincy Wright explained (in 1932), the League of Nations Covenant machinery provided three types of procedures in case of hostilities. namely: (1) stopping hostilities, (2) settling the dispute, (3) and applying economic sanctions/trade blockades.²⁷⁰ Other peaceful and low-cost/symbolic “sanctions” were never considered a part of this system. Therefore, as soon as economic sanctions became too controversial for League of Nations’ members, other tools and means were deemed as mere insignificant formalities and ultimately abandoned. Because the narrative is always about whether or not economic sanctions were employed coercively against Japan, no attention was given to the innovations and development of the “non-recognition” tools of the League of Nations. Here, international legal compliance was equivalent to coercive economic sanctions. In later international legal literature and archives, the Manchuria incident is often seen as a failure of the League of Nations and without legal value.

In the National Archives of the United Kingdom government, the incident is described as a simple, direct, and linear development. Following an assault on a Chinese garrison in Mukden, the Japanese invaded Manchuria and set up its own government; China appealed to the League of Nations, the Japanese rejected the appeal; the League of Nations intervened, but that ultimately led to the withdrawal of Japan from the League, while no enforcement resolution was attained.²⁷¹ Similarly, the Office of the Historian of the United States shows little appreciation of the international community's collective reaction to what happened in Manchuria.²⁷² According to the Office, the Manchuria incident marked a failure of the 1920s-era perspective on peace, non-aggression and disarmament in the face of changing alliances, economic interests, imperialist ambitions and altered policies.

²⁶⁹ Manley O Hudson, ‘The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute’ (1933) 27 *The American Journal of International Law* 300.

²⁷⁰ Quincy Wright, ‘The Manchurian Crisis’ (1932) 26 *The American Political Science Review* 45., 52

²⁷¹ The National Archives. (2022). The Cabinet Papers | Credibility and end of the League. The National Archives of United Kingdoms. <https://www.nationalarchives.gov.uk/cabinetpapers/themes/blows-credibility-end-league.htm>

²⁷² Milestones: 1921 to 1936. (2022). Office of the Historian. <https://history.state.gov/milestones/1921-1936/mukden-incident>

Even in the more recent (and very detailed) analysis of Lord Bullock and William Deakin, the doctrine of non-recognition in the case of Manchuria is viewed as the representation of “a retreat from commitment.” And when all member states of the League of Nations adopted the non-recognition policy, it is described as being done “out of a sense of helplessness.”²⁷³ Even more interestingly, the authors comment that rather than solving the problem effectively, non-recognition may have made future Sino-Japanese reconciliation more difficult. They argue that non-recognition may have hindered attempts by Japanese moderates to seek an agreement with Britain and the United States so that they, in return, could control the rise of militarism inside Japan. On the other hand, economic sanctions are mentioned as the only sensible choice if the League of Nations sincerely desired to uphold the principles of its Covenant. Overall, despite being a very bright innovation of the international community at the time, non-recognition under the banner of the League of Nations has been perceived until the present day as nothing more than a burden, an empty shell with no necessary substance (i.e. economic sanctions). The very same story, attitude and commentaries have been provided in the case of the Italian invasion of Ethiopia.²⁷⁴

Another similar tendency could also be found in the non-recognition campaign against the apartheid government of South Africa. This is a very complicated case with the combination not only of South Africa’s gross internal violations of human rights, but also the “exportation” of apartheid, evidenced by South Africa’s alliance with the Rhodesian racist white-minority regime and the latter’s declaration of independence.²⁷⁵ There was also the disturbing plan to create the nominally independent Transkei in 1976, where all Black Africans with language ties to Transkei (whether or not they lived there) would be forced to move there, to lose their South African citizenship and be tied to this new country - a blatant, twisted version of apartheid.²⁷⁶ Therefore, the international community has taken much time to eventually reach comprehensive, systematic, but also innovative approaches to non-recognition of the apartheid South African government. The effectiveness and comprehensiveness of this non-recognition campaign will be studied in depth in our case study chapter, and it is sufficient to mention here that international boycotts against apartheid and spearheaded by action in the sphere of culture, sports and academia possessed not only symbolic meaning but also had an actual psychological, social and political impact on the support of Afrikaner white communities for apartheid.

Yet, unfortunately, all of those collective efforts and innovations in non-recognition campaigns against apartheid, which created a comprehensive system against an incumbent government over an internal human rights problem, have been reduced in the eyes of many to a trivial symbolic gesture with neither real impact nor legal meaning. It is as if non-recognition as a

²⁷³ Bullock and Deakin (n 216),.

²⁷⁴ Please review O’Mahoney (n 210), 74-113

²⁷⁵ The National Archives, ‘Southern Rhodesia’s Unilateral Declaration of Independence (UDI)’ (*The United Kingdom National Archives*, 11 November 2015) <<https://blog.nationalarchives.gov.uk/southern-rhodesias-unilateral-declaration-independence-udi/>> accessed 14 September 2022.

²⁷⁶ Shireen Ally and Arianna Lissoni (eds.), *New Histories of South Africa’s Apartheid-Era Bantustans* (Routledge 2018).

policy of collective security and legal response to unlawful situations means nothing unless economic sanctions are brought into the equation.

Richard Bissell, in his excellent and detailed book concerning apartheid and its relation to international organisations, *regrets* that South Africa's expulsion from the Commonwealth was only a symbolic act, which its government was happy to live with because it "continued to benefit from Commonwealth preferences and from membership in the sterling zone, both based upon bilateral agreements with Britain."²⁷⁷ Despite describing carefully how the Commonwealth was the first to take action and recognising its impacts on the international scene, Bissell then sides with Miller, seeing the performances of African Commonwealth leaders at the time as "increasingly rhetorical."²⁷⁸

Similarly, the withholding of South Africa's credentials on the stage of the UNGA merited scarcely any international legal study and analysis. The idea that trade and economic interests have to be the only concern of international organisations when dealing with illicit conduct and unlawful situations severely damages the theoretical imagination for the development of international rule maintenance and enforcement. Sports, academic and cultural boycotts have received greater prominence, with voluminous contributions to the literature. However, they are rarely studied as part of low-cost non-recognition campaigns with effects and impacts of their own. Instead, authors frequently connect these measures to the greater framework of economic interest and sanctions.

Rob Nixon, for example, was an avid supporter of sports boycotts in the case of South Africa's apartheid. However, even he points out that the moral pressure of sports boycotts (by states or domestic actors) very often fails. The real problem was that the economic liability (especially for policing and security) that came with hosting South African teams had become prohibitive, contributing to the cancellation of many sports series. In Nixon's view, financial pressure succeeded where legal aspiration and morality did not. Even more pessimistically, Victor Peppard concluded, around 1993, that negative sports diplomacy is virtually guaranteed to fail. He insisted that the severance of sporting relations or an announcement of sports boycotts were no more than an "expression of righteous indignation" that highlighted the inability of a country or a community to influence another country to cooperate and change its policies.²⁷⁹ Similarly, Davenport and Saunders found that campaigning over sports in South Africa was generally meaningless. The nature of these (non-recognition) campaigns dealt only with the element of "petty apartheid." Its significance or importance, if it had any, was only marginal and

²⁷⁷ Richard E Bissell, *Apartheid and International Organizations* (Routledge 2019), 46

²⁷⁸ JDB Miller, 'Politicians, Officials, and Prophets' (1971) 26 *International Journal* 325., 332

²⁷⁹ Victor Peppard, *Playing Politics : Soviet Sport Diplomacy to 1992 / Victor Peppard and James Riordan* (Jai Press Greenwich, London 1993) <<https://library.olympics.com/Default/doc/SYRACUSE/58607/playing-politics-soviet-sport-diplomacy-to-1992-victor-peppard-and-james-riordan>> accessed 11 November 2022., 81

peripheral.²⁸⁰ The same view of campaigns in academic and cultural boycotts is also well-recorded.²⁸¹

B. Separating non-recognition and economic sanctions

It is best to separate non-recognition measures - which could include official diplomatic isolations, refusal to cooperate in certain fields and sports/cultural/academic boycotts - from economic sanctions. The former is arguably an institutionalised and frequently utilised international legal process, while the latter's status in international law is contested and highly unreliable.

• Achievability

The realisability of non-recognition, despite doubts, is much more concrete than economic sanctions. In the case of Ukraine, firstly, the UNGA Resolution 68/262 of 2014 and Resolutions ES-11/1; ES-11/4 officially established the unlawfulness of territorial situations created by the illicit actions of Russia. For Resolution 68/262, the violation of international law was the referendums in Crimea and the city of Sevastopol, which led to the annexation of Crimea as an unlawful situation. For Resolution ES-11/1 and ES-11/4, the violations of international law are obviously the Russian aggression and their referendums in four Ukrainian regions. Russian territorial gains were temporary, as (at the time of writing) Ukrainian forces had already liberated Kherson. Nevertheless, UNGA resolutions confirm the illegality of Russia's conduct and the invalidity of any subsequent annexation and other situations. Soon after these resolutions were adopted, other UN bodies and specialised agencies followed the requests contained in the UNGA's resolutions without protest or hesitation. The records are also surprisingly consistent.

One more example: in May 2021, seven years after Russia annexed Crimea, the joint report of OHCHR and the UN Secretary-General on the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol was exemplary.²⁸² Its title pays respect to the fact that the autonomous republic and Sevastopol are Ukrainian. In the introduction, it is emphasised that the two political entities are "occupied" by the Russian Federation and that reference to Russia will include the term "occupation authorities." More importantly, under UNGA resolution 75/192, the OHCHR contacted the Russian Federation to discuss arrangements for a mission to Crimea. However, Russia requested that such a visit must be

²⁸⁰ Lee Jones, 'South Africa: Sanctioning Apartheid' in Lee Jones (ed), *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015) <<https://doi.org/10.1093/acprof:oso/9780198749325.003.0003>> accessed 29 August 2022., 92

²⁸¹ SR Benatar, 'Academic Boycott--Political Strategy or Moral Imperative? Selective Support as a Justifiable Alternative' (1991) 79 *South African Medical Journal* = *Suid-Afrikaanse Tydskrif Vir Geneeskunde* 660.; and Michael C Beaubien, 'The Cultural Boycott of South Africa' (1982) 29 *Africa Today* 5.

²⁸² Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General on 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine' (27 May 2021) UN Doc A/HRC/47/58 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/113/64/PDF/G2111364.pdf?OpenElement>> accessed 05 September 2022.

“organised in compliance with the rules regulating visits to the Russian Federation’s territory,” and the OHCHR refused to comply with this requirement.

These examples name only a few of the ways in which the UN system keeps abreast of the UNGA’s guidance. As other leading international institutions take action with regard to the situation in Ukraine, a legal and moral foundation is provided for other organisations to emulate. Besides sports boycotts, academic boycotts have also taken place in certain international organisations. For instance, Russia’s membership of the International Mathematics Union has been suspended. Therefore, the duty of non-recognition as a legal process is straightforward, powerful and, most importantly, achievable. As soon as the authoritative international bodies (normally the UNSC and the UNGA) have identified an act as illegal and a situation as unlawful, the non-recognition practices of UN specialised agencies and other international organisations naturally follow, thus providing a strict sense of rule maintenance in the international legal system.

A uniform regime of economic sanctions, on the other hand, is not always achievable in a non-recognition campaign. We should be mindful that economic sanctions are optional in the machinery of the international legal system. The UNGA’s Declaration on Friendly Relations notes that: “No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”²⁸³ Consequently, the right to collectively and lawfully impose sanctions against a State is rather an exclusive right of the Security Council, under Article 41 of the UN Charter. Considering the whole procedural formality, economic sanctions are never innate consequences of unlawful situations. One obvious testimony to this fact is that two years after the Russian Federation invaded Ukraine, no regime of sanctions has been formed or even considered by the UN institutions.

Indeed, I support the argument that individual states also have the right to “countermeasure” an international legal violation affecting their own legal rights or threatening all nations (such as the violation of the rule of prohibition of aggression).²⁸⁴ The United States of America and the European Union are currently carrying out their inherent right to take countermeasures. However, “countermeasures” are neither necessarily collective nor are they institutionalised legal responses to illicit actions and unlawful situations under international law. It is safe to conclude that economic sanctions, let alone the duty of non-recognition, are not indispensable components of the established international legal responses to unlawful situations. Its role should be limited when discussing the determination of the legal responses of the international community to an unlawful situation.

²⁸³ UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), available at: <https://www.refworld.org/docid/3dda1f104.html> [accessed 13 November 2022]

²⁸⁴ Joaquín Alcaide Fernández, ‘Countermeasures’ (Oxford Bibliographies) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0072.xml>> accessed 12 November 2022.

- **Predictability**

Even if economic sanctions are chosen to be a part of non-recognition campaigns, they are unpredictable in terms of both compliance and effects. Concerning the compliance issue, dealing with the universally condemned apartheid regime in South Africa and the UNSC/UNGA-backed economic sanctions, Edmund Chawira, Trade Export Manager of Zimbabwe at the time, confessed:

“While a lot of countries have lifted sanctions against South Africa, I am not sure we had any sanctions against it. Economic activity has always been carried out behind closed doors.”²⁸⁵

Not all states are comfortable with the idea of imposing sanctions, and they are often portrayed as a Western phenomenon. David Leyton-Brown, for example, sees economic sanctions as a speciality of the United States and its allies.²⁸⁶ Citing many examples, he argues that, in the West, economic sanctions are looked upon as an instrument of first resort. He condemns the practice as an “easy” way of dealing with the pressure of public demands in a democratic society, as sanctions are employed irrespective of whether they achieve the aims that they purport to achieve, that is, non-recognition of unlawful situations, punishment of the perpetrators and the correction of deviant behaviour. In short, economic sanctions are imposed because they can be imposed, not because they need to be.

At the core of the theoretical discussion are advocates of the hegemonic stability theory, who challenge the connotations of justice and the common good that are intrinsic to the notion of collective sanctions.²⁸⁷ According to this theory, “rule”, “public good”, “values” and “international regime” are never to be considered inclusive or universal. Instead, they reflect a particular hegemonic order, which is currently that of the United States.

In short, economic sanctions are argued to be successful only if this dominant state assumes the leadership role and wields sufficient enforcing power. However, as soon as the distribution of the world’s economic resources becomes more equitable, that power will decline. With fewer resources, the dominant power will no longer be able to entice or bribe other states into remaining within the confines of its hegemony. And since many claim that the United States has begun to lose its grip as the leading international power, future compliance with economic sanctions may be limited, even if mandated by the UNSC. The unpredictability of compliance will become a major feature of future economic sanctions, and that is something that should not be associated with the international legal process of non-recognition.

On the other hand, the positive impact of economic sanctions has also been debated for almost a century. Lee Jones’s work on international sanctions, named *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work*, actually found that sanctions

²⁸⁵ Quoted in ‘Southern Africa: Keeping Friends among the International Donors’ [1992] *Inter Press Service*.

²⁸⁶ David Leyton-Brown ed., *The Utility of International Economic Sanctions* (1st edn, Routledg 2017).1

play only a modest role and that contextual factors determine their effects.²⁸⁸ According to this study, those who impose economic sanctions must be prepared to tell “a plausible causal story about how economic pain is going to produce political gain.” If such a story cannot be told, international policymakers should abandon the rhetoric of economic sanctions altogether. Jones also notes that the South Africa case - “the most frequently invoked basis for such analogical reasoning” - has very peculiar socio-economic features that are simply not present elsewhere. He then warns the Boycott, Divestment, Sanctions (BDS) campaigners who fight against the “Israeli apartheid state” that there are some “stark differences from the South African context that may give [them] pause for thought.”²⁸⁹

With the same intention but a different approach, Philip Levy asserts outright that South Africa was not freed from the apartheid system by the effects of international economic sanctions.²⁹⁰ He argues instead that the structure of the apartheid economy had become incompatible with normal, stable and healthy development. Patti Waldmeir’s well-regarded work on the end of apartheid supports this view. She emphasises the essential role of private lenders and investors, acting solely in their own interests. She quotes a Chase executive: “It was never the intention to facilitate change in South Africa, the decision was taken purely on account of what was in the interest of Chase and its assets.”²⁹¹ The politically unstable nature of a regime like apartheid is itself a risk for investors. We are led to the conclusion that the limited set of public trade and financial sanctions imposed by the European Community, the British Commonwealth and the United States - South Africa’s major partners – were not a causal factor in South Africa’s institutional changes. In general terms, Kim Nossal worries that economic sanctions only reflect the oscillations of domestic and coalition politics. Since sanctions sustain the appearance of action: “all the participants feel better, but nothing of substance is actually accomplished.”²⁹²

Regarding the unlawful situation in Ukraine, some scholars have pointed to the West’s failure to obtain any meaningful sanctions based on multilateralism. Crimmino, for example, expresses regret that sanctions designed by Western states in response to the occupation of Crimea (i.e., embargoes on the sale of military goods and products related to oil, restrictions on financial dealings between Western and Russian companies and selective freezing of assets) have had no apparent impact on Russia.²⁹³

²⁸⁸ Lee Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015).,

²⁸⁹ Lee Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015)., Conclusion.

²⁹⁰ Philip I Levy, ‘Sanctions on South Africa: What Did They Do?’ (1999) 89 *The American Economic Review* 415.

²⁹¹ Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (WW Norton & Co 1997).

²⁹² Kim Richard Nossal, *Rain Dancing: Sanctions in Canadian and Australian Foreign Policy* (University of Toronto Press 1994). 29

²⁹³ Ryan Crimmino, ‘Putin in Crimea: Have Sanctions Run Their Course?’ (2018) 39 *Harvard International Review*.

Quantitative researchers have been confirming this development since 2014. In an economic study in 2019,²⁹⁴ a research group ran various models. It concluded that neither real GDP growth, the price of oil, nor the effective exchange rates between Russia and a composite of nineteen euro-area countries had been impacted negatively. Their conclusion, predictably, was that economic sanctions were inefficient as an “instrument of political pressuring,” and they appealed to the EU to consider lifting the sanctions to “de-escalate” the political situation in Europe. Thus, they appear to be of the opinion that the international community should “de-escalate” in order to be at peace with the aggressor.

The results of Western sanctions imposed on Russia during the year 2022 might be more mixed. Russia has become the most sanctioned country in the world, and the sanctions regime has become much stricter than it was in 2014.²⁹⁵ For example, the Russian rouble fell to its lowest level in the weeks after the Ukraine invasion, but had become the world’s best-performing currency by June 2022.²⁹⁶

Russian trade was recorded to be severely impacted. However, its current account surplus for 2022 could still exceed US\$250 billion, with windfall earnings from energy exports due to European dependence on Russian oil and gas.²⁹⁷ Even with a sharp decline in volume and value, the Russian export model has shown some resilience by finding alternative markets for its energy and commodities, and offering to supply at attractive prices to countries such as China and India.²⁹⁸

However, despite these numbers, a Yale University study conducted in August 2022 concluded that Russian fiscal and monetary interventions to counter sanctions would not yield sustainable results. They insisted that the Russian economy was already suffering at the macro level and would soon face “economic oblivion” in the long term if the sender countries remained united.²⁹⁹

I genuinely hope that these measures will continue to be in place and will weaken the capacity of the Russian oligarchy to maintain its presence in Ukraine. However, as we explained above, the mixed impacts of economic sanctions, along with procedural uncertainty and the limited participation of international players in those sanctions, signify that the mythical status of

²⁹⁴ Konstantin A Kholodilin and Aleksei Netšunajev, ‘Crimea and Punishment: The Impact of Sanctions on Russian Economy and Economies of the Euro Area’ (2018) 19 *Baltic Journal of Economics* 39.

²⁹⁵ Girish Luthra, ‘The Russia-Ukraine Conflict and Sanctions: An Assessment of the Economic and Political Impacts’ (ORF) <<https://www.orfonline.org/research/the-russia-ukraine-conflict-and-sanctions/>> accessed 12 November 2022.

²⁹⁶ Jason Karaian, ‘The Russian Ruble Keeps Rising, Hitting a Seven-Year High.’ *The New York Times* (21 June 2022) <<https://www.nytimes.com/2022/06/21/business/russian-ruble-ukraine.html>> accessed 12 November 2022.

²⁹⁷ Rebecca M. Nelson, ‘Russia’s War on Ukraine: The Economic Impact of Sanctions (IF12092)’ (*Congressional Research Service*, 3 May 2022) <<https://crsreports.congress.gov/product/details?prodcode=IF12092>> accessed 12 November 2022.

²⁹⁸ ‘The Price of War: Macroeconomic Effects of the 2022 Sanctions on Russia’ (CEPR) <<https://cepr.org/voxeu/columns/price-war-macroeconomic-effects-2022-sanctions-russia>> accessed 12 November 2022.

²⁹⁹ Jeffrey Sonnenfeld and others, ‘Business Retreats and Sanctions Are Crippling the Russian Economy’ (19 July 2022) <<https://papers.ssrn.com/abstract=4167193>> accessed 21 February 2023.

sanctions in the international legal process of non-recognition and its connection with general international law must be suitably debunked.

Other tools of non-recognition, however, are free from all of the abovementioned difficulties. I argue that U.N. bodies and specialised agencies never defy the provisions and guidance of the UNGA, despite contemporary scholars claiming that the UNGA's resolutions have neither political nor legal power. These institutions implement the duty of non-recognition with little or no effort, as their job is technically to deny the perpetrators their rights to cooperation and the access they normally enjoy within the institutions. And because their activities with other member states also employ the language of non-recognition, these members have no choice but to follow the UNGA's resolutions in the relevant fields of international life. The entire process has proved to be consistent and predictable.

Indeed, resorting to sanctions can be helpful, as they bring about a diplomatic loss of face and send signals to the target country that the resolve to resist its aggression continues to exist. It can also alter the status of the target country as a dominant supplier of critical resources to friends and allies and may reduce the target country's capacity to engage in military conflict,³⁰⁰ which is slowly happening as a result of the sanctions imposed on Russia. However, with all of its possible functions, economic sanctions do not constitute an officially recognised concept in the UN Charter. This does not exclude the possibilities of economic sanctions being a part of the international legal process of non-recognition. However, it is certainly neither the most important nor indispensable in non-recognition's legal components. The association of international legal responses to an unlawful situation (specifically non-recognition) obsessively with economic sanctions usually lead to the fallacy of "perfect compliance."³⁰¹

3.2.3. Non-recognition and Recognition: The Law of State Responsibilities and the Law of Statehood in International Law

At this point, a brief but substantial understanding of non-recognition has been established. We have the contemporary codifications of non-recognition, depicting the duty as a *jus cogens* duty of abstention and will be triggered in case of systematic and gross violation of *jus cogens* norms of international law. We then have the interpretation of non-recognition as a legal process. International legal process theory, it is argued, provides a safer and more predictable framework to study and conceptualise non-recognition. Finally, an important line between non-recognition campaigns and the popular topic of economic sanctions has been drawn. The dissertation argues that non-recognition is a possible *de jure* principle that rejects the legality of unlawful situations produced by unlawful conduct, in line with the ancient legal principle of *ex injuria jus non oritur*. It holds definite normative power that can enable it to be considered a part of international customary law. The application of economic sanctions, on the other hand, is only one optional tool of international relations and law. The most important takeaway is

³⁰⁰ Lawrence J Brady, 'The Utility of Economic Sanctions as a Policy Instrument', *The Utility of Economic Sanctions* (1st edn, Routledg 2017), 298 - 300

³⁰¹ Peter Spiro, 'Ukraine, International Law, and the Perfect Compliance Fallacy' (*Opinio Juris*, 2 March 2014) <<http://opiniojuris.org/2014/03/02ukraine-international-law-perfect-compliance-fallacy/>> accessed 11 June 2022.

that states may or may not participate in economic sanctions to practice non-recognition, and their non-participation should not be considered an implied recognition of the situation.

However, there is still one conceptual interaction that might cause confusion: the recognition of states/governments and the duty of non-recognition of unlawful situations. The seemingly opposite terms “recognition” and “non-recognition” very often lead to the belief that they are two sides of the same legal coin. It seems extremely difficult for scholars outside the sphere of international law to distinguish one from the other. In the course of my interviews with two scholars specialising in history (one is an expert in Classical Greece, and the other an expert on the Napoleonic era) and a third whose work focuses on Asian geopolitics, I asked them about the principle of non-recognition. All three immediately cited or mentioned the practice of recognition or non-recognition of a government or a state. This shows that non-recognition has not reached the same level of popularity, legal clarity and academic impact as recognition.

Even within the realm of international law, non-recognition is very often studied alongside the law of statehood and recognition. For example, in Dugard’s seminal work, “Recognition and the United Nations” (first published in the 1980s), he spends half of the book dealing with non-recognition.³⁰² Although Dugard clearly understood the significant differences between the two concepts and analysed each instance with convincing evidence and outstanding argumentation, he also tended to mix non-recognition with recognition as if they were parts of the same international legal branch. The case of the Declaration of Independence/secession of Katanga, for instance, is one of the classic case studies of statehood and recognition of states.³⁰³ It is, surprisingly, studied by Dugard within the framework of non-recognition. On the other hand, the creation of the state of Bangladesh is studied in terms of the language of statehood and the law of recognition, which is not necessarily convincing concerning the deep involvement of foreign forces in the conflict.

Today, however, the law on statehood and recognition of statehood and the law on state responsibilities of non-recognition of unlawful situations have achieved clearer boundaries. The international rule of statehood and the problem with state/government recognition are built upon essential concepts and keywords such as “self-determination”, “the peoples”, “decolonisation”, or “the Montevideo convention’s requirements for statehood.” Specifically, the most important question of this field of study is: how can the international community identify a state and justifiably recognise the existence of this State as a member of it?³⁰⁴ Even if we are talking about the recognition of government, these keywords and questions remain inevitable.

³⁰² John Dugard, *Recognition and the United Nations* (Grotius Publications 1987).

³⁰³ See how the UNSC dealt with Katanga’s declaration of independence: UNSC Res 169 (24 November 1961). The language used in this resolution is almost exclusively about statehood and the law of state recognition: ‘territorial integrity’, ‘secessionist’, ‘recognizing the Government of the Republic of the Congo as exclusively responsible for the conduct of the external affairs of the Congo’...

Dugard studied this case from page 86 to 90, *ibid*.

³⁰⁴ JAMES CRAWFORD, ‘Statehood and Recognition’ in James R Crawford (ed), *The Creation of States in International Law* (Oxford University Press 2007) <<https://doi.org/10.1093/acprof:oso/9780199228423.003.0001>> accessed 5 January 2023.

On the other hand, the international rule of non-recognition is a part of the law of “state responsibilities”. The rationale of the principle of non-recognition, as we have iterated several times, is that an illicit action shall not produce a lawful right, and the perpetrators shall not benefit from their wrongdoing. Non-recognition primarily addresses concepts and keywords, including “jus cogens”, “serious breaches of international law”, “state responsibilities”, and sometimes “collective security.”

To differentiate the two research fields, I believe that accounts from authors such as Daniel Patrick O’Connell and Ti-Chiang Chen are more than illustrative. For O’Connell, non-recognition is concerned only with territorial changes/acquisition/annexation (a view possibly outdated in today’s world but true at his time, nevertheless). He asserts that non-recognition has nothing to do with a new government or new State. In some cases where the territorial changes take the form of a new entity (like the creation of the Japanese-backed Manchukuo state), the non-recognition of this entity really amounts to the non-recognition of the “seizure of alien territory.”³⁰⁵

Although reaching the same conclusion, Ti-Chiang Chen does not rely on territorial elements. Instead, he emphasised the “violations of international law.”³⁰⁶ Chen insists that non-recognition should not be spoken of in connection with new States or governments in a general sense, but it could enter the equation if there are elements of illegality. For instance, there is the establishment of a State or government that is brought about by the illegal acts of foreign States. The question concerning the creation of these States is, therefore, about the consequences of unlawful conquests and interventions to which non-recognition should be applied.

As we have already mentioned, identifying the element of illegality is not an easy task. In many unlawful situations, perpetrators try to justify their illicit conduct and ill intentions with the language of statehood, such as “self-determination.” The Russian-backed secessionists in Ukrainian Donbas and the so-called referendum for the independence of Crimea, followed by its immediate annexation by the Russian Federation, all rely on the idea of statehood and the simple question of recognition.

Fortunately, academic and international communities agree that modern history has gone far beyond the point of tolerating spontaneous external self-determination and demands for secession. After the end (technically) of the process of decolonisation and also the legal repercussions of the dissolution of the Soviet Union and other Eastern European socialist states, the international community has become much more cautious in dealing with the rhetoric of self-determination and statehood. At this point, International law has developed sufficiently to embrace the principle of self-determination in a binary form, as entailing rights to internal or external self-determination, depending on the circumstances.³⁰⁷ To ensure international

³⁰⁵ Daniel Patrick O’Connell, *International Law: Volume One* (Stevens and Sons 1970), 142

³⁰⁶ Ti-Chiang Chen, *The International Law of Recognition* (Рипол Классик 1951), 428 - 432

³⁰⁷ ‘Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia | ASIL’ <<https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan>> accessed 6 January 2023.

stability, the right to external self-determination exercised through remedial secession could only apply in extreme circumstances involving colonised and severely persecuted peoples. Neither of these conditions were met in Crimea and Eastern Donbas, allowing the international institutions to easily establish Russian interventions and their armed invasions as unlawful. These legal and political facts lead us to the practice of non-recognition, rather than a question of statehood and recognition.

3.3. Non-recognition and the Emerging Post-colonial School

3.3.1. Acknowledging the Colonial Roots and Remnants in International Law

[International lawyers were] “... *armed thieves who came in the dark, tricked their way to profit, used law to justify themselves, and devastated the people and planet.*”³⁰⁸

(Joshua Castellino, advocating minority rights and international accountability for colonialism)

Post-colonial critiques of public international law are one of the most profound and authoritative challenges to contemporary international institutions. I recognise that most of these arguments have strong legitimacy and should be adequately addressed by international law experts. However, we must also acknowledge specific theoretical and practical weaknesses in this literature if we are to ensure that criticism of international law does not fall into the limbo of international nihilism.

Professor Antony Anghie’s influential classic, *Imperialism, Sovereignty and the Making of International Law*, offers important insights into the post-colonial approach to international law.³⁰⁹ The book’s core purpose is to advocate for the recognition of the colonial “residue” inside the contemporary international legal system. Anghie attempts to demonstrate that the Western colonial enterprise is far from extinct and still lingers within “every” fabric of international law and its institutions. Although there are many approaches to dissecting and studying this phenomenal work, I would like to summarise briefly several lines of argument that have become keynotes in both the “Third World Approach to International Law” (TWAIL) and the recent post-colonial movement that opposes international law. Recently, a substantial, updated article by Professor Anghie has revisited the topic, but his core ideas and arguments remain.³¹⁰

³⁰⁸ Joshua Castellino, ‘Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection’ in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds) (Torkel Opsahl Academic EPublisher (TOAEP) 2020) <<https://www.legal-tools.org/doc/2rkcrx/>> accessed 21 April 2023.

³⁰⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) <<https://www.cambridge.org/core/books/imperialism-sovereignty-and-the-making-of-international-law/8AFA91E6F502B2C4996BB14E1A548E7A>> accessed 22 March 2023.

³¹⁰ Antony Anghie, ‘Rethinking International Law: A TWAIL Retrospective’ (2023) 34 *European Journal of International Law* 7.

Anghie was, first and foremost, one of the pioneers who challenged the so-called *inevitability* of the European form of political organisation, its international arrangements and its celebrated yet problematic legacy. As he observes, the “modern” international order is nothing more than the result of Europeans imposing themselves on the lands of non-Europeans.³¹¹ Examining the history of colonialism from the 1500s to the period immediately after the Second World War, Anghie contends that the “universalising mission of international law”, by embracing the idea of the Mandate system and then Trusteeship, and even by adapting to anticolonial political sentiments, continues its task of ensuring that the Western model of law, politics, economy and vision... is seen as “natural, inevitable and inescapable”.³¹² Anghie then criticises the idea of formal sovereignty in European society, its focus on “effective government,” “defined boundaries,” and “defined population” - all of which are techniques for reducing international society to economic terms. This is the process that Anghie calls “the economisation of government.”

Anghie’s second important argument resides in his depiction of colonialism as profoundly shaping the character of international institutions, and not only at their formative stage. In his view, international institutions and lawyers consistently attempt to obscure the colonial origins of international law and the inherently exploitative nature of colonial encounters. Therefore, colonial and imperialist remnants have never been confronted or addressed. By adopting this line of reasoning, Anghie supports the famous proposal of Ruth Gordon, who describes international attempts to deal with crises of “failed states” by temporarily administering them, as in the case of Somalia, Cambodia, Timor and Kosovo, as “contemporary manifestations” of neo-colonialist policies.³¹³

It is interesting to find that the post-colonial critique of international law depends on and draws heavily on the realist interpretation of the history of international relations. For example, the problematisation of the international economy as a tool of imperialism and colonialism has been noted and confirmed, for example, in H. Boeke’s *the Structure of Netherlands Indian Economy* and Benjamin Cohen’s *The Question of Imperialism: The Political Economy of Dominance and Dependence*.³¹⁴ Anghie’s consistent challenge to the “perceived” inevitability of “European states” also echoes Hedley Bull’s “The Anarchical Society”, published almost a decade before.³¹⁵ Following the basic assumption of political realism that the state is the leading actor in international relations and that the international community is inherently anarchic, Bull proposes a loose idea of the state that would not exist if there was no projection of European political ideology/systems throughout the world. He contends that states “are simply groupings

³¹¹ Anghie (n 313)., 105 - 110.

³¹² *ibid.*, 146

³¹³ Ruth Gordon, ‘Saving Failed States: Sometimes a Neocolonialist Notion’ (1997) 91 Proceedings of the ASIL Annual Meeting 420. And Anghie (n 313)., 195 - 200.

³¹⁴ Julius Herman Boeke and WL Holland, *The Structure Of Netherlands Indian Economy* (Literary Licensing, LLC 2012).

And Benjamin J Cohen, *The Question of Imperialism: The Political Economy of Dominance and Dependence* (Macmillan 1974).

³¹⁵ Hedley Bull, *The Anarchical Society* (Macmillan Education UK 1977) <<http://link.springer.com/10.1007/978-1-349-24028-9>> accessed 5 April 2023.

of men, and men may be grouped in such a way that they do not form states at all.”³¹⁶ In *The Expansion of International Society*, Bull again insists that the so-called international society is nothing more than an extension of the European states. He asserts that the creation of the international society is the “transformation from a society fashioned in Europe and dominated by European states into the global international society of today.”³¹⁷

In another work by Paul Keal, *The Moral Backwardness of International Society*, the contributing authors draw on realist propositions of the idea of the a state (from Bull’s to Benjamin Cohen’s) to establish their argument for a possible alternative to the present international order.³¹⁸ Keal analyses the beliefs and attitudes that resulted in indigenous peoples being labelled as “uncivilised” and excluded from the “civilised” world that formed the basis of international society. The major international law treatises of the late nineteenth and early twentieth centuries reflect this phenomenon. Keal, like Anghie, connects colonisation and the resulting patterns of empire to the development of international society. This society is seen as a result of the expansion of European states into a global sphere. The legitimacy of international society, including the agreed-upon norms that govern it, is brought into question by an examination of the historical processes by which that society came about. Overall, Keal argues for an understanding of “self-determination” that is not based on Western jurisprudence and is divorced from traditional links to sovereignty and to a “state-centric” view of the world.

In another provocative collection entitled *Colonial Wrongs and Access to International Law*, the realism of international relations lends some support to the contentious idea of cultural relativism.³¹⁹ We have, for example, the rationalisation of Makau Mutua’s statement that “[a]ttempts to craft a truly universal regime of rights, one that reflects the complexity and the diversity of all cultures, have generally been viewed with indifference or hostility by the official guardians of human rights.”³²⁰ Most of Makua Mutua’s reasoning is similar to that which we find in the works of Anghie and Keal. At the theoretical level, the authors remind readers that international “justice” nowadays ignores the continuing socio-economic violence that remains one of the causes of colonial grievance. Part II of the book focuses mainly on (and challenges) existing international legal notions (including “the nation-state”, “self-determination”, and other economic-social arrangements), noting that they are norms of colonial subjugation, continuing crimes vis-à-vis a colonial wrong.

The foundation leads to later parts of the book, where the authors reach thought-provoking conclusions on contemporary international politics. For example, at a series of conferences

³¹⁶ *ibid.*, 20

³¹⁷ Edited by Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford University Press), 1 - 5.

³¹⁸ Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2003) <<https://www.cambridge.org/core/books/european-conquest-and-the-rights-of-indigenous-peoples/2F60AFED5E8D5BA4B4625605DD7EDFC7>> accessed 23 March 2023.

³¹⁹ Morten Bergsmo & Wolfgang Kaleck, *Colonial Wrongs and Access to International Law* (2020).

³²⁰ Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

held by the Centre for International Law Research and Policy (prior to the publication of this work), it was concluded that the world had overlooked the colonial context of the violence against the Rohingyas in contemporary Myanmar. According to the authors, it is undeniable that colonial domination persists in the Global South through international law and its structures, even after "formal independence" has been attained. This is due to the enduring and multidimensional impact that colonialism has had on these regions.

3.3.2. Is International Law Inherently Western? Another Look at TWAIL

At its core, the post-colonial intervention in international law contains a certain amount of nihilistic prejudice against the general development of international law. It is true that, without a common and compelling political language of their own and during a time of constant hardship, colonised peoples adopted and employed fundamental concepts of European society to break the political hold great powers had over them. Even Marxism-Leninism, one of the most famous ideologies supporting colonial struggle, was an idea borrowed from the West. However, the claim that it was the expansion of European society that created the modern world and contemporary public international law suffers from two significant weaknesses:

- (1) To quote the words of Judge James Crawford of the ICJ, there is a measure of "generalisation and simplification" in the blanket assumption that the entire system of international law is a European construct and dominated by European influences.³²¹ These words appear in a review of Anghie's work, but might well apply to other writers with similar views.
- (2) The belief of post-colonial authors that the European system of nation-states and international society are distinctly different is problematical and seems to be just another variation of the Euro-centric theory of international law.

My first response to the "generalisation" in the work of Anghie and others who hold similar views is that, notwithstanding their legitimate concerns and criticisms, the international legal system that came into being after 1945 was never truly European. The US's emergence as an international power brought norms and concepts that were unique to the American continent (including Latin American countries) to the international arena. For instance, international scholars have long noted the contribution of Pan-Americanism and important norms that are argued to arise strictly from America's legal situation and not that of Europe. The most commonly cited American principles are non-intervention by third-party States; compulsory international arbitration for State to State disputes; territorial limits based on the *uti possidetis iuris* of 1810; the third-party right to recognition of internal belligerents; the right of diplomatic asylum; the principle of *ius soli* in nationality laws; the freedom of navigation of national rivers; jurisdiction over coastal security; and freedom of neutral trade in times of war.³²²

³²¹ Anghie (n 313)., Introduction by James Crawford

³²² Jorge L Esquirol, 'Latin America' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) <<https://doi.org/10.1093/law/9780199599752.003.0024>> accessed 10 July 2023.

Although there are still a goodly number of debates discussing this phenomenon, we can safely say that legal norms coming from the American continent are contributions to the general evolution of universal international law.³²³ These norms clearly rethink the traditional imperialist approaches to independence and statehood (such as non-intervention by third-party States or territorial limits based on *uti possidetis iuris*); but they are also practical, easily integrated and, more importantly, fair and equitable vis-a-vis the newly independent American states.

Similarly, there is scholarly acknowledgement of the third-world's offerings to the development of international law. For example, the African-Asian initiatives leading to the Bandung Conference and many other cooperations afterwards have reshaped international law, consolidated the role of the UNGA in dealing with international legal issues, from decolonisation to territorial disputes and peace and security, and actively challenged the remnants of imperialism. However, even with such ambition, the products of this conference recognised the "universality" of some parts of the language of contemporary international law. The ten principles in the "Dasa Sila" were intended to envision a new international order and to plant the seeds of a new international law.³²⁴ The "Dasa Sila" principles were, nevertheless, in conformity with the UN Charter, since the legal principles inscribed in the Charter already reflected the inclusive and progressive ideas that all peoples and nations could support.

Returning to the comments of James Crawford on the work of Anghie, I agree with the former's critique. The high degree of generalisation and simplification in Anghie's depiction of international law are not sufficiently supported by his examples and arguments. Although I acknowledge Anghie's valid criticism of the exploitative nature of the international legal system at the beginning of the 20th century, his generalisations directed against the entire system fall short.

Let us take, for example, Anghie's subjects of discussion. Despite his blanket disapproval of contemporary international law, his arguments focus primarily on the Mandate System of the League era (which has since been dismantled), and then the Trusteeship System (which is now inactive), and then the technicalities of international economic management, including the Bretton Woods Institutions (BWI), the World Bank and the International Monetary Fund (IMF), entities that Anghie regards as contemporary successors of the Mandate System.³²⁵ These organisations are indeed important components of the international legal system but certainly do not represent the entirety of the system.

Anghie excludes many milestones of international law created by developing countries in the hope of a better future for international society. These milestones include the *Declaration on*

³²³ Carlos Sánchez i Sánchez, *Curso de derecho internacional publico americano : sistematica i exegesis* (Editora Montalvo 1943).

³²⁴ Luis Eslava, Michael Fakhri and Vasuki Nesiah, 'The Spirit of Bandung' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Past and Pending Futures* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/bandung-global-history-and-international-law/spirit-of-bandung/5C0F2DC4165E532553D31B0F7C4F2095>> accessed 7 May 2023.

³²⁵ Anghie (n 313), 191-195

Principles of International Law concerning Friendly Relations - now a part of customary international law,³²⁶ and the record of the UNGA (comprised of predominantly third-world countries) in succeeding from time to time in isolating former empires and contemporary powerhouses in the course of major territorial/political disputes. We might also mention the role of modern human rights agencies inside the United Nations, such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), and its role in monitoring facts and sometimes intervening in serious human rights violations.

Anghie's attempt to justify Ruth Gordon's four-page opinion³²⁷ (which claims that assisting communities that can no longer provide for the health, safety and welfare of their inhabitants is a form of colonialism), is also challengeable. Although European racial superiority and European cultural superiority are collectively and unquestionably wrong, to suggest that the dire situations in Yugoslavia, Somalia, Cambodia and Timor did not warrant international intervention because "societies that have been living and surviving for countless generations might have some idea of how to improve their own space and lives" is to push international solidarity, assistance, and development to the dangerous line of revisionism. Not all societies "survive for countless generations." On the contrary, countless kingdoms, peoples and communities have entirely disappeared due to the brutality of war and historical power politics. Although still a controversial book,³²⁸ Steven Pinker's *The Better Angels of Our Nature: Why Violence Has Declined* makes a persuasive case for the argument that the evolution of modern human institutions, including international law, has contributed to a better, safer and more inclusive environment for every community in today's world, regardless of its military and economic might and size.

Consider another Southeast Asian example: Cambodia. With the United Nations Transitional Authority in Cambodia (UNTAC), the United Nations, for the first time in its history, changed the political structure of a member state to bring about peace and (partial) reconciliation.³²⁹ The Cambodian people and most commentators consider UNTAC's mission as a success. Under its auspices, free and fair elections were held, which showed respect for the principle of self-determination of the Cambodian people; a start was made to the rebuilding of Cambodia's infrastructure, administration and economy, and the foundations of civil society were also established, leaving Cambodia with a more open political process after years under the

³²⁶ Stephen M Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law', *Proceedings of the ASIL Annual Meeting* (ASIL 1979) <<http://www.jstor.org/stable/25658015>> accessed 11 June 2022. And UNGA, 'Res 2625 on "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations" UN Docs A/RES/2625(XXV)' <<https://www.refworld.org/docid/3dda1f104.html>> accessed 18 April 2023.

³²⁷ Gordon R, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 91 *Proceedings of the ASIL Annual Meeting* 420

³²⁸ Bret Stetka, 'Steven Pinker: This Is History's Most Peaceful Time--New Study: "Not So Fast"' (*Scientific American*) <<https://www.scientificamerican.com/article/steven-pinker-this-is-historys-most-peaceful-time-new-study-not-so-fast/>> accessed 18 April 2023.

³²⁹ Michael W Doyle and Nishkala Suntharalingam, 'The UN in Cambodia: Lessons for Complex Peacekeeping' (1994) 1 *International Peacekeeping* 117.

dominion of the Khmer Rouge, followed by foreign occupation.³³⁰ It is clear that the UN-backed intervention resolved the regional political disputes (especially between Vietnam and China) and led to the relative betterment of targeted societies, with no “colonialist” undertones. Intentionally stretching or blurring this reality is an unjustifiable denial of the value of international law.

More importantly, Anghie’s thesis on the monopoly of Western financial institutions has lost some of its impact in recent years. The nature of multilateralism in modern international trade and relations has allowed the emergence of new economic powers with new political ambitions, free from European influences. For example, the Asian Development Bank (ADB) was created with predominantly Japanese backing and was supposed to be an alternative to the European power model. However, several studies have established that Japan has used its financial power to act as the dominant power and has influenced international norms in more or less the same ways as the European powers did formerly; although the country does try to limit its financial gains, due to its broader definition of self-interest.³³¹ On the other hand, Japan has leveraged its political heft within the ADB to exert influence on newly-elected UNSC members. These countries take rotational turns as President of the Council, participate in ongoing debates, and vote on those matters of global security that are important to Japan.³³²

Similarly, the Asian Infrastructure Investment Bank (AIIB), led by the Chinese government, has been involved in an identical strategy to that of Western powers. AIIB focuses on supporting China’s ambitious One Belt One Road initiatives, which even intends to rewrite international geopolitics and geo-economy.³³³ As author Wan Ming observes in his well-received book: *The Asian Infrastructure Investment Bank The Construction of Power and the Struggle for the East Asian International Order*, China’s plans and its implements for asserting its dominant new global role are also not very different from those of the Europeans, the Americans or the Japanese.³³⁴ Wan Ming admits, however, that the United States was undoubtedly more liberal than any alternative system in existence at the end of World War II. Its commitment to the idea of “embedded liberalism” in setting up intergovernmental organisations has facilitated greater international cooperation and the construction of domestic welfare institutions to cushion potential losers in the global market.³³⁵

³³⁰ ‘Was UNTAC’s Mission in Cambodia a Success or a Failure? - Khmer Times’ (21 October 2021) <<https://www.khmertimeskh.com/50956684/was-untacs-mission-in-cambodia-a-success-or-a-failure/>> accessed 18 April 2023.

³³¹ Ming Wan, ‘Japan and the Asian Development Bank’ (1995) 68 *Pacific Affairs* 509.

³³² Daniel Yew Mao Lim and James Raymond Vreeland, ‘Regional Organizations and International Politics: Japanese Influence over the Asian Development Bank and the UN Security Council’ (2013) 65 *World Politics* 34.

³³³ Kevin G Cai, ‘The One Belt One Road and the Asian Infrastructure Investment Bank: Beijing’s New Strategy of Geoeconomics and Geopolitics’ (2018) 27 *Journal of Contemporary China* 831.

³³⁴ Ming Wan, *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order* (Palgrave Macmillan US 2016) <<http://link.springer.com/10.1057/9781137593870>> accessed 19 April 2023.

³³⁵ Ming Wan, ‘The AIIB versus the World Bank and the ADB’ in Ming Wan (ed), *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order* (Palgrave Macmillan US 2016) <https://doi.org/10.1057/9781137593870_4> accessed 19 April 2023.

My message is that, with or without Western states, the economisation of international politics and its utilisation in establishing international norms and order happens whenever an economic powerhouse gathers enough institutional strength, diplomatic experiences and capital. The change from a US/European-led liberal order to a handful of focused alternatives, such as those presented by China, Russia, Japan and India, would not create a “better” or “different” vision of international reality.

Much the same could be said about Keal’s process of examining the colonial roots and concepts within the contemporary international system.³³⁶ Keal presents a catalogue of conceptual and doctrinal impediments between Western legal concepts and the concepts of other groups. They include different priorities in human rights discourse, cultural barriers, the prevailing schools of legal and political thought that are rooted in Western classical theory, and the central edifice of state sovereignty. Admittedly, all of these details are insightful and important to take into account when studying international law and its problems. Yet, while he presents a compelling case for change, Keal’s analysis and argument fail to fully acknowledge the progress that has already been made in addressing these challenges through the current international legal institutions.³³⁷

The international legal system has made significant strides in promoting cultural integrity, land and resource rights, and social welfare nondiscrimination of indigenous peoples. This is evidenced by the UN Committee on the Elimination of Racial Discrimination’s general recommendation on the Convention on the Elimination of All Forms of Racial Discrimination and the International Labour Organization Convention (No. 169) on Indigenous Tribal Peoples, which Keal briefly mentions without attributing any legal significance to them. These legal initiatives demand that states respect the aspirations of indigenous peoples in all decisions that affect them, demonstrating the inclusivity and progressiveness of the international legal system. Although this is not to say that these documents are enough to address the inequalities still lingering through the system, they are certainly talking points in debates on the topic of whether international law is inherently Western and cannot assimilate itself to other ideas and norms.

Now, we consider Anghie’s second argument, that the concepts of state/international politics/economic/public international law are “reproduced” in non-European societies,³³⁸ and that these concepts have had to strive to conform to the European model. Although it is true that European countries have employed rhetoric and fake standards to distinguish themselves as civilisations and to define others as not-civilisations, the conceptualisation of geography, effective central government, defined boundaries, absolute separation of sovereignty and well-defined groups of loyal inhabitants in the formation of states have existed for a long time in non-European lands.

For example, in the small kingdom of Dai Viet, the rejection of Chinese imperialism and the striving for a separate, independent political entity were ancient political demands. This was

³³⁶ Keal (n 322).

³³⁷ S James Anaya, ‘European Conquest and the Rights of Indigenous Peoples. The Moral Backwardness of International Society. By Paul Keal’ (2005) 99 *American Journal of International Law* 306.

³³⁸ Anghie (n 313), 145 - 150

manifested in the famous poem “Nam Quoc Son ha Nam De cu.” The poem's author was reportedly Ly Thuong Kiet, commander-in-chief of the Ly Dynasty (1009-1225), and is a part of the country's semi-historical records from “Lĩnh Nam Chích Quái” (Selection of Strange Tales in Lĩnh Nam) to the official “Đại Việt Sử ký Toàn thư” (National Chronicle of the Đại Việt).

In the translation of Alexander Vuving in the German Journal on Contemporary Asia, the poem goes as follows:

“In the Southern country's mountain and river, the Southern Emperor inhabits.

The separation is natural and allotted in Heaven's Book.

If the [Northern] bandits come to trespass it,

You shall see yourselves handed with failure and shame!”³³⁹

In this poem, we can see that the order of relationship at issue between the northern state and the southern state was not just a problem of feudal ownership, but a complex, multi-layered relationship between the southern country's “geography”, its “ruler”, its absolute “separation” from the “north” and the “inhabiting” nature of the southern leadership (not occupying or owning).³⁴⁰ More importantly, the “Book of Heaven” and “Heaven” were in the domain of the ultimate points of reference, as if the order were natural, universal and absolute. Heaven seems to be the supreme source of authority, and Heaven's Book is the source of primary truth. All of these appear to precede European perceptions of the “epistemic universalism” of the elements of international law.³⁴¹

Or if we go a little bit ahead to the case study of Tibet: when Lcang Skya Rol Pa'i Rdo Rje recommended that Qianlong should grant a few border areas to the Dalai Lama, Qianlong's Grand Secretary and Governor-general of Sichuan and Shaa – Jalangga, wrote: “We assume that he requested these places because the Dalai Lama was in financial difficulties, not because he wanted the places to be given to the Tibetans. The yearly revenue from Litang, Batang, and Jiatang is less than ten thousand jin (taels). If we take this amount out of the revenue of Dajianlu and give it to the Dalai Lama, they can make ends meet. Such places as Litang should remain within China.”³⁴² The limits of the territories of China and Tibet, over which territory Qing's

³³⁹ Alexander Vuving, ‘The References of Vietnamese States and the Mechanisms of World Formation’ (1 April 2001) <<https://papers.ssrn.com/abstract=1782997>> accessed 5 April 2023.

³⁴⁰ *ibid.*, 66 -67

³⁴¹ Jan Klabbers, ‘On Epistemic Universalism and the Melancholy of International Law’ (2018) 29 European Journal of International Law 1057.

³⁴² Arthur W Hummel (ed), ‘Eminent Chinese of the Ch'ing Period, 1644-1912 (2 Vols)’, *Eminent Chinese of the Ch'ing Period, 1644-1912 (2 vols)* (Brill 2010) <<https://brill.com/edcollbook/title/19457>> accessed 30 June 2023. 39;

Xiangyun Wang, ‘The Qing Court's Tibet Connection: Lcang Skya Rol Pa'i Rdo Rje and the Qianlong Emperor’ (2000) 60 Harvard Journal of Asiatic Studies 125., 134 – 135

sovereign power extended, and where that of the Dalai Lama should end, are clearly reflected in these communications.

The idea of international relations and cooperation within a particular set of “international rules of law” as an exclusively European capability is also questionable. For example, a close examination of the Chinese Verifications of Collected Texts [Tongwen hui kao 同文彙考] shows us that whenever a matter concerning relations between the Qing court and Korea arose, officials were dispatched to the other side to share official messages between the government representatives of equal rank [ziwen 咨文]. They then explained the situation and reached a resolution through cooperation rather than force or intimidation.³⁴³ On the other hand, the *ziwen* envoys were responsible for reporting on specific affairs between the two states, such as requests by the Korean court for almanacks, bilateral trade, border surveys, investigations into cross-border crimes, unlawful cross-border fishing, and maritime disaster relief. Although “international rule of law” was a concept that was alien to the two kingdoms, a similar idea - a shared systematic belief in *Li* (禮 / “proper conduct”) as a major concept of Confucianism – and it allowed the alien Manchurian Qing court to communicate and establish its relationship with the Koreans - a very loyal tributary state of the defunct Ming Court. Here again, the concept of borders, the authority of each court over relatively defined territories and ways of dealing with “cross-border” elements of governance are strong evidence of the territorial mindset of the Confucious-influenced kingdoms.

But were they not merely vassal states of China? And was not territorial independence impossible in such relationships of suzerainty? Many Chinese scholars would disagree with such a characterisation. One of the first attempts by international scholars to explain the “Chinese world order” can be accredited to the renowned American historian John King Fairbank.³⁴⁴ Fairbank’s thesis posits that the Chinese courts maintained a Sino-centric hierarchical world order in which China had a superior-inferior, overlord-vassal relationship with its neighbours. In brief, Chinese emperors conferred official titles and ranks on neighbouring rulers, providing them with a form of “civilised” legitimacy. In return, these local rulers, with the approval of Chinese emperors, conducted their own version of self-centric international relations with the outer “barbarians”, while also receiving, if necessary, diplomatic and military protection from the Son of Heaven. Overall, these practices confirmed the superiority of Chinese civilisation and the ultimate legitimacy of the Chinese emperor.

But did this tributary system take away the independence of the vassal states? In several accounts, the tributary relationship between China and its neighbouring states is described as

³⁴³ Shangsheng Chen (陳尚勝), ‘The Chinese Tributary System and Traditional International Order in East Asia during the Ming and Qing Dynasties from the Sixteenth to Nineteenth Century’ (2020) 5 *Journal of Chinese Humanities* 171. And Seung Moon Won 承文院, *Tongwen huikao 同文彙考* [Verifications of Collected Texts] (Seoul: Gugsapyeonchan-wiwonhoe, 1978).

³⁴⁴ K. Fairbank (ed.), *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA, 1968); Fairbank, “Introduction: The Old Order”, in *The Cambridge History of China: X: Late Ch'ing, 1800-igii*, Part 1, ed. Fairbank (Cambridge, 1978), pp. 29-34

“suzerainty.”³⁴⁵ This approach, however, has sometimes received a less than enthusiastic response from East Asian authors and some Western researchers. Mark Mancall, for example, sees the concept of the tributary system as, in fact, no more than a “Western invention for descriptive purposes.”³⁴⁶ On the other hand, it should be noted that the term “suzerainty” was often applied by the European powers that colonised Asia, Africa, and Latin America. Traditional Chinese political schools knew this concept as *zongzhuguo* (宗主國), which basically means that the superior state establishes firm control over tributary states (such as in matters of foreign policy, defence, and even taxation) while allowing these states limited internal autonomy. In contrast, the Chinese empire always referred to itself as the Celestial Empire [*tianchao*, 天朝] during tributes, whereas vassal states referred to China as the superior domain [*shangguo*, 上國], not “suzerainty” [宗主國].³⁴⁷ The names used reflect a loose intellectual alliance where all the kingdoms involved willingly accepted China as the centre of politics, culture, philosophy, language and as a social model. China also did not control its tributary states to any substantial degree, either externally or internally, as one might imagine.

These pieces of evidence problematise modern post-colonial theorists' insistence that international law is nothing more than the projection of European liberal modernity. In fact, many Global-South authors have already challenged this post-colonial theoretical assumption. They argue that the European model of international order and its claims to be the unique provenance of the principles of the universality of morality/governance and civilisation, holds no special place in the overall development of human society.

For example, in *The Politics of International Law*, Martti Koskenniemi observes that identifying the international rule of law with liberal modernity has trapped international law in a particular Hobbesian (or European) ontology, sociology, and politics.³⁴⁸ This essay lends theoretical support to the collection entitled *The Moral Responsibility of Rulers: Going Back Beyond the Liberal Rule of Law for World Order*.³⁴⁹ In the book's introduction, Anthony Carty and Janne Nijman note their intention to free “the rule of law for world order” from its European liberal entrapment and restore its roots in the cross-cultural dialogue of a pluralist international order.³⁵⁰ However, their findings do not entirely reject the contemporary international legal system. Instead, most of the contributing authors come to the realisation that

³⁴⁵ Zhang, S. A Historical and Jurisprudential Analysis of Suzerain-Vassal State Relationships in the Qing Dynasty. *Front. Hist. China* 1, 124–157 (2006). <https://doi.org/10.1007/s11462-005-0003-8>

³⁴⁶ Mark Mancall, “The Ch'ing Tributary System: An Interpretive Essay”, in *The Chinese World Order*, ed. Fairbank, pp. 63-64

³⁴⁷ The Chinese Tributary System and Traditional International Order in East Asia during the Ming and Qing Dynasties from the Sixteenth to Nineteenth Century. Chen Shangsheng 陳尚勝 Professor of History, Shandong University, Chinachensh@sdu.edu.cn

³⁴⁸ Martti Koskenniemi, ‘The Politics of International Law’ *The Politics of International Law*.

³⁴⁹ Anthony Carty and Janne Elisabeth Nijman, *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (First edition, University Press 2018).

³⁵⁰ Anthony Carty and others (eds), ‘The Moral Responsibility of Rulers: Going Back Beyond the Liberal Rule of Law for World Order’, *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0001>> accessed 30 March 2023., 5

different cultural understandings of international order and law (such as morality, justice or ethics) “are not so incommensurable as they are often argued to be.”³⁵¹ The collection provides a forum that enables Asian historians and legal/political experts to explain why international law has never been completely disconnected from the politics of Asia.

For example, Tian Tao shows how 19th-century scholars, including W.A.P. Martin, Song Yuren, Kang Youwei, Tang Caichang, and Guo Songta, agreed that there was an analogy between European modern international law and the universal principles created by Confucius during the Warring States of *Spring and Autumn*.³⁵² For instance, Kang Youwei connected *Spring and Autumn*’s emerging inter-kingdom behaviour code to international law for the following reasons:

(1) Confucius and Grotius had a common belief in the human mode of behaviour and their spiritual pursuit.

(2) European international law and *Spring and Autumn* had the same internal basis—both carrying the idea of axiomatic and general law.

On the other hand, while acknowledging power politics, Qing officials of the time, such as Guo Songtao and Zheng Guanying, found that the pursuit of ethics and justice and a common code of conduct were the basic foundations of international law - just as in Confucianism.

The case study chapters also show that European and Confucian systems were not too far apart. Discussing the crisis of the Ryukyus in Chapter 16, Patrick Sze-lok Leung and Anthony Carty argue that, although Japan tried to depict China’s tributary relationship with Ryukyu as an example of China considering itself as of higher standing than any other country and was a threat to “European-style” international law, the reality was quite the opposite. The tributary relationship between China and Ryukyu provided significant autonomy to the Ryukyu people, and China was defending Ryukyu in the face of Japanese encroachment.³⁵³ Sze-lok Leung and Carty conclude that, although motivated also by self-interest, Chinese conduct was in conformity with the benevolence and the fair and universal rhetoric of European international law.

On the other hand, Bijun Xu and Patrick Leung contend that the legal order established by the traditional treaties between China, Korea and Japan should have been sufficient to save Korea from further encroachment on its freedom by Japan. They covered all the disputes arising in

³⁵¹ *ibid.*, 6

³⁵² Tian Tao, ‘Chinese Intellectuals’ Discourse of International Law in the Late Nineteenth and Early Twentieth Centuries’ in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0016>> accessed 30 March 2023.

³⁵³ Patrick Sze-lok Leung and Anthony Carty, ‘The Crisis of the Ryukyus (1877–82): Confucian World Order Challenged and Defeated by Western/Japanese Imperial International Law’ in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0017>> accessed 30 March 2023.

the Sino-Japanese War³⁵⁴ and concluded that Japan had simply violated these treaties, and that the international community, governed by Western international law, did not care. There was no real difference between Qing Court's approach to their so-called "tributary" relations and the dominant practices of international law.

Case studies of the Sino-Japanese war for Korea and the Sino-Franco war for Annam are also complementary to such observations. China's effort to keep Annam as a buffer state but also as an independent state (as it mostly was during the tributary history) was in accordance with Western international law. It was more so than the treaties of "equality" with France, whereby Annam was ultimately incorporated into the French Empire. Clearly, international law could not defend the personality of one of its principal founders, and Confucianism did not bar Chinese officials from understanding the contradictions between French behaviour and modern international law.³⁵⁵

Overall, most of the authors contributing to the study of the book agree that the "Tianxia" Confucian system is certainly Sino-centric and hierarchical. However, they also agree with the 19th-century scholar Guo Songtao's perspective, saying that "Tianxia" is a dynamic concept, as it changes with the expansion of the Chinese Empire and its interaction with the world. When facing new systems of law, particularly international law, the Empire under Heaven simply drew instant analogies. For the Qing literati, "international law, justice and reasonableness were overlapping concepts."

With the support of these theoretical and practical works, I argue that the nature and fundamental assumptions of modern international law, such as international rule of law, hope for a society of independent political entities, and equal and fair practices, are embedded in the operation of all human institutions. International law, even if it is viewed simply in positivist terms, does bring a sense of justice and fairness, contributing to the ongoing development of inclusion. As Pirie put it in her work *The Rule of Laws: A 4,000-Year Quest to Order the World*, "[...] once laws set out a vision that people can believe in, they can also be used against any power-holder who tries to ignore them. This gives law its ability to both legitimate and limit power."³⁵⁶

To further strengthen my proposition concerning the debates on the possible universality of international law and its recent institutions, some famous interdisciplinary studies would be helpful. Let us consider Adrian Hastings's *The Construction of Nationhood*. Hastings challenges the influential notion, posited by Elie Kedourie, Gellner, Anderson and Eric Hobsbawm, of Western-born nationalism and the nation-state as the "modernist" view of

³⁵⁴ Patrick Sze-lok Leung and Bijun Xu, 'The Sino-Japanese War and the Collapse of the Qing and Confucian World Order in the Face of Japanese Imperialism and European Acquiescence' in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0019>> accessed 30 March 2023.

³⁵⁵ Carty and others (n 354), 34

³⁵⁶ Fernanda Pirie, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books 2021).

human development.³⁵⁷ Hastings questions their studies: “Can the historian validly so redefine people against their own self-understanding?”³⁵⁸ By examining deeper the development in England, Western Europe, Slavic Southern Europe and cases in Africa, Hastings argues that it would be a mistake to categorise nations and nationalism into just two types – “Western” and “Eastern”. In Hastings’s language, the institution of government and nation-state is the natural development of the human community worldwide. “proto-nation,” or “nation,” “state,” or “quasi-state”... are all terms used to describe political communities and their population’s likeness in language, economy, culture, religion and more. There is nothing distinctively European about these concepts.

Patrick Manning’s critically acclaimed book, *A History of Humanity*, reaffirms the trend of *world history* established in significant works such as *Guns, Germs, and Steel* by Jared Diamond; *The Human Web* by John R. McNeill and William H. McNeill; *Maps of Time* by David Christian; *Big History and the Future of Humanity* by Fred Spier; *Social Change* by Christopher Chase-Dunn and Bruce Lerro; and *Sapiens* by Yuval Harari.³⁵⁹ By means of an exploration of the historical and anthropological evidence, Manning, in concurrence with the concepts of other world historians, suggests that when facing the same ecological threats and social changes (or “social and environmental pressure”), human societies seem to come up with almost identical human “institutions”, including the institutions of “community”, “confederation”, “rituals”, “workshops”, “politics”, wherever they were in the world. This forms what Manning calls the “living Human Systems” with a certain logic of social evolution. At their core, Manning’s concepts reject the views of early modern diplomats, such as Gobineau, who tried to describe civilisations in terms of race, where the former were achieved through a mysterious combination of the “civilising instinct”, group-level culture and the administration of a specific racial society.³⁶⁰

The “nation-state”, “international law”, and the “international rule of law” are institutions that fit the development of living Human Systems. The idea that they are inherently and distinctively “Western” is somewhat radical. As many political scientists have pointed out, it was the Asian kingdoms that first successfully created and possessed the “strong state” and the

³⁵⁷ Adrian Hastings, *The Construction of Nationhood: Ethnicity, Religion, and Nationalism* (Cambridge University Press 1997).

³⁵⁸ *ibid.*, 20 - 22.

³⁵⁹ Patrick Manning, *A History of Humanity: The Evolution of the Human System* (Cambridge University Press 2020) <<https://www.cambridge.org/core/books/history-of-humanity/7B275674255241D1BB2DEE626C2259C5>> accessed 12 April 2023.

Jared Diamond, *Guns, Germs, and Steel* (5th Printing edition, WW Norton 1999).

J McNeill and William McNeill, *The Human Web: A Bird’s-Eye View of World History* (1st edition, WW Norton & Company 2003).

David Christian, *Maps of Time: An Introduction to Big History, With a New Preface* (2nd edn, 2011).

Christopher Chase-Dunn and Bruce Lerro, *Social Change: Globalization from the Stone Age to the Present* (1st edition, Paradigm Publishers 2013).

Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Signal 2016).

³⁶⁰ Patrick Manning (ed), ‘Anthropocene Evolution’, *A History of Humanity: The Evolution of the Human System* (Cambridge University Press 2020) <<https://www.cambridge.org/core/books/history-of-humanity/anthropocene-evolution/EE110BB69C498B8D2416D0D53BEE7CE5>> accessed 12 April 2023.

“strong community”. In contrast, most European political entities were considered “weak states” until the 17th and 18th centuries.³⁶¹ Similarly, to say that a normative system for more predictable and honourable conduct in interstate relations exists only because European powers initially imposed it is also historically inaccurate, as is demonstrated by the history of the Asian Confucian states.³⁶²

3.3.3. **Non-recognition and Its Theoretical Roots in the Non-European World? Another Way to Interpret TWAIL**

In the above sections, some theoretical aspects of post-colonial/third-world intervention are examined and problematised for the sake of confirming the virtually universal nature of international law. However, when it comes to non-recognition, the evidence suggests that non-recognition is even a legal concept contributed to the international system and advocated by “non-European”, “developing”, or “third-world” countries. In this section, we spend some time exploring the possible world of alternative versions of “non-recognition” in different historical and legal international settings. This approach is to allow the modern understanding of non-recognition to interact with as many actors and agencies as possible, which could strip away prejudices and assumptions.

A. “Non-recognition” and the Confucious International Order?

Firstly, I propose the argument that the theoretical and cultural heritage of Eastern and Southeast Asian countries is much more relevant to the argument of non-recognition, compared to Enlightenment Europe. But did the Confucious international order have any practice that rejects wrongful acts and maintains justice? Was this order a voluntary system at all?

Of course, some authors refuse to see China’s international system, with its sense of justice and morality and its universal Confucian values, as freely chosen. Instead, they invoke “power” as the primary tool for understanding China’s inventive system. Wang, in a famous article named “Power, Confucianism, and War in Medieval East Asia,” argues that the system of inner vassalage, which tries to exclude the roles of nomadic Northern tribes of the Mongols, Jurchen, and later Manchus, does not paint the complete picture of China’s international relations.³⁶³ The rhetoric of China as the embodiment of moral superiority and civilisation, with universal recognition inside the Asian sphere, fell short when China had to deal, occasionally, with much stronger Northern empires. The Song dynasty decided to offer money and, technically, after the Treaty of Shanyuan, became an inferior state within the Liao empire, hoping that it could preserve interstate peace and maintain its already weakened internal governance.³⁶⁴ Also, China was periodically invaded by “barbarian” outsiders. Tribes from the steppes founded two major

³⁶¹ David Stasavage, ‘The Ongoing Democratic Experiment’, *The Decline and Rise of Democracy*, vol 96 (Princeton University Press 2020) <<https://www.jstor.org/stable/j.ctvss3zz6.16>> accessed 16 April 2023.

³⁶² Yongjin Zhang, ‘System, Empire and State in Chinese International Relations’ (2001) 27 *Review of International Studies* 43.

³⁶³ Yuan-kang Wang, ‘Explaining the Tribute System: Power, Confucianism, and War in Medieval East Asia’ (2013) 13 *Journal of East Asian Studies* 207.

³⁶⁴ David C Wright, ‘The Sung-Kitan War of A.d. 1004-1005 and the Treaty of Shan-Yüan’ (1998) 32 *Journal of Asian History* 3.

dynasties — the Yuan Empire, from 1271 to 1368 (which was of Mongol origin), and the last imperial dynasty of China, the Qing, from 1644 to 1911 (which was Manchu).³⁶⁵ In agreement with Wang's arguments (in *The Tenacious Tributary System*), Peter Perdue contends that the role of a peaceful tributary order modelled on Confucian norms has been largely exaggerated.³⁶⁶ Perdue rightly points out that open Chinese dominance could only be maintained with the Ming's or the Qing's superior military and economic prowess. And in the Northern kingdoms, which did not accept the Confucian world view, a much more jaundiced kind of international relations began to be practiced by the Chinese elites. The Ming dynasty always regarded the Inner Asian steppe as a threat. And although they did establish some control over the whole of the former Yuan dynasty's possessions, Ming's frontiers were reduced in all directions, as explained in Timothy Brook's book *The Troubled Empire*.³⁶⁷ Eventually, Ming courts came to rely on the Great Wall and retreated behind this strategic defensive structure.

On the other hand, Crossley argues that the Qing became much more successful in dealing with Inner Asia than the Ming, not because of Confucian normative power, but because Qing imperial ideology could be flexible, thanks to their Central Euroasia kinship with the Mongols and other peripheral groups.³⁶⁸ They also presented themselves as the defenders of Lamaism/Tibetan Buddhism - the most influential religion in those regions. The emperor Kangxi, for example, was particularly popular among the Mongols because he was adept at using Buddhist conceptions of universal benevolence. Many Tibetan Buddhist clerics revered Kangxi as one incarnation of Maitreya Buddha, thus legitimising the imperial role of the Qing court over the Mongols and other tribes.³⁶⁹

This is some of the information that we need in order to remind ourselves that China's superiority as the centre of a cosmologically ordered social structure was not uncontested. And the morality of Confucianism has never been the only source for the East Asian concept of international relations. However, extending a little our discussion concerning the Confucian world order in the previous section, the relationship between nations that accepted this order had all the theoretical elements for the flourishing of modern non-recognition. For instance, concerning peace and non-interference, the research group of David C. Kang shows that Vietnamese courts dealt with interstate wars far more often early in their history, and most of the wars were against the Ming Chinese occupation from 1407 to 1428.³⁷⁰ After Vietnam re-established its independence, however, China rarely waged war against this tributary state to seek partial or complete dominance.

³⁶⁵ Erik Ringmar, 'China and East Asia', *History of International Relations : A Non-European Perspective* (Open Book Publishers 2020) <<http://books.openedition.org/obp/9081>> accessed 15 November 2022.

³⁶⁶ Peter C Perdue, 'The Tenacious Tributary System' (2015) 24 *Journal of Contemporary China* 1002.

³⁶⁷ Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (Belknap Press 2013).

³⁶⁸ Pamela Kyle Crossley, *A Translucent Mirror: History and Identity in Qing Imperial Ideology* (University of California Press 2002).

³⁶⁹ Perdue (n 370).

³⁷⁰ Kang DC, Nguyen DX, Fu RT, Shaw M. War, Rebellion, and Intervention under Hierarchy: Vietnam–China Relations, 1365 to 1841. *Journal of Conflict Resolution*. 2019;63(4):896-922. doi:[10.1177/0022002718772345](https://doi.org/10.1177/0022002718772345)

As noted above, the connection between China and the tributary states became essentially one of culture and trade rather than a political-military one, as contemporary scholars have offered a different interpretation of this relationship, which is called the “investiture-tribute system” (*fenggong tixi* 封貢體系).³⁷¹ These scholars believe that the relationship between the Chinese empire and its neighbours was generally mutual, and not always unilaterally imposed by China. When the Chinese empire received tributes (precious metals, luxurious goods and exotic products) from its neighbours, it reciprocated with investiture and also tributes (Chinese products, rights to trade with the imperial traders, rights to diplomatic recognition as “inner vassal” (neichen, 內臣).

Even though the Manchus and the Mongols were not native to the concept of Confucian states and they basically imposed alien rulership in China, the observation that they were eventually brought under the influence of Chinese customs has been long established in the literature, beginning, arguably, with Thomas Pereira - a Portuguese missionary who spent decades in the Qing Empire and even held several high government posts.³⁷² Thus, the capacity of the Confucian system, whose moral objective was to promote social order and cosmic harmony, should not be underestimated and should not be associated with modern realist theories of international relations.

Acknowledging such a sense of the Confucian order and morality, non-recognition – in this context understood as a gesture of not recognising a series of facts produced by illegitimate actions – was neither about aggression, territorial annexation, nor human rights. These concepts have never been the core of the Chinese international order. Instead, the latter was about the rule-based, music-ritual harmonious order of a Sinocentric cosmology, where Chinese emperors bestowed peace, civilisation, morality and Confucianism upon other states. This system of rules would have been violated if Confucius’s ideology was broken and the Sinocentric civilisation undermined.

The practice of East Asian historical “non-recognition” had been employed precisely at these moments. Most importantly, the historical “non-recognition” of the Manchu’s subversion of the Confucian power dynamic and the fall of the Ming dynasty practised by both Vietnam and Korea – two integral members of the neo-Confucian realm – would be exemplary.

If prudent calculations on size, economic gains and military prowess were the themes of the Eastern Asian international order, then the Korean Chosŏn dynasty’s submission to the ruler of the new giant empire standing right at their doorstep should be automatic. But that was not the case at all. The Koreans, in general, continued to see themselves as supporters of Ming dynasty orthodoxy.³⁷³

³⁷¹ Dittmar Schorkowitz and others (eds), *Managing Frontiers in Qing China: The Lifanyuan and Libu Revisited* (Brill 2016) <<https://brill.com/display/title/32688>> accessed 13 December 2022.

³⁷² Sergei Leonidovich Tikhvinskii and Leonard Sergeevich Perelomov, *China and Her Neighbours, from Ancient Times to the Middle Ages: A Collection of Essays* (Progress Publishers 1981), 12

³⁷³ JaHyun Kim Haboush, ‘Contesting Chinese Time, Nationalizing Temporal Space: Temporal Inscription in Late Chosŏn Korea’, *Time, Temporality, and Imperial Transition* (University of Hawaii Press 2005)

Chinese civilisation (Korean: Chunghwa/中華) at the centre of the physical and philosophical worlds was an established and fundamental concept of politics in Chosŏn (or Joseon) linked the courts in Beijing and Hansŏng to one another.³⁷⁴ Following Toyotomi Hideyoshi's 豊臣 秀吉 (1537–1598) invasion of the Korean peninsula and the Ming empire's genuine support for the Chosŏn dynasty, some circles within the government even began to worship Chinese generals and gods of war.³⁷⁵ Long before that, the Korean royal court used the years of the Ming Emperor's reign to record letters and documents.

Within this Chinese-Confucious international moral order, the Koreans actively refused to recognise the new Qing dynasty's superiority. The principle of Korean foreign affairs for almost a decade was: Ming and its political remnants were continuously seen as the true Confucian state, while the Manchus were no more than barbarian interlopers.³⁷⁶ Yun Chip 尹集 (1606–1637), a devoted Confucious scholar and an important Korean statesman of the time, appealed to King Injo in 1636 that he would rather see the country be destroyed “than to be unable to uphold righteousness.”³⁷⁷ Overall, it took the Qing court two major invasions (with a hundred thousand troops) in 1627 and 1636, and the execution of the entire anti-Qing Korean Confucious leadership to suppress Joseon's “non-recognition” of Qing's new rule of the Central Kingdom.³⁷⁸

Although the political contexts were vastly different, a very similar approach is recorded in Vietnam's history. Around the 1640s, Dai Viet (Việt Nam) or Annam (安南 as it was called by Chinese rulers) faced serious internal strife and crises. The “Le Kings and Trinh lords” (Vua Lê - Chúa Trịnh) constituted the most well-established and powerful feudal political entity in the country. However, a “two heads regime” (*luồng đầu chế*) has never been an ideal form of government for an absolute monarchical state. Manipulation, political coercion and even *regicide* were the main themes of the relationship between Le Kings and Trinh lords, in which

<<https://www.degruyter.com/document/doi/10.1515/9780824873905-007/html>> accessed 22 November 2022. See also: Han Myŏnggi, “Myŏng-ch'ŏng kyoch'egi tongbuk'a chilsŏ wa chosŏn chibaech'ŭng ui taeŭng” (The East Asian order and the response of the Chosŏn elite during the Ming-Qing transition), *Yŏksa wa hyŏnsil* 37 (2000.9), 124–148; 130–137.

³⁷⁴ See more from Korean scholars: Yuanhong Wang, “Claiming Centrality in the Chinese World: Manchu–Chosŏn Relations and the Making of the Qing's “Zhongguo” Identity, 1616–43.” *The Chinese Historical Review* 22, no. 2 (November, 2015): 95–119.

³⁷⁵ Kuwano Eiji “Chosŏn Korea and Ming China after the Imjin waeran: state rituals in the later Chosŏn period” in *The East Asian War, 1592–1598: International Relations, violence and memory* (Abingdon: Routledge, 2015), 294–321. Also Thomas Quartermain, ‘Besieged on a Frozen Mountain Top: Opposing Records from the Qing Invasion of Chosŏn, 1636–1637’ (2018) 21 *Acta Koreana* 137.

³⁷⁶ Perdue (n 370).

³⁷⁷ The translation could be found in Quartermain (n 379). Also find the official view of the Joseon court in: Myengsoo Seo, ‘Changing Perceptions of the Qing Dynasty in the Late Joseon Dynasty and Chinese Style Architecture That Emerged in Joseon in the 18th Century’ (2022) 21 *Journal of Asian Architecture and Building Engineering* 849.

³⁷⁸ Beside Yun Chip, Korean Confucious statesmen including O Talche 吳達濟 (1609–1637) and Hong Ikhan 洪翼漢 (1586–1637) were also handed to Qing and then executed. See more in: ‘Manchu Invasion of Korea’ (*New World Encyclopedia*)

<https://www.newworldencyclopedia.org/entry/Manchu_invasion_of_Korea#Second_Manchu_Invasion_of_Korea> accessed 23 November 2022.

the latter held the controlling position.³⁷⁹ In the extreme north of Vietnam, however, especially in Cao Bang province, the Mac dynasty continued to compete for the official title of the “King of Annan”. The Mac rulers were the usurpers of Le’s throne and were generally seen by the Viet population as illegitimate. However, their military prowess, for some time, exceeded or rivalled that of the Le-Trinh alliance. More importantly, this dynasty was to a certain extent supported by the Ming (and then the Southern Ming) dynasty.³⁸⁰ In the south, Nguyen lords also established a new centre for Viet civilisation - Phu Xuan. Southern Vietnamese at the time called their territory the “Inner Region” (Đàng Trong) to differentiate themselves from the “Outer Region” (Đàng Ngoài), which also indicated their intention to create a distinct political entity.³⁸¹

Surprisingly, all of these entities maintained a strict formal recognition of the “Heavenly Court” of the Ming dynasty. Around 1640, even though Ming had been weakened significantly, with minimal control inside Ming territory, the Trinh lord still wrote to the Ming Emperor asking that the title “King of Annan” be restored to the “Revival” Le king.³⁸² His request was denied, however, as the Ming were now supporting the Mac dynasty, with the intention of prolonging the factional fighting inside Dai Viet.

In 1644 - 1645, when Qing troops successfully took over Beijing, both Mac and Le-Trinh showed no sign of accepting the new Qing-led international order. They continued to view the newly established Southern Ming emperor as the “Son of Heaven”, and the Ming dynasty as the only truthful representative of the Confucian/Heaven-mandated cosmology. In 1646, the Trinh lord even again asked Zhu Youlang (Yongli Emperor/永曆帝), the last emperor of the Southern Ming, to reconsider the decision to restore the “King of Annan” title to the incumbent Le king. This time, the Yongli Emperor agreed and sent Dai Viet a gold and silver seal, inscribed “King of Annan.”³⁸³ For 15 years, from 1645 to 1659, despite internal conflicts and competition for legitimacy between the Le-Trinh, Mac and Nguyen feudal factions, all the Vietnamese political entities favoured the remnants of the Ming dynasty.

It is important to note that they also had their chances to communicate with the Qing rulers. When the Qing troops took control of Fujian in 1645, two Le-Trinh ambassadors were arrested by Qing troops. The ambassadors were then sent back to Dai Viet with the message that the

³⁷⁹ See more from Trần Thị Vinh, ‘Thế chế chính quyền Nhà nước thời Lê - Trịnh sản phẩm đặc biệt của lịch sử Việt Nam thế kỷ XVII-XVIII’ <http://repository.vnu.edu.vn/handle/VNU_123/70611> accessed 24 November 2022.; and

Vuong Tran Ngoc, ‘Lưỡng Đầu Chế Thời Lê - Trịnh và Những Hệ Quả Lịch Sử Của Nó (Kỳ 1)’ (2008) 209 Tạp chí Triết học <<http://philosophy.vass.gov.vn/triet-hoc-vietnam/Luong-dau-che-thoi-Le--Trinh-va-nhung-he-quachich-su-cua-no-Ky-1-58.0.html>> accessed 24 November 2022.

³⁸⁰ Nguyen Thi My Hanh, ‘Controversial Border and Territory Issues between the Mac Dynasty (Dai Viet) and Ming Dynasty (China)’ (2022) 9 Humanities and Social Sciences Communications 1.

³⁸¹ Li Tana, ‘An Alternative Vietnam? The Nguyen Kingdom in the Seventeenth and Eighteenth Centuries’ (1998) 29 Journal of Southeast Asian Studies 111.

³⁸² Ibid.

³⁸³ Kathlene Baldanza, *Ming China and Vietnam: Negotiating Borders in Early Modern Asia* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/ming-china-and-vietnam/2113FB7FA7F2C110BE11AC3008B388BE>> accessed 29 November 2022.

Qing had inherited the Mandate of Heaven and requested Dai Viet's recognition and submission. However, the Revival Le dynasty refused to recognise the Qing and allied themselves with the Ming.³⁸⁴ For the Mac court, in 1659, when Qing troops successfully took over Guishun, Guizhou, the Yongli Emperor, and some of his followers passed into Mac territory. Facing Qing's first vital diplomatic demand to give up the refugees, Mac's leadership declined.³⁸⁵ Concerning the Nguyen court, they were occupying the southern lands of Dai Viet and did not need to be involved directly in the legitimacy disputes. However, for the Nguyen lords, specifically Nguyen Phuoc Hien, it had become a tradition to receive Ming loyalists and they were treated with respect and dignity. Some high-ranking Ming officials were given lands and opportunities to work for the Nguyen court.³⁸⁶

Indeed, Dai Viet feudal factions could not avoid the new reality forever. In 1662, Zhu Youlang was captured and executed by the Qing. Dai Viet finally accepted the Great Qing as the new leader of the old "investiture-tribute system", marking almost two decades of Dai Viet's campaign of "non-recognition" of the Qing. Overall, the arguments and information above are not designed to say that modern-day non-recognition was intelligible and accepted as a regional moral doctrine in Sinocentric East Asia. However, dealing with the reality that a bigger and stronger empire had absorbed the old-world order, members of this East Asian system clearly showed that these medieval states were motivated by something other than mere anarchic self-interest. Confucius's morality and systematic belief in Sinocentric cosmology strongly restrained states' behaviour. Such a foundation made the assimilation by this society of the modern concept of non-recognition reasonably smooth.

B. "Non-recognition" in High Medieval, Renaissance, and early modern Europe

Europe's high medieval era (from 1000 to 1300 A.D), the Renaissance era, and the modern era (from after 1500 A.D to, arguably, the middle of the 18th century), were not as organised and stable as the East Asian order. In fact, I would argue that they fell short even by comparison with Vietnam or Korea, in terms of the functional and instrumental elements that characterise the modern state. European borders were fluid in nature. The extent of territories ruled by an individual might well fluctuate between successive rulers of the same dynasty, owing to inheritance laws, alliances by marriage or the outcome of wars of conquest.

Although the European entities could define themselves under one religious, cultural, political and juridical unity, often referred to as the *respublica christiana*,³⁸⁷ the polities of kings, lords, and royal princes represented their own political interests, which sometimes led to direct conflict. Europe's feudal system was based on a hierarchy of relationships, with the Pope and

³⁸⁴ Hongnian Sun, *Qing Dai Zhong Yue Zong Fan Guan Xi Yan Jiu* (Di 1 ban, Heilongjiang jiao yu chu ban she 2006) <<https://catalog.lib.uchicago.edu/vufind/Record/5892865>> accessed 29 November 2022., 3

³⁸⁵ Ibid, 5-6

³⁸⁶ Văn Lượng Lưu, *Biên Hoà Sử Lược Toàn Biên (Quyển Thứ II)* (Biên Hùng 1973), 112

³⁸⁷ Randall Lesaffer (ed), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press 2004) <<https://www.cambridge.org/core/books/peace-treaties-and-international-law-in-european-history/C219F9C0E8C4DD7DB46D505B44BA5BD1>> accessed 30 November 2022., 12 - 13

the Holy Roman Emperor at the top, nobles below them and the peasants at the bottom.³⁸⁸ However, there was no political actor that could effectively represent the entirety of one political territory. Even kings sometimes had to settle differences and conflicts of interest with their subordinates. King Louis XI of France, for example, had to resolve disputes with his rebellious vassals of the Ligue du Bien Public led by Charles the Bold through the Treaty of Conflans of 1465 and the Treaty of Péronne of 1468).³⁸⁹ Even the Emperors of the Holy Roman Empire frequently entered into peace “treaties” with their vassals and with small city towns in central and northern Italy that repeatedly went to war against their ruler.³⁹⁰

In fact, the concept of treaties, territorial thinking, and the idea of a united political entity was severely underdeveloped in Europe. Historical records provide no evidence that the political actors at the time understood the difference between internal treaties (signed between a suzerain and his vassals) and external ones (signed between two sovereign kings or suzerains).³⁹¹ Kings and Emperors had to deal with vassals who owed them allegiance as if the underlings were foreign rulers. Depending on the power balance, the location, and even family ties, French magnates could become vassals of German kings and ask for assistance when threatened by their principal lords. And while German vassals might already be bound by feudal allegiance to their German kings, they could also receive financial or rental fiefs and enter into feudal relations with foreign rulers from England and France.³⁹² If there were conflicts between their liege lords, these vassals (who usually lived in frontier towns or rich and semi-independent cities) could retain their neutrality through the system of double-vassalage.

These conditions seem to ensure that our search for non-recognition in historical Europe is bound to fail. Since the number of loosely independent political entities with substantial *de facto* power was abundant, their “statements” or “behaviours” of non-recognition risks overwhelming our study with a plethora of examples with no real legal substance. Private feudal conflicts between these entities were beyond number, and the importance of each “non-recognition” practice could reach saturation point. In short, we are afforded to conclude that elements such as territorial order, defined population, and the administrative and sovereign capacity of medieval European polities render it virtually impossible to make comparisons with modern international law.

However, even in this allegedly anarchist society of nations/polities, there must be certain types of rules for non-recognition. Conduct that went against the morals of Christendom led to legal discontinuity, rival claims for power and forced dispossession of feudal inheritance, which were things that had to be resolved or restrained, one way or another. Otherwise, even the basic structure of *respublica christiana* would not have been able to survive.

³⁸⁸ Richard W. Mansbach, Kirsten L. Rafferty, Introduction to Global Politics, s.61.

³⁸⁹ Lesaffer (n 391).

³⁹⁰ Wilhelm G. Grewe, *The Epochs of International Law* (De Gruyter 2013) <<https://www.degruyter.com/document/doi/10.1515/9783110902907/html?lang=en>> accessed 6 December 2022.

³⁹¹ “the monopoly of representing their territories” is a phrase borrowed from Lesaffer (n 391), page 16.

³⁹² Grewe (n 394), 68 - 69

Luckily, Wilhelm G. Grewe's seminal work, *The Epochs of International Law*, allows us to find some confirmation of the existence of the legal notion of non-recognition, although indeed, Grewe never directly mentions the principle of non-recognition of modern international law. Specifically, Grewe finds that medieval European law did not accept the right to conquest within Christendom. Using a mix of public law (the concept of the *just war* and private law (*feudal possession and inheritance law*), Grewe proves that the idea of a "just feud" was limited to inflicting damage upon the adversary, not taking away his inheritance, property, and lands. Grewe cited other experts, such as Brunner, to reach a conclusion on the legal perspective of the medieval feud:

"Whoever attacks the possessions of his adversary in feud, no longer exercises feud but dispossession, lawless force. Thus, he becomes, in the law of the land, a violator of the peace and an enemy of the country."³⁹³

Therefore, private conflicts and public wars between European polities were frequent and allowable. However, "territorial acquisition" would be considered lawless and would generally not be recognised. This is the closest we can get to the concept of non-recognition as it exists in modern international law. The idea of this principle of the medieval feud is that after the conclusion of peace between two adversaries, lands, villages, and castles would be restored to their original and rightful owners.

Scattered across Grewe's book are examples that we can understand as the practice of non-recognition in medieval Europe. For example, in 1400, the incompetent but lawful Roman-German King Wenceslas was deposed by the collective decision of the German princes. Then Rupert, Count of Palatine, was chosen as the new king. Such conduct was clearly against the Papal order and the inheritance laws of Christendom. Hence, the reaction of other polities was somewhat in line with what we would expect. Vassal states and magnates of the Holy German Empire, such as Aragon, Padua, Florence and Luca, did not answer Rupert's call for submission. Venice made a declaration of neutrality. Mantua explicitly refused. The Pope provided conditions and requirements for Rupert if he wanted the Papal blessing, and the King of France and the King of England delayed their answers and waited until a concrete political opinion was settled.³⁹⁴ Indeed, just like the East Asian international order, reality and effectiveness eventually ruled in medieval Europe. Temporal rulers with actual control of the kingdom's territories and resources were always better partners than legitimate rulers with no means to sustain their partnership and alliance. However, we could also conclude that legal, moral and even religious restraints prevented European kingdoms from behaving anarchically.

Unfortunately, this was the end of the medieval European root of non-recognition until the creation of the League of Nations. Mixed populations with no definitive border or delimitation effort, and then came the capacity of extensive and effective sea exploration, set Europe became the main theatre of international politics. The idea of borders, proper conduct and lawful

³⁹³ *ibid.*, 122-123

³⁹⁴ *Ibid.*, 82

restraint became a hindrance to European colonial ambitions. And they were not even a reality within Europe.

While international lawyers, until this point, generally agree that the Westphalian Treaties laid down the basic principles of the modern law of nations, such as sovereignty, equality, religious neutrality and the balance of power,³⁹⁵ many international historians debate such a hypothesis. For instance, in *Peace Treaties and International Law in European History*, Lesaffer argues that the Westphalia peace treaties succeeded in putting an end to Europe's bitter and chaotic religious wars. They also succeeded in bringing peace to the Holy Roman Empire and establishing relative stability in Central Europe. However, Lesaffer points out that references to the sovereignty and equality of religions were just a part of the constitutional arrangement for the new order of the Holy Roman Empire. The clauses are far less original than many prior peace treaties. The Westphalia peace treaties do not merit being considered as constituting a milestone in the technical-juridical development of modern international law.³⁹⁶

Supporting this line of argument, Glenda Sluga, in *The Invention of International Order: Remaking Europe after Napoleon*, proposes that, not even after the Napoleonic wars that Europe had any rule-based territorial order been established in Europe or, consequently, in the European colonial territories. As Sluga observes: "Republics existed alongside constitutional monarchies; tiny principalities were lodged between large absolutist empires."³⁹⁷ And almost any of them could disappear at any time with no one batting an eye. The making, breaking and re-establishing of polities became business-as-usual in Europe. At the beginning of the 1800s, Bonaparte alone invented the Confederation of the Rhine (the *Rheinbund*). Three hundred formerly sovereign polities of various forms were now combined into 39 agglomerations, populated by three million people. The Kingdom of Westphalia, and the Kingdom of Italy reduced the ten polity units of the Italian peninsula to only three. This was the reality until the Napoleonic domination of Europe ran out of steam in the 1810s. Subsequently, the European political map was redrawn again and again for almost another century.

The above outline fits with the historical legal development set out by Grewe.³⁹⁸ Grewe divides the law of nations of Europe from 1494 to 1919 into the following: the Spanish Age (1494 - 1648), the French Age (1648 - 1815), and the British Age (1815-1919). Yet, in all of these eras, "realpolitik", the acquisition of territory by effective occupation and control (the so-called classical law of occupation), and "effectiveness" were the legal principles that prevailed. Sometimes, the cession of territory was tied to the emerging principle of national sovereignty and self-determination. In the Treaty of Turin of 1860, Savoy was ceded to France; the London Treaty of 1864 ceded the Ionian Islands to Greece and the Vienna Peace Treaty of 1866 ceded

³⁹⁵ Ove Bring, 'The Westphalian Peace Tradition in International Law: From Jus Ad Bellum to Jus Contra Bellum'.

Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 International Organization 251.

³⁹⁶ Lesaffer (n 391), 10-12.

³⁹⁷ Glenda Sluga, *The Invention of International Order: Remaking Europe after Napoleon* (Princeton University Press 2021) <<https://www.degruyter.com/document/doi/10.1515/9780691226798/html>> accessed 6 December 2022.,

³⁹⁸ Grewe (n 394).

Venice to Italy. These treaties expressed the consent of the population or the confirmation of authorised representatives of the people of the territories and seemed to be the one requirement for the lawful transfer of territory. However title by conquest was still the dominant norm for the European powers, whether inside or outside of Europe. I have discovered, to my surprise and contrary to orthodox belief, that the foundation of non-recognition in European legal thinking before the First World War was even weaker than in the East Asian legal order.

C. *Non-recognition and Its Philosophical Roots in the “Third World”?*

When certain theoretical aspects of post-colonial/third-world intervention are examined, the evidence suggests that non-recognition is a legal concept given to the international system and advocated by what are normally referred to as “non-European”, “developing”, or “third world” countries.

To begin with, as we have mentioned many times throughout the thesis, non-recognition appeared for the first time in 1890, at the Washington international conference of American States. The conference provided a forum for American countries to introduce their concept of equality between states and their position that military conquest should generate no territorial rights.³⁹⁹ Only after that event did the principle of non-recognition make its way into international instruments. From the Kellogg—Briand Pact and the Covenant of the League of Nations to the Anti-war Treaty of Non-aggression and Conciliation, states either agreed implicitly to “undertake to respect and preserve as against external aggression” or explicitly committed themselves not to recognise any territorial arrangement, occupation or acquisition of territories not obtained by “peaceful means.” At its inception, non-recognition was clearly a revolutionary innovation of national groups outside the Eurocentric system of beliefs. It was slowly incorporated into the universal legal system because it reflected the fairness and equitableness that any international legal system needs to justify its existence.

Even more interesting, the philosophical tendency of non-recognition, as shown in Part A of Section 3.3.3., is more suited to the ideological peace and harmony of the East Asian international order, rather than the mayhem of medieval Europe. Empirically, this observation is further supported by the fact that it was China and a territorial dispute in East Asia during the early 20th century that brought to life the whole modern literature and discussion of non-recognition. On the other hand, as the case studies chapter will prove, non-recognition has been the tool of the “weak” for over a century. Although we will analyse these cases in depth in the next chapter, a short overall argument here might be helpful in both illustrating my argument and preparing us for the case studies.

In the case of Manchuria, many international authors tend to label non-recognition as an “American” legal contribution (by naming it the “Stimson Doctrine”). But at this point, this should not be the case. Although the American delegate played a role in the whole process, it

³⁹⁹ See Leonard, T. M. (2012). First international conference of American states, Washington, 1889. In the Encyclopedia of U.S.-Latin American Relations (pp. 347-347). CQ Press, <https://dx.doi.org/10.4135/9781608717613.n318> and Brownlie I, *International Law and the Use of Force by States* (Oxford University Press 1963), 410

was the Nationalist Government of the Republic of China that pursued the legal strategy of non-recognition with their innovative use of League's legal framework and their consistently skilful diplomacy. While wars and territorial skirmishes were still being treated as the norm in the world of the early 20th century, with the advice of experienced diplomat Wellington Koo, the Chinese appealed on September 21, 1932 to the League of Nations under Article 11, and to the United States as a signatory to the Kellogg-Briand pact.⁴⁰⁰ They effectively and legally manoeuvred their skirmishes with Japan into an international issue. This astute Chinese move, despite being strongly opposed by the Japanese, paved the way for a highly successful diplomatic and propaganda campaign in Geneva. While China had insufficient resources and military capability to dismantle the Kwantung Army, their legal efforts paid off with legal assessments of Japan's conduct, international commitment to the firm idea that Manchuria was indisputably Chinese territory, and a legal confirmation for restoration. In my view, it is the nationalist government of China, rather than Stimson, that should be credited with the innovation and endeavour concerning the first use of non-recognition in the League's system.

Similarly, although the Ethiopian crisis was indeed the mark of the failure of the League's system and also the downfall of the League's collective security, we must also note that the duty of non-recognition was called for, not by a utopian European or a European international legal scholar, but by Emperor Haile Selassie himself. According to the Emperor, Article 16 of the League Covenant (which is very close to Article 41 of ARSIWA) and the concept of collective security were of utmost importance to the existence of the League. We will not examine the details of the case, but in general, the idea that the international community should not recognise Italy's conquest was due to Ethiopia, with some support from non-colonial states such as the Soviet Union, New Zealand and the Nationalist Government of China after 1937. In this case, the practice of non-recognition clearly detached itself from the rhetoric of the Western rule of law and civilisation that Italy tried to use to justify its conquest.

In all later cases within the United Nations era, including Tibet, Palestine, South Africa, Cambodia, and Ukraine, non-recognition is tailored specifically for developing countries' needs and legal benefits, thanks to the active role of democratic institutions like the UNGA. Dealing with the systemic and institutionalised human rights violations in South Africa, non-recognition was used creatively and assertively by the international community to bypass the so-called "internal affairs objection" or principle of "non-interference." Most notably, even in the case where India – a formerly colonised nation – resorted to the use of force to violently reverse the colonial situation in Goa, the international process involved helped us to clearly prioritise which "unlawful situation" we should focus on; and it was the remnant of colonialism, not the artificial "territorial integrity" of the Portuguese empire.

This chapter is set up to present, depict and discuss most major aspects of the concept of non-recognition. Firstly, the chapter visits non-recognition through a rare theoretical approach, that

⁴⁰⁰ Lord Bullock and William Deakin, 'The Manchurian Crisis: The European Powers and the Far East' in Zara Steiner (ed), *The Lights that Failed: European International History 1919-1933* (Oxford University Press 2005) <<https://doi.org/10.1093/acprof:oso/9780198221142.003.0015>> accessed 9 November 2022.

of O'Mahoney. O'Mahoney's political thesis on non-recognition offers further support to my hypotheses on non-recognition and its status as customary international law: (1) The rule maintenance theory of non-recognition explains non-recognition as an organic part of international law, and (2) Non-recognition as a process theory fits perfectly the presumption in our chapter on customary international law.

Then, the chapter tries to systemise and understand contemporary debates and uncertainties surrounding the duty of non-recognition found in the existing literature. They include the three questions concerning the technicality/properties of non-recognition, the blurred line between non-recognition and economic sanctions, and the critical difference between the law of non-recognition and the law of recognition in international law. Although some facts and cases are discussed, they largely serve as vantage points for the technical debates and the ongoing interpretative "negotiation" of the concept of non-recognition.

Finally, the chapter addresses possible problems of non-recognition relating to the emerging scholarship of post-colonialism and decolonisation. In this section, non-recognition is examined through a historical lens. This enables me to incorporate the concept of "non-recognition" into the larger story of worldwide progress. We found that the idea of non-recognition, which could briefly be described as the principle that law or right does not arise from injustice, and seems to be embedded in the spirit of the law of many epochs of international order. Interestingly, the practice of not recognising specific political facts due to their contradiction with existing norms was even more prevalent in Eastern Confucian society than in the European order. Such an understanding helps me to rethink or even challenge the idea that non-recognition is a Western legal concept.

4. Deconstructing State Practice

4.A. Pre-Charter Non-recognition

The non-recognition literature has never appreciated the pre-charter practice of non-recognition. However, I believe that such a harsh evaluation does not do justice to the contribution, the context, and the innovation that the international community at that time was able to produce, despite all the historical constraints. Although I do not wish to form a complete argument in this chapter, it explores all the overlooked and underappreciated developments of non-recognition during this challenging timeline. I believe that a commitment to understanding what happened in this era of non-recognition practice will allow the dissertation, in the latter chapters, to grasp and establish a more reliable and linear continuity of non-recognition as a legal concept of the modern world.

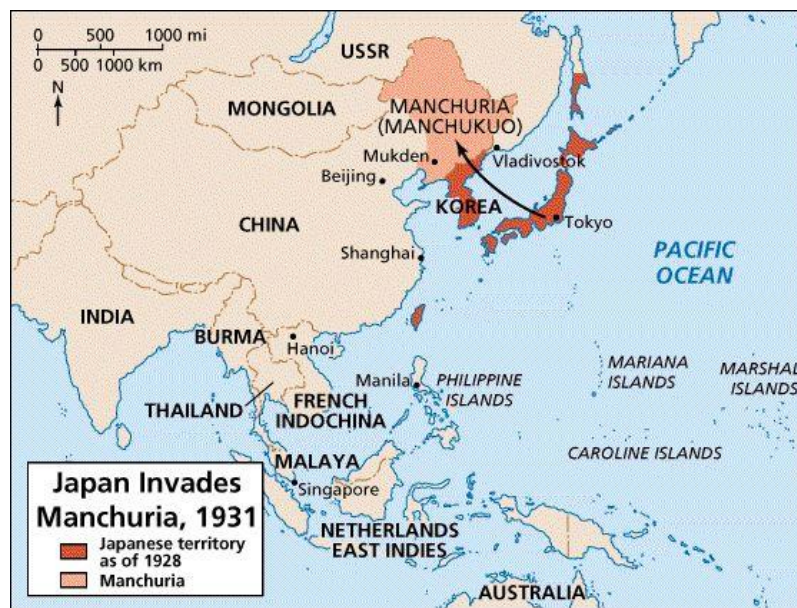


Image 4.A.1 Illustration of the Japanese Empire and the Manchurian situation.⁴⁰¹

4.A.1. Non-recognition in Manchuria Crisis (1931 – 1933)

The standard view of the international response during the Manchuria incident of 1931 – 1933 is that it was a failure. It was believed that there was no significant development in either the law or the politics of international actors. Many see this incident as undermining the international order and displaying the ineffectiveness of the League of Nations in its role of maintaining international peace. Such views, while quite ubiquitous, unfairly use contemporary

⁴⁰¹ 'Japan and the Manchuria Crisis | History Revision for GCSE, IGCSE, IB and AS/A2 History | Mr Allsop History' <<https://www.mrallsophistory.com/revision/japan-and-the-manchuria-crisis.html>> accessed 20 December 2023.

standards and language in their critique of a historical community that still regarded colonialism as inevitable, and where the political leadership of colonised territories was struggling to formulate an alternative vision of international relations at a time when nationalism and national liberation were still alien concepts.

The views also ignore the perspective of international legal scholars of the time. For example, Manley Ottmer Hudson, an American lawyer and judge at the Permanent Court of International Justice and a member of the International Law Commission, hailed the responses of the Assembly of the League of Nations to the Sino-Japanese Dispute as '*epoch-making*'.⁴⁰² He argued that this was the first time since its inception that the League of Nations was able to collectively use the procedure of Article 15 of the Covenant and new significance was given to its provisions.

Which of the interpretations above should we favour? How should we understand the role of the Manchuria incident in the development of the principle of non-recognition in international law?

1. Preliminary Political-legal analysis

A. Environment

To start with, both China and Japan were members of the League of Nations at the time of the conflict, although the intentions and ambitions of each were vastly different. The diplomats of the Republic of China ("ROC") had high expectations of the League of Nations. The ROC was a founding member of the League and was present at the 1919 Paris Peace Conference. A very optimistic assumption of the elite of Chinese society was that the world was changing and that equality for smaller, weaker nations was achievable. Of course, such a vision was contradicted by the continuing chaos on the Chinese mainland, but we should not underestimate what the Chinese delegation could do with their limited resources, even when facing the negligence of the major powers.

As members of the League, they expended much time and energy seeking greater integration of China into the international system. It is thought by some that China's enthusiasm and dedication to the new order won it a permanent seat in the United Nations Security Council almost thirty years later. It could be said that the Chinese representatives had successfully employed the sophisticated strategy of using the language of the imperial-oriented international system itself to describe China's treaty problem as a miscarriage of international law.⁴⁰³ These efforts included the persistence of the Chinese in calling for a systematic reconsideration of China's unequal treaties under the new Article 19 of the League's Covenant; their signing of the compulsory arbitration clause before the Permanent Court of International Justice; and their impressive struggle to lobby for a permanent seat on the League's Council. In 1924, the ROC representative Tang Tsai-fou (唐在復) made an argument in the Assembly plenary that

⁴⁰² Hudson MO, "The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute" (1933) 27 *American Journal of International Law* 300

⁴⁰³ Kaufman, Alison Adcock. "In Pursuit of Equality and Respect: China's Diplomacy and the League of Nations." *Modern China* 40, no. 6 (2014): 605–38.

perfectly reflected his country's aspirations: "We have no doubt whatever that we are witnessing the dawn of a new era in which right will triumph over might, in which the peaceful settlement of disputes under the auspices of the League of Nations will gradually become the established custom."⁴⁰⁴ China never reached its goals within the lifetime of the League. It never became a permanent member of the Council nor a vital part of the Committee on Intellectual Cooperation. Its struggles for treaty revisions achieved only partial and piecemeal results, although the Nationalist government did succeed in convincing Western powers to return tariff autonomy to China.⁴⁰⁵ Yet the ROC's sophisticated and progressive interpretation of the new international system did implant an ambivalence toward the equality of nations within the League – the headquarters of imperialism.

However, emerging as a decisive winner in both regional skirmishes and in World War I, the "Allies" Japan was in a strong position when confronted with the idea of the League of Nations. Western scholars, even those US statesmen who were not happy with the Twenty-One Demands and Japan's continental policy, regarded Japan as a great power whose participation was vital to the feasibility and success of any agenda of the League.⁴⁰⁶ Since China, conversely, was called a "backward country which is unable to maintain law and order at home", many wanted to see "a Japanese hegemony in China" as an alternative to the instability then rampant in the giant republic.⁴⁰⁷ This common belief caused Japan to be considered the only Asian empire worthy of being included in the League's "first-class" membership and ultimately as a permanent member of the League's Council.

But did Japan display arrogance with regard to its military and economic prowess? Not necessarily. Many historical accounts show that Japan, too, was well prepared for the new world order. The Japanese quickly adopted economic internationalism by forming the International Chamber of Commerce in Paris in 1919. They were eager to participate in cultural internationalism by hosting the World Sunday School Convention in 1920 and establishing a "Japanese League of Nations Association".⁴⁰⁸ The Japanese government also made commitments to internationalism in other ways. Big business interests, which filled the political campaign coffers, demanded rational policies of economic expansionism. Japan's military forces soon realised that disarmament obligations and a compromised budget obliged them to

⁴⁰⁴ League of Nations (1924a) "Report on the work of the Council and of the Secretariat: continuation of the discussion," Fourteenth plenary meeting, Sept. 10. League of Nations Official J., special supplement no. 23: Records of the Fifth Assembly - Text of the debates: 96.

⁴⁰⁵ Wang, Ching-Chun. "How China Recovered Tariff Autonomy." *The Annals of the American Academy of Political and Social Science* 152 (1930): 266–77. <http://www.jstor.org/stable/1016561>.

⁴⁰⁶ Burkman, Thomas W. *Japan and the League of Nations: Empire and World Order, 1914–1938*. University of Hawai'i Press (2008)

⁴⁰⁷ Thomas W Burkman, 'The Idea of a League' in Thomas W Burkman (ed), *Japan and the League of Nations: Empire and World Order, 1914-1938* (University of Hawai'i Press 2007) <<https://doi.org/10.21313/hawaii/9780824829827.003.0002>> accessed 13 January 2024.

⁴⁰⁸ Hugh T. Patrick, "The Economic Muddle of the 1920s," James W. Morley, ed., *Dilemmas of Growth in Prewar Japan* (Princeton, 1971), 214–215. Or see more at Akira Iriye, "The Failure of Economic Expansion: 1918–1931," Silberman and Harootunian, eds., *Japan in Crisis*, 239–246 and Iriye, *After Imperialism*, 26.

adopt a moderate tone. At the same time, the Japanese Foreign Ministry was determined to enhance Japan's status by participating in the flow of international accommodationism.⁴⁰⁹

On the legal side, it should be noted that the League's Covenant had no shortage of innovations. Article 10 asserts the principle of territorial integrity. Articles 13 and 14 set out the foundations of a world Court of Justice. Article 15 and Article 16 established a collective procedure in which the Council and the League's members combined to punish a "covenant-breaking state", economically and militarily. Most members, however, went no further than making recommendations with unspecified obligations for unspecified states. War was not yet entirely excluded as an option in international relations. That is why, within the League's first four years, the Assembly had tried several times to strengthen the Covenant's provisions for settling international disputes.

The first attempt is now known as the Draft Treaty of Mutual Assistance of 1923. To clarify and specify actions that the League's members would take in case of an act of aggression, the Council would meet to discuss the facts and would decide in four days which nation was the aggressor. The Council was also entrusted with the authority to dictate which sanction was to be applied, which member states were to apply them, and whose armed forces were at the disposal of the League to repel the aggressor. Such measures were not welcomed by the British leadership.⁴¹⁰

In 1924, the diplomats at Geneva tried again with the "Protocol for the Pacific Settlement of International Disputes", commonly known as the Geneva Protocol. The proposal, following the Draft Treaty of Mutual Assistance, continued to aspire to (1) a universal institution of compulsory arbitration, (2) an enforcement mechanism for judicial and other decisions, (3) a formal prohibition of an aggressive resort to armed force. While war was not completely outlawed,⁴¹¹ the Geneva Protocol came quite close to the current UN system, whereby armed force can only be employed for self-defensive and collective actions of legal international authorities.

Yet, this should not preclude us from making claims about the emergence of an *opinio juris* concerning a belief in the collective juridical power of the international community in rectifying unlawful actions. Japan itself was involved in the process of drafting the Geneva Protocol. Its spokesmen were dissatisfied with the draft Protocol, since it prevented Japan from asking the League to take action when its nationals were under duress in China, and also prevented Japan from protesting against the humiliations inflicted by the US's immigration laws.⁴¹² Japan resented America's immigration legislation, particularly the anti-Japanese

⁴⁰⁹ Burkman (no 399), 107 – 110

⁴¹⁰ "The Draft Treaty of Mutual Assistance." *Journal of the British Institute of International Affairs*, vol. 3, no. 2, 1924, pp. 45–82., 55 – 61

⁴¹¹ Williams, John F. "The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes." *Journal of the British Institute of International Affairs*, vol. 3, no. 6, [Royal Institute of International Affairs, Wiley], 1924, pp. 288–304, 294 – 296

⁴¹² Ibid.

agitation that led to a public referendum in 1920, resulting in the imposition of new restrictions on land ownership by Japanese aliens in California.

Finally, and most importantly, the aspiration for world peace reached its first fruition on August 27, 1928, when fifteen nations signed the Kellogg-Briand Pact in Paris. Signatories included France, the United States, the United Kingdom, Ireland, Canada, Australia, New Zealand, South Africa, India, Belgium, Poland, Czechoslovakia, Germany, Italy, and Japan. Nearly all the world's nations eventually subscribed to the Kellogg-Briand Pact, agreeing to renounce war as an instrument of national policy and to settle all international disputes peacefully. A general 'belief' was, arguably, formed in such an uncertain time.

In our own time, many criticise the pact for its ineffectiveness and failure to prevent - aggressive behaviour on the part of nation-states. Nevertheless, the aforementioned developments in the international legal language show us the dawn of a new set of communal beliefs and a sense of legal duty, where States were concerned with the practices of law and their possible interests, but never actually challenged the righteousness of the new system. As we will find in the following arguments, there were many reasons why the Japanese civilian power's aspiration for international accommodationism never materialised, and also why the agreement of the entire international community at the time to prohibit war is more significant than it seems.

B. Conflict

After almost a century of intense study by Japanese, Chinese and other writers, the Manchurian crisis that began with the Mukden incident is no mystery to historians and political scientists. The fact that the entire operation was instigated by the Kwangtung Army, with no prior approval from Tokyo, is a well-recorded detail.⁴¹³ Neither the high command of the Japanese army nor Prime Minister Wakatsuki Reijirō was able to tame the Kwangtung Army during the entire military campaign, from September 1931 to December 1931. Wakatsuki's cabinet fell in December, and Wakatsuki's successor, Prime Minister Inukai Tsuyoshi, who tried to check the military's political power, was assassinated by extreme militarists in 1932.⁴¹⁴ Other successive administrations either sanctioned the invasion under the growing tide of domestic public opinion or were ignored due to the rise of Japanese militarism. Overall, unlike the annexation of Korea, there is very little debate on how the incident unfolded.

In September 1931, the Japanese armed forces in Manchuria detonated a small quantity of dynamite near the railway line owned by Japan's South Manchuria Railway in Mukden. The explosion evidently caused little damage to the railway line, as scheduled trains continued to use the track right afterwards, with no delay. After accusing Chinese dissidents of committing the act of sabotage, the Imperial Japanese Army in Manchuria responded with an all-out armed

⁴¹³ Colegrove, Kenneth. "Militarism in Japan's Foreign Policy." *The Annals of the American Academy of Political and Social Science* 215 (1941): 7–16. See also Japan - The rise of the militarists. (2020). Encyclopedia Britannica. <https://www.britannica.com/place/Japan/The-rise-of-the-militarists>

⁴¹⁴ Tetsuo Najita. "Inukai Tsuyoshi: Some Dilemmas in Party Development in Pre-World War II Japan." *The American Historical Review* 74, no. 2 (1968): 492–510. <https://doi.org/10.2307/1853674>.

invasion. After several months, the Japanese forces had taken control of most of the strategic defensive locations in Manchuria. Six months later, in March 1932, the State of “Manchukuo” was created (Manchukuo is the Japanese version of Manchuria and is used interchangeably with Manchuria in this section), clearly under the direct supervision and influence of the regional Japanese Imperial Army.⁴¹⁵ The Kwantung Army believed they had successfully severed northeast China from the republic and established an independent country that would soon gain international recognition.

Simultaneously, Japanese military leaders had their eyes on prominent Chinese cities and there followed a quick escalation all over the coastal area of China. In January 1932, the Japanese navy and its imperial troops opened an attack on Shanghai with the aim of capturing this prosperous city full of foreign traders and businessmen.⁴¹⁶ However, unlike in the North, Japanese forces encountered serious and brave resistance from elite divisions of the Nationalist Government's Army, and their hopes of a quick skirmish and an easy takeover were frustrated.⁴¹⁷ After most other war efforts failed, Japan was forced into international isolation. The Japanese government decided to withdraw from the League of Nations in March 1933.

2. Legal debates

Thanks to the consistency of the League's reports, there are no significant legal debates on the Manchuria crisis. While the Nationalist government of China used the Covenant effectively to pursue the case, present it in the correct form and adhere to all the League's recommendations and suggestions, Japan offered no substantial legal defence of its position. Reviewing the statements and the documents of the Japanese side closely, it is clear that they fought shy of international legal discussion.

For example, when first summoned by the Council to discuss the Mukden incident in the course of several meetings on September 19, 1931, the Japanese government tried to minimise the significance of the incident by describing it as “minor”. Two days later, with the Japanese forces advancing all over Manchuria, Japanese delegates resorted to the justification that they were protecting the sizable Japanese civilian population that lived in Manchuria, and also Tokyo's industrial assets. They also spoke of China's inability to control and administer the territory, which is simply not a legal argument.⁴¹⁸ Neither of these reasons resonated among League's members nor were they accepted in any of the League's documents as a reasonable explanation of Japan's military campaign to seize complete control over Northeast China.

⁴¹⁵ Han, Suk-Jung. "The Problem of Sovereignty: Manchukuo, 1932-1937." *Positions: East Asia Cultures Critique* 12, no. 2 (2004): 457-478. muse.jhu.edu/article/171783.

⁴¹⁶ Treat, Payson J. “Shanghai, January 28, 1932.” *Pacific Historical Review* 9, no. 3 (1940): 337–43. See more from Toshihiko Shimada. (1984) “The Extension of Hostilities, 1931–1932”. trans. Akira Iriye, in Morley, ed., *Japan Erupts*, pp. 233–335.

⁴¹⁷ Alvin D. Coox. (1990) *Nomonhan: Japan Against Russia in 1939*, 45

⁴¹⁸ League Of Nations. Commission Of Enquiry Into The Sino-Japanese Dispute Contributor, and Edward Robert Bulwer-Lytton Lytton. *Situation in Manchuria: Report of the Lytton Commission of Inquiry*. Geneva: League of Nations, October 01, 1932.

Later developments also proved that Japan could produce no legal defence for their actions. To counter a more drastic resolution of October 24, 1931, calling for the withdrawals of Japanese forces in Manchuria to the railway zone by November 16, 1931, the Japanese representatives, in opposing the resolution, cited nothing more than their opposition to a fixed day of withdrawal.⁴¹⁹

In 1933, the American diplomat Philip Marshall Brown also tried to validate Japanese arguments in one way or another.⁴²⁰ Brown cited the Japanese government's statement to the Council of the League of Nations on November 21, 1932, which argued that the position of Japan concerning Manchuria was a very “simple matter” of self-defence, supported by a standard principles set out in the *Caroline case* that every act of self-defence must depend on the importance of the interest to be defended, the imminence of the danger and the necessity of such an act. Brown then went on to accuse Secretary Kellogg of being responsible for the confusion of the draft of the Kellogg-Briand Pacts, and for making his later comments that the anti-war treaty did not impair in any way the right to self-defence. This was, in my opinion, a very shallow argument against a treaty that only has three short articles and did not cite any enforcement agency. While Kellogg did contend that the right of self-defence was inherent in every treaty, even in a treaty of war, and that a state is alone competent to decide whether circumstances require recourse to a war of self-defence, he first and foremost mentioned the magic words – “protect and defend its territory from attack and invasion.” If that was not clear enough for Brown, it was for the League of Nations Assembly.

3. Identifying illicit acts and unlawful situations

Immediately after the clash at Mukden, the Nationalist Government appealed to the League's Council (which included Great Britain, France, Italy, and Japan), citing the assistance due under Article 11 of the Covenant.⁴²¹ The Council promptly passed two resolutions on September 30, 1931, and December 10, 1931, which set out the basic principles for addressing the dispute, as summarised below:

- (1) Respect for China's territorial integrity,

⁴¹⁹ Hudson (no 395), 301.

League of Nations Assembly, ‘Report on the Sino-Japanese Dispute’ (1933) 27 *American Journal of International Law* 119., 125

⁴²⁰ Brown, P. M. (1933). *Japanese Interpretation of the Kellogg Pact*. *The American Journal of International Law*, 27(1), 100. doi:10.2307/2189787

⁴²¹ Article 11 of the Covenant is as follows:

“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. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.”

- (2) Recognition of the importance of the Japanese government's statement that it had no territorial designs on Manchuria.
- (3) The Council noted the Japanese government's commitment to the withdrawal of its troops into the railway zone was proportional to the safety of the lives and property of Japanese nationals.
- (4) The Council noted the Chinese representative's statement that his government would assume responsibility for the safety of the lives and property of Japanese nationals outside that zone as the withdrawal of the Japanese troops continued and the Chinese local authorities and police forces were re-established.
- (5) Both governments were requested to avoid taking any action that might disturb the peace and good understanding between the two nations, and both governments were requested to take all necessary steps to prevent any extension of the scope of the incident or any aggravation of the situation.⁴²²

Although the outline was produced optimistically, later development of the situation led to the creation of the Commission of Enquiry, mandated by the League and led by Lord Lytton of Great Britain. They were authorised to travel to Japan and Manchuria to investigate the incidents. However, after the Japanese-orchestrated military escalation in Shanghai, it was now clear to most neutral states that the situation created by Japan in northeast Asia was intended to escalate out of control – and that a Sino-Japanese war was foreseeable. Therefore, all the members of the League's Council, besides China and Japan, unanimously addressed Japan to remember the importance of Article 10 of the Covenant⁴²³:

“[...] no infringement of the territorial integrity and no change in the political independence of any Member of the League brought about in disregard of that article ought to be recognised as valid and effectual by Members of the League.”⁴²⁴

Issued on February 16th, 1932, this is arguably the first collective legal and political language of non-recognition. Particularly, it was a direct response to the unlawful creation of the so-called “Manchukuo” state that was now disclosed to the world by Japan as their alternative order for Manchuria. On February 19th, 1932, due to another request by China submitted under the substantive term of Article 10 and procedural term of Article 15, paragraph 9,⁴²⁵ the Council

⁴²² See the two resolutions recorded in Quincy Wright, ‘The Manchurian Crisis’ (1932) 26 *The American Political Science Review* 45., 50

⁴²³ Article 10:

“The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”

⁴²⁴ League of Nations Assembly (n 423)., 130 – 131

⁴²⁵ Paragraph 9 of Article 15:

“The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.”

agreed to refer the situation to the Assembly.⁴²⁶ In the meantime, stronger condemnations were expressed by almost all nation-states that existed at the time. The United States, not a member of the League but one of the founders of the Kellogg-Briand Pact, also actively engaged in the initiative against Japan's aggression. As we analysed extensively in Chapter 3 concerning the TWAIL approach to international law and the necessity to demystify the role of the United States in the emergence of non-recognition, it was the consistent and skilful use of the League's mechanism by the nationalist government of China that forced the colonial setting of 1930's international law to satisfy a second-class state's demands.

In February 1933, the League of Nations Assembly Report on the Sino-Japanese Dispute employed more solid conclusions. These included:

- (1) The assertion that while the tension originated before September 18, 1931, specific responsibilities would appear to lie on both sides; the Chinese government bear no responsibility for the development of events since September 18, 1931. The Assembly, therefore, implied that Japan's actions could not be justified in terms of self-defence and was, therefore, unlawful;⁴²⁷
- (2) The insistence that sovereignty over Manchuria belonged to China, while also suggesting the establishment of an autonomous entity that was compatible with the administrative integrity of China and also taking into account the treaty rights and interests of Japan and third states in Manchuria;⁴²⁸
- (3) More importantly, the Assembly rejected the continuation and recognition of the existing Manchurian regime, as it was incompatible with the fundamental principles of existing international obligations on which peace in the Far East depended.

In short, the Assembly's report could be said to wholly identify all parties' rightful and wrongful conduct. Unfortunately, most historians, international relations analysts, and some international lawyers, have underestimated what the international community did regarding the Manchurian crisis. Richard Overy, for example, in *The Origins of the Second World War*, and Westel Woodbury Willoughby, in *The Sino-Japanese Controversy and The League of Nations*, presented and expanded upon his proposition on the origins of the Second World War, regarding the failure of the League in the Manchurian incident as a major contributing element.⁴²⁹ Reading most of these critiques of how the League of Nations responded and protected the territorial integrity of China, we can safely argue that they reached their specific conclusion solely because the League was not able to coerce Japan to return Manchuria to

⁴²⁶ League of Nations Assembly (n 423), 131

⁴²⁷ *ibid.*, 145 – para 9 and 10.

⁴²⁸ *ibid.*, 149 – para 7,8 and 10.

⁴²⁹ Westel Woodbury Willoughby, *The Sino-Japanese Controversy and the League of Nations* (Johns Hopkins Press 1935).

Richard Overy, *The Origins of the Second World War* (Taylor and Francis 2016).

China by force – a classic “perfect compliance fallacy” case.⁴³⁰ With all the talk of the “greater good” and collective interest that was to be heard in the 1930s, such a prospect was inherently absurd in that historical setting.

It is vital to remember that colonialism and alien exploitation of native communities were perfectly lawful and even recognised practices at the time. Japan itself claimed that its legitimate interests in Manchuria were protected by the Treaty of Portsmouth, signed by Russia and Japan in 1905, and on the foundation of the Triple Intervention (France, Russia, Germany) after the first Sino–Japanese war.⁴³¹ Basically, China still lived with the legacy of the forceful concession of many of its sovereign and territorial rights - ironically, by the very countries to which they turned for help in the Manchuria crisis.

If we see modern international law and the concept of justice in international law as a person, such a person had only reached his elementary years when the Manchuria incidents happened. Should we compare that person to an elder possessing centuries-old wisdom (i.e., domestic law)? And should we expect that person to be capable of resolving inter-continental conflicts involving multifaceted interests?

If we extend the landscape to include other nations and other legal situations during the 1920s and 1930s, we can note that Ho Chi Minh, the radical revolutionary leader of Vietnam, only discovered and began to be influenced by Lenin’s thesis of the right of nations to self-determination in 1920 (while Lenin himself fully introduced this dissertation only in 1914).⁴³² Segregation and lynching were either lawful or tolerated by state governments of the United States of America,⁴³³ and the apartheid model of governance had just been explicitly inaugurated in South Africa.⁴³⁴ It should also be remembered that the massacre of unarmed protesters by the British in colonised India was considered by a large part of the British public to be justified.⁴³⁵

By taking into account the above grand scheme of facts and understanding that international law was only a “primitive” law, we have to acknowledge that at this particular time, the cost of compliance with this newly established law/doctrine of peace and international justice was consistently higher than the cost of acting out of naked self-interest. Only then can we

⁴³⁰ Peter Spiro, ‘Ukraine, International Law, and the Perfect Compliance Fallacy’ (*Opinio Juris*, 2 March 2014) <<http://opiniojuris.org/2014/03/02ukraine-international-law-perfect-compliance-fallacy/>> accessed 11 June 2022.

⁴³¹ League of Nations Assembly (n 423), 142

⁴³² Quinn-Judge, Sophie. “Ideological Influences on the Revolutionary High Tide: The Comintern, Class War and Peasants.” *South East Asia Research* 19, no. 4 (2011): 685–710.

⁴³³ NAACP. (2022, February 11). History of Lynching in America.

⁴³⁴ Tiryakian, Edward A. “Apartheid and Politics in South Africa.” *The Journal of Politics* 22, no. 4 (1960): 682–97.

⁴³⁵ Alexander, C. (2017, August 11). Colonialism in India was traumatic – including for some of the British officials who ruled the Raj. The Conversation. <<https://theconversation.com/colonialism-in-india-was-traumatic-including-for-some-of-the-british-officials-who-ruled-the-raj-77068>> accessed 11 June 2022.

comprehend how impressive the League of Nations' collective responses were. I propose to recognise the achievements of the League in the Manchuria crisis in three categories:

- (1) The willingness and promptness in fact-finding and dispute-resolving procedures were unprecedented;
- (2) The response was the first collective and formal application of the non-recognition of unlawful situations at the dawn of international law;
- (3) The complexity of the international "sanctions" (or, to use a better term – measures) and other means that were employed by the League, which are usually overlooked.

In the dispute in September of 1931, the Council and the Assembly issued two resolutions, called for several meetings and hearings, and then successfully formed and sent their Commission of Enquiry to Manchuria, Japan, and Shanghai for interviews and investigations. Before the end of February 1932, six months after the first incident occurred, the Commission of Enquiry was "on the spot" and performing its role.⁴³⁶ Such a timeline and such dedication are impressive even by contemporary standards. More importantly, while the Lytton report was accused of being a compromised production in the context of Japan's status as a world-class power, the report clearly showed and explained how the conflict escalated and who was the initiator.

Contrary to the shared beliefs of statespeople at the time,⁴³⁷ the authorised commission, the League's Council and the League's Assembly proved that facts in international relations and international law are not too difficult to understand and arbitrate. It is possible to identify the aggressor, the unlawful conduct, and even collectively acceptable responses in a conflict without the need for, as those critical voices claimed, a forty-year interval.

4. Non-recognition campaign(s) in the case of Manchuria

As discussed in our definition and theory chapter, an effective campaign of non-recognition relies on the institutional practices of the leading international institutions of its time. On the other hand, the international practices of such an institution depend on how widespread and common international life is at the time. Understandably, if the international community lacks the means and tools for economic, cultural and other connections, there are limited choices in carrying out the duty of non-recognition. In the case of Manchuria, in the early days of the 20th

⁴³⁶ Arthur K Kuhn, 'The Lytton Report on the Manchurian Crisis' (1933) 27 *The American Journal of International Law* 96.

⁴³⁷ 'The Draft Treaty of Mutual Assistance' (1924) 3 *Journal of the British Institute of International Affairs* 45., 55-61

We can find, for example, comments of British politician such as Leo Amery:

"I venture to say that though there may be cases in which you can decide who is the aggressor definitely in four days or four weeks, there will be very few. In the great majority of cases, forty years would not suffice to decide, in the conflict of interest and ambition and national and commercial and other motives, which of those who joined in the conflict was the real aggressor. These great conflicts arise like thunderstorms, by the increasing tension of the electricity on both sides; they are rarely as simple as the act of a footpad who assaults a peaceful pedestrian in the street."

century, we have a very narrow pool of options for practising non-recognition. Nevertheless, the League of Nations still showed an exceptional commitment to the practice, signalling a proper rise in legal perception and expectation.

First, we should mention the communicative aspect of non-recognition in this crisis. The 1933 resolution of the League, its previous statements and reports, and the development that led to its adoption set a new goal, a new outlook, precedents and a re-imagining of the world order. As Judge Manley Ottmer Hudson commented: “Never before in history has there been any comparable expression of a world judgment on a dispute between two nations.”⁴³⁸ The Assembly unanimously adopted this language:

“[...] the Members of the League intend to abstain, particularly as regards the existing regime in Manchuria, from any act which might prejudice or delay the carrying out of the recommendations of the said report.

They will continue not to recognise this regime either *de jure* or *de facto*. They intend to abstain from taking any isolated action with regard to the situation in Manchuria and to continue to concert their action among themselves as well as with the interested States not members of the League.”⁴³⁹

Regardless of the implementation, such a statement signified a new norm and a new understanding of how the international community should react to the “might is right” mentality. More importantly, the collective response did not stop at a merely symbolic announcement. In order to give genuine authority to non-recognition in the situation that existed in Manchuria, the intention of many states was to make the effect of withholding recognition as much as possible.⁴⁴⁰ The actions that were taken included:

- (1) A complete prevention of the participation of the present government of Manchuria in either closed conventions or open conventions. In this category of non-recognition, member states would have to refuse to agree to the admission of Manchukuo in the case of a closed convention. In the case of an open convention, the depositary should consult all of the contracting parties. The parties would thus be given an opportunity to give a negative opinion as to acceptance of the accession of Manchukuo:
- (2) Concerning postal services, the Committee acknowledged the Chinese government’s request that “stamps issued by the puppet government will be invalid” and “all legitimate postal services in Manchuria have been temporarily suspended.”
- (3) The Committee declared it inexpedient to propose that individual governments prohibit transactions in Manchukuo currency since “a domestic currency is created by a domestic law” and is used in the same way as any object of value bought and sold in

⁴³⁸ Hudson (no 395).

⁴³⁹ League of Nations Assembly (n 423), 151 – 152

⁴⁴⁰ Middlebush, Frederick A. ‘The Effect of the Non-Recognition of Manchukuo’, *The American Political Science Review*, vol. 28/no. 4, (1934), 677-683.

international trade. However, the Committee proposed the prevention of official quotations in Manchukuo currency in those countries which maintained an official foreign exchange market.

- (4) Each member of the League should inform its nationals of the risks of attending upon contractual business relations with anyone in Manchuria or accepting concessions from the Manchurian authorities, and particularly of the difficulty of protecting its nationals and their interests in Manchuria.
- (5) Non-recognising governments should not accept passports issued by the Manchukuo government and, therefore, could not allow its agents to grant visas for such documents.

The combination of efforts was impressive and did aspire to become a relatively comprehensive system of non-recognition. Indeed, as consistently repeats, there were always problems in implementing such an ambitious plan at such a difficult time. Noted by scholars, the campaigns with Manchukuo currency and limiting business with the Manchukuo government did not contribute much to the overall plan, since this government after all engaged in protectionism, and few business activities were being conducted in Manchurian territory.⁴⁴¹ On the other hand, postal services to Manchukuo were not a dominant factor in international plans either. However, the institutional communications and declarations of non-recognition within the League system created the legal stands and legacy that would be used later to restore the lawful situation after World War II ended

Many will point out that the Chinese and Japanese finally signed a truce and that the agreement left the Japanese firmly in control of Manchuria. The ineffectiveness of the League of Nations has always been blamed for being unable to prevent the escalation leading to World War II. Yet, one thing remains with us from the Manchuria crisis: a strong, clear, authoritative and available legal reference for later generations of government, stemming from the denial of recognition to the Japanese puppet state of Manchukuo. There are too many forces that can alter the outlook of collective international aspirations and efforts. As mentioned previously, even the Japanese civil government of the time was prepared to be more cooperative and more involved in the implementation of the international legal system, but the rise of militarism during an era of economic hardship forced them to tolerate the arbitrariness and brutality of the military, inside and outside of Japan. Considering the resources available to the international community at the time, I strongly contend that non-recognition, as an obligation, manifested itself before 1945, in the Manchuria crisis.

4.A.2. Non-recognition in the Italian invasion of Ethiopia (1934 – 1936)

In Geneva in June 1936, the exiled Emperor Haile Selassie of Abyssinia spoke of his faith in the League of Nations:

“Despite the inferiority of my weapons, the complete lack of aircraft, artillery, munitions, hospital services, my confidence in the League was absolute [...] I thought it to be

⁴⁴¹ O’Mahoney (n 202).

impossible that fifty-two nations, including the most powerful in the world, should be successfully opposed by a single aggressor.”⁴⁴²

The emperor then clarified that he did not expect League Members to use their own troops to protect the territorial integrity of Ethiopia. However, he did expect the members not to obstruct his effort to protect Ethiopia in the international area. And maybe some of them could provide assistance, which “has been constantly refused” to him. He lamented: “What, then, in practice, is the meaning of Article 16 and of collective security.”⁴⁴³

Haile Selassie’s interpretation of the event and his painful disappointment about the League’s promise that cost him his country’s independence are all justifiable. Despite his tireless efforts in restructuring Ethiopia’s image to fit into the European imagination of the international system, despite his honest legacy in utilising the League’s mechanisms to resolve major disputes his country had faced, and most importantly, despite the assurance of the Committee of Thirteen, The Council and the Assembly of the League of Nations to him that the aggressor would not triumph, none of them helped Ethiopia to materialise the vision the Emperor expected in a just international order.

Yet, looking from the contemporary perspective, as much as we need to point out the hypocrisy of the European powers and the shameful illustration of the hierarchy of interests and norms that motivated European powers and non-European powers during the League’s years,⁴⁴⁴ modern jurists also need to acknowledge the legal precedents and practice that the League was able to produce, considering all the limitations it had to face. The League’s practice of non-recognition in the Italian invasion of Ethiopia could be seen as one of the seminal events prior to the outbreak of the Second World War. However, this legal endeavour, although not very successful, could also be understood as the continuation of the collective practice that the Manchuria incident had just established. More importantly, a relatively consistent tone and legal argument presented by the parties involved in the crisis allowed a logical, lawful, and smooth transition to territorial justice after the Second World War.

⁴⁴² Timothy Stapleton, ‘Haile Selassie, Appeal to the League of Nations’, *Africa: War and Conflict in the Twentieth Century* (Routledge 2018).

⁴⁴³ Emperor Haile Selassie of Ethiopia, ‘Appeal to the League of Nations’ <<https://www.blackpast.org/global-african-history/1936-emperor-haile-selassie-ethiopia-appeal-league-nations/>> accessed 20 June 2023.

⁴⁴⁴ Ian S Spears, ‘The Ethiopian Crisis and the Emergence of Ethiopia in a Changing State System’, *Collision of Empires* (Routledge 2013), 33-36

The fact that the failure of the non-recognition campaign against the Italian conquest led to the complete collapse of League's collective security tells a lot about the importance of the duty of non-recognition and how the duty manifested a "minimum" requirement of the international rule of law.



Image 4.A.2. Italian conquest of Ethiopia.⁴⁴⁵

1. Preliminary Political-legal analysis

A. Legal environment

The official narrative of the League of Nations was that this post-World War I organisation pledged to ensure the equal treatment of all its members. But that is also the problem with the League system: you must be "considered" one of its members. Very much like the Manchuria incident that we have discussed, in the turmoil of a changing state system, the legal order that the League of Nations created was never a "universal" legal system that focused on rights and equality between every nation. It was a *privilege* granted to a nation deemed "civilised" enough to stand with the advanced European governance model, territorial thinking and firepower capacity. The monopoly of Western scholars and states in describing and explaining the legal concept of the nation-state also allowed the group to pick and choose political entities that they

⁴⁴⁵ 'Ethiopia: 3rd October 1935 – the Italian Invasion Begins' (Martin Plaut, 29 July 2013) <<https://martinplaut.com/2013/07/29/ethiopia-3rd-october-1935-the-italian-invasion-begins/>> accessed 24 December 2023.

deemed fit to join “the club”. Consequently, the conquest of a civilised nation (a club member) against a less civilised one (a non-club member) was still perfectly legal within this legal framework.

For instance, in the case of Korea, a misunderstanding of the Chinese tributary system led to the conclusion that Korea was not (and could not be) an independent country.⁴⁴⁶ This narrative presented the argument that the backwardness and the inherent incapability of the Korean feudal leadership had resulted in the immeasurable suffering of the Korean people. Here, only a “civilising mission” undertaken by the most advanced and civilised country in the region – the Japanese Empire – could lift the country out of such misery. The same approach happened with the Ethiopian empire, but with a twist – Ethiopia was already a recognised member of the League.

The truism is that pre-colonial Africa did not organise their political entities with the same European characteristics: a centralised government, a defined population, and a fixed border. This is not to say that there has been no centralisation model in Africa, as some scholars refer to the concept of “pre-colonial centralisation.”⁴⁴⁷ These include several loosely-defined “kingdoms” that had a smaller territorial scale than modern states and did not generally possess fixed borders but were contained by a centralised administrative unit with a tradition of organised tax collection. The people of other territories, however, were content to live with their tribal, royal and other traditional institutions and did not care much about a determined territory or a working taxation regime. Nevertheless, they were all amalgamated together into an arbitrary and artificial whole to form what the West understood as nation-states. This “achievement” is now recognised as originating with the Berlin Conference of 1884–85, where the first internationally recognised and mutually exclusive borders were established in Africa.⁴⁴⁸

For political scientists, the development has led to several debates about the “goodness” of the imposition of the European model. Some argue that the traditional institutions of Africa were uniformly illegitimate and also despotic,⁴⁴⁹ leading them to conclude that democracy and centralised institutions were possible in Africa only because the colonisers imported it.⁴⁵⁰

⁴⁴⁶ John King Fairbank (ed), *The Chinese World Order; Traditional China's Foreign Relations* (Harvard University Press 1968) <<http://unisg.link/hm00276850>> accessed 30 August 2022.

Keun-Gwan Lee, ‘Trope of a Sovereign State: Treaty-Making by Korea From 1876-1899’ (2008) 11 *The Review of Korean Studies* 11.

Kirk W Larsen, *Tradition, Treaties, and Trade: Qing Imperialism and Chosŏn Korea, 1850–1910* (Harvard University Press 2011).

⁴⁴⁷ Christoffer Cappelen and Jason Sorens, ‘Pre-Colonial Centralisation, Traditional Indirect Rule, and State Capacity in Africa’ (2018) 56 *Commonwealth & Comparative Politics* 195., 197-199

⁴⁴⁸ Joanne Yao, ‘The Power of Geographical Imaginaries in the European International Order: Colonialism, the 1884–85 Berlin Conference, and Model International Organizations’ (2022) 76 *International Organization* 901.

⁴⁴⁹ Daron Acemoglu and others, ‘Indirect Rule and State Weakness in Africa: Sierra Leone in Comparative Perspective’, *African Successes, Volume IV: Sustainable Growth* (University of Chicago Press 2014) <<https://www.nber.org/books-and-chapters/african-successes-volume-iv-sustainable-growth/indirect-rule-and-state-weakness-africa-sierra-leone-comparative-perspective>> accessed 20 June 2023.

⁴⁵⁰ Jacob Gerner Hariri, ‘The Autocratic Legacy of Early Statehood’ (2012) 106 *American Political Science Review* 471.

However, many others doubt this suggestion, as they found that African rulers established by means of “modern democracy” were largely unpopular and had less legitimacy than traditional authority. Many political movements in Zambia, Uganda, Ghana, and Botswana provided evidence of this.⁴⁵¹

Nevertheless, it was true that the entire legal system installed by the League of Nations to protect the integrity and independence of its member states was inherently prejudiced against non-European nations. African political systems, European-inspired or not, were never seen as competent or politically and legally equal to those of Europe. Specifically, although Ethiopia was welcomed into the League through a unanimous vote, major members at the time questioned the “quality” of this nation-state. Britain, Australia, Norway, Switzerland and Italy all expressed their reservations, calling Ethiopia’s admission to the League “premature” in view of all the problems that the country faced.⁴⁵² Ultimately, while Ethiopia was accepted into the organisation, thanks to the lobbying of France, the decision came with many requirements and further commitments. The latter included the tasks of reducing the power of feudal rases, subduing regional powers, centralising the country’s administration and, most importantly, eradicating slavery.⁴⁵³ One author observed that Ethiopia, along with Liberia, was like one of many contemporary “quasi-states,” as its foundations and claims to statehood were based on historical recognition and a sense of justice rather than force, capacity and proper state power.⁴⁵⁴

This could help us to see why the lacklustre protection that 20th-century international law provided to Ethiopia was somewhat predictable but also, to some extent, extraordinary. Ethiopia’s admission, with all the tasks that came with it, reflected not only the superiority complex of the League’s members toward Ethiopia but also the genuine internal problems that the Ethiopian central government had yet to address, which had both positive and negative implications for the practice of non-recognition.

B. Conflict

Although not directly related to the Italian invasion in 1935, several events prior to the invasion should be considered in order to gain a more in-depth understanding of the political attitude of League members toward Ethiopia and the legal consequences of the invasion. The first event to consider is the so-called Lake Tana agreement between Great Britain and Italy in 1925. This collection of diplomatic notes resulted from decades of territorial expansion, pursuing and compromising the colonial interests of both of these European countries in Northern Africa.

⁴⁵¹ Cappalen (no 440).

Crowder, M. (1964). Indirect rule: French and British style. *Africa*, 34(3), 197–205.

⁴⁵² Haile I Sellassie, *My Life and Ethiopia’s Progress: The Autobiography of Emperor Haile Sellassie I* (Frontline Books 1999).

‘Report of the Council of the League of Nations Under Article 15, Paragraph 4, of the Covenant’ (1936) 30 *American Journal of International Law* 1. (For instance, the central authority’s control in areas remote from the capital was a possible cause for concern).

⁴⁵³ Harold G Marcus, *Haile Sellassie I: The Formative Years 1892-1936* (Berkeley: University of California Press 1987), 13

⁴⁵⁴ G Bruce Strang (ed), *Collision of Empires: Italy’s Invasion of Ethiopia and Its International Impact* (Routledge 2016).

Historians have been unable to reach any consensus on the intentions of both parties with regard to the agreement. Some authors agree with Alan Cassels' suggestion that "the vagueness of the colonial entente left it to both parties to interpret it at will," while the scope for misunderstanding was "boundless."⁴⁵⁵ Examining the political and historical contexts, however, allows us to make some bullet points leading to this conclusion:

- (1) Great Britain needed a dam in Lake Tana.⁴⁵⁶ After conquering the White Nile region in 1899, Britain required a friendly power to be in charge of the Blue Nile – the source of the Nile's lower basins running through Egypt and Sudan. The agricultural productivity of Egypt, cotton crops in Sudan and flood prevention in both countries relied on controlling the water supply from Lake Tana.
- (2) Italy, on the other hand, felt entitled to be the reversionary protector of all of Ethiopia. From the Anglo-Italian protocols of March 24 and April 15, 1891 to the Tripartite Treaty between Britain, France and Italy in 1906,⁴⁵⁷ Ethiopia was recognised as a territory under the Italian sphere of influence. This included both Lake Tana and the Western Ethiopian highlands.
- (3) Finally, the Ethiopian government seemed to lack enthusiasm for the idea of cooperating with Great Britain to construct the dam in Lake Tana. In 1902, the British government failed to convince the Ethiopian government to construct the dam. Further Anglo-Ethiopian negotiations over Tana broke down in November 1923.

These colonial interests, combined with the fact that Ethiopia had never been considered an equal partner among League's members, allowed a *de facto* political partitioning of Ethiopian territory between Britain and Italy, whereby Italy offered diplomatic support for Britain's concession plan for Lake Tana, while the British government recognised again the sphere of influence of Italy over Ethiopia. The agreement caught international attention, while Ethiopia quickly and justifiably viewed the agreement as a danger to Ethiopian sovereignty. A protest was sent to the League of Nations, arguing that:

“[...] it did not seem to us proper to allow some members of the League of Nations to conclude an agreement among themselves and to force another member to accept their plan”.⁴⁵⁸

Ethiopia's protest appeared to have been taken into account, with the explicit withdrawal of both Britain and Italy from further committing to this agreement. More importantly, both countries separately declared that their purpose was not to divide Ethiopia territorially or

⁴⁵⁵ Alan Cassels, *Mussolini's Early Diplomacy* (Princeton University Press 2016), 299-300

⁴⁵⁶ Antoinette Iadarola, 'The Anglo-Italian Agreement of 1925: Mussolini's "Carte Blanche" for War against Ethiopia' (1979) 1 *Northeast African Studies* 45.

⁴⁵⁷ 'Agreement between the United Kingdom, France, and Italy, Respecting Abyssinia, Signed at London, December 13, 1906' (1907) 1 *The American Journal of International Law* 226.

⁴⁵⁸ Spears (n 448).

Sellassie (n 456), 136

economically or to create a protectorate over the country.⁴⁵⁹ Eventually, Italy and Britain tried to establish influence over Ethiopia in a more “equal” way. Friendly treaties were concluded, and the presence of the two European powers was established in the country, often via commercial companies and economic cooperation.

This favourable outcome could have been described from different perspectives. For the Ethiopian leadership, it strengthened the belief in the League’s system. For international observers, it at least confirmed reasonable and functional equality standards among state members. Overall, it proves that the League era’s norms of international law worked to a certain extent. However, this is not to say that they worked flawlessly, as the root of discrimination against non-European nation-states was still a feature of this legal system. Until 1934 – 1935, the discriminative attitude against countries like Ethiopia began to re-emerge. The Wal Wal incident started this downfall.

The Wal Wal incident occurred at the oasis of Wal Wal, Ogaden, technically a province of Ethiopia. However, for a couple of years before the event, Italian forces from Somaliland occasionally penetrated these territories with no deterrence or protest from the Ethiopian government, probably due to their lack of capacity to patrol and secure borders far from the capital. Until this point, tribes and other local forces were still an essential ingredient of the Ethiopian political landscape, as they were the ones capable of controlling remote areas. The obsolescent and outdated administrative system of Ethiopia allowed the Italians to temporarily occupy Wal Wal and several other oases in southern Ethiopia.⁴⁶⁰

Italian and Ethiopian forces encountered one another at Wal Wal, where around a thousand Ethiopian troops were escorting an Anglo-Ethiopian commission exploring pasturage and watering facilities in the region. The Italian forces stopped the commission and prevented them from continuing the mission, claiming that the area was a part of Somaliland.⁴⁶¹ After several days of stand-off, a clash broke out on the afternoon of December 5, 1934. Fighting continued until the morning of December 06, when the Ethiopians were put to flight, and the Italian forces remained in charge of the oasis.⁴⁶² The details have become blurred, with each party blaming the other. However, although more Ethiopians than Italians were killed, it was the Italian government that demanded reparation. They also requested a formal Ethiopian apology and the recognition of Italy’s right to occupy Wal Wal.

The unreasonable demands seemed to be a part of the Italian plans, as historians believe Italy had been preparing for the invasion of Ethiopia for quite some time.⁴⁶³ Only ten days after the Wal Wal incident, in an interview with the French journal *Le Matin* on September 15, Mussolini emphatically stated that “[t]his is not a game of poker [...]. [W]e shall go straight

⁴⁵⁹ WB Stern, ‘The Treaty Background of the Italo-Ethiopian Dispute’ (1936) 30 *The American Journal of International Law* 189.

⁴⁶⁰ Pitman B Potter, ‘The Wal Wal Arbitration’ (1936) 30 *The American Journal of International Law* 27.

⁴⁶¹ George W Baer, *The Coming of the Italian-Ethiopian War*: (Harvard University Press 1967)., 22-23 and 40

⁴⁶² Potter (n 464)., 28-29

⁴⁶³ Jason Davidson, ‘Italy, British Resolve and the 1935-1936 Italo-Ethiopian War’ [2014] *Cahiers de la Méditerranée* 69.

ahead.”⁴⁶⁴ Although Italy played a guessing game about their intentions with Great Britain and France for almost a year, Italian troops eventually invaded Ethiopia on October 3, 1935. Mussolini prepared an escape hatch, entailing that the Italian troops would advance for a few hundred miles and then pause to “await events on the international plane.” However, with no severe backlash and with increasingly complicated political conditions in Europe, Italy took possession of Ethiopia entirely in May 1936.

2. Legal debates:

The legal debates between Ethiopia and Italy echoed the problem we have mentioned regarding the League’s treatment of non-European nations: the status of Ethiopia as a full and worthy sovereign state. For the Ethiopians, they reasonably and predictably relied on the fact that they were full members of the League of Nations. With a confident degree of trust from the Ethiopian leadership in the League’s system and after successfully pressuring Great Britain and Italy to abandon the Lake Tana agreement, the Wal Wal incident seemed to be a resolvable issue.

At first, the dispute between Ethiopia and Italy was about the Wal Wal incident (from December 5, 1934 until September 3, 1935). Although the incident cost many lives on both sides, and although, there was Italian “retaliative” aggression against the Ethiopian garrison at Gerlogubi, they were considered local armed skirmishes and did not gain much international prominence.⁴⁶⁵ Therefore, after disputing whether or not to submit the dispute to the Council of the League of Nations as an appropriate measure, both parties finally agreed to utilise Article V of the Treaty of Amity, Conciliation and Arbitration of August 2, 1928 (the “Treaty of Conciliation”), under which the two Governments undertook “to submit to a procedure of conciliation and arbitration.....without recouring to armed force.”⁴⁶⁶ According to this provision, Ethiopia’s main argument now was that any disputes between them and the Italians must be resolved in pacific ways, as set out in Article V of the Treaty of Conciliation and overall accordance with the spirit of the League’s Covenant.

Understandably, the Italians were under no pressure to offer a legal defence for their deviant behaviour and were clearly trying to sabotage the conciliation efforts. They consistently avoided multilateral forums, insisting that the Council had no role in resolving the conflict. They demanded prior payment of reparations without any discussion or negotiations following the Treaty of Conciliation and requested Ethiopia’s unconditional recognition of every territory that the Italians controlled, while also publicly making military preparations (known to the world through the Suez Canal authorities),⁴⁶⁷ which was the only reason they sometimes expressed “readiness” to negotiate with Ethiopia.

⁴⁶⁴ *ibid.*

⁴⁶⁵ Alfred Zimmermann, ‘The League’s Handling of the Italo-Abyssinian Dispute’ (1935) 14 *International Affairs* (Royal Institute of International Affairs 1931-1939) 751.

⁴⁶⁶ The Council of the League of Nations, ‘Report on Dispute between Ethiopia and Italy’ (1936) 30 *The American Journal of International Law* 1.

⁴⁶⁷ John H Spencer, ‘The Italian-Ethiopian Dispute and the League of Nations’ (1937) 31 *The American Journal of International Law* 614.

Finally, on September 3, 1935, nine months after the Wal Wal incident, the Commission of Arbitration issued their unanimous decision.⁴⁶⁸ As expected, the arbitrators reached a rather compromised conclusion, saying that no one was in the wrong at Wal Wal, therefore exonerating both parties from any responsibility for the incident of December 5, 1934. This was also the turning point for dispute resolution, as Italy completely abandoned the character it had previously assumed and challenged Ethiopia's membership of the League. At the meeting on the September 4, 1935 of the League's Council, when the award was presented, an Italian representative famously railed that "Italy's dignity as a civilised nation would be deeply wounded were she to continue a discussion in the League on a footing of equality with Ethiopia."⁴⁶⁹

Here, we return to what was previously foreshadowed. Without any legal justification for their upcoming aggression, the Italians relied on the rhetoric that "the entire legal system installed by the League of Nations to protect the integrity and independence of its member states was inherently prejudiced against any other nations except European."⁴⁷⁰ The Italian government accused the Ethiopian government of not fulfilling basic and fundamental conditions of League membership, including a stable Government, an effective political and administrative organisation, and well-defined frontiers, and it attacked the poor track record of Ethiopia's slave trade abolition. In short, the Italians questioned Ethiopia's rightful place as a legitimate member of the civilised nations and asserted that it was unreasonable for them to place any confidence in Ethiopia's ability to provide a meaningful contribution to the interests and security of member States, in this case, Italy. The Wal Wal incident seemed no longer relevant or active in Italy's justification for armed intervention against Ethiopia.⁴⁷¹

Until September 23, 1935, this "civilised" rhetoric was amplified until the Italian government started to describe modern Ethiopia as an anachronistic, barbaric and violent empire employing oppression, enslavement and subjugation against people of other races, languages and faiths. This accusation is of the utmost irony, considering what Rome was planning. The Italians also pointed out that all the reforms required for Ethiopia to be admitted to the League had been ineffective. At the same time, the supply of slaves, contrary to the values of the League of Nations, was protected by the Ethiopian Emperor and local governments.⁴⁷² Bear in mind that even during the Wal Wal incident settlement process, desperate for a proper justification, Italy

⁴⁶⁸ 'Italy v. Abyssinia (Walwal Incident).' (1945) 8 Annual Digest and Report of Public International Law Cases 268.

⁴⁶⁹ 'Report of the Council of the League of Nations Under Article 15, Paragraph 4, of the Covenant' (n 456). Meeting of 4 September – Presentation of the Italian Government's Memorandum' in Documents Relating to the Italo-Ethiopian Conflict, 17.

⁴⁷⁰ Observation in Section 1.A.

⁴⁷¹ Examined the timeline provided in Spencer (n 471).

For more details: The Council of the League of Nations (n 470), 26 - para 26, 27.

⁴⁷² Strang (n 458), 172-173; 299.

Summary of the Oral Observations of the Delegate of Italy, 22 September 1935' in Documents Relating to the Italo-Ethiopian Conflict, 60

even objected to the appointment as arbitrators by Ethiopia of non-Ethiopians, holding that this showed Ethiopia's lack of diplomatic talent and unfitness for membership of the League.⁴⁷³

The conclusion of Italy was, therefore, a century-old argument of colonialism: Ethiopia needed to be saved, not by its own leaders but through the benevolence of Italian civilisation.⁴⁷⁴ Such an aggressive stance caught the Ethiopian leadership off-guard. The representative of Ethiopia said that he had heard "with great surprise the indictment of Ethiopia by the Italian representative."⁴⁷⁵ However, the members maintained that the Council's attention should be focused on one capital point: whether an Italian war against Ethiopia could be seen as a just war. Being a member of the League and strictly following all findings and recommendations from international authorities, Ethiopia's legal position made much more sense than Italy's rampant language of colonisation.

In support of the Ethiopian government, the Haitian delegate – General Alfred Nemours, stressed the importance of parallels between Europe and Africa. He emphasised that tolerating a European invasion of Ethiopia on the misconstrued justification that it was a lawless country and an inferior civilisation or race set a perilous precedent.⁴⁷⁶ After all, during September 1935, the League's Committee of Thirteen had concluded that "the country [Ethiopia] is better organised and the central authority is better obeyed."⁴⁷⁷

3. Identifying illicit acts and unlawful situations

Collective international responses to the two-year-long Ethiopia crisis have been heavily criticised. It is considered a part of the series of events that led to World War II and an undeniable failure of the League of Nations system. Again, I must point out the unrealistic standard contemporary scholars expect from a loosely voluntary military-based order from one century ago. As we have established in the section on political and legal foundations, the vision and basic principles of the League's international legal system were still pretty much built on prejudice, semi-colonial thinking, white supremacy, and Euro-centrism. Of course, its treatment of other members of the international community that were non-European would be discriminative; and the capacity of collective security would also be limited within the box of such thinking.

George W. Baer, a prominent writer on the First and Second World Wars, had reminded the scholarly community several times that invasion and militarily aggressive conduct had not yet

⁴⁷³ Potter (n 464), 31

⁴⁷⁴ Extract from the Minutes of the Fifteenth Plenary Meeting of the Assembly of the League of Nations, 10 October 1935, in Documents Relating to the Italo-Ethiopian Conflict, p. 91.

⁴⁷⁵ 'Report of the Council of the League of Nations Under Article 15, Paragraph 4, of the Covenant' (n 456), 13

⁴⁷⁶ General Alfred Nemours, Statements of the Delegations, in Documents Relating to the Italo-Ethiopian Conflict, 99

Spears (n 448), 49

⁴⁷⁷ Report of the Committee of Thirteen, in Documents Relating to the Italo-Ethiopian Conflict, 29.

Strang (n 458), 46

been considered immoral or unlawful acts.⁴⁷⁸ He asserted that the League of Nations, its institutions and related mechanisms were never meant to be a moral agency, nor were its courts of law. Articles 11, 15 and 16 of the League's Covenant, to the official minds and intentions at the time, were not to establish a sin or crime of aggression but merely a treaty violation. Considering Baer's advice, we can argue that any critique against the international responses to unlawful situations during this period must take care that we do not blame the League for failing to solve problems that it was not designed to solve.

It should be remembered that the League and its members were acting in a complex and messy legal and political environment. They nevertheless tried to uphold specific values and norms, many of which have become the backbone of modern international law. The importance of these practices was thereby highlighted, even though they were not particularly successful, well-regarded, or influential at the time. And non-recognition was one of those practices.

To understand the intricacy of the details of the international responses and other collective actions of the "civilised" community of states in dealing with the Ethiopia crisis, I invite readers to visit John H Spencer's article named "The Italian-Ethiopian Dispute and the League of Nations", published in the *American Journal of International Law*.⁴⁷⁹ Here, Spencer skillfully divides the crisis into six phases, three of which he calls: the Voting of Sanctions period (from October 11 to November 6, 1935), the Hoare-Laval period (from November 6 to December 19, 1935), and the Interim period (from December 19 to February 12, 1936). Following the phases certainly helps the audience understand this crisis fully. Learning from Spencer's approach but also focusing on the collective practice of non-recognition at the time, I would like to emphasise the importance of two periods of this crisis:

- (1) International reaction after Italy's official invasion of Ethiopia (from October 3, 1935); and
- (2) The League's disengagement from the Ethiopia crisis (beginning on April 20, 1936).

First and foremost, we should note that the League had been very active in dealing with the crisis. After Italy rejected the findings of the Committee of Arbitration in September 1935, a sub-Committee of Five, the Committee of Thirteen and another Committee of Six were subsequently formed in only one month to seek a pacific settlement for the dispute.⁴⁸⁰ Therefore, when Italy defied every proposal put forward by the League of Nations' authorised committees, the League was reasonably quick to act. On October 3, 1935, Italian troops crossed the Mareb River and officially invaded Ethiopia. Three days later, the Committee of Six issued its report dealing with two questions:

- (1) "Does a stage of war exist between Italy and Ethiopia?" and

⁴⁷⁸ George W Baer, 'Sanctions and Security: The League of Nations and the Italian–Ethiopian War, 1935–1936' (1973) 27 *International Organization* 165., 172-173

⁴⁷⁹ Spencer (n 471).

⁴⁸⁰ The Council of the League of Nations (n 470).

(2) “If so, has the war been resorted to in disregard of Articles 12, 13 or 15 of the Covenant?”⁴⁸¹

Basically, we see the League of Nations determining the legality of the war that Italy provoked. The conclusion was clear and unanimous from the members’ perspective: on October 07, 1935, the Italian Government had resorted to unsanctioned war, violating its covenants under Article 12 of the Covenant of the League of Nations.⁴⁸²

4. Collective Reactions and the Non-recognition Campaign?

The prompt identification of unlawful situations allowed expedited responses from the League’s community with the creation of the Co-ordination Committee (and many other sub-committees, such as the legal sub-committee). On October 11, 1935, eight days after the invasion, the first proposal of sanctions against Italy was introduced. The spirit of this proposal was to allow member states to export weapons and other war materials to Ethiopia. On the other hand, the proposal prohibited the exportation, re-exportation or transit immediately to Italy or Italian possessions of arms and munitions. Member states were requested to confirm this sanction and report back to the League’s Secretary General.⁴⁸³ On October 14, 1935, the second proposal was introduced: to cut off Italy’s ability to borrow and use international money to fund its war. Here, the Committee required that members states to take all measures necessary to render impossible several operations, including loans, banking and other credits to the Italian government or to any public authority, person or corporation in Italian territory. On October 19 and October 31, 1935, a total ban on Italian goods and an embargo on exporting natural resources to Italy were also installed. On November 06, 1935, principles for an embargo on petroleum and related products exported to Italy were also set in motion.⁴⁸⁴

As in the Manchuria incident, we can see the new and young international order was swift and determined to address the deviant behaviour of aggressive states. Comparing these responses to modern-day standards, the speed, the articulation of sanctions and the overall member support for each measure could be considered far superior to what the United Nations has recently offered. Even the collective compliance with the League’s proposal was remarkable. For example, with regard to the first proposal, from October 31 to November 02, 1935, 43 out of 58 states (including the United Kingdom, France and the USSR) had already implemented an arms embargo against Italy.⁴⁸⁵ Other members, including Afghanistan, Haiti, Iran and Honduras, expressed their support for the sanctions but could not participate as they did not produce any war machinery. Luxembourg and Switzerland also refused to provide arms to

⁴⁸¹ Quincy Wright, ‘The Test of Aggression in the Italo-Ethiopian War’ (1936) 30 *The American Journal of International Law* 45.

⁴⁸² ‘Report of the League of Nations Council Committee’ (1936) 30 *The American Journal of International Law* 37., 40

Baer (n 482)., 623-624

⁴⁸³ Coordination Committee, ‘Declaration on Mutual Support’ (1936) 30 *The American Journal of International Law* 41., 42

⁴⁸⁴ *ibid.*, 43

⁴⁸⁵ Legal Sub-Committee, ‘Report to the Co-Ordination Committee’ (1936) 30 *The American Journal of International Law* 52., 52

Ethiopia due to their “principle of neutrality,” but the proposal’s aims were nevertheless achieved.

It should be noted that the above tools are direct economic sanctions, and as we explained in previous chapters, economic sanctions are ontologically different from the duty of non-recognition. This is understandable, as non-recognition had yet to be developed at this time, and the tendency to combine everything relating to international legal enforcement with economic sanctions has been a habit to this day. Nevertheless, the fact that the international community was comfortable implementing economic sanctions proves their willingness to participate in a much less demanding form of collective security, such as the duty of non-recognition. In reality, the rejection of the Italian conquest and its subsequent rule over Ethiopia was the norm among states from 1935 to 1936. That said, the problem with implementing non-recognition and other efforts to restore lawful conditions was not about the failure of the League’s mechanism or the community’s commitment as a whole. It was the imperial thinking that we have mentioned and the compromises between the biggest empires of the time that bankrupted the international effort against Italian aggression.

In 1935, the UK and France’s appeasement mentality, demonstrated by the Hoare-Laval proposal, caused other League member states to question their intentions and the impact on the global order. The proposal, put forth by British Foreign Minister Sir Samuel Hoare and French Premier and Foreign Minister Pierre Laval, along with their Italian counterparts, legitimised Fascist aggression in Ethiopia. They suggested Italy be granted *de facto* control over the African country with the approval of the two European powers.⁴⁸⁶ The exchange, as many believe, was that Mussolini would not take Germany’s side when the time came, although, in the event, he did side with Germany anyway.

The Hoare – Laval proposal was a significant turning point in European and international politics during the interwar period, as it caused confusion and distrust among League members concerning the League’s values and the direction in which it was heading. The power and the authority of the League of Nations in the dispute had been so heavily prejudiced that M. Van Zeeland, on behalf of Belgium, had to question what the British and French were planning to do with the proposals of the Co-ordination Committee and the involvement of the League overall:

“In the circumstances, does it not seem right that efforts towards conciliation should, from this moment, be placed under the auspices and within the framework of the League itself?”⁴⁸⁷

The second most crucial period marked the League’s disengagement from the Ethiopia crisis, which I would like to call the “fallout”. With the most influential members of the League hoping to appease Italy and distance them from Germany, Italian commanders and troops became much more reckless in their methods of war. After facing several stalemates due to the

⁴⁸⁶ Kentaro Wani, *Neutrality in International Law: From the Sixteenth Century to 1945* (1st edition, Routledge 2017).

⁴⁸⁷ Spencer (n 471), 626

resistance of the Ethiopians, Italy resorted to gas warfare and successfully demoralised Ethiopian troops.⁴⁸⁸ From February 1936 to May 1936, Italian troops made rapid gains, and on 5 May 1936, they advanced and occupied Ethiopia's capital Addis Ababa.

Several days before that, on April 20, 1936, the League of Nations officially announced the "adjournment" of the Council of the League of Nations on the matter of Ethiopia. All of the measures being implemented and proposed were abandoned. The League accepted its failures to prevent the invasion. Also expected were the United Kingdom's and France's admissions that sanctions no longer had any utility in dealing with the situation. On July 6, 1936, the Coordination Committee adopted a resolution proposing that the government members of the League could abrogate the sanctions they had implemented in October 1934.⁴⁸⁹

There is a bright side to the story, however. It is vital to this study to say that at least the language of the non-recognition principle was still in the legal mind of the League of Nations. Strongly advocated and reintroduced by the Argentine Republic to the League of Nations Assembly during the meeting of June 02, 1936,⁴⁹⁰ the principle of non-recognition was incorporated into the Assembly's resolution, stating that members of the League of Nation remained:

"Firmly attached to the principles of the Covenant, which are also expressed in other diplomatic instruments, such as the declaration of the American States dated August 3, 1932, excluding the settlement of territorial questions by force . . .

It was recommended that the Council should invite from the Government Members of the League any proposals which they might wish to make to improve the application of the principles of the Covenant."⁴⁹¹

Moreover, as noted by O'Mahoney, Maxim Litvinov, the USSR representative, argued against the British's proposition of Halifax on the basis that:

"It must be clear that the League of Nations has no intention of changing its attitude, whether to the direct seizure and annexation of other people's territory or to those cases where such annexations are camouflaged by the setting-up of puppet 'national' governments."⁴⁹²

Delegates from significant nations, such as V. K. Wellington Koo from China and William Jordan from New Zealand, concurred with Litvinov's viewpoint. Jordan's representatives contended that recognizing members' freedom to make decisions on recognising or not recognising the Italian conquest of Ethiopia would imply renunciation of the Council's resolution on March 1932 (concerning Manchuria) and Article 10 of the Covenant. Their

⁴⁸⁸ Spears (n 448), 47

⁴⁸⁹ Spencer (n 471), 636

⁴⁹⁰ League of Nations Official Journal, Spl. Supp., No. 151, 34

⁴⁹¹ A Lawrence Lowell, 'Alternatives Before the League' (1936) 15 *Foreign Affairs* <<https://www.foreignaffairs.com/articles/1936-10-01/alternatives-league>> accessed 24 December 2023.

⁴⁹² O'Mahoney (n 202), 107

minority opinion, unfortunately, could not move in a substantial direction, but as will be explained in more detail in the later chapters, the failure of the early version of non-recognition led to the failure of the entire collective security vision of the League itself, signifying the magnitude of this principle.

4.B. Non-recognition in the Palestine – Israel Crisis (1949 – 2024)

Understanding the international campaigns of non-recognition during the protracted, multi-faceted and eventful conflicts between Israel (with the relative support of Western powers) and Palestine, supported/backed by the Arab world, could be exhausting and even unachievable within the setting and scope of this dissertation. Each side of the conflict deserves its own interpretation to be depicted entirely and unobstructedly. Understandably, the space and resources that I have for the dissertation do not match such an expectation. From 1945 to the 1980s, there were at least five major armed conflicts and countless skirmishes, massacres, assassinations, intragroup fighting, and political betrayal, all of which contributed to significant changes in boundaries, territorial situations and political confrontations in this area.

Such numbers explain why the literature on the Israeli-Palestinian conflicts is so vast. From political science to post-colonialism studies, human rights to international diplomacy, from military history to anthropology – each field of modern social science can always find certain aspects of the conflict that are topical and that fit its research interests. Understanding this context, there are not many reasons for me to try to discuss and include as much as possible the details of the history of Israeli-Palestinian territorial disputes and conflicts. They have already been much discussed elsewhere. The information and arguments presented in this chapter are selected for their relevance concerning the practice of non-recognition and how they contribute to the acknowledgement of non-recognition as part of the CIL.

1. Preliminary political-legal analysis

In 1922, the borders of Mandated Palestine were established by the League of Nations to include an area of 27,000 square kilometres on which over 600,000 Christian and Muslim Palestinians lived alongside approximately 80,000 Jews.⁴⁹³ In 2022, formerly Mandated Palestine was home to 9 million Israeli residents (7.1 million of them being Jewish), alongside approximately 5.3 million Palestinians.⁴⁹⁴ The Jewish population has gone from owning a single-digit per cent of Mandated Palestine land to militarily asserting its dominance over the entire territory, including the Gaza Strip, the West Bank, and both East and West Jerusalem.

Such a significant shift in the political and territorial control of Palestine begs the question of legality – to which extent should the expansion of Israeli territory be acknowledged under international law, and where the literal boundaries between the two political entities should be determined. Under the lens of the principle of non-recognition, the Israeli-Palestinian political-legal conflict can be simplified and studied entirely as a series of modern territorial conflicts and acquisitions. Therefore, in the preliminary legal/historical analysis of the situation of Israel-Palestine, it is proposed to study this case through three major historical stages:

⁴⁹³ Elizabeth Matthews, David Newman and Mohammed S Dajani Daoudi, *The Israel-Palestine Conflict: Parallel Discourses* (Taylor & Francis Group 2011) <<http://ebookcentral.proquest.com/lib/uvic/detail.action?docID=668869>> accessed 16 January 2023., 68. See also the League's Mandate: ECF Database, 'League of Nations Mandate for Palestine (1922)' <<https://ecf.org.il/issues/issue/232>> accessed 16 January 2023.

⁴⁹⁴ Matthews, Newman and Daoudi (n 497).

- (1) The establishment of Israel and its 1949 boundaries, using the negotiated *armistice lines* between Israel and bordering countries;
- (2) The consolidation of Israel's occupation over the West Bank, the Gaza Strip, the Golan Heights, the Sinai peninsula, and East Jerusalem after the 1967 War between Israel and the Arab powers;
- (3) The erection of the notorious "Separation Barrier", also known as the "Security Fence/Wall," was intended to enclose the entire West Bank and several Palestinian lands, including East Jerusalem.

- **The establishment of Israel and the 1949 armistice borders**

The establishment of the State of Israel inside Mandated Palestine (a land previously under Turkey's control) was a controversial legal innovation of the British and the League of Nations. Concerning the British, in 1917, the letter of the Foreign Minister – Lord Balfour – promised a national home for the Jews. It reads:

"His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation."⁴⁹⁵

This letter soon became known as the Balfour Declaration. At the time, it was indeed a political promise with no legal character. However, the Balfour Declaration was soon incorporated into the Resolution of the San Remo Conference, a meeting in 1920 of four World War I Allied Powers (Britain, France, Italy and Japan):

"The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory, to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on November 8, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people."⁴⁹⁶

In 1922, the League of Nations gave the British Empire the official mandate to administer Palestine (hereinafter, the "Mandate"). Again, the Balfour declaration was translated into the League's official document, thus, arguably, constituting the legal right of a national Jewish

⁴⁹⁵ James Balfour, 'The Balfour Declaration' (Yale Law School, Avalon Project, 2 November 1917) <https://avalon.law.yale.edu/20th_century/balfour.asp> accessed 17 January 2023.

⁴⁹⁶ ECF Database, 'Resolution of San Remo Conference' (1920) <<https://ecf.org.il/issues/issue/251>> accessed 17 January 2023.

home in Palestine. Article 2 of the Mandate clearly stated that “[T]he Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the Mandate for Palestine and the establishment of the Jewish national home...” Article 4 of the Mandate recognised the Jewish Agency – an international body established in 1929 as a lobbying and activist group working for the creation of Israel – as a “public body”, cooperating with the Mandatory in matters that may affect establishing the “Jewish national home.”

At the time, there were debates regarding the effectiveness of the Mandate, since it was never defined what it meant by a “national home,” or stipulated where exactly should this “national home” be located in “Palestine.”⁴⁹⁷ However, these questions were answered quite clearly with the 400-page report of the Peel Commission. Issued in 1937 after the deadly but somewhat justified Arab Strife, the report of the Peel Commission proposed a partition solution.⁴⁹⁸

- (1) The commission noted that there were already over 400,000 Jews in Palestine in 1936, making up almost 30 per cent of the population. With the achievements of the Jews in such a short time period, the commission believed that an independent Jewish State would be possible. Therefore, they proposed that this Jewish State to be established in a small area of about seventeen per cent of Western Palestine, constituting about four per cent of the entire area of Palestine;
- (2) Concerning the Arabs, the commission was of the opinion that the Arabs of Palestine were a community belonging to Southern Syria. They especially noted that Arabs living east and west of the Jordan River had ties of kinship, language and culture with the Arabs in surrounding countries. The proposal for the Arabs here was not a country but to be a part of the Transjordan emirate;
- (3) The Holy sites in Jerusalem would be treated with a special international mandate;
- (4) The commission argued that the transfer of populations between designated territories is the only way to end riots and armed conflicts, thus solving the question of Palestine conclusively.

However, only the Jewish Agency supported this plan. For better (or for worse), both the British government and the Arab communities saw this plan as “impracticable” and rejected it. Until now, scholarly communities still see the plan as the inception of Israeli settler-colonialism.⁴⁹⁹ In 1938, Britain’s sponsorship of Zionism seemed to deteriorate as the British

⁴⁹⁷ Ruth Lapidot, ‘Is the Balfour Declaration a Legally Binding Document?’ (2017) 28 Jewish Political Studies Review 42.

⁴⁹⁸ Shaul Bartal, ‘The Peel Commission Report of 1937 and the Origins of the Partition Concept’ (2017) 28 Jewish Political Studies Review 51.

⁴⁹⁹ Faye Sayegh, ‘Zionist Colonialism in Palestine (1965)’ (2012) 2 Settler Colonial Studies 206.

Yair Wallach, ‘The Racial Logic of Palestine’s Partition’ [2022] Ethnic and Racial Studies 1.
Traces of Racial Exception: Racializing Israeli Settler Colonialism (Bloomsbury Academic 2017)
<http://www.bloomsburycollections.com/book/traces-of-racial-exception-racializing-israeli-settler-colonialism>
 accessed 17 January 2023.

government introduced several strict measures to limit Jewish immigration (at 75,000 per year) and ban Jewish land purchases from Arabs.⁵⁰⁰

From the historical perspective, measures initially intended to safeguard the legitimate interests of the Arabs further complicated the situation. The Jewish military elements started to rebel against their former allies, while the Palestinian revolt against the British had not come to an end. Violence between Jewish settlements and Palestinian communities also escalated. After World War II, exhausted and unable to come to terms with both communities, especially after the devastating bombing at the British headquarters located in the King David Hotel in Jerusalem, Britain decided to end its Mandatory role and asked the newly established United Nations for a world-sanctioned solution.⁵⁰¹

The United Nations' plan, nevertheless, opted for partition. Although the detailed report of the Special Committee on the Mandated Palestine offered many legal insights concerning the legality of the British-proposal for a "Jewish National Home" back in the 1920s (which we will revisit in the next section), the committee saw the partitioning of Palestine as the best political/legal option that was available. Only three members of the Special Committee proposed a federal state with Jewish and Arab components, while a majority of seven members suggested the partition of Palestine into a Jewish state and an Arab state.⁵⁰² More interestingly, none favoured a single state in Palestine.

The drive toward partition and independent, separate Jewish and Arab states became inevitable, although controversial with UNGA Resolution 181 (1947).⁵⁰³ This unexpectedly long and detailed resolution again gathered support from the Jewish Agency but none from the Arabs, while also facing the inaction and reluctance of the major powers, including the United Kingdom and the United States. With the possibility of the implementation of Resolution 181 having faded, the Jewish elements inside Palestine speeded up their military preparation and carried out several vital military operations to gain the upper hand.⁵⁰⁴ On 14 May 1948, the State of Israel was officially proclaimed.

⁵⁰⁰ Arie J Kochavi, 'The Struggle against Jewish Immigration to Palestine' (1998) 34 Middle Eastern Studies 146.

⁵⁰¹ RICHARD LEONARD JASSE, 'Zion Abandoned: Great Britain's Withdrawal from the Palestine Mandate, 1945-1948' (PhD, The Catholic University of America) <<https://www.proquest.com/docview/303013192/abstract/14B0D6B0A5B74C00PQ/1>> accessed 17 January 2023.

Bruce Hoffman, 'The Bombing of The King David Hotel, July 1946' (2020) 31 Small Wars & Insurgencies 594.

⁵⁰² John Quigley, *The Case for Palestine: An International Law Perspective* (2005) <<https://read.dukeupress.edu/books/book/969/The-Case-for-PalestineAn-International-Law>> accessed 10 January 2023., 33 - 35

⁵⁰³ UNGA, 'Resolution 181 on "Palestine Plan of Partition with Economic Union" UN Docs A/RES/181(II)' <<https://www.un.org/unispal/document/auto-insert-185393/>> accessed 26 December 2023.

⁵⁰⁴ Netanel Lorch, *The Edge of the Sword: Israel's War of Independence, 1947-1949* (2d rev. ed., Massada Press 1968).

The next day, however, the armies of Egypt, Iraq, Lebanon, Transjordan, and Syria invaded the newly formed State of Israel.⁵⁰⁵ This event was later called the “Israeli War of Independence” by the Jewish people, or “al-Nakba” (the catastrophe) by the Arab Palestinian people.⁵⁰⁶ The war ended with a total victory of the Jews, forcing all Arab countries involved to agree on a system of armistice lines drawn in bilateral armistice agreements with the new State of Israel.

In the end, Israel held 77 *per cent* of the previously mandated Palestine, except the Gaza Strip and the West Bank of the Jordan River.⁵⁰⁷ West Jerusalem came under the control of Israel, while East Jerusalem was considered a part of the West Bank and administered by the Hashemite Kingdom of Jordan. This first Jewish armed campaign, leading to the creation of the armistice lines with the Arab countries, is the first questionable territorial situation that poses challenges to the duty of non-recognition.

- **1967 Israel – Arab War and the Israeli Occupation**

Known worldwide as the “Six-day War”, the war of 1967 was the result of decades of political disputes, military build-up and a severe regional arms race.⁵⁰⁸

To Israel, the Palestinian attacks inside their “established” territories, patinated by surrounding Arab countries, especially Syria, was perceived by the Israelis as a threat to their security. Egyptian president Gamal Abd al-Nasir was accused of escalating the situation by deploying 80,000 troops into Sinai,⁵⁰⁹ requesting the United Nations to withdraw its United Nations Emergency Force (UNEF) in Sinai and Gaza, and then forcing the closure of the Strait of Tiran. All that happened while the US, the principal guarantor of Israel’s security, seemed hesitant to provide diplomatic support or any helpful guidance for the reopening of the the Strait of Tiran and for the condemnation of the aggressive behaviour of the Arabs. The challenge to the Israeli government was one of state survival and memories of the Holocaust conjured the spectre of extermination. To them, military action was imminent – it was “a war of no choice” (*milhemet ein-brera*).⁵¹⁰

On June 5, 1967, the Israeli Air Force attacked military air bases in Egypt, Syria and Jordan. Its “pre-emptive” strikes successfully neutralised 80% of the warplanes of the aforementioned states.⁵¹¹ And only one week later, the Israeli Defense Force had taken the West Bank, the Gaza Strip, and the Sinai Peninsula. Israel also occupied Syria’s Golan Heights. The IDF stopped

⁵⁰⁵ PR Kumaraswamy, *The A to Z of the Arab-Israeli Conflict* (Scarecrow Press 2009) <<http://ebookcentral.proquest.com/lib/uvic/detail.action?docID=616443>> accessed 10 January 2023.

⁵⁰⁶ Benny Morris, *1948: A History of the First Arab-Israeli War* (Yale University Press 2009).

⁵⁰⁷ Gideon Biger, ‘The Boundaries of Israel—Palestine Past, Present, and Future: A Critical Geographical View’ (2008) 13 *Israel Studies* 68.

⁵⁰⁸ Office of the Historian, ‘Israel - Palestine Milestones: 1961–1968’ <<https://history.state.gov/milestones/1961-1968/arab-israeli-war-1967>> accessed 19 January 2023.

⁵⁰⁹ Roland Popp, ‘Stumbling Decidedly into the Six-Day War’ (2006) 60 *Middle East Journal* 281.

⁵¹⁰ Gideon Gera, ‘Israel and the June 1967 War: 25 Years Later’ (1992) 46 *Middle East Journal* 229.

⁵¹¹ Ersun N Kurtulus, ‘The Notion of a “Pre-Emptive War.” The Six Day War Revisited’ (2007) 61 *Middle East Journal* 220.

their offensive campaign only after pressure from the United States.⁵¹² Both East and West Jerusalem were officially under Israel's control. Israel's *pre-emptive* armed attacks, although praised by military strategists and historians, have faced heavy criticism from international lawyers.

Whether one sees this event as a triumphant historical chapter or a disaster, one clear consensus is that the legal and political challenges that it created was a series of territorial problems. Some of these problems involved sovereign states, as in the case of Egypt's Sinai Peninsula and Syria's Golan Heights. Some dealt with territories with a questionable status, such as the West Bank and Gaza Strip.⁵¹³ Thanks to this military victory, the Israeli government, in the 1980s also proclaimed Jerusalem, complete and united, the capital of Israel with the so-called "Basic Law: Jerusalem Capital of Israel."⁵¹⁴

It should be noted, however, that Jordan officially annexed the West Bank from 1949 to 1967, while Egypt administered the Gaza Strip in the same period.⁵¹⁵ The question of Gaza and West Bank statehood under the banner of Palestinian nationalism had never been raised during those 20 long years.

- **The 1990s – 2000s security challenges and “the Wall”**

Israeli military occupation over most strategic and essential locations of the Middle East did much to guarantee the country's overall security. However, this military superiority did not necessarily safeguard the everyday personal security of Israeli villages and citizens. As Daphne Barak-Erez – an associate judge of the Supreme Court of Israel – explains, the justification for the security barriers is that they are a “passive” and more effective anti-terrorist measure. She articulates Israel's claim with three supporting arguments:

- (1) A growing number of terrorist attacks originated from Palestinian territories, usually involving suicide bombers entering Israeli civilian areas.
- (2) These attacks are impossible to prevent using ordinary security measures, given the proximity and porosity of Palestinian areas to Israeli civilian centres. Methods such as deportation, house demolition, and administrative detentions were ineffective in reducing the incidence of terrorist attacks.

⁵¹² Quigley (n 506).

⁵¹³ ‘1967 War: Six Days That Changed the Middle East’ *BBC News* (4 June 2017) <<https://www.bbc.com/news/world-middle-east-39960461>> accessed 19 January 2023.

⁵¹⁴ Naor, ‘Menachem Begin and “Basic Law: Jerusalem, Capital of Israel”’ (2016) 21 *Israel Studies* 36.

⁵¹⁵ Hasan Ismaik, ‘Unite Jordan and Palestine—Again’ (*Foreign Policy*) <<https://foreignpolicy.com/2021/10/15/jordan-palestine-israel-annex-west-bank-israel-occupation/>> accessed 19 January 2023.

Ilana Feldman, *Police Encounters: Security and Surveillance in Gaza under Egyptian Rule* (Stanford University Press 2015).

- (3) Peace negotiations between Israel and the Palestinians had already collapsed in the 1990s. There was no prospect of obtaining an assurance of security from the Palestinian authorities.⁵¹⁶

Although these arguments seem understandable and fairly uncontroversial, the intentions of the Israeli government in carrying out this policy were questionable. As pointed out by the author Said Saddiki, 90 per cent of the total route of the system of security barriers is inside the West Bank, covering the land to the east of the pre-1967 border between Israel and the formerly Jordanian-administered West Bank.⁵¹⁷ The barrier system problematically cuts through villages and communities. It not only separates the Israelis from the Palestinian population but also Palestinians from Palestinian lands, their public services, community connections, and even personal kinship.

For reference, the total length of this system of security barriers extends approximately 750 kilometres (the red lines on the map), more than twice the 320-kilometre-long 1949 armistice line (green lines in the map).⁵¹⁸ As we can see in the smaller map, it zigzags into the West Bank territory repeatedly to ensure Israeli settlements fall on its western edge. As a result, to Palestinians, this is nothing more than a land grab to legitimise Israeli “colonial settlements” in the West Bank.

Two conflicting narratives always contain elements of truth and reasonableness. It is true that the security barriers were built after the outbreak of the Second Palestinian Uprising (Al-Aqsa Intifada) in September 2000.⁵¹⁹ In 2001 and 2002, Palestinian armed groups carried out 87 bombings against Israeli civilian targets, causing 299 deaths.⁵²⁰ It is also true that the Israeli government consistently repeats their claims and justifications that the security barriers are nothing more than a temporary structure, built to meet urgent security needs.⁵²¹

On the other hand, the Palestinians are also correct in their observations that the barriers not only provide protection to the legitimate and recognised Israeli borders and national territory but also perpetuate Israeli settlers’ occupation and ongoing “colonisation.” The wall is complex, with permanent features. On both sides of the wall are a sand road, a paved road, a trench and barbed wire, mirroring each other.

⁵¹⁶ Daphne Barak-Erez, ‘Israel: The Security Barrier—between International Law, Constitutional Law, and Domestic Judicial Review’ (2006) 4 *International Journal of Constitutional Law* 540.

⁵¹⁷ Said Saddiki, ‘1. Israel and the Fencing Policy’, *World of Walls : The Structure, Roles and Effectiveness of Separation Barriers* (Open Book Publishers 2018) <<http://books.openedition.org/obp/4560>> accessed 20 January 2023.

⁵¹⁸ ‘Israel and the Occupied Territories: The Place of the Fence/Wall in International Law’ (*Amnesty International*) <<https://www.amnesty.org/en/documents/mde15/016/2004/en/>> accessed 20 January 2023.

⁵¹⁹ Michal Shamir and Tammy Sagiv-Schifter, ‘Conflict, Identity, and Tolerance: Israel in the Al-Aqsa Intifada’ (2006) 27 *Political Psychology* 569.

⁵²⁰ Efraim Benmelech and Claude Berrebi, ‘Human Capital and the Productivity of Suicide Bombers’ (2007) 21 *Journal of Economic Perspectives* 223.

⁵²¹ Susan Akram and Michael Lynk, ‘The Wall and the Law: A Tale of Two Judgements’ (2006) 24 *Netherlands Quarterly of Human Rights* 61.

2. Legal debates

The above simplifies the long and eventful territorial conflict between Israelis and Palestinians. It is certainly not enough to properly understand the conflict from a historical perspective, with its political complexities, agents, plots and betrayals. Nevertheless, the section provides vital milestones that allow international lawyers to break the conflict down and study it piece by piece.

- **The establishment of Israel and the 1949 armistice borders**

The establishment of Israel inside the land of Palestine and then the extension of Israel's border to the 1949 armistice borders have been all questioned by the UN agencies, international scholars and Arab jurists. And the League of Nations Mandate over Palestine was the first in line for criticism.

During the time of his representation of India for the United Nations Special Committee on Palestine (UNSCOP) in the summer of 1947, Sir Mohammad Abdur Rahman presented a compelling argument in his special note to the UNSCOP.⁵²² Specifically, he argued that the Balfour Declaration and the British tampering with Palestine were motivated by an imperialistic ambition to secure eastward security in the Middle East. But more importantly, Rahman concluded that the Balfour Declaration had neither legal nor moral validity. The Declaration was not legal because the British Government had no sovereign right over Palestine when the Jewish National Home was promised. The declaration was also alleged to be immoral since it was in contravention of the political commitments already made to the Arabs.

The position, however, has some problems. Even if the Balfour Declaration was just a British "imperialistic" and arbitrary instalment, it was legitimised and legalised by the League of Nations with the Mandate for Palestine. What could really be said about this mandate? Rahman rejected the mandate as well.

He argued that the mandate concerning Palestine imposed by the League of Nations violated the basic principle of self-determination stipulated in Article 22 of the Covenant. Rahman noted that Jews from various other parts of the world had nothing in common with the Jews in Palestine except their religion. Therefore, followers of a certain faith cannot be considered "peoples" or "communities" to which the League of Nations Covenant promised statehood. By prioritising a Jewish national home and encouraging Jewish migration to Palestine, Rahman observed that the legitimate right to self-determination of the Arab population had been abandoned. Rahman did not reject the right of newly immigrated Jews as he accepted that "the Mandate has been in force and cannot be undone"; and "private rights (of Jewish immigrants) have been created." However, to him, the just and proper solution for Palestine was for the

⁵²² 'Question of Palestine/Partition Recommendation - UN Special Committee on Palestine (UNSCOP) - Report Addendum 1 (Annexes, Appendix and Maps)' (*Question of Palestine*) <<https://www.un.org/unispal/document/auto-insert-186346/>> accessed 25 January 2023.

Jewish immigrants to acquire Palestinian citizenship. There should be no partition or federation plan over the territory of Palestine.

Another prominent Arab international scholar, Hisham H. Ahmed, after explaining the connection between the US government, the British government and the American Zionists, saw the Balfour Declaration as nothing more than a territorially ambitious draft of the American Zionists themselves. He added that at the time the declaration was made public, 91 per cent of the people in Palestine were Arab Muslims and Christians, and only 9 per cent were Jews. Thus, the Balfour Declaration, which put emphasis on a Jewish national home in Palestine without consulting the Arab established population, constituted a “flagrant violation” of the Arabs’ right to self-determination.⁵²³

He argued that, even in the UNSCOP’s report to the General Assembly, the Special Committee commented in paragraph 176 that:

“With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the “A” Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle.”⁵²⁴

This very legal foundation makes the acceptance of an independent Jewish state inside Palestine questionable and possibly subject to the principle of non-recognition.

From Israel’s side, there are not many counterarguments in this regard. The most cited proof of Israeli rights to statehood in Palestine is usually their “historic rights.” Specifically, many Jews firmly hold that their patriarch, Abraham, first settled in the area around 1800 B.C.⁵²⁵ The Jewish people were expelled from the land is a historical fact, and the argument is that Christian and Muslim rule over the land was illegitimate in the first place, and the re-installment of a Jewish state is a just step to help right the wrong.

This argument is “technically” problematic as international law does not tolerate or intend to create a platform for “historic rights” claims. The term is generally disruptive and rather unproductive. In some cases, it could also be dangerously unpredictable. Recently, China’s claim to her “historic rights” in the South China Sea was rejected by an arbitration tribunal

⁵²³ Hisham H. Ahmed, ‘From the Balfour Declaration to World War II: The U.S. Stand on Palestinian Self-Determination’ <https://referenceworks.brillonline.com/entries/the-shafr-guide-online/*-SIM110060058> accessed 25 January 2023.

⁵²⁴ ‘Question of Palestine/Majority Plan (Partition), Minority Plan (Federal State)- UN Special Committee on Palestine (UNSCOP) - Report’ (*Question of Palestine*) <<https://www.un.org/unispal/document/auto-insert-179435/>> accessed 25 January 2023.

⁵²⁵ John A Collins, ‘Self-Determination in International Law: The Palestinians’ 12 Case Western Reserve Journal of International Law 137.

formed and requested by the Philippines under UNCLOS.⁵²⁶ Overall, it is logical for some scholars to see Israel's claim to the right of self-determination and statehood in Palestine as untenable under international law. Therefore, its eventual formation requires our attention to be focused on the principle of non-recognition.

The territorial borders of Israel consolidated after the first Arab-Israeli war, later called "the 1949 armistice line" or "the Green line", also poses questions concerning its legality and validity. Specifically, the *de facto* division of Palestine between Jewish and Palestinian states was brought forward by the use of force and is not in line with the demarcation lines offered by UNGA Resolution 181. The arrangements between Israel and several Arab states (Egypt, Lebanon, the Hashemite Kingdom of Jordan and Syria) left massive areas of the Negev Desert, Central and Northern Palestine under Israeli control.⁵²⁷ From a humanitarian perspective, more than 750,000 Palestinians were expelled from their lands, and 418 villages were depopulated and/or demolished. The war, after all, provided a degree of territorial stability, allowing the Israeli authorities to insist on the preposition, as follows:

"In addition to the territory indicated on the working document annexed to the Protocol of May 12, all other areas falling within the control and jurisdiction of Israel under the terms of the armistice agreements concluded by Israel with Egypt, Lebanon, the Hashemite Kingdom of Jordan and Syria should be formally recognised as Israel territory."⁵²⁸

To the Israelis, the Green lines are their official state boundaries. Should this be considered another unlawful situation and subject to the principle of non-recognition?

- **1967 Israel – Arab War and the Israel's Occupation**

As we mentioned in the analysis section, after the 1967 war, Israel asserted military control over Sinai, Golan Heights, the Gaza Strip, West Bank, and Jerusalem. There have been several debates on the legal justification of these military activities. However, few challenge the occupied territories' legal status since Israel has never propagated the idea of annexation in any of the occupied territories. However, the way Israel handles the occupied territories sparks concerns about how they intend to return the lands to Palestinians and stabilise regional security eventually. In addition, the radicalisation of the Arabs' perspective concerning the existence of the state of Israel was also worrying.

⁵²⁶ Zou Keyuan, 'Historic Rights in International Law and in China's Practice' (2001) 32 *Ocean Development & International Law* 149.

And Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, *Chinese Journal of International Law*, Volume 15, Issue 2, June 2016, Pages 265–307, <https://doi.org/10.1093/chinesejil/jmw019>

⁵²⁷ Rafal Soroczynski, 'Acquisition of Title to Territory in the Aftermath of the Use of Force in the United Nations Era: The Case of the State of Israel' (2017) 30 *Revue québécoise de droit international* 65.

⁵²⁸ UNCCP, Letter Dated 31 August 1949 Addressed to the Chairman of the Conciliation Commission by Mr Reuven Shiloah, Head of the Delegation of Israel, and Containing Replies to the Commission's Questionnaire of 15 August 1949, UN Doc A/AC.25/IS.36, September 1949, para 3.

For Israel, there could be no return to the pre-1967 borders and political situation, not because of territorial ambition but because of security. A hero of Israel at the time – Prime Minister Levi Eshkol – in several national addresses and political statements, sent a message to the international community to “be under no illusion that the State of Israel is prepared to return to the situation that reigned up to a week ago,” and “the Land of Israel shall no longer be a no man’s land, wide open to acts of sabotage and murder.”⁵²⁹ According to several analyses and observations, this proposition has formed and guided Israel’s policy ever since, by establishing that:

- (1) The 1949 “Green Line” was indefensible. What happened in Jerusalem, upper Galilee valley, and the outskirts of Tel Avi... before and during the 1967 war had shown that it is implausible to ensure Israel’s security without some compromise concerning the Green Line;
- (2) Israel would continue her military occupation unless there were peace settlements and security guarantees from Arab countries.⁵³⁰

In other words, the violator has no intention of permanently changing the recognised borders between the two entities. In fact, when the Israeli army took over the West Bank on June 7, 1967, it issued a proclamation that the Israeli military would assume all governmental powers in the area, with all the existing laws inside the territory remaining in force. There was also the Security Provisions Order which contained detailed provisions for Israeli rule in the occupied areas. (30) According to these provisions:

“[a] military tribunal and the administration of a military tribunal shall observe the provisions of the Geneva Convention of August 12, 1949 ... with respect to legal proceedings, and in case of conflict between this Order and the said Convention, the provisions of the Convention shall prevail.”⁵³¹

On the other hand, thanks to the rapid Soviet military equipment enforcement of the Egyptian and Syrian military, the Arab world agreed upon an increasingly hawkish pro-war narrative, which made a protracted armed conflict with Israel inevitable. On September 1, 1967, the

⁵²⁹ CIE Staff, ‘Prime Minister Levi Eshkol Statement to the Knesset at Conclusion of June War’ (CIE, 7 June 2019) <<https://israeled.org/resources/documents/prime-minister-levi-eshkol-statement-knesset-conclusion-june-war/>> accessed 26 January 2023.

Eshkol, Levi. "Principles Guiding Israel's Policy in the Aftermath of the June 1967 War as Outlined by Prime Minister Eshkol." *International Documents on Palestine, 1967*. Ed. Fuad A. Jabber. Beirut: Institute on Palestine Studies, 1972. 156.

⁵³⁰ Gera (n 514).

Bernard Reich and Shannon Powers, ‘The United States and Israel: The Nature of a Special Relationship’, *The Middle East and the United States* (5th edn, Routledge 2016).

⁵³¹ ‘The Legality of the West Bank Wall: Israel’s High Court of Justice v. the International Court of Justice - Document - Gale OneFile: LegalTrac’ <<https://go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=LT&u=uvictoria&id=GALE|A176477656&v=2.1&it=r>> accessed 29 January 2023.

summit adopted the well-known “Three No’s”: “No peace with Israel, no recognition of Israel, and no negotiation with it.”⁵³²

I would like to argue that the behaviour and political choices of both factions after the war have led to serious regional polarisation and a uniquely unlawful situation in the history of this principle. Although Israel has not, for the last twenty years approximately, put forward any territorial claims to Sinai, the Gaza Strip and the West Bank (excluding East Jerusalem and the *de facto* extension of Israeli administration to Golan Height), it wants to control these areas for as long as possible, in the interest of its self-perceived security requirements.

The Arab world and the Palestinians, although they know that their legal right to these territories was “legally” respected by the international community and, to a certain extent, Israel, wanted to pursue something more than just a normalisation of international borders. I would not blame them for that. The idea that a group of people who last inhabited Palestine centuries ago could claim rights based on a religious text to a land where the current inhabitants have been living for more than a millennium is legally problematic.⁵³³ Yet, anti-Israel sentiments have also led to holocaust denial, anti-Semitism, and genocidal rhetoric within the Arab world.⁵³⁴

On a separate note, we must also mention that Israel declared Jerusalem as its capital during its occupation of the West Bank. Fortunately, there is no significant legal debate or “grey area” with this trope. The Israeli government did this entirely for their domestic audience.⁵³⁵ The international community, from international organisations like the UN to Israel’s most important ally – the United States, has no intention of participating in this adventurism (except for Donald Trump, of course).⁵³⁶ Therefore, there would be no difficulties in analysing how the duty of non-recognition would be applied in this case.

• “The Wall”

As we have previously established, Israel annexed Jerusalem, but does not intend to annex either Gaza or the West Bank (at least it is the narrative until now). The “security barriers” or the “wall” built around the West Bank have been consistently defended by the Israeli government as only a security tool. In the Statement of the Government of Israel on Jurisdiction

⁵³² TG Fraser, *The USA and the Middle East Since World War 2* (Springer 1989).

Such acceptance of international humanitarian law from the Israeli government was short-lived however.

⁵³³ Natasha Gill, ‘The Original “No”: Why the Arabs Rejected Zionism, and Why It Matters’ Middle East Policy Council.

⁵³⁴ Michelle L Picheny, ‘A Fertile Ground: The Expansion of Holocaust Denial into the Arab World Note’ (2003) 23 Boston College Third World Law Journal 331.

Bruce Hoffman, ‘Understanding Hamas’s Genocidal Ideology’ (*The Atlantic*, 10 October 2023) <<https://www.theatlantic.com/international/archive/2023/10/hamas-covenant-israel-attack-war-genocide/675602/>> accessed 26 December 2023.

⁵³⁵ Naor (n 518).

⁵³⁶ The Committee on the Exercise of the Inalienable Rights, of the Palestinian People and United Nations, ‘The Status of Jerusalem’ <<https://www.un.org/unispal/wp-content/uploads/2016/07/The-Status-of-Jerusalem-English-199708.pdf>> accessed 26 January 2023.

and Propriety to the ICJ during the written proceeding concerning the request for an advisory opinion on the legal consequences of the construction of the wall in occupied Palestinian territory, Israel highlighted Palestinian terrorism against Israel and the responsibilities of the Palestine authorities for Palestinian terrorism.⁵³⁷ However, Israel did not spend time debating or discussing its justification, as its letter to the ICJ was solely concerned with issues of jurisdiction and propriety.

On the other hand, the Palestinian authorities, in rejecting the legality of the wall, relied on international humanitarian law, conventional human rights law and the right to self-determination of the Palestinians.⁵³⁸ Palestine pointed out that Israel had already accepted that the Fourth Geneva Convention was applicable in the occupied Palestinian territory for a period of time but revoked this acknowledgement soon afterwards. Israel still recognises its role in the West Bank as an occupier, applying it *de facto* in accordance with its humanitarian provisions.⁵³⁹ Palestine then argued that Israel is also a member of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights (ratified on October 3, 1991). Therefore, Israel also had to undertake “to respect and to ensure...to all individuals within its territory and subject to its jurisdiction” as required by Article 2(1) of ICCPR. In general, the focus is on three points:

- (1) Israel, as the occupier, has no lawful basis in building a “security wall” inside, dividing occupied territories.

The main argument is that the rights of the occupying power are not limitless and absolute. These rights, as provided by international humanitarian law, include the “requisition of goods and services” that are necessary to the needs of the occupation army, the right to “destroy private property” that is absolutely necessary for military occupation, or the right to “requisition and destroy property” that is necessary and proportionate. International humanitarian law, specifically the Fourth Geneva Convention, has never viewed the construction of a quasi-permanent structure in occupied territory to encircle the local communities and physically incorporate certain occupied areas into the occupying power’s territory as something that falls into the category of “military necessity” or security “proportionality”.⁵⁴⁰

- (2) The wall is clearly intended to finalise the annexation of East Jerusalem.
- (3) The wall violates the basic human rights of the Palestinians under occupation, including the right to freedom of movement, family life, and private property...

The aforementioned accusations and arguments are relatively stable and well known as we can find them in almost all studies and books focusing on the legality of the wall and Israel’s

⁵³⁷ The Government of Israel, ‘Written Statement of the Government of Israel on Jurisdiction and Propriety’ <<https://www.icj-cij.org/public/files/case-related/131/1579.pdf>> accessed 29 January 2023.

⁵³⁸ Palestine, ‘Written Statement Submitted by Palestine’ <<https://www.icj-cij.org/public/files/case-related/131/1555.pdf>> accessed 29 January 2023.

⁵³⁹ *ibid.*, para 409 - 413.

⁵⁴⁰ *ibid.*, para 430 - 440.

occupation in general. The Israeli government's defence of their decisions, on the other hand, merits a closer look, particularly in the domestic trials, where Palestinian claimants brought the wall dispute to the Supreme Court of Israel. Cases such as *Beit Sourik Village Council v. the Government of Israel* and *Mara'abe v. The Prime Minister of Israel* will serve as examples.⁵⁴¹ In these cases, the Israeli government puts forward three primary legal justifications:

- (1) The "barrier" is only temporary. It is not intended to become a permanent border between Israel and the Palestinian State.
- (2) As the occupied power, Israel is authorised by international law to use all possible and reasonable means to preserve "public safety and order."
- (3) Dealing with the proportionality requirements, in both cases, the Israeli government insisted that the authorities did not only prepare gates for more accessible transportation for the villagers but also arranged for medical personnel to visit the villages on a regular basis. Village children who go to schools outside the enclave are also offered funding and transportation.⁵⁴²

In the case of *Mara'abe*, although Aharon Barak – the President of the Supreme Court of Israel, seemed to agree that the segment of the barrier around the Alfei Menashe enclave did not pass the three-part proportionality test, generally, the court agreed with the Israeli government that neither the Fourth Geneva Convention nor the Hague Regulations prohibit the construction of a security barrier as a measure for security in occupied territory. The construction of the wall was carried out, although "by way of taking possession," has been "temporary" and "accompanied by payment of compensation."⁵⁴³ Israel's highest court also criticised international judgments concerning the wall, due to its lack of attention to the security side of the equation.

3. Identifying Illicit Act(s) and Unlawful Situation(s)

The above sections offer condensed but relatively systematic gateways to an understanding of the political/legal situations concerning the Israel – Palestine territorial conflicts. With most of the fundamental problems, debates, and legal questions presented, I now examine these situations through the lens of the international process of non-recognition.

A. *The establishment of Israel and the 1949 "Green Line" as lawful consequences of international processes*

⁵⁴¹ 'Supreme Court of Israel: Beit Sourik Village Council v. the Government of Israel' (2004) 43 International Legal Materials 1099.

Geoffrey R. Watson, 'Mara'abe v. Prime Minister of Israel. Case No. HCJ 7957/04' (2006) 100 The American Journal of International Law.

⁵⁴² 'Mara'abe v. The Prime Minister of Israel' <<https://versa.cardozo.yu.edu/opinions/mara%E2%80%9999abe-v-prime-minister-israel>> accessed 30 January 2023., para 84 - 91.

⁵⁴³ *ibid.*, para 16.

Scholars who insist on the illegality of the establishment of Israel and its 1949 borders usually use three main branches of argumentation: (1) The Palestine Mandate of the League of Nations violates the right to self-determination of the Arab population; (2) UNGA Resolution 181 establishing the partition plan for Palestine territory is not binding; (3) Israel's border after 1949 was consolidated by the use of force.

Concerning the Palestine Mandate, authors such as John Quigley depend on paragraph 176 of the Report on the Question of Palestine of the UNSCOP to prove their proposition that the legal foundation of Israel was baseless: "Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle."⁵⁴⁴ Quigley observes that the Special Committee *avoided* questioning the validity of the League's approach, even though a self-determination right had just been written into Article I of the UN Charter.⁵⁴⁵ However, such an observation seems to be based on an incomplete reading of the report.

For instance, in paragraph 174, the Special Committee specifically mentioned the agreement between Amir Feisal, representing and acting on behalf of the Arab Kingdom of the Hejaz, and Dr Weizmann, representing and acting on behalf of the Zionist Organization. This was a treaty-level acknowledgement of the Arab statesmen that they were willing to give a part of Palestine to the Jews, provided that the rest of Arab Asia "was free." Such a condition was on the eve of fulfilment during the time of the Peel Commission (1937),⁵⁴⁶ and was even more ready at the time of compilation of the report of the UNSCOP (1947).

In fact, the UNSCOP did not avoid discussing the validity of the League of Nations approach, and the committee actually confirmed the validity of the Palestine Mandate. Firstly, the Palestine Mandate did not violate Article 22 of the League's Covenant because the community of Palestine has never been recognised as an independent nation, unlike Arab Syria and Transjordan. The Arab communities of the Middle East reportedly even acknowledged such a position. Secondly, the Special Committee agreed with the Peel Commission that the recognition of possible national communities, besides other established Arab nationals such as Syria, Transjordan, and Iraq, was provisional and subject to the consideration of the League of Nations. And finally, the committee explicitly rejected legal challenges against the Palestine Mandate for the reasons advanced by the Arab States relating to legal procedures. The mandate was built by the Supreme Council of the Principal Allied Powers as a part of the First World War settlement. The plan was subsequently approved and confirmed by the Council of the League of Nations. Therefore, the foundation for establishing the state of Israel is not as fragile and arbitrary as many scholars have deemed it to be. Legal considerations, political consultation and procedural requirements for the Palestine Mandate and its survival in the United Nations era were explicitly confirmed by the UNSCOP, the authorised agent of the UNGA.

⁵⁴⁴ 'Question of Palestine/Majority Plan (Partition), Minority Plan (Federal State)- UN Special Committee on Palestine (UNSCOP) - Report' (n 528)., para 176

⁵⁴⁵ Quigley (n 506).

⁵⁴⁶ Palestine Royal Commission, 'Palestine Royal Commission Report (Peel Report)' <<https://content.ecf.org.il/files/M00300%20-%20PeelCommissionFullReport.pdf>> accessed 30 January 2023.

The same language and outlook for Mandate Palestine were transferred and implanted into Resolution 181, which officially re-ignited the partition plan for a Jewish and an Arab state in the territory of Palestine. But Resolution 181 has not been greeted with open arms. Hans Kelsen, for instance, cited Resolution 181 to conclude that the General Assembly could only bring forward “recommendations.” The provisions inside the UNGA “do not constitute a legal obligation to behave in conformity with them.”⁵⁴⁷ Similarly and even more directly, Clyde Eagleton insisted that “a resolution of the General Assembly, such as that for the partition of Palestine, is no more than a recommendation.”⁵⁴⁸ And in the same spirit, Ian Brownlie argued that the General Assembly does not have the power over territory, had “no capacity to convey title,” and “cannot assume the role of territorial sovereign.”⁵⁴⁹ Technically speaking, the scholars are completely right, as the UN Charter does not grant the General Assembly any institutional power as such. And to say that a UNGA resolution could give Israel a valid territorial title in Palestine is not legally correct.

However, it is also important to note that the UNGA’s endorsement and its preferred solutions for an unresolved mandate/territorial dispute often become the final solution accepted by the international community. Until this point, a general conviction has been confirmed repeatedly. The advisory opinion of the International Court of Justice on the status of South-West Africa actually clarified and reasserted the role of the United Nations in dealing with territorial issues of the residual mandate system.⁵⁵⁰ The opinion noted:

“For the above reasons, the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to the supervision and control of the General Assembly and to render annual reports to it.”⁵⁵¹

Indeed, the language is clear that the General Assembly has the power of supervision and control, but not the power to decide the status of the mandated territories. Yet, in the end, it has always been the final conclusion of the General Assembly that settled the unresolvable and politically polarised question of mandates and territorial status. As in the case of South-West Africa, it was Resolution 2324-2325 (XXII) of December 16, 1967 and Resolution 2145 (XXI) of October 27, 1966 that decided the sovereign fate of South-West Africa, whether it continued to be a part of South Africa, or eventually gained independence.⁵⁵² Denying the General

⁵⁴⁷ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1950), 195 - 196

⁵⁴⁸ Clyde Eagleton, ‘Palestine and the Constitutional Law of the United Nations’ (1948) 42 *American Journal of International Law* 397.

⁵⁴⁹ Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1979), 175

⁵⁵⁰ *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128 [International Status of South-West Africa].

Also see argument from Soroczynski (n 531).

⁵⁵¹ *Ibid*, 137.

⁵⁵² UNGA, ‘Res 2324 - 2325 on the “Question of South West Africa” UN Docs A/RES/2324(XXII)’ <<https://digitallibrary.un.org/record/202874>> accessed 27 December 2023.

Assembly its collective authority in these situations lacks prudence and an active progressive mindset in understanding how legitimate international legal processes work.

More importantly, the official recognition of statehood is in the hands of the General Assembly. This international agent is vested with the ultimate right to admit one country into the international community. No matter that a significant number of international scholars deny the legal foundation of the State of Israel, such a foundation was built based on the general consent of the General Assembly. The State of Israel was ultimately admitted into the UN in 1949,⁵⁵³ an event that effectively confirmed the legality and authority of Resolution 181.

In conclusion, it is safe to finalise the controversy around the establishment of the Jewish State of Israel: it has never been an unlawful situation. Israel is a political entity created with the legal and legitimate support of the most prominent leading international organisations that formed the political order during their time: the League of Nations and the United Nations. Like many other mandates where the peoples were recognised with a right to establish their independent state, the Jewish State followed the same procedure. Although politically speaking, we could criticise the “imperialistic” or “Western hegemonic” nature of the foundation of the Jewish State, but so are the legal concepts of “territorial integrity”, “independent sovereignty”, “human rights”, and “equitable geographic representation” ... most of which materialised and are protected under the Western-infused international jurisprudence. But that does not mean all of them are inherently “evil” and should not be a part of modern life. The State of Israel was created under the same rules and processes and is, therefore, validated as a lawful creation of the United Nations.

However, there is still a problem with the current state of Israel, specifically its “international borders.” As we mentioned, after the 1949 war, Israel held 77 per cent of all of Palestine except Gaza Strip and West Bank. However, in a message to US President Truman asking for political support in recognising Israel internationally, the Jewish Agency limited their claim to statehood only “within frontiers approved by the General Assembly of the United Nations in its Resolution of November 29, 1947.” More interestingly, some authors have pointed out that the 1949 armistice lines were not considered international borders. And Arab states’ acceptance of these armistice agreements did not imply recognition of the state of Israel or any part of Israeli-controlled territories.⁵⁵⁴

In my opinion, such an interpretation is just another non-problem, exaggerated into a significant legal concern. Specifically, during its membership application to the United Nations, Israel had responded to concerns that Israel’s declaration of independence had claimed no borders by

UNGA, ‘Res 2145 on “Question of South West Africa” UN Docs A/RES/2145(XXI)’ <<https://digitallibrary.un.org/record/203150>> accessed 28 June 2023.

⁵⁵³ Etc) UNGA, ‘Res 273 “Admission of Israel to Membership in the United Nations” UNGA Docs A/RES/273(III)’ <<https://digitallibrary.un.org/record/210373>> accessed 6 February 2023.

⁵⁵⁴ See more from Simha Flapan, *The Birth of Israel: Myths and Realities* (Pantheon Books 1987), 386-433

And Israel-Egypt, General Armistice Agreement, United Nations Treaty Series, vol. 42, p. 251 (1949).

Israel-Jordan, General Armistice Agreement, id., p. 303.

Israel-Syria, General Armistice Agreement, id., p. 327.

Israel-Lebanon, General Armistice Agreement, id., p. 287.

establishing that the question of the borders of Israel was determined by negotiation between it and the Arab states.⁵⁵⁵ The explanation built upon the 1949 armistice lines was strong enough to convince the majority of the UNGA to accept Israel's application. The new Jewish state officially became a member of the United Nations with Resolution 273, which resulted in 37 votes in favour, 12 against, with 9 abstentions.⁵⁵⁶ As explained by several Jewish sources, the fact that Israel's application in 1948 was rejected but then accepted in 1949 shows that the defined borders established by the armistice agreements were the key ingredients of Israel as a "peace-loving" nation.⁵⁵⁷

From that point on, it seems reasonable to argue that the post-1949 territory claimed by Israel constituted a precisely defined whole. More importantly, there was no valid legal counterclaims against the 1949 Green Line. Such observation is evidenced by the fact that the Palestine Liberation Organisation (PLO)⁵⁵⁸ has consistently used the Green Line (which also separates Israel and two vital territories of Palestine: the West Bank and the Gaza Strip) as the foundation of their quest for independent statehood.

For instance, as argued by the PLO Negotiations Affairs Department in Palestine – Israel Journal, the 1949 Green Line is viewed as the "internationally recognised border":

"If Israel is truly interested in its security, it will do one or both of the following: (1) withdraw completely from all of the territories it occupied in 1967 or (2) place additional security on its internationally recognised border, rather than in the Occupied Palestinian Territories. Israel has long had the formula for peace and security – end the occupation."⁵⁵⁹

As we can see, the most problematic milestone perceived by the Palestinian authorities is the 1967 War and, therefore, the territories occupied by Israel afterwards. Beside Occupied East Jerusalem, Gaza, and West Bank, Palestine has forwarded no territorial counterclaim in the Negev Desert, Central and Northern Palestine. Israeli–Palestinian territories delimited in 1949 seem to be considered the concrete foundation for the establishment of the state of Palestine, without any official protest or objection from the principal actors involved in the conflict, including Israel.

More importantly, in the written statement of Palestine when it intervened on the question of the legal consequences of the wall/security barrier in the Occupied Palestinian Territory as the

⁵⁵⁵ Nafez Nazzal, *The Palestinian Exodus from Galilee, 1948* (Institute for Palestine Studies 1978) <<https://www.palestine-studies.org/en/node/1649387>> accessed 6 February 2023., 75 Flapan (n 558), 200.

⁵⁵⁶ UNGA, 'Res 273 "Admission of Israel to Membership in the United Nations" UNGA Docs A/RES/273(III)' (n 557).

⁵⁵⁷ Louis Shub, 'Israel and the United Nations' (1950) 51 *The American Jewish Year Book* 379.

Arie Geronik, 'Israel-UN Relations: Three Phases and Three Questions' (2020) 25 *Israel Studies* 73.

⁵⁵⁸ Salem Barahmeh, 'The Palestinians, the PLO, and Political Representation': [2014] *International Centre for the Study of Radicalisation and Political Violence (ICSR)*.

⁵⁵⁹ PLO Negotiations Affairs Department, 'Bad Fences Make Bad Neighbors' (2022) 9 *Palestine - Israel Journal* Vol. 9 No. 3.

International Court of Justice was addressing it, the 1949 armistice lines were presented as the lawful territorial reality of the two political entities.⁵⁶⁰ Explaining the UN Security Council's Resolution 242 (1967) and the term "territories occupied" in the recent conflict, the Palestinian authority specified that this:

"[...] obviously meant those territories situated beyond the Armistice Lines (this, of course, included Egyptian and Syrian territories occupied by Israel in June 1967). In particular, and for the purpose of this case, these territories are the West Bank, including East Jerusalem, and the Gaza Strip, which are the subject of reference in the ensuing analysis."⁵⁶¹

The fact – that the political entity that is directly involved and victimised in the territorial conflicts shows no interest in denying the existence of Israel while also recognising the 1949 armistice lines as the internationally recognised borders of both Israel and Palestine – has allowed authoritative international organisations, including the UNGA and the UNSC, to come to decisive conclusions on the border debates surrounding Israel and Palestine. To name a few, Resolution A/ES-10/14 (2003) of the UNGA or Resolution 446 (1979) of the Security Council rely on the armistice line of 1949 as the authoritative characterisation for the two-state solution. Specifically, Resolution A/ES-10/14 affirms "the necessity of ending the conflict on the basis of the two-state solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949..."⁵⁶² Similarly, the UNSC Resolution 242 determined that "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 "have no legal validity," *implying* that the Council does not contest the legality of the Israel – Palestine borders from 1949.⁵⁶³

In short, the "Green Line" or the "Armistice Line" of 1949 has long been seen as the internationally recognised borders of Israel with Arab countries and with Palestine. The UNGA, the UNSC, and the Palestinian authority have consistently given such acknowledgements. Since there were fair and equitable international legal processes that already determined the lawfulness of the state of Israel and its international borders, based on the 1949 armistice line, debates and rejections of the situation, or insistence on the necessity of non-recognition of the state of Israel itself, became irrelevant.

B. Israel's military occupation after 1967

⁵⁶⁰ Palestine (n 542). Please see, for example, paragraph 6, 86,

⁵⁶¹ *ibid.*, para 89 - 90.

⁵⁶² UNGA, 'Res ES-10/14 on "ILLEGAL ISRAELI ACTIONS IN OCCUPIED EAST JERUSALEM AND THE REST OF THE OCCUPIED PALESTINIAN TERRITORY" UN Docs A/ES-10/14' <https://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_ES-10/14>.

UNSC, 'Resolution 446 on Establishment of a Commission to Examine the Situation Relating to Settlements in the Arab Territories Occupied by Israel UN Docs S/RES/446(1979)' <<https://digitallibrary.un.org/record/1696>> accessed 14 February 2023.

⁵⁶³ UNSC, 'Res 242 Concerns Achievement of a Peaceful and Accepted Settlement in the Middle East UN Docs S/RES/242(1967)' <<https://digitallibrary.un.org/record/90717>> accessed 9 February 2023.

After establishing Israel's firm lawful existence and its 1949 border as internationally recognised borders, we have a much easier time dealing with what the Israeli government has done since 1967. It is an open, transparent, and indisputable fact that the international legal institutions and processes have no problem identifying Israel's military occupation of Sinai, the Golan Heights, the Gaza Strip, the West Bank, and the city of Jerusalem in its entirety. This is true even in the case of Israel's closest allies such as the United States and the United Kingdom.

As soon as the 1967 war settled and Israel appeared to strengthen its occupied territory, the UNSC unanimously issued Resolution 242. In this resolution, the UNSC affirmed "the inadmissibility of the acquisition of territory by war" and requested the "withdrawal of Israel's armed forces from territories occupied in the recent conflict" while also terminating "claims or states of belligerency" and confirming "respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area." The disapproval of Israel's conduct at the highest power level of the United Nations was loud and clear. But that was just the tip of the iceberg.

One year after the war concluded, in 1968, the UNSC issued fourteen resolutions dealing with the legal repercussions of the 1967 War. For example, Resolutions 250, 251 and 252 repeatedly announced that Israel's occupation of Jerusalem was unlawful and that any attempts to carry out annexation in the occupied territories were invalid.⁵⁶⁴ The resolutions also deplored the holding by Israel of a military parade in Jerusalem on 2 May 1968, rejected "the acquisition of territory by military conquest", and announced the inadmissibility of "all legislative and administrative measures" that intended to change the international legal status of Jerusalem.

From that point on, the UNSC remained fixed on the matter and consistently used its power to identify Israel's military conduct and occupation as explicitly unlawful. The collective Resolutions 279, 280, and 285 (1970), to name only a few, declared that the Israeli force's presence in Lebanon was unlawful and demanded "the complete and immediate withdrawal of all Israeli armed forces from Lebanese territory."⁵⁶⁵ Then, in Resolution 497, the UNSC reaffirmed their request in Resolution 242 before rejecting the "Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights."⁵⁶⁶ The UNSC also re-established that "all the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, continue to apply to the Syrian territory occupied by Israel since June 1967."

Similarly, the General Assembly contributed their fair share in determining the legality of the territorial situation after 1967. Just after the 1967 War, the UNGA focused on Israel's effort to

⁵⁶⁴ UNSC, 'Res 250, 251, 252 on the Israeli Military Parade in Jerusalem' <<https://digitallibrary.un.org/record/90752>> accessed 9 February 2023.

⁵⁶⁵ UNSC, 'Res 279, 280 on Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/279(1970)' <<https://digitallibrary.un.org/record/90781>> accessed 9 February 2023.

And UNSC, 'Res 285 on the Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/285(1970)' <<https://digitallibrary.un.org/record/90783>> accessed 9 February 2023.

⁵⁶⁶ UNSC, 'Resolution 497 (1981) /: Adopted by the Security Council at Its 2319th Meeting, on 17 December 1981.' <<https://digitallibrary.un.org/record/26751>> accessed 9 February 2023.

transform and unify East and West Jerusalem into a part of their territories. With a series of resolutions in emergency sessions, the UNGA first:

“1. Considers that these measures [to change the status of Jerusalem] are *invalid*;

Calls upon Israel to rescind all measures already taken and desist forthwith from taking any action which would alter the status of Jerusalem...”⁵⁶⁷

In later resolutions, such as Resolution 2254, the UNGA deplored the failure of Israel to implement the resolutions of the UNGA. In summary, the international legal institutions and processes dealing with the territorial situations after the 1967 war and Israel’s occupation in many Middle East territories showed the ability of the legal processes to determine and establish unlawful situations effectively and authoritatively if the responses are deemed necessary.

C. *Israel’s Construction of the Wall/Security Barriers*

Addressing the legality and the legal consequences of the “wall”/“security barriers” built by Israel (and the continuing Israeli settlements) in the supposed territories of Palestine, we can see the international institutions have again utilised the established international legal processes to consider the situation and eventually to adopt a legal response as they deem fit and necessary.

As Israel’s occupation and the expansion of Israeli settlements in the West Bank, Gaza and Jerusalem have existed for decades, the foundation for the illegality of the construction of the Wall/Security Barriers is rooted in the decade-confirmed illegality of Israel’s efforts to alter the physical structures of the occupied territories, to condone unlawful settlements and, allegedly, to change the permanent status of the occupied territories.

The first UNSC document explicitly addressing this problem was Resolution 446 of March 22 1979.⁵⁶⁸ In this Resolution, the UNSC “determines that the policy and practices of Israel in establishing settlements the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving comprehensive, just and lasting peace in the Middle East.” Already in 1979, the UNSC generalised the problematic expansion of Israeli settlements in the occupied areas and denounced them as “having no legal validity.” The resolution also formed a commission consisting of three members of the Security Council to examine the situation relating to settlements in the Arab territories occupied since 1967. Three months later, the commission submitted its report to the UNSC with a series of investigations, interviews, maps and testimonies. This report (Volume II, S/13450) did not have

⁵⁶⁷ UNGA, ‘Res 2253. 2254, 2255, 2256 on “Measures Taken by Israel to Change the Status of Jerusalem” UN Docs A/RES/2253(ES-V) | A/RES/2254(ES-V) | A/RES/2255(ES-V)’ <<https://digitallibrary.un.org/record/203080>> accessed 14 February 2023.

⁵⁶⁸ UNSC, ‘Resolution 446 (1979) /’ (n 566).

a legal standing of its own, but it allowed the participants to paint a clear picture of Israel's illicit conduct.⁵⁶⁹

For instance, the statement of the Permanent Representative of Jordan to the United Nations and the representative of the Crown Prince of Jordan was the opening statement of the report. It insisted that Israeli practices “in confiscating land in the West Bank and Jerusalem were arbitrary and contrary to the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.”

In the witness statement of Mr Ibrahim Shukrallah, Director of the Political Department, League of Arab States, Cairo, Israel was accused of trying to establish new *faits accomplis* concerning Jewish settlements. He also condemned the fact that the Israel state was trying to destroy Palestinian villages and establishments, bringing up the population of Israel in order to increase both demographic and economic viability for a permanent annexation of those territories.

With this evidence and political foundations, the next report of the commission (S/13679) firmly established that Israel had “relentlessly pursued” its settlement policy despite all Security Council decisions and appeals. The commission especially noted that the continuation of Israel's policy would harm the “pursuit of peace in the area” and the “situation in the occupied territories”.⁵⁷⁰ With the commission's support, the legal processes against Israel's conduct moved again to the floor of the Security Council. On 1 March 1980, the UNSC passed Resolution 465. It says:

“[...]

Determines that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof *have no legal validity* and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.

...

⁵⁶⁹ UNSC Commission, ‘Report of the Security Council Commission Established under Resolution 446 (1979). Volume II. UN Docs S/13450/Add.1’ <https://digitallibrary.un.org/record/3606?ln=zh_CN> accessed 14 February 2023.

⁵⁷⁰ UNSC, ‘Report of the Security Council Commission Established under Resolution 446 UN Docs S/13679’ <<https://digitallibrary.un.org/record/10448>> accessed 14 February 2023.

7. Calls upon all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.”⁵⁷¹

With Resolution 465, the legality of any Israel policy performed in order to “to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967” would fall under the characterisation of Resolution 465 and would be easily identified as unlawful. The consistency of the UNSC is proved in Resolution 2334 (2016), the first UNSC resolution directly deals with occupied Palestine territories following Resolution 465. In this updated resolution, the primary legal assessment of the situation was reiterated. In it, the UNSC:

“1. Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;

Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard...”

Although it does not specifically address the concern of the construction of the Wall/Security Barriers, UNSC’s series of Resolutions 446, 465 and 2334 provide the legal generalisation concerning Israel’s conduct, especially when such conduct is about expanding or maintaining the Jewish settlements within the Palestinian occupied territories.

Evidently, the abovementioned resolutions (especially 446 and 465) provide the legal foundation for UNGA’s assessment concerning the construction of the Wall/Security Barriers. In Resolution A/58/98 of December 09, 2003 of the UNGA (right after asking the International Court of Justice the question of the legality of the construction of the wall with Resolution ES-10/14), the organ considered the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 and the call of relevant parties, and therefore:

“1. Reaffirms that Israeli settlements in the Palestinian territory, including East Jerusalem, and in the occupied Syrian Golan are illegal and an obstacle to peace and economic and social development;

2. Calls upon Israel to accept the *de jure* applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, to the Occupied Palestinian Territory, including East Jerusalem and the occupied Syrian Golan and to abide scrupulously by the provisions of the Convention, in particular, Article 49;

⁵⁷¹ UNSC, ‘Resolution 465 on Israeli Settlement Policies in the Occupied Territories UN Docs S/RES/465(1980)’ <<https://digitallibrary.un.org/record/11767>> accessed 15 February 2023.

3. Reiterates its demand for the complete cessation of all Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan;

4. Demands that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.”⁵⁷²

International scholars also very often talk about the ICJ’s advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.⁵⁷³ The opinion provides authoritative and insightful analyses concerning the legal positions of both sides. Finally, it concludes that “the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem”, has violated various international obligations incumbent upon Israel.⁵⁷⁴ However, with or without the advisory opinion (which is not binding but organisationally influential), resolutions from the UNSC and UNGA are far more than enough to conclude that the effort of Israel to build a Wall/Security Barriers in the occupied parts of Palestinian territories is illegal, thus creating/perpetuating the unlawful situation.

4. Non-recognition campaign against Israel’s illicit conduct:

At this point, I have mounted a case for the claim that among three significant events during the Israel – Palestine situation, two are authoritatively identified as unlawful situations: (1) Israel’s occupation of various Middle Eastern/Arab territories, including Sinai, Golan Heights, the Gaza Strip, the West Bank and East Jerusalem; and (2) Israel’s expansion and protection of Jewish settlements in the Gaza Strip, the West Bank and East Jerusalem (materialised with the debates concerning the construction of the Wall). And as hypothesised, the international community has practised non-recognition as clearly as possible in its communication concerning the two incidents.

A. *The Language of the UNSC*

Until 2023, the UNSC has issued almost 300 resolutions directly dealing with questions related to Israel. Its view on the lawful existence of the State of Israel is as crystal clear and determined as its view on the unlawfulness of Israel’s occupation of Arab territories and the expansion of Jewish settlements. Although it has vital partners and allies inside the UNSC, Israel seems to be unable to influence the international processes. As we mentioned, the UNSC first introduced the idea that Israel’s military gains after the 1967 War were unlawful with Resolution 242. In

⁵⁷² UN General Assembly (58th UNGA, ‘Res 58/98 on Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan UN Docs A/RES/58/98’ <<https://digitallibrary.un.org/record/508158>> accessed 16 February 2023.

⁵⁷³ International Court of Justice (ICJ) (n 249).

⁵⁷⁴ *ibid.*, para 143.

the resolution, the UNSC explicitly called the territorial situation after the war as territories occupied by Israel and requested unconditional withdrawal.⁵⁷⁵

There is dissatisfaction with this resolution, however. Quigley, in *The Case for Palestine*, for example, complains that the Resolution was adopted under Chapter 6 of the UN Charter (recommending solutions for disputes) and not Chapter 7 (decisions that bind member states).⁵⁷⁶ He also notes that the Resolution “sought to deal with the recent hostilities and did not address the question of Israel’s borders,” which is not necessarily correct, considering that the 1949 Green Line had been established and accepted as the international borders by all involved parties. Nevertheless, Resolution 242 is still the root of the legal foundation for the UN in dealing with the “occupied” Arab territories. At the time of this resolution, since the Israeli government did not intend to annex territories of sovereign Arab countries (Lebanon, Jordan, Syria and Egypt), and as the armed conflicts were dragging on, non-recognition has yet to play a dominant role in the public discourses.

However, the UNSC remains vigilant on the issue and never once drops its description of the situation with Israel as the “Occupying Power” in these territories and its obligations in accordance with international humanitarian law, specifically “all the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949”. We can find such language in all of the resolutions relating to Israel issued from 1968 to 1979, such as resolutions 252, 285, 298, 350, 468, and 607.⁵⁷⁷ As we discussed in Chapters 2 and 3, the language used by the UNSC shapes legal perception on the issues and establishes norms for the international community. The consistency in the language used creates consistency in communication, creates consistency in common knowledge, and finally, consistency in the world view of international rule-based order.

As soon as the Israeli government shows the intention to alter any occupied territory’s status, non-recognition becomes a large part of the international response. For the UNSC, Israel’s *Basic Law: Jerusalem Capital of Israel*, which declares that Jerusalem – complete and united – is the capital of Israel, was a sign of problematic territorial ambitions to come in the future.⁵⁷⁸ The UNSC immediately responded with Resolution 478.⁵⁷⁹ Besides the usual legal assessments of Israel’s conduct (in this case, the issuance of the Basic Law), which says that it “constitutes a violation of international law and does not affect the continued application of the Geneva

⁵⁷⁵ UNSC, ‘Resolution 242 (1967) /’ (n 567).

⁵⁷⁶ Quigley (n 506).

⁵⁷⁷ UNSC, ‘Res 250, 251, 252 on the Israeli Military Parade in Jerusalem’ <<https://digitallibrary.un.org/record/90752>> accessed 9 February 2023.

UNSC, ‘Res 285 on the Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/285(1970)’ <<https://digitallibrary.un.org/record/90783>> accessed 9 February 2023.

UNSC, ‘Res 468 on the Deportation of Palestinian Leaders from Territories Occupied by Israel UN Docs S/RES/468’ <<https://digitallibrary.un.org/record/13068>> accessed 17 April 2024.

⁵⁷⁸ Marco Pertile and Sondra Faccio, ‘What We Talk about When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy’s Relocation to the Holy City’ (2020) 33 *Leiden Journal of International Law* 621.

⁵⁷⁹ UNSC, ‘Res 478 on the Status of Jerusalem UN Docs S/RES/478(1980)’ <<https://digitallibrary.un.org/record/25618>> accessed 16 February 2023.

Convention relative to the Protection of Civilian Persons in Time of War”, two vital elements of non-recognition language appeared. First is the reaffirmation that “the acquisition of territory by force is inadmissible.” This was recorded in the resolution’s preamble, as in many other modern practices of non-recognition. The second is in the operative section, which insists:

“[...] not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status Jerusalem and calls upon:

- (a) All Member States to accept this decision;
- (b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City;”

One year later, when Israel tried to apply Israeli laws and its administration system in the Golan Heights (occupied Syrian territories), the UNSC issued Resolution 497.⁵⁸⁰ Although Israel did not express a clear intention of annexation, as in the case of Jerusalem, the UNSC repeated the same language of non-recognition, such as “the acquisition of territory by force is inadmissible”...*etc.*

During the 1990s and in the following decades of the new millennium, the UNSC continued to monitor the situation between Israel, Palestine, and the Arab States in great detail. Every year, at least three or four UNSC resolutions deal with terrorism, armed conflicts, and humanitarian issues in the occupied territories.

In 2016, with the increasing fortification of the Jewish settlements and the alarming rate of “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians”, Resolution 2334 was passed with a direct approach to deal with the entirety of the territorial situation in the occupied territories, rather than just Jerusalem, or the Golan Heights, and the West Bank. Specifically, non-recognition language and its practice were mentioned as follows:

“[...]”

3. [The UNSC] Underlines that it will not recognize any changes to the June 4, 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiation;

4. Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution;

⁵⁸⁰ UNSC, ‘Res 497 on the Annexation of the Golan Heights UN Docs S/RES/497(1981)’ <<https://digitallibrary.un.org/record/26751>> accessed 16 February 2023.

5. Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967

[...]”⁵⁸¹

Resolution 2334 repeats two essential components of the UN-documented practices of non-recognition that we have examined so far. Firstly, the leading organ of the UN declares that the situation is “unlawful”, “invalid”, or “null and void” and itself would not recognise such a situation. This means that, no matter how things go, the bureaucracy of the United Nations cannot (and will not) provide any implication that the concerned situation is lawful. This power arrangement means that the Member States themselves could not participate in international life, usually administered by the agencies of the UN, and try to legitimise the situation themselves.

Secondly, the UNSC’s resolutions clearly “call” or “request” Member States not to recognise the situation. Although not all the resolutions are based on Chapter VII of the UN Charter and intended to create concrete legal obligations with an enforcement mechanism, they have established strong normative quasi-legal thinking and practice when it comes to the question of Israel’s occupation of Palestine, Israel’s expanding settlements in the occupied territories and Israel’s attempt to annex the entirety of Jerusalem.

B. The Language of the UNGA

The UNGA has been more active in the matter of Israel and the City of Jerusalem than the Security Council. As usual, many scholars have claimed that the UNGA has no real legal authority or power to deal with these disputes and that the UNGA’s resolutions are “non-binding” with only suggestion power.⁵⁸² But that does not negate the fact that UNGA’s resolutions, and political/legal assessment and propositions are always the backbone of most international solutions. In the case of Israel and Palestine, the UNSC itself frequently cited UNGA resolutions and legal stances on the issue and used them as guidance for their own resolutions.

For instance, in Resolution 252, the UNSC recalled several UNGA resolutions (such as resolutions 2253 (ES-V) of July 4, 1967, and 2254 (ES-V) of July 14, 1967) as the foundation and reasoning for the issuance of Resolution 252.⁵⁸³ Therefore, in my view, underestimating the UNGA’s power and ability to reflect State practices and opinions and how it could influence the final outcome of international conflicts and disputes is to ignore the biggest and most important piece of the international law puzzle.

⁵⁸¹ UNSC, ‘Res 2334 on 'Cessation of Israeli Settlement Activities in the Occupied Palestinian Territory, Including East Jerusalem' UN Docs S/RES/2334 (2016)’ <<https://digitallibrary.un.org/record/853446>> accessed 27 December 2023.

⁵⁸² See Chapters 2 and 3 again for the arguments and counterarguments.

⁵⁸³ UNSC, ‘Resolution 250 (1968) /’ (n 568).

Back to the question of Palestine, as we mentioned, the UNGA started to assess the situation with restraint. When the 1967 war broke out with no clear indication of violations from the involved parties, the UNGA passed Resolution 2253 with an overwhelming voting record: 99 in favour, none against, 20 abstentions, 3 absent and no against.⁵⁸⁴ The resolution:

“[Was] deeply concerned at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City,

1. Considers that these measures are invalid;
2. Calls upon Israel to rescind all measures already taken and to desist forthwith from taking action which would alter the status of Jerusalem;”
3. Requests the Secretary-General to report to the General Assembly and the Security Council on the situation and on the implementation of the present resolution not later than one week from its adoption.”⁵⁸⁵

This resolution was the starting point of consistent use of non-recognition language from 1967 to 1980, although there were no real “unlawful situations” as the conflicts between Israel and other Arab states continued to be extremely complicated.

In 1970, UNGA issued Resolution 2546, reminding Israel of its obligations to uphold international human rights law in all “occupied territories” as defined by both UNSC and UNGA in 1967.⁵⁸⁶ In 1974, the Report of the Special Committee to Investigate Israeli Practices adopted by the UNGA Resolution 3240 continued to describe territories under Israel’s military control as “occupied.” It also warned that Israel’s conduct contravened the Geneva Conventions relative to the Protection of Civilian Persons in Time of War of 1949. Possible violations listed include:

- “(a) The annexation of parts of the occupied territories;
- (b) The establishment of Israeli settlements therein and the transfer of an alien population thereto;
- ...”

The resolution accepted the declaration that the “policies of Israel constitute not only a direct contravention to, and violation of, the purposes and principles of the Charter of the United Nations, in particular the principles of sovereignty and territorial integrity, the principles and

⁵⁸⁴ ‘UN General Assembly Resolution 2253-ES-V (July 1967)’ <<https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-2253-es-v-july-1967>> accessed 28 February 2023.

⁵⁸⁵ UNGA, ‘Res 2253, 2254, 2255, 2256 on “Measures Taken by Israel to Change the Status of Jerusalem” UN Docs A/RES/2253(ES-V) | A/RES/2254(ES-V) | A/RES/2255(ES-V)’ <<https://digitallibrary.un.org/record/203080>> accessed 14 February 2023.

⁵⁸⁶ UNGA, ‘Res 2546 on “Respect for the Implementation of Human Rights in Occupied Territories” UN Docs A/RES/2546(XXIV)’ <<https://digitallibrary.un.org/record/202418>> accessed 28 February 2023.

provisions of the applicable international law concerning occupation and the basic human rights of the people, but also an impediment to the establishment of a just and lasting peace.” Most importantly, the resolution then “urges all States to refrain from any action which Israel will exploit in carrying out its policy of colonizing the occupied territories.”⁵⁸⁷ Such languages show the collective caution of the UNGA when asking Member States not to recognise and aid the unlawful situations that the Israeli government had been trying to augment over the years.

We could also mention the series of resolutions 3005 (XXVII) (1972), 3175 (XXVIII) (1973), and 3336 (XXIX) (1975) on the permanent sovereignty over national resources in the Arab territories occupied by Israel. Taking Resolution 3336 for example, the UNGA “called upon all States, international organisations and specialised agencies not to recognise or co-operate with, or assist in any manner in, any measures undertaken by the occupying Power to exploit the resources of the occupied territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories.”⁵⁸⁸ Such a call was an evident practice of non-recognition that focuses on protecting the sovereign national resources in occupied territories. Resolution 3336 was passed with 99 approvals, 32 abstentions, five absences and only two against (Israel and the United States).⁵⁸⁹ Again, state practice through voting and the opinion expressed seemed overwhelming and consistent.

From 1980, the UNGA became even more active on the question of Palestine and the legal repercussions of Israel’s occupation. Every year from the 1980s until the present, the UNGA has issued at least 28 resolutions that directly mentioned or dealt with the Palestine–Israel situation. In the “busiest” year of 1995, there were 77 resolutions dealing with all types of questions concerning the relationship between Israel and Palestine. Taking the 1990s as one historical slide for our analysis, we can list several instrumental UNGA documents.

Resolution 45/83 (A, B and C) of December 13, 1990 reaffirmed that all legislative and administrative measures and actions taken by Israel, the occupying Power, in the Syrian Arab Golan, City of Jerusalem, and other occupied territories... “invalid”, “null and void”, “illegal” and “in violation of international law and of the relevant United Nations resolutions.” The resolution then “calls upon all Member States, the specialised agencies and all other international organisations to abide by the present resolution and all other relevant resolutions and decisions” and “to put an end to the flow to Israel of any military, economic, financial and technological aid, as well as of human resources, aimed at encouraging it to pursue its aggressive policies against the Arab countries and the Palestinian people...”⁵⁹⁰

⁵⁸⁷ UNGA, ‘Res 3240 on Adopting the “Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories” UN Docs A/RES/3240(XXIX)[C]’ <<https://digitallibrary.un.org/record/640852>> accessed 28 February 2023.

⁵⁸⁸ UNGA, ‘Res 3336 on “Permanent Sovereignty over National Resources in the Occupied Arab Territories” UN Docs A/RES/3336(XXIX)’ <<https://digitallibrary.un.org/record/190163>> accessed 28 February 2023.

⁵⁸⁹ UN Library, ‘Voting Record of Resolution 3336 on Permanent Sovereignty over National Resources in the Occupied Arab Territories’ <<https://digitallibrary.un.org/record/651053>> accessed 1 March 2023.

⁵⁹⁰ UNGA, ‘Res 45/83 on the “Questions of Palestine” UN Docs A/RES/46/82’ (1990) <<https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-45-83-december-1990>> accessed 1 March 2023.

Resolution 45/83/A was adopted with a voting record of 99 approved, 19 against and 32 abstentions. For Resolution 45/83/B, it was 84/23/41. And for Resolution 45/83/C (on Jerusalem), the voting record was an impressive 145/1/4. There were discrepancies in way that the Member States read and understood each part of this resolution. Section A directly mentioned agreements on strategic cooperation between the United States of America and Israel. Section B deplores “the negative vote by a permanent member of the Security Council”, which was the United States. Section C focused on the status of Jerusalem and the illegal attempt of Israel to alter this status, and therefore received almost universal support. Overall, although there were still political differences in how the UNGA should use its language and its singling out of a particular state, the legality of the situation and the collective non-recognition of such a situation are obviously established as the norm within the international community.

We can also look at the comprehensive Resolution 49/62, which shows that the monitoring system of the United Nations on Palestine and Israel has evolved into a sophisticated mechanism for non-recognition of Israel’s occupation and territorial ambitions in the occupied territories.⁵⁹¹ UNGA’s authorised agencies for the situation in Palestine at the time include the (1) Division for Palestinian Rights of the Secretariat; (2) the Committee on the Exercise of the Inalienable Rights of the Palestinian People; (3) Special Coordinator in the Occupied Territories and (4) others, occasionally the Special Rapporteur... The committee and these representatives themselves have circulated their own language and documents manifesting the non-recognition duty against Israel’s control in the occupied Middle East territory.

For example, the Committee on the Exercise of the Inalienable Rights of the Palestinian People is still active and contributes greatly to the documentation and investigation of the unlawful situations created by Israel’s breach of international law. In 2021, this Committee issued its annual report, which the UNGA adopted with document A/76/35.⁵⁹² In Section F, “Action by Member States and regional organisations”, the Committee mentioned States’ activities and behaviour and how they are viewed under the lens of the duty of non-recognition. Para 95 asserted that unilateral decisions by Member States to recognise Jerusalem as the capital of Israel and the transfer of embassies in Israel from Tel Aviv to Jerusalem are “null and void” and “calls upon Member States to rescind those decisions” and to respect the “historic status quo of the holy sites in Jerusalem.” With Para 96 and 97, in a direct manner, the Committee established that it is the responsibility of “States, private entities and corporations not to contribute to grave Israeli violations of Palestinian human rights, including with respect to their activities in settlements in the Occupied Palestinian Territory, including East Jerusalem” and to “implement the relevant obligations under international law, including as set out in paragraph 5 of Security Council resolution 2334 (2016), in which the Council called upon

⁵⁹¹ UNGA, ‘Res 49/62 on “Question of Palestine” UN Docs A/RES/49/62’ <<https://digitallibrary.un.org/record/169934?ln=en>> accessed 1 March 2023.

⁵⁹² Committee on the Exercise of the Inalienable Rights of the Palestinian People, ‘2021 Annual Report of Committee on the Exercise of the Inalienable Rights of the Palestinian People to the General Assembly UN Docs A/76/35’ <<https://www.un.org/unispal/document/2021-annual-report-of-committee-on-the-exercise-of-the-inalienable-rights-of-the-palestinian-people-to-the-un-general-assembly-a-76-35/>> accessed 1 March 2023.

Member States to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.”

In a sense, even though the UNGA does not have the technical power to create legal obligations and binding resolutions, it can establish the platform for the language and practice of non-recognition. Such practices and language are then popularised, become common knowledge, and finally can exist objectively. Moving into the new millennium, it is canonical for any UNGA resolution about Israel’s occupation of Palestinian and other Middle-Eastern territories to retain the view on Israel’s illegal conduct and the obligation of Member States and other international organisations not to recognise the situation and any of Israel’s attempts to legitimise the situation..

C. The Language and Practices of UN agencies

The UN system in the Israeli-occupied territories is vast, with a variety of funds, programmes, and agencies. From 1993 until now, over twenty UN organisations have had ongoing activities and projects inside the occupied territories.⁵⁹³ Therefore, the legal languages and perceptions that these organisations use will shape international dialogue surrounding the situation. For example, The United Nations Relief and Works Agency (UNRWA) is still responsible for providing a certain degree of education, health, and social services to Palestinian refugees. Member States that would like to understand or be involved in these aspects of political life in the occupied territories have no choice but to adopt the UNRWA’s depiction of the situation in Palestine.

But it is the World Bank that is more powerful and resourceful, and should be our first research target. From collecting information and data, drawing the economic map of Gaza and the West Bank,⁵⁹⁴ communicating with related lenders or borrowers to providing aid... the World Bank possesses significant power in shaping the legal position of Member States concerning the Palestinian Occupied Territories, most notably through its communication and policy guidelines and recommendations. Some authors, such as Jeremy Wildeman, question the legitimacy and impartiality of the World Bank, given that the US remains its biggest shareholder and the US administration always has a say in choosing its President.⁵⁹⁵ However, since the publications of the World Bank are usually the collective works of many international experts, and with an editorial standard based on the UN document system, they are surprisingly free from American interests. This is self-evident in the World Bank’s first series of reports concerning the Palestinian economy called “Developing the Occupied Territories: An

⁵⁹³ TORUNN LAUGEN, ‘The World Bank and the UN in the Occupied Territories’ (1998) 29 Security Dialogue 63.

⁵⁹⁴ ‘West Bank and Gaza | Data’ <<https://data.worldbank.org/country/PS>> accessed 2 March 2023.

⁵⁹⁵ Jeremy Wildeman, ‘EU Development Aid in the Occupied Palestinian Territory, between Aid Effectiveness and World Bank Guidance’ (2018) 4 Global Affairs 115. Anne Le More, *International Assistance to the Palestinians after Oslo: Political Guilt, Wasted Money* (1st edition, Routledge 2008). And *Inside Story - China Banking Checkmate?* (Directed by Al Jazeera English, 2015) <<https://www.youtube.com/watch?v=yioaSWu3fUY>> accessed 2 March 2023.

Investment in Peace.” And Volume III, for instance, does not keep its economic analysis strictly non-political.⁵⁹⁶

First and foremost, the West Bank, Gaza and East Jerusalem are referred to collectively as “Occupied Territories” (or “OT”). This basic but important choice of words reflects the willingness of the World Bank to follow the consistency of the legal perception of the situation in accordance with the resolutions of the United Nations, both the General Assembly and the Security Council. When it comes to the question of East Jerusalem and the economic importance of the Holy City to the West Bank, the World Bank’s report went even further. It firstly reminded the readers that “actions taken by Israel were considered invalid by the United Nations” and that the “international community has not recognized the Israeli annexation of East Jerusalem.” The report then highlighted the reality that Israel’s continued exercise of authority over the area has harmed Palestinian civil and industrial life, due to Israel’s denial of Palestinian access to ancient religious sites of Jerusalem, tertiary health care institutions, and transportation.⁵⁹⁷ The acknowledgement of Israel’s illegal and problematic occupation and expansion of Jewish settlements into the occupied territories has also been communicated clearly in almost all of the World Bank’s publications, reports, studies and organisational communications.

Another example worth considering is a World Bank study named *Area C and the Future of the Palestinian Economy*, authored by Orhan Niksic, Nur Nasser Eddin, and Massimiliano Cali.⁵⁹⁸ In this study, the authors highlight that a part of West Bank territories (labelled Area C by the Oslo Process) remains under Israeli military and administrative control. The bigger problem is that Area C is richly endowed with natural resources. It also contains almost all of the West Bank’s agricultural assets, especially its water reserve. Not only continuing to describe the West Bank as the “occupied territory”, the report also directly shows how the Israeli occupying administration in the West Bank has effectively restricted Palestinian construction and build-up in arable land and, therefore, reserved a large portion of the occupied territories for Israeli settlements.⁵⁹⁹ The report observes that such construction restraints also mean the underdevelopment of many areas of Areas A and B, since residential or commercial projects require connection with the existing service infrastructure (transport, water, energy) that needs to cross land in Area C. The World Bank’s reports and other communications and studies certainly contribute to world literature on the Israeli occupation of Palestinian territories and effectively reject Israel’s efforts in normalising the annexation of Palestinian lands.

Besides the World Bank, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) is another UN agency that has been particularly active in dealing with non-recognition of Israel’s occupation of Palestinian territories. The admission of Palestine to

⁵⁹⁶ World Bank, ‘Developing the Occupied Territories: An Investment in Peace - Vol III - Private Sector Development]’ <<https://www.un.org/unispal/document/auto-insert-202183/>> accessed 2 March 2023.

⁵⁹⁷ *ibid.*, page 10 - 13.

⁵⁹⁸ Orhan Niksic, Nur Nasser Eddin and Massimiliano Cali, *Area C and the Future of the Palestinian Economy* (The World Bank 2014) <<http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0193-8>> accessed 2 March 2023.

⁵⁹⁹ *ibid.*, 13-14.

UNESCO was not convincing, with a bare majority (107 votes in favour out of 173 Member States).⁶⁰⁰ There were also many challenges against the status of Palestine, which has yet to be recognised and administered as a Member State of the UN. After all, the word “State” is used as a prerequisite for UNESCO admission in its constitution.⁶⁰¹ However, the question of Palestine’s statehood does not prejudice the established illegality of Israel’s ongoing occupation, as is shown in the decisions and resolutions of the United Nations.⁶⁰² UNESCO is involved in the practice of non-recognition of Israeli occupation in two unique ways.

Firstly, there is the vast body of international legislation, such as the 1907 Hague Regulations (now often treated as customary law), UNESCO’s 1972 and 2003 Conventions for the Protection of the World Cultural Heritage and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the “Hague Convention”) that is available for utilisation in the hands of the UNESCO. Most importantly, Israel is a signatory to the 1954 Hague Convention and its Protocol for the Protection of Cultural Property in the Event of Armed Conflict, which legitimates UNESCO’s engagement and practice with its non-recognition of Israel’s claims in the occupied territories through cultural, religious and archaeological activities.

For example, Article 43 of the Hague Regulations obliges the occupying state to exercise its powers to benefit the occupied area, altering the pre-existing public, governmental, and administrative structures as little as possible. Article 9 of the Second Protocol to the Hague Convention of 1954, on the other hand, requires that archaeological excavation, alteration or change of use of cultural property in the occupied territory be carried out in close cooperation with the competent national authorities of the concerned territory. Combined with UNESCO’s central role in the protection and preservation of cultural heritage worldwide, the management of part of the occupied territories (especially the Old City of Jerusalem) has become a primary manifestation of the unlawfulness of Israel’s conduct.

Following the conclusion of the 1967 War and Israel assuming the role of managing power over Jerusalem, the Israeli government ordered several archaeological excavations in the Old City of Jerusalem. The excavation areas included the soil along the monumental Western Wall surrounding the Haram Al-Sharif compound, containing the two Muslim mosques of Al-Aqsa and the Dome of the Rock, land that was in the adjacent Moslem Waqf territory and the old Jewish quarter.⁶⁰³ UNESCO quickly issued resolutions 3.342 and 3.343 (1968). In the resolutions, UNESCO’s General Conference cited UNGA’s Resolution 2253 (ES-V) and the

⁶⁰⁰ Steven Erlanger and Scott Sayare, ‘Unesco Accepts Palestinians as Full Members’ *The New York Times* (31 October 2011) <<https://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html>> accessed 17 April 2024.

⁶⁰¹ Shadi Sakran, *The Legal Consequences of Limited Statehood: Palestine in Multilateral Frameworks* (Routledge 2019), 60 - 63

⁶⁰² Clizia Franceschini, ‘UNESCO, Religious Freedoms and World Cultural Heritage in the Old City of Jerusalem: The Line of Fire between Challenges, Comparisons and New Perspectives’ (2018) 0 *Stato, Chiese e Pluralismo Confessionale* <<https://riviste.unimi.it/index.php/statoechiese/article/view/10838>> accessed 7 March 2023.

⁶⁰³ Raphael Greenberg, ‘Extreme Exposure: Archaeology in Jerusalem 1967–2007’ (2009) 11 *Conservation and Management of Archaeological Sites* 262.

Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) as the political/legal foundation for their resolutions, calling upon Israel:

- “a) to preserve scrupulously all the sites, buildings, and other cultural properties, especially in the old city of Jerusalem;
- b) to desist from any archaeological excavations, transfer of such properties and changing of their features on their cultural and historical character;”⁶⁰⁴

The resolutions did not employ strong language to condemn Israel in the hope that Israel would cooperate to a certain extent. Their political/legal references, however, clearly identified Israel’s presence in the whole City of Jerusalem as the occupying power during and after armed conflicts. Israel’s assumed legal obligations concerning the historical/cultural/religious sites, in Palestine and Jerusalem specifically, are not only a set of positive rules but also the presupposition of the unlawful situation in Palestinian territories.

Until 1974, with Israel’s “persistent violation of UNESCO’s resolutions”, the UNESCO General Conference felt obliged to give a more explicit assessment of the situation. With Resolution 3427, the General Conference agreed on the language that (1) condemned “Israel for its attitude, which is contradictory to the aims of the Organisation as stated in its Constitution, by its persistence in altering the historical features of the City of Jerusalem...;” and (2) established the common position within the organisation towards Israel’s “illegal occupation of this city.”⁶⁰⁵ As expected, this resolution also cited UNGA’s resolutions 2253 and 2254 in the preamble to its reasoning. Consequently, UNESCO has participated fully in the ecosystem of the non-recognition practice of the United Nations against Israel’s conduct in Palestinian territory, within its field of competence.

Yet, another layer of UNESCO’s participation in the collective non-recognition campaign against unlawful situations in the Palestine – Israel disputes exists: UNESCO’s power to recognise and add cultural and religious sites inside the territory of Palestine into the World Heritage List (“WHL”) as a World Heritage Site (“WHS”).⁶⁰⁶ By respecting and attributing the right WHS titles to the right governing authority, UNESCO creates a strong sense of belonging, territorial integrity, and sovereignty of a particular governing authority, although the WHS list is still strictly cultural. And this is exactly what UNESCO has done to reject Israel’s claims of ownership in several heritage sites within the occupied West Bank.

The first significant step in this direction was UNESCO’s official declaration of the “Old City of Jerusalem and its Walls” as a part of the WHL in 1981. Interestingly, Jerusalem was nominated by the Hashemite Kingdom of Jordan, while the World Heritage Committee of the First Extraordinary Session of 1981 included Argentina, Australia, Brazil, Bulgaria, Cyprus,

⁶⁰⁴ ‘Records of the General Conference, Fifteenth Session, Paris, 1968, v. 1: Resolutions - UNESCO Digital Library’ <<https://unesdoc.unesco.org/ark:/48223/pf0000114047>> accessed 7 March 2023.

⁶⁰⁵ ‘Records of the General Conference, 18th Session, Paris, 17 October to 23 November 1974, v. 1: Resolutions - UNESCO Digital Library’ <<https://unesdoc.unesco.org/ark:/48223/pf0000114040.page=144>> accessed 7 March 2023.

⁶⁰⁶ Franceschini (n 606), 27 - 28

Egypt, France, the Federal Republic of Germany, Guinea, Iraq, Italy, Jordan, Libyan Arab Jamahiriya, Nepal, Pakistan, Senegal, Switzerland, Tunisia, the United States of America and Zaire.⁶⁰⁷ When the Americans requested the presence of Israel since Israel was “the State responsible for the administration and de facto control of the Old City of Jerusalem”, the Chairman (at the time, M. Michel Parent, of French nationality) rejected the request since Israel did not accept the authority of UNESCO as one of its members.⁶⁰⁸

Eventually, the expressive acts of the committee members confirmed the dominant legal position of UNESCO as an agency of the UN concerning Israel’s occupation of the city of Jerusalem. For example, apart from the US, the majority of state representatives had no reservations about Jordan’s competence in making the nomination for the Old City.⁶⁰⁹ More importantly, while a limited number of members raised the question of Israel’s ongoing occupation (such as Egypt and Jordan), there was almost a consensus that Israel was neither the sole administrator of Jerusalem nor that Jerusalem was on the lawful territory of Israel, that Jerusalem is of “universal cultural heritage value”, and that competent international authorities should determine the status of Jerusalem.

After Palestine became a member of UNESCO in 2011, the Palestinian authority has been able to apply for the World Cultural Heritage recognition of the cultural and religious heritage of symbolic significance within the Occupied Territories. In 2012, the Church of the Nativity and the Pilgrimage Route in Bethlehem were inscribed on the WHL.⁶¹⁰ They were all designated as Palestinian cultural sites, with no debate.

Israel has also contested the ownership of the Temple Mount (including the Haram al-Sharif Mosque, Rachel’s Tomb and the Bilal Ibn Rabah Mosque) and Hebron (with the Tomb of the Patriarchs), although all of these sites are located in the West Bank. However, in 2017, UNESCO officially recognised Hebron and religious sites within the old town as Palestinian World Heritage Sites, while the Israeli government was very much in control of the area and was increasingly converting the Tomb of the Patriarchs into a Jewish-dominated site.⁶¹¹ In UNESCO’s series of documents dealing with the site, the organisation and its committee rejected Israel’s claim to the sites and called Israel the “Occupying Power”. During the 2019 and 2021, UNESCO continued to update the condition of Hebron and deplored “Israeli excavations, works, construction of private roads for settlers and of a Wall inside the Old City of Al-Khalil/Hebron.”⁶¹²

⁶⁰⁷ ‘WH Committee: 1st Extraordinary Session, Paris 1981’ <<https://whc.unesco.org/archive/repxt81.htm>> accessed 7 March 2023.

⁶⁰⁸ *ibid.*, para 7.

⁶⁰⁹ *ibid.*, para 13 - 14.

⁶¹⁰ UNESCO World Heritage Centre, ‘36 COM 8B.5 - Decision’ (*UNESCO World Heritage Centre*) <<https://whc.unesco.org/en/decisions/4776/>> accessed 8 March 2023.

⁶¹¹ UNESCO World Heritage Centre, ‘41 COM 8B.1 - Decision’ (*UNESCO World Heritage Centre*, 2017) <<https://whc.unesco.org/en/decisions/6875/>> accessed 8 March 2023.

⁶¹² UNESCO World Heritage Centre, ‘43 COM 7A.29 - Decision’ (*UNESCO World Heritage Centre*, 2019) <<https://whc.unesco.org/en/decisions/7522/>> accessed 8 March 2023.

The relationship between UNESCO and Israel has been a mixture of compromise, hope, reconciliation and outright struggle. As we analysed above, the recognition of Hebron and the Tomb of the Patriarchs as Palestinian cultural sites has led to fervent controversy. It was used by the Israelis to justify the expansion of Israeli settlements in the city of Hebron and the re-establishment of Jewish control of the religious site.⁶¹³ However, the consistency and determination of UNESCO as a bureaucratic organisation and as a collective voice of a democratic community focusing on universal cultural values of humanity contributes to an extraordinary extent to confirming the illegality of Israel's occupation of Palestine and the non-recognition of Israel's efforts to alter the geopolitical condition of the occupied territory.

5. Conclusion

The Israeli-Palestinian conflict and its consequences constitute one of the most famous and notable practices of non-recognition in the history of the modern international community – i.e., the era of the United Nations. It is undoubtedly a complex story and is still in development. Political rhetoric could disrupt the quest for justice and reconciliation. Israel, although currently the occupying power of the Palestinian territories, is entitled to statehood, security guarantee and proper recognition from neighbouring Arab states. Palestine's governing authority, although yet to effectively control all the political/military factions that defiantly engage in terrorist and sabotage activities, should also preserve its territories and sovereign opportunities in accordance with the modern principle of self-determination.

In the maze of political disputes and self-interested interpretation of political events, international law in general and the duty of non-recognition manifested through state practices before the United Nations provide predictability and normative consistency. The fact that Israel went beyond the 1949 recognised borders to occupy the West Bank, Gaza, especially Jerusalem and other Arab territories has been met with a united front of collective non-recognition actions: statements, majority-voted resolutions, economic reports, cultural expression and other aspects of international life. The democratic international processes at the Security Council, the General Assembly and other UN agencies allow the documentation of the practice of non-recognition to be shown in a clear pattern of state practice and *opinio juris*.

Indeed, some authors have argued that states never refer to the “principle” or the “duty of non-recognition” as “law” or “normative rule.” However, a law or a rule does not ascend to power merely through iteration of its name. Individuals who sign contracts and States who sign treaties do not forget to honour their commitments just because they have never mentioned *pacta sunt servanda* in these agreements. Law is about what is perceived as proper and mandatory conduct. For the non-recognition principle, what is perceived as proper conduct is that states refrain from accepting, acquiescing or tolerating illegality. And that is precisely what we have observed during the long history of Israel's occupation of Palestinian territories.

⁶¹³ Franceschini (n 606)., 38.

4.C. Asian Experiences of Non-recognition

4.C.1. The non-recognition of China's annexation of Tibet (1950 / 1959)

Contemporary Chinese speak of Tibet as if they are the country's saviours. When the Chinese think of pre-1951 Tibet, they tend to mock the shortcomings of the region's feudal government. Life expectancy, they say, was only in the thirties; 95 percent of Tibetans were illiterate; 95 percent of the population were hereditary serfs and slaves owned by monasteries and nobles. In the Chinese government's own words, taken from a White Paper on the protection and development of Tibetan culture in 2009,⁶¹⁴ Tibet had long been a society languishing under a system of feudal serfdom under theocratic rule, "a society which was even darker than the European society of the Middle Ages." According to this rhetoric, without the intervention of the People's Republic of China, the Tibetans would still be living in backward medieval conditions. There is still a widespread belief among the Han population that Tibetans suffered under a cruel and broken system, and that the Chinese had a moral obligation to "liberate" them.

Some have pointed to the economic development and financial assistance provided by Beijing. One foreign observer, for example, asks: "In 1996, China spent some \$600 million in Tibet... For that same year [1996], the United States gave a total of eight hundred million dollars in aid to all of Africa. That's all of Africa—we're talking about hundreds of millions of people. In Tibet, there are only two and a half million. So, if they become independent, who's going to be giving them that kind of money?"⁶¹⁵ The Communist Party itself has proclaimed the fact that billions of US dollars have been poured into Tibet since 2001.⁶¹⁶

Even allowing that the statistics are accurate, and also, Beijing's investments in Tibet are recorded in a credible manner, yet, using the language of "liberation" while depending on these economic justifications is reminiscent of the language of colonialism and imperialism in their global "civilising mission." For instance, the Japanese once argued that the protectorate they established after the forceful annexation of Korea was utterly natural and justifiable on rational grounds.⁶¹⁷ Japanese intellectuals long maintained that Korea was unfit for independence, that their royal court was a hotbed of corruption and intrigue, where offices were openly advertised at the court so that the highest bidder could reimburse himself by squeezing the last drop from the common people. Also, the Japanese alleged that the Korean court had no organised method of tax collecting: instead, each authority sent out its own agents, who forced people to pay. The currency system was in the most wretched state; the justice system was so outdated and corrupt that innocent persons were often thrown into jail, in order either to extort money or to wreak

⁶¹⁴ China The State Council Information Office, 'Protection and Development of Tibetan Culture*' (2009) 8 Chinese Journal of International Law 233.

⁶¹⁵ Peter Hessler, 'Tibet Through Chinese Eyes' (*The Atlantic*, 1 February 1999) <<https://www.theatlantic.com/magazine/archive/1999/02/tibet-through-chinese-eyes/306395/>> accessed 30 June 2023.

⁶¹⁶ 'Has Beijing's Investment in the Region Won over Tibetans?' (*Nikkei Asia*) <<https://asia.nikkei.com/Politics/Has-Beijing-s-investment-in-the-region-won-over-Tibetans>> accessed 30 June 2023.

⁶¹⁷ Toyokichi Iyenaga, 'Japan's Annexation of Korea' (1912) 3 *The Journal of Race Development* 201.

personal vengeance. On top of that, the Japanese government “had lent the Korean government over 14,000,000 yen free of interest and without a fixed period of redemption (from 1906 – 1910), and that sum did not include the 90,000,000 yen to build the railroads in order to ‘modernise’ Korea.”

Western intellectuals, similarly, pointed out the antiquated nature of Indian civilisation by focusing on the caste system. The system divides people into four Varna categories: Brahmins (priests), Kshatriyas (warriors), Vaishyas (agriculturalists), and Shudras (servants). Lowest of all are the Dalits, or untouchables, who are not even recognised within the caste system.⁶¹⁸ As John Wilson, a missionary of the Church of Scotland and onetime president of the Bombay branch of the Royal Asiatic Society commented, the concept of natural and positive distinctions in humanity has been brought to the most fearful and pernicious development among the Hindus.⁶¹⁹

Arguably, after centuries of reforms and modernisation, Japan had a better governance model, functioning authorities and a more effective system than Korea. And it is also true that the human rights impact of such a religious system on Indian society are still being felt today.⁶²⁰ But such superiority is no justification for forcefully intervening and obstructing the right to self-determination of other nations. While those nations desperately needed reforms, it is safe to say that they would prefer to carry out those reforms by themselves, not by a neighbouring nation convinced of its own superiority. Just as in the case of Japan’s intrusion into Korea, the “superior” side – China – made major financial investments in the territory it encroached upon. But how much of that money benefited Tibetans, and how much was allocated to Han personnel, the infrastructure for Han economic expansion, the payroll of Chinese military units, and as part of a concerted drive to sinicise the people of Tibet?

The argument of a “civilising duty” and “economic salvation” is one of the oldest justifications for colonialism and imperialism, and should be excluded from all discourse concerning the fate of the Tibetan people. The use of force that tries to take away such freedom must be subject to the discussion of non-recognition.

1. Preliminary Political/Legal Analysis

⁶¹⁸ Peter J Cain, ‘Character, “Ordered Liberty”, and the Mission to Civilise: British Moral Justification of Empire, 1870–1914’ (2012) 40 *The Journal of Imperial and Commonwealth History* 557.

⁶¹⁹ Nicholas B Dirks, ‘Castes of Mind’ [1992] *Representations* 56., 56

⁶²⁰ ‘Hidden Apartheid’ [2007] Human Rights Watch <<https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables>> accessed 30 June 2023.

A. *Historical and Political Understanding*



Image 4.C.1. The map of the contemporary “Tibet Autonomous Region”.⁶²¹

After addressing one of the most disturbing but popular arguments concerning Tibet, we now focus on the political and legal foundation prior to the 1951 invasion. Before any further discussion, it is vital to bear in mind that Tibet as a territorial unit has not been adequately defined. The Tibet Autonomous Region that the People’s Republic of China created after the repression of the Lhasa uprising excludes several prefectures and county-level units, which now belong to Sichuan and Yunnan. We should also not forget that there are three Tibetan regions: Central Tibet, Kham, and Amdo. Each of these has a unique sense of identity and political loyalty. Relations between the centre of Tibet and the eastern borderlands were not devoid of ambivalence. Only after the Communist takeover were traditional regional identity and regional religious schools superseded by a pan-Tibetan identity – a more secularised and politicised nationalist movement that included the whole of Tibet.⁶²²

However, Tibet’s complex internal affairs during and even before Qing imperial rule in Beijing are evidence of a clear sense of structural and historical separation between Central Tibet (with Lhasa as the spiritual and political centre of Tibet as a whole) and the Chinese “Sons of Heaven” in Beijing. We can see that Tibetan Buddhism, along with a specific culture, shared mythology, a unified written language, common history, shared memories, customs and territory, gave the people of the vast Tibetan plateau a sense of belonging to a specific group. No political scientist in the world who has thoroughly studied the history of China and Tibet

⁶²¹ Matthew Wills, ‘Tibet and China 65 Years Later’ (*JSTOR Daily*, 23 May 2016) <<https://daily.jstor.org/tibet-and-china-65-years-later/>> accessed 8 January 2024.

⁶²² *Frontier Tibet: Patterns of Change in the Sino-Tibetan Borderlands* (Amsterdam University Press 2019) <<https://www.jstor.org/stable/j.ctvt1sgw7>> accessed 30 June 2023.

would give credence to the CCP's claim that Tibet has *always* been an “integral part of China.”⁶²³ Such an assertion is simply untrue.

Tibet's peripheral location, its limited commercial activities, and low population density did not allow it to compete with Vietnam, Japan or Korea for the title of “inner vassal” of China. But it is nonetheless as much an independent state as any of them. Historians such as Elliot Sperling promote the idea that Tibetans were willing subjects of the Yuan and Qing Emperors and that Tibet is, therefore, a part of China.⁶²⁴ These propositions suffer from the “Fairbank syndrome” – a misunderstanding of the gap between Western and Eastern interpretations of the “investiture-tribute system.”⁶²⁵ Historically, Tibet played an even more critical role in relation to the Qing court than other vassal states. Tibetan Buddhism (or Lamaism, a form of Vajrayana Buddhism) had a vital strategic, spiritual, and religious role in the expansion of the Qing dynasty with the establishment of the early days of the Manchu imperial cult.⁶²⁶ The supreme leaders of the Qing also had a strong personal belief in the religion.

In their attempt to consolidate their overlordship in Inner Asia, most notably over the Mongolians, Manchu rulers soon granted titles and political privileges to top-ranking lamas across Tibet and Mongolia. The first Qing emperor, Nurhaci (1616-26), received advice and spiritual guidance from a Tibetan lama based in Eastern Mongolia.⁶²⁷ His successor, Hong Taiji (1627-43), acquired a statue of Mahakala (a Buddhist deity) during his East Mongol conquest and quickly adopted Mahakala as the tutelary god of the Qing military.⁶²⁸ Hong Taiji was also the first Qing emperor to invite the Dalai Lama to the royal court. And before the reign of the Shunzhi Emperor (r. 1644-61), the pious Buddhist Qing Emperor met the Dalai Lama (the Fifth) at Nanyuan.⁶²⁹ Beginning with Kangxi, Qing leaders slowly drifted away from Inner Asian religious beliefs. Kangxi himself leaned towards Confucianism, while most Manchu rulers became influenced by Confucian statecraft, either voluntarily or to appease the Han Chinese. Nevertheless, Lamaism had already penetrated deeply into the overall worldview and religious beliefs of the Manchu leadership.

⁶²³ ‘Was Tibet Always Part of China?’ (*ThoughtCo*) <<https://www.thoughtco.com/tibet-and-china-history-195217>> accessed 17 April 2024.

HE Richardson, *Tibet and Its History* (Oxford University Press 1962) <<http://archive.org/details/in.gov.ignca.11408>> accessed 17 April 2024.

Xiuyu Wang, ‘Tibet and Modern China’, *Oxford Research Encyclopedia of Asian History* (2020) <<https://oxfordre.com/asianhistory/display/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-158>> accessed 17 April 2024.

⁶²⁴ Elliot Sperling, ‘Opinion | Don’t Know Much About Tibetan History’ *The New York Times* (13 April 2008) <<https://www.nytimes.com/2008/04/13/opinion/13sperling.html>> accessed 30 June 2023.

⁶²⁵ This proposition and relevant debates have been discussed in detail in Chapter 3.

⁶²⁶ SAMUEL MARTIN GRUPPER, ‘The Manchu Imperial Cult of the Early Ch’ing Dynasty: Texts and Studies on the Tantric Sanctuary of Mahakala at Mukden’ (PhD, Indiana University 1979) <<https://www.proquest.com/docview/288078403/abstract/CD06F617A5EA4FF0PQ/1>> accessed 30 June 2023.

⁶²⁷ Wang, ‘The Qing Court’s Tibet Connection’ (n 346)., 127

⁶²⁸ Samuel M Grupper, ‘Manchu Patronage and Tibetan Buddhism during the First Half of the Ch’ing Dynasty’ <<http://www.dsplace.cam.ac.uk/handle/1810/227072>> accessed 30 June 2023.

⁶²⁹ Wang, ‘The Qing Court’s Tibet Connection’ (n 346).127 – 128

Historical records show how much effort Qing emperors invested in the strengthening of Lamaism and their own cults in the interest of their empire's legitimacy. Hong Taiji built temples to Mahakaia and Kalacakra in Shenyang. Kangxi constructed Buddhist temples at Rene; and his grandson Qianlong built reproductions of the Potala and the Panchen's residence at Tashilhunpo, at the same site.⁶³⁰ The Yonghe Palace, or Yonghe Temple (Chinese: 雍和宫, "Palace of Peace and Harmony"), and the Yonghe Lamasery, popularly known as the Lama Temple, are other examples of how the Qing court incorporated their religious beliefs into the existing landscape of Beijing.⁶³¹

Even during the reign of Qianlong, one of the most secular and competent rulers of the Qing dynasty, the practices of appointing a chief administrative lama to the royal court and of authorising monumental translations and text editing projects of the Buddhist canon flourished and continued to be respected.⁶³² The Qing court occasionally sent communications asking for Tibet's religious support in arbitrating disputes between their Khans and between the Dzungar, the Khalkha, and the Mongols. The Dalai Lama himself invested, entitled, and provided seals for tribal leaders and kings, and, like the Qing emperors and Khans, the Dalai Lama received and dispatched embassies, commanded populations, and even armies.⁶³³

The role of Lhasa in the Qing dynasty could, therefore, be compared to the role of the Vatican in other European kingdoms in medieval times. The suggestion that Qing effectively controlled or owned the political head of Lhasa and Tibet as a part of Qing's territory appears to reflect an inadequate understanding of the political dynamics of the two entities.

More importantly, the sense of territorial and power separation was understood with crystal clarity by the leaders of Lhasa and Beijing. For instance, when Lcang Skya Rol Pa'I Rdo Rje, a close associate of Qianlong in the court, recommended that Qianlong should grant a few *border areas* to the Dalai Lama, Qianlong's Grand Secretary and Governor-general of Sichuan and Shaa, Jalangga, wrote:

"In Tibet, there are thousands of temples and monasteries and over four hundred thousand lamas in residence. There is also a financial need for taking care of patrons who make pilgrimages to Tibet."

We assume that he requested these places because the Dalai Lama was in financial difficulties, *not because he wanted the places to be given to the Tibetans*. The yearly

⁶³⁰ Herbert Franke, *From Tribal Chieftain to Universal Emperor and God: The Legitimation of the Yüan Dynasty* (Verlag der Baerischen Akademie der Wissenschaften 1978).

Hok-lam Chan and others, *China Under Mongol Rule* (Princeton University Press 1981) <<https://www.jstor.org/stable/j.ctt7zv4pr>> accessed 30 June 2023., 296-328.

GRUPPER (n 630).

Grupper (n 632).

⁶³¹ Ping Xu, 'The Mandala as a Cosmic Model Used to Systematically Structure the Tibetan Buddhist Landscape' (2010) 27 *Journal of Architectural and Planning Research* 181.

⁶³² Wang, 'The Qing Court's Tibet Connection' (n 346).

⁶³³ James Hevia, 'Lamas, Emperors, and Rituals: Political Implications in Qing Imperial Ceremonies' [1993] *Journal of the International Association of Buddhist Studies* 243.

revenue from Litang, Batang, and Jiatang is less than ten thousand jin (taels). If we take this amount out of the revenue of Dajianlu and give it to the Dalai Lama, they can make ends meet. *Such places as Litang should remain within China.*⁶³⁴ (emphasis added)

The limits of “Chinese territory” and the territory over which Qing’s sovereign power extended are clearly reflected in these communications. And the legal status of Tibet during the Chinese Republic was no different. If Tibet was already an independent entity in the golden days of the Qing dynasty, the Qing court practised no formal authority over Tibet after a series of unequal treaties during the mid-19th century. Evidence of this state of affairs can be drawn from the Convention of Calcutta (1890) between the British Empire and the Qing Court. It was signed in the hope of recognising the Sikkim – Tibet border (Tibetans considered Sikkim to be part of their own suzerainty) and of allowing the opening of a British Trade Agency in Yatung, just inside Tibet’s territory.⁶³⁵ The Lhasa leadership rejected any territorial arrangement between the two empires without consultation with Tibet. In 1904, seeing no chance of using China to pressure Tibet, the British and their Indian dominion government invaded the Buddhist land, forcing the 13th Dalai Lama into exile (although his spiritual and political leadership continued to be respected by Tibetans until his death in 1933).⁶³⁶

The Western myth of China’s complete suzerainty over Tibet did not end, however. The Anglo-Russian Agreement of 1907 continued to reinforce such a belief. In Article 11 of the Tibetan section, we find: “in conformity with the admitted principle of the suzerainty of China over Tibet, Great Britain and Russia engage not to enter into negotiations with Tibet except through the intermediary of the Chinese Government.”⁶³⁷ The Tibetans in 1912 again showed that they had no intention of allowing China’s perpetual influence over their land by ordering the expulsion of all Chinese from Central Tibet.⁶³⁸ During the period of warlordism in China, Tibetan armies were able to re-capture Chamdo in 1918, and made a profound advance eastward towards Tachienlu. Eric Teichman, the British Consular Agent in Western China from 1917 to 1919, took the initiative and tried to arrange a truce between the two forces. Until the 1930s, there were continual skirmishes between Chinese Nationalists and Tibetans.⁶³⁹

⁶³⁴ Hummel (n 346), 39

Wang, ‘The Qing Court’s Tibet Connection’ (n 346), 134 – 135

⁶³⁵ Fabienne Jagou, ‘10. The Dispute between Sichuan and Xikang over the Tibetan Kingdom of Trokyap (1930s-1940s)’, 10. *The Dispute between Sichuan and Xikang over the Tibetan Kingdom of Trokyap (1930s-1940s)* (Amsterdam University Press 2019) <<https://www.degruyter.com/document/doi/10.1515/9789048544905-015/html>> accessed 30 June 2023.

Thejalkhoukho, ‘The Sikkim–Tibet Convention of 1890 and the Younghusband Mission of 1904’ (2021) 57 *China Report* 451.

⁶³⁶ Alex McKay, ‘19th Century British Expansion on the Indo-Tibetan Frontier: A Forward Perspective’ (2003) 28 *The Tibet Journal* 61.

⁶³⁷ Ellsworth Huntington, *The Anglo-Russian Agreement as to Tibet, Afghanistan, and Persia* (Bulletin of the American Geographical Society 1907) <<http://archive.org/details/jstor-198436>> accessed 30 June 2023., 653-658.

⁶³⁸ Julie G Marshall, *Britain and Tibet 1765-1947: A Select Annotated Bibliography of British Relations with Tibet and the Himalayan States Including Nepal, Sikkim and Bhutan* (RoutledgeCurzon 2005).

⁶³⁹ *Ibid.*, 402 – 404

From 1914 to 1949, Tibet existed for all intents and purposes as an independent, neutral state, as reflected in the Tripartite Simla Convention agreed by China, Tibet, and Britain. However, the Chinese delegates later refused to sign it.⁶⁴⁰ In 1950, the British government had an independent study that concluded that all the evidence showed that Tibet was not a part of China but, instead, had a clear international identity of its own.⁶⁴¹

B. Conflicts

The Communist Chinese did not go into Tibet without first waging a “war of nerves”, and the feud between the Dalai Lama and the Panchen Lama was a critical aspect of the war. According to Werner Levi, writing on the Far Eastern Survey in 1954, the factionalism and political tension inside Tibet was a long-standing problem and was quickly exploited by both the Nationalists and the Communist Chinese.⁶⁴² Strictly speaking, the Panchen Lama stands higher than the Dalai Lama in the spiritual hierarchy. However, enjoying more spiritual prestige and also a monopoly of temporal power, the Dalai Lama has always been considered the supreme leader of Tibet. This led to an internal conflict, resulting in the Panchen Lama, after refusing to pay more taxes to help the Tibetan army, fleeing to China and then to Mongolia in 1924, where he stayed until his death in 1937.

In 1944, the Chinese Nationalist Government insisted that they had found the Panchen Lama’s reincarnation in China, and in 1949 installed this new (tenth) Panchen, Ngoerhtehni, at Kumbum monastery in Chinghai province.⁶⁴³ The new Panchen quickly sided with the Communist regime when they took over the whole of China, creating religious legitimacy for the later invasion.

In the spring of 1950, the Chinese People’s Liberation Army (“PLA”) moved into the disputed areas bordering China and Tibet. At the same time, the so-called “Provisional Government of Tibet” was set up, triggering a degree of panic in the Tibetan government and its population. The poorly trained and inadequately equipped army was expanded and reformed. Taxes were raised. The Tibet National Assembly (comprising nobles and monks) was relocated to Lhasa, where they could inform the Dalai Lama of any significant political development.⁶⁴⁴ These preparations, however, did not provide a real sense of security for Tibet. The leadership of Tibet at the time, together with the Dalai Lama, who was only fifteen years old and still had no authority, was accused of being profoundly lacking in understanding of the situation and of the strategic realities surrounding them.⁶⁴⁵ The most widely told story of all is the story of ‘*Sh*t on their picnic!*’

⁶⁴⁰ Nirmal C Sinha, ‘The Simla Convention 1914: A Chinese Puzzle’.

⁶⁴¹ British Foreign Office Records, FO371/84454, minute by R. H. Scott, Southeast Asia Department of the British Foreign Office, dated 2 November 1950.

⁶⁴² Werner Levi, ‘Tibet under Chinese Communist Rule’ (1954) 23 Far Eastern Survey 1.

⁶⁴³ Hsiao-ting Lin, *Modern China’s Ethnic Frontiers: A Journey to the West* (Routledge 2010).

⁶⁴⁴ Levi (n 646), 2

⁶⁴⁵ Lezlee Brown Halper and Stefan Halper, *Tibet: An Unfinished Story* (Illustrated edition, Oxford University Press 2014), 98

On October 07, 9,000 PLA troops crossed the Yangzte River into Tibet and soon overwhelmed the poorly trained Tibetan force. The first town of Khampa fell into the hands of Beijing and, on October 1, 1950, news reached the regional governor, Ngabo Jigme, that the PLA was nearing Chamdo, a large town in eastern Tibet on the route to Lhasa. Ngabo tried to contact Lhasa to ask for directions, but there was no response. It was four days later, amid chaos, that Ngabo's aide-de-camp was finally able to speak to a Kashag aide-de-camp in Lhasa. The response? It was "*Right now it is the period of the Kashags' picnic, and they are all participating in this. Your telegrams are being decoded, and then we will send you a reply.*"⁶⁴⁶ At this, Ngabo exploded and yelled, '*Sh*t on their picnic!*' By October 19, Chamdo and most towns on the eastern side of Tibet had been taken. At this point, with their main defending forces broken, the options for Lhasa were slight. Effectively occupying the eastern front of Tibet, Mao gave Lhasa an ultimatum: either voluntarily become a part of China and be rewarded with a certain degree of autonomy or accept Beijing's terms. Beijing seemed to prefer psychological warfare to force Lhasa into submission rather than all-out force.

In May 1951, the delegation of Tibet had no other choice but to sign the infamous "Seventeen Point Agreement for the Peaceful Liberation of Tibet" in Beijing.⁶⁴⁷ Notable provisions included the re-institutionalisation of the Panchen Lama's position; a promise to give Tibetan people the right to exercise national regional autonomy under the unified leadership of the Central People's Government; an assurance that the central authorities would not alter the existing political system in Tibet, especially the powers of the Dalai Lama. Officials of various ranks would hold office as usual; religious beliefs, customs, and habits of the Tibetan people would be respected; all lama monasteries would be protected and, finally, the local government of Tibet would be allowed to carry out reforms of its own accord.

This agreement is the first-ever agreement that recognised China's "sustainable" authority over Tibet. However, this was not the end of the traditional Tibetan government. From 1951 to 1959, we note that Chinese (and also Tibetan) affairs in Tibet have never been monolithic, with each party possessing a homogeneous set of views and policies.⁶⁴⁸ Zhang Jingwu, the representative of the Communist Central Committee, was able to meet the Dalai Lama at Dromo/Tromo County (its Tibetan name, now known as Yadong County) to convince him not to flee to India and to cooperate with the Communist Party.⁶⁴⁹ This was one of many direct communications between the Dalai Lama and the Chinese leadership.

In the first few years, Beijing was also able to peacefully apply specific critical structural changes to the traditional Tibetan religious governance. The changes included the secularisation of the institution of the Dalai Lama himself. He appeared in public more

⁶⁴⁶ Ibid.

⁶⁴⁷ Levi (n 646).

⁶⁴⁸ Melvyn C Goldstein, *A History of Modern Tibet, Volume 4: In the Eye of the Storm, 1957-1959* (First Edition, University of California Press 2019)., 183

⁶⁴⁹ Melvyn C Goldstein, Dawei Sherap and William R Siebenschuh, '13. To Lhasa Again', *A Tibetan Revolutionary* (University of California Press 2004) <<https://www.degruyter.com/document/doi/10.1525/9780520940307-019/html?lang=en>> accessed 17 April 2024.

frequently, accompanied by laymen and Chinese officials. We can also speak of the weakening of the celestial classes. By abolishing the tradition of the “Lama Raj” period,⁶⁵⁰ a tradition that rests on the arrangement by which a monk and a lay official head every administrative unit, the Communists eradicated the vital historical primacy of the monks within the Tibetan governance structure.

On the other hand, among the Communists themselves, there was infighting, and various disputes occurred. Fan Ming from the Northwest Bureau (NWB) and Zhang Guohua from the Southwest Bureau (SWB) arrived with their armies in Tibet and soon began an argument over which one of them should be appointed the First Secretary of both the Tibet Work Committee and the Tibet Military Affairs Headquarters. There were also confrontations over the possible division of Front and Back Tibet, the role of Panchen Lama, and many others, all in the tense Rectification and Anti-rightist campaign.⁶⁵¹ There were also complications coming from local insurgency groups fighting against the Chinese Han’s forceful “reform” in many parts of Tibet, especially the Khambas and their formal Chushigandru organisation in Lkoha, which was believed to be sponsored by a particular faction of the Tibetan government.

In the environment of confrontation, mistrust, and misunderstanding, the final blow was when the PLA invited the Dalai Lama to the Tibet Military Headquarters of the PLA for a ceremony and then tried to refuse to accommodate his customary twenty-five Bodyguard Regiment soldiers. While the Dalai Lama insisted that he could go safely to the military HQ, his subordinates and the Tibetan people did not believe it to be so. On the morning of March 10 1959, thousands of Tibetans flooded Dalai Lama’s Summer Palace, and Norbulinga tried to prevent him from going to the PLA headquarters. The historical record shows that these people were a crowd that had come solely to stop the Dalai Lama’s planned visit and not to protest against the Chinese occupation, let alone to start an uprising or revolt.⁶⁵² The demonstration, however, soon turned into an anti-Chinese, pro-independence affair, with an element of violence.

From March 10 to March 17, the situation worsened. The Dalai Lama and the Tibetan government (Kashag) were unable to prevent the *198 iming langlu* leaders (“people’s uprising song”) from preparing for a major battle with the Chinese PLA and attack Chinese personnel inside Lhasa. On the other hand, while the Chinese insisted that they had only augmented their forces near Lhasa and Norbulinga for defensive purposes, the PLA was the first to open fire. The Dalai Lama and his trusted advisors fled Lhasa on the evening of March 17. By March 20, the “Battle for Lhasa” was over, marking the end of the old Tibet.⁶⁵³

2. Legal debates

⁶⁵⁰ Levi (n 646)., 6

⁶⁵¹ Goldstein, *A History of Modern Tibet, Volume 4* (n 652)., 190 – 205

⁶⁵² Goldstein, Melvyn C.. *A History of Modern Tibet, Volume 4: In the Eye of the Storm, 1957-1959*, Berkeley: University of California Press, 2019. <https://doi-org.ezproxy.library.uvic.ca/10.1525/9780520972254>, 357

⁶⁵³ Chen Jian, ‘The Tibetan Rebellion of 1959 and China’s Changing Relations with India and the Soviet Union’ (2006) 8 *Journal of Cold War Studies* 54.

There should be no confusion concerning the legality of China's military action against Tibet in 1950 – 1951. The position that Tibet was an independent state even during the Qing Dynasty has been firmly established above, although as a part of its investiture-tribute system. There was also the adoption of the United Nations Charter and an emerging principle contained in Article 2, prohibiting the use of force in international disputes.

It could be argued that the People's Republic of China – the China of the Communist Party (CCP), was at that time not a member of the United Nations and that since the prohibition of the use of force had only been a "treaty provision" in the 40s, the PRC had no obligation to adhere to such a requirement. However, historical records clearly indicate the CCP's willingness to support the formation of the UN. For example, on April 24, 1945, Mao Zedong wrote that:

"[...] in regard to the establishment of an institution to preserve international peace and security, the Chinese Communist Party completely approves of the proposals made at the Dumbarton Oaks Conference and the decision concerning this question made at the Crimea (Yalta) Conference... The Chinese Communist Party has already sent its own representative to join the Chinese delegation at the San Francisco Conference in order to express the will of the Chinese people."⁶⁵⁴

More importantly, in the twelve-member delegation representing the State of China that was sent to the San Francisco Conference, there was a member representing the CCP, and all the members signed the Charter.⁶⁵⁵ The question of the representation of China in the United Nations began on November 18, 1949, when the newly established Central People's Government of the People's Republic of China (hereafter Communist China) requested that the United Nations immediately deprive the Nationalist China delegation "of all rights to further represent the Chinese people in the United Nations." Nevertheless, the CCP displayed a strong commitment to participating and honouring the principles of the UN.

Unfortunately, what was more problematic was the Tibetan government's inconsistent responses concerning China's territorial assertions. For example, after living in exile for a while, the Dalai Lama agreed to return to Tibet and lead the traditional Tibetan government. The Dalai Lama, until his flight from Tibet in 1959, had participated and was elected to the position of Vice Chairman of the Standing Committee of the National People's Congress (NPC).⁶⁵⁶ He also agreed to be Director of the Preparatory Committee for the Tibet Autonomous Region (PCTAR). In short, the leadership of Tibet agreed to this new power settlement and accepted the status of Tibet as Communist China described it.⁶⁵⁷ While many

⁶⁵⁴ China Institute of International Affairs (ed), *China and the United Nations: Report of a Study Group Set up by the China Institute of International Affairs* (Published for the Carnegie Endowment for International Peace by Manhattan Pub Co 1959), 39

⁶⁵⁵ Winberg Chai, 'China and the United Nations: Problems of Representation and Alternatives' (1970) 10 Asian Survey 397.

⁶⁵⁶ 'Origin of the Title of "Dalai Lama" and Its Related Backgrounder -- China.Org.Cn' <http://www.china.org.cn/china/tibet_democratic_reform/content_17357971.htm> accessed 30 June 2023.

⁶⁵⁷ Melvyn C Goldstein, *A History of Modern Tibet, Volume 2: The Calm before the Storm: 1951-1955* (First Edition, University of California Press 2009), 496

have argued that Dalai Lama was obliged to act as he did to preserve his government's internal autonomy and the continued existence of the entire Tibetan socioreligious system, it nevertheless constituted a formal acceptance by the legitimate Tibetan government of the territorial claims of Beijing. In short, the victim state itself accepted and participated in the *fait accompli*.

In addition, the day-to-day administration and operation of the traditional Tibetan government also demonstrated that Tibet had complied and consented to China's ultimate authority. One of the best examples of this compliance was the Dalai Lama's and the Kashag's consultation with the Tibet Working Committee and ultimately the Central Committee on a draft of the Dalai Lama's edict during 1957 – 1958. This was no ordinary edict. The document actively condemned separatism and officially publicised the Dalai Lama's opposition to any independence activities in Tibet (particularly those of the Khambas movement). In their review, the Central Committee's comments on the draft were as follows:

“In terms of the relationship between the Central Committee and the Tibetan local government, the Seventeen-Point Agreement clearly points out, “under the unitary leadership of the Central People's Government, the Tibetan people have the right of regional autonomy.”

But in the document [the Dalai Lama's drafted edict], there is no emphasis on the leadership of the Central Committee, and no emphasis that Tibet is an inseparable part of the motherland.

On the contrary, it says, “within the big family of the motherland, every ethnic group should maintain independence and keep the initiative in one's own hands. [and] “If all the political power of Tibet is taken under the control of the Central Committee, there is good reason for the emergence of the idea (of armed rebellion and opposing the Central Committee).” So it is obvious that while they are opposing independence activities in Tibet, they are spreading the idea of Tibetan independence.”⁶⁵⁸

The Central Committee requested that either the edict should not be published or that it should be revised before publication. Ultimately, the Dalai Lama and the Kashag revised the edict to meet Beijing's demands before disseminating it. It is clear that there was an established consensus among the Tibetan government, including even the Dalai Lama – the spiritual head and supreme leader of the land – that they accepted becoming a part of China and maintaining a subordinate relationship with the CCP, as long as the internal religious structure of Tibet remained intact.

Experts in Tibetan history, such as Melvyn C. Goldstein, after carefully considering all historical accounts, witnesses and archives, suggest that the March 10 Uprising was not due to the intentions of the Dalai Lama and the Tibetan government. It has been claimed that some of the Dalai Lama's officials deliberately ignored his wishes and covertly incited the Lhasa

⁶⁵⁸ DPRC, “Central Committee's Reply to (TWC's) Inquiry Regarding Dalai's Preparation to Publicize a Document Opposing Any Activities for an Independent Tibet,” 14 November 1958

populace to come to Norbulinga the next day to demonstrate. They also argued that, if the Dalai Lama's wishes had been respected, there would have been no March 10 demonstration or Lhasa uprising, and Tibetan history would have followed a very different trajectory.⁶⁵⁹

The historical facts force us to consider the element of state consent concerning the use of force in international relations. As a characteristic of any legal system, continuous breaches of law allowed to remain triumphant will eventually affect the validity of the law.⁶⁶⁰ And if the victim state itself acquiesces or consents to such illegality, there would be nothing the international legal system can do to prevent the consolidation of the situation.

3. Identification of Illicit Acts and Unlawful Situations:

Tibet did call for international help. On November 17, 1950, Tibet first appealed to the United Nations. The letter effectively presented Tibet's view on its relations with China, viz:

"The attention of the world is riveted on Korea, where aggression is being resisted by an international force. Similar happenings in remote Tibet are passing without notice. It is in the belief that aggression will not go unchecked, and freedom unprotected in any part of the world that we have assumed the responsibility of reporting through you [the Secretary-General] recent happenings in the border area of Tibet to the United Nations Organisation.

As you are aware, the problem of Tibet has taken on alarming proportions in recent times. The problem is not of Tibet's own making but is largely the outcome of the unthwarted Chinese ambition to bring weaker nations on her periphery within her active domination. Tibetans have for long-lived a cloistered life in their mountain fastness, remote and aloof from the rest of the world except insofar as His Holiness the Dalai Lama, as the acknowledged head of the Buddhist Church, confers benediction and receives homage from followers in many countries."⁶⁶¹

Lhasa's document skillfully conveyed the right message that it was the natural Chinese urge for expansion that had "wholly misconstrued the significance of the time of friendship and inter-independence that existed between China and Tibet as neighbours" and that "the armed invasion of Tibet for the incorporation of Tibet into Communist China through sheer physical force is a clear case of aggression." Tibet at that time had many potential allies, such as the British, the Americans, or the Indians, but it found support from an unlikely source – El Salvador. On November 14, Hector David Castro, the chairman of the El Salvador delegation, telegraphed the U.N. Secretary-General requesting that the "invasion of Tibet by foreign forces" be added to the agenda based on the United Nations's primary responsibility "to

⁶⁵⁹ Goldstein, *A History of Modern Tibet, Volume 4* (n 652), 340

⁶⁶⁰ Lauterpacht (n 215), 427

⁶⁶¹ British Foreign Office Records, FO371/84454, telegram from the United Kingdom's U.N. delegation to the British Foreign Office, dated 14 November 1950.

maintain international peace and security,” as cited in paragraph 1 of Article 1 of the United Nations Charter.⁶⁶²

However, within the General Committee, in debates held prior to the Tibet question being brought to the General Assembly, both the United Kingdom and India abstained from publicising their knowledge about Tibet. India was obsessed with obtaining a friendly relationship with the new China, while the UK now believed that India should bear the responsibility for supporting Tibet.⁶⁶³ More importantly, the Committee, while relatively neutral, had no knowledge of Tibet, what was happening in Tibet, and of the legal position of Tibet. After a suggestion by India that the Tibet – China issue should be dealt with by the two parties involved and lengthy consultation with the Chinese Nationalist government in Taiwan, it was unanimously decided to adjourn consideration of the El Salvador proposal. Thus, Tibet’s first appeal to the UN was an unfortunate failure.

It was not until after the Lhasa Uprising in 1959 that international entities started to show some interest in Tibet. In a report on *The Question of Tibet and the Rule of Law*, the International Commission of Jurists (ICJ) found that there was a systematic intention on the part of China “to destroy in whole or in part the Tibetans as a separate nation and the Buddhist religion in Tibet.”⁶⁶⁴ The ICJ’s second report, based on their fact-finding mission, on Tibet and the Chinese People’s Republic, concluded that “Tibet was at the very least a *de facto* independent State” before its annexation by the Chinese government in 1951.⁶⁶⁵

This investigation prompted the adoption of the United Nations General Assembly’s (UNGA) Resolution 1353 (XIV) of October 21, 1959 and Resolution 1723 (XVI) of December 20, 1961, both of which solemnly confirmed the fundamental right to freedom of the Tibetan people and their right to self-determination.⁶⁶⁶

But even after the third UNGA’s Resolution on Tibet (Resolution 2079), the United Nations’ consideration of the question of Tibet remained unfinished.⁶⁶⁷ The political will to achieve any purpose from the resolutions was feeble, and many have insisted that the UN intentionally ignored the question of Tibet’s status under international law. Tibetan statehood fell into the rabbit hole of constitutive theory. The German academic Thomas Heberer expressed the view of many scholars when he wrote: “No country in the world has ever recognised the independence of Tibet or declared that Tibet is an ‘occupied country’.”⁶⁶⁸

⁶⁶² Melvyn Goldstein, ‘Tibet: After the Fall of Chamdo’ (1991) 16 *The Tibet Journal* 58., 71

⁶⁶³ *ibid.*, 75-78

⁶⁶⁴ International Commission of Jurists. (1959) *The Question of Tibet and the Rule of Law*. <http://www.icj.org/wp-content/uploads/1959/01/Tibet-rule-of-law-report-1959-eng.pdf>, IV, 21, 22, 25

⁶⁶⁵ International Commission of Jurists. (1960) *Tibet and the Chinese People’s Republic* <https://www.icj.org/wp-content/uploads/1960/07/Tibet-China-thematic-report-1960-eng.pdf>

⁶⁶⁶ UN General Assembly, Question of Tibet [1959] UNGA 5; A/RES/1353 (XIV) (21 October 1959); and UN General Assembly, Question of Tibet [1961] UNGA 5; A/RES/1723 (XVI) (20 December 1961).

⁶⁶⁷ UN General Assembly, *Question of Tibet*, 18 December 1965, A/RES/2079.

⁶⁶⁸ Vanessa Frangville, “Tibet in Debate: Narrative Construction and Misrepresentations in Seven Years in Tibet and Red River Valley”, *Transtext(e)s Transcultures 跨文本跨文化* [Online], 5 | 2009, document 6, Online since

4.C.2. The Indian invasion of Goa (1961 – 1970s)

The “Goa incident”, “Goa liberation” or “Goa invasion by India”, depending on one’s individual perspective, is either a righteous action that properly annihilated colonial remnants in India or a dangerous action that could endanger the non-violence principle of the United Nations and destabilise the “good title” of the territorial claim of Portugal, which has stood for centuries. Either way, the Goa incident, its history and its development in the international arena allow us to explore how the principle and practice of non-recognition deal with the debate on colonised territories, the violence involved in the decolonisation process and the conflicting East–West concepts of unlawfulness in international law. Analysing this incident closely, I reject the idea that the Goa incident destabilises the consistency of the duty of non-recognition.

1. Preliminary political-legal analysis:

A. *Legal environment*

The Portuguese enclaves in India at the time comprised some 4,000 square kilometres and a population of only 600,000. Administratively, the territories constitute a province of Portugal consisting of three districts – Goa, Daman and Diu. Goa was the province’s capital and the most important district. Its name was often used to refer to the whole territory.

Before the Portuguese arrived in India in 1498, Goa was a great emporium of the East and a centre of regional commerce. From the Indian point of view, Portugal’s hold on Goa is nothing more than a classic case of colonialism that is morally, legally and politically wrong. According to this account, the historical footprints of the Portuguese on the land consisted of only bloodshed, terror, sordid acts and wholesale slaughter.⁶⁶⁹ They took control of the prosperous

22 April 2010, connection on 21 September 2021. URL: <http://journals.openedition.org/transtexts/289> ; DOI: <https://doi.org/10.4000/transtexts.289>; http://www.chinadaily.com.cn/china/2008-04/17/content_6622644.htm

⁶⁶⁹ DP Singhal, ‘Goa—End of an Epoch’ (1962) 34 *The Australian Quarterly* 77.

port of Goa in 1510, which at the time belonged to the Sultan of Bijapur. Subsequently, Portugal conquered Diu (in 1546) and Daman (in 1559).

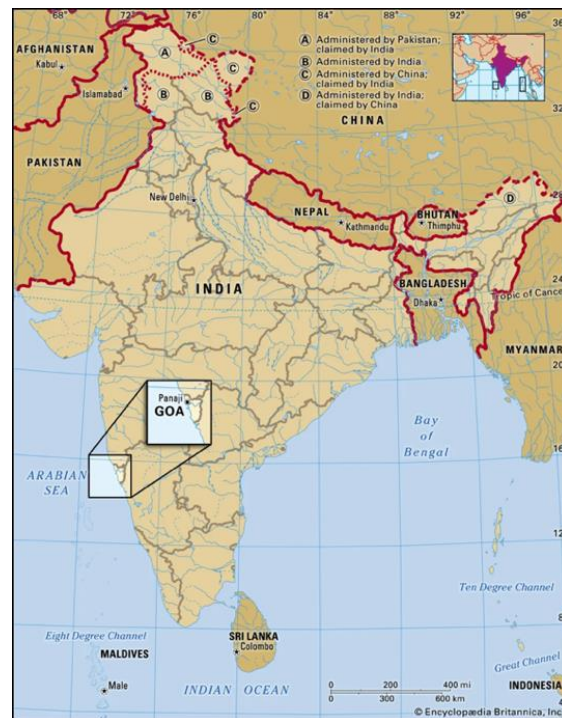


Image 4.C.2. The Goa enclaves on the west coast of India

If we adopted a rather formalistic view of law, is it debatable to call Portugal's conquest of Goa unlawful *per se*, primarily due to the so-called "right of conquest" that was prominent until the beginning of the 20th century. Early international legal thinkers, such as Lassa Oppenheim and Emer de Vattel, saw the right of conquest as an inevitable explanation for the international legal order prior to the modern legal structure of the international community.⁶⁷⁰ Oppenheim wrote in 1905: "As long as a Law of Nations has existed, the states, as well as the vast majority of writers, have recognised subjugation as a mode of acquiring territory."⁶⁷¹ Such belief is also reflected in, for example, Bismarck's infamous statement: "Gentlemen, if you contest the right of conquest, you cannot read the history of your own country. It is thus that states are formed... The Poles themselves committed the crime of conquest a hundredfold..." This is one of many manifestations of his motto, "Macht geht vor Recht" (*Power predicates law*).⁶⁷² This belief is by no means Eurocentric, as countless conquests, invasions and wars in general were what formed Asia's brightest empires, including China and India. Unless we want to detonate a complete and chaotic revision of modern borders and international relations, accepting wars

⁶⁷⁰ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press 1988).

Gilad Ben-Nun, 'Territorial Conquest: Its Prevalence, Demise, and Resurfacing: 1880s – The Present' (27 June 2023) <<http://www.connections.clio-online.net/article/id/fda-133260>> accessed 26 June 2023.

⁶⁷¹ Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green 1905), 288

⁶⁷² Otto Pflanze, 'Bismarck's "Realpolitik"' (1958) 20 *The Review of Politics* 492.

and conquests as a legitimate and valid title to territory world history to a certain degree is the only way of making sense of the current international environment that we are living in.

However, decolonisation is also a recent authoritative international project that tries to rectify the unjust practice of conquest, at least to the extent that it must liquidate European empires established from the 16th century all over the world. Such a strong desire was recorded in the Soviet's response before the United Nations, after Portugal submitted the Goa question to the Security Council. Here, the Soviet representative reminded Portugal that the Declaration on the granting of independence to colonial countries and peoples adopted by the General Assembly had unequivocally agreed that measures must be taken for the liquidation of colonial empires.⁶⁷³ When Portugal joined the UN in 1956, it is argued that Portugal accepted the responsibilities set out under Article 73 on non-self-governing territories since they still had many colonies at the time. It was the Government of Portugal's fault that it did not carry out and had no intention of carrying out these provisions of the declaration, thereby causing a threat to peace and security in various parts of the world.

But what make 500 years of rule become irrelevant to the recognition of sovereignty? As Quincy Wright argued, there was no law at that time to prohibit enjoyment of the "fruits of aggression."⁶⁷⁴ The Portuguese title might have been dubious when Albuquerque first conquered Goa in 1510. But after four and a half centuries of uncontested occupation with an extended civil administration and formal incorporation of Goa into the body of its own state territory, it is possible to say that Portugal had a good title to Goa. It is also important to keep in mind that India itself seemed to subscribe to this idea on a case-by-case basis. Notably, in the Ladakh boundary dispute with China, while Chinese delegates insisted that there could be no boundary without a delimitation treaty ratified by both parties, the Indian commissioner argued:

"It is unprecedented in the history of international relations that after one state has publicly exercised full administrative jurisdiction for several centuries over certain regions, another state should raise a dispute regarding their ownership."⁶⁷⁵

These contradictory propositions led each party to interpret its understanding of Goa's situation, sometimes using the very same language. To address this issue, a majority of scholars have utilised the "salt-water" (or "blue-water") thesis of external self-determination,⁶⁷⁶ insisting that Portugal had no historical right or geographical or cultural connection with Goa to claim it as a part of her sovereignty.⁶⁷⁷ As they contend, the mother tongue of Goans is

⁶⁷³ UNGA, 'Res 1514 on "Declaration on the Granting of Independence to Colonial Countries and Peoples"' UN Docs A/RES/1514(XV) <<https://digitallibrary.un.org/record/206145>> accessed 26 June 2023.

⁶⁷⁴ Quincy Wright, 'The Goa Incident' (1962) 56 *American Journal of International Law* 617., 623

⁶⁷⁵ Margaret W Fisher and Leo E Rose, 'Ladakh and the Sino-Indian Border Crisis' (1962) 2 *Asian Survey* 27.

⁶⁷⁶ UNGA, 'Res 637 (VII) on "The Right of Peoples and Nations to Self-Determination"' UN Docs A/RES/637(VII)[A] <<https://digitallibrary.un.org/record/666117>> accessed 26 June 2023.

'Goa—End of an Epoch on JSTOR' <<https://www.jstor.org/stable/20633766>> accessed 26 June 2023.

⁶⁷⁷ Lynne O'Donnell, 'Portugal Left a Mark on India' (*Foreign Policy*, 13 May 2023) <<https://foreignpolicy.com/2023/05/13/india-goa-portugal-colonial-history/>> accessed 26 June 2023.

Konkani, and that of the people living in Daman and Diu is Gujarati. These languages are in no shape, or form related and used in Portugal but are widely spoken in Indian regions surrounding the Portuguese enclaves.

Religion is also a criterion employed to demonstrate the presence of “blue water” between the colony and the colonising country. In this regard, the population of Goa was predominantly Hindu. And even if 36 per cent of them were Catholics, the Hindu cultural practices was still maintained. Trade and education also entered the picture. Some directed attention to the fact that Portugal’s share in Goa trade was only 10 per cent of imports and one per cent of exports, with almost the entire middle class of Goa depending on India for higher education and employment. Such disconnection with its so-called “metropolitan motherland,” according to Indians, led to the inevitable revolt of the Goans against foreign oppression.

However, the Portuguese themselves had something to say about this accusation. One of the most comprehensive responses would be from Oliveira Salazar, former Prime Minister of Portugal from 1932, who was also appointed Portugal’s Minister of Foreign Affairs and Minister of War. The Indians called him the “Dictator of Portugal.”

On Foreign Affairs, Salazar argued that it was a historical fact that the Portuguese were the allies of Hindus against the oppression of Mohammedans.⁶⁷⁸ They were not invaders. Portugal’s presence over the land resulted from a series of treaties with local rulers, allowing the sovereignty of the King of Portugal to be established through payment of a token tribute and permission to build fortresses on a such defined territory as was necessary for its defence. He insisted that no traveller passing into Goa from the Indian Union could fail to gain the impression that he was entering a whole new nation. The way people think, feel and act was European. Controversially, Salazar contended Goa might not be a remoted geographic or economic front of Portugal, but it was indubitably a human one: “Goa is the transplantation of the West onto Eastern lands, the expression of Portugal in India,” as the result of 450 years of common life.

More interestingly, the former Prime Minister also used the commercial and educational factors mentioned by the Indians to prove that there is nothing called “colonial exploitation” in Goa. He defined colonialism as an economic and political system which implies a sovereign power foreign to the subjected territory, an economic enterprise for the colonising power’s benefit (to a larger or smaller extent). And if that is so, he continued, no elements of colonialism could be attributed to Portuguese Goa. According to Salazar, Goa had never been exploited for Portugal’s economic benefit. From 1540, generations of Portuguese authorities complained about Goa as a burden on the metropolitan treasury. Until the 1950s, Goa still absorbed its own revenues and received large subsidies from the metropolis. Therefore, neither the metropolitan

Tracey Banivanua Mar (ed), ‘Saltwater: The Separation of People and Territory’, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/decolonisation-and-the-pacific/saltwater-the-separation-of-people-and-territory/1927CEBC2272645E87C034690E73A0D4>> accessed 26 June 2023.

⁶⁷⁸ Oliveira Salazar, ‘Goa and the Indian Union’ <<https://www.foreignaffairs.com/articles/india/1956-04-01/goa-and-indian-union>> accessed 30 August 2022.

people nor the metropolitan capital enjoy any special privileges over the interests of local Goans. In trade, the metropolitan share in Goan imports and exports was modest, further proving the supposed non-exploitative approach to Goa. He also argued that, politically and juridically, there is no distinction between the Portuguese of Goa and the Portuguese of the European continent, the adjacent islands, and the rest of the overseas territories. The Goans enjoyed all rights, had access to all posts, carried out all functions and worked to earn a living throughout the Portuguese territory.

Finally, we should note that the international atmosphere at the time was tense. The Cold War dimension arguably hardened Western support for Portugal. The North Atlantic Treaty Organization's (NATO) out-of-area initiatives proposed that decolonisation process that transformed the structures of the international system a possible out-of-area issue for NATO, in accordance with Article 4.⁶⁷⁹

We should also consider that India's Nehru faced harsh criticism from Afro-Asian countries for his "metropolitan world views."⁶⁸⁰ Many African leaders, who admired Nehru and India's leadership in fighting against Portugal's colonial legacy, said they were disappointed with India's gradualist approach to resolving the Goa question. Taking advantage of the situation, Communist China, still enraging in a dispute with India over Tibet, denounced Nehru as an imperialist stooge. Nehru was described as "a recent addition to the rogues' gallery of the Chinese press," "the skeleton at the anti-colonial feast in Belgrade."⁶⁸¹ These unique political and legal foundations were the contextual backdrop to the military incident in Goa.

B. Conflict

India sent forces into Goa after the ICJ, in the Right of Passage case, ruled against Portugal having any rights of passage, extending for its armed forces, armed police, arms and ammunition anywhere within Indian territory.⁶⁸² On the morning of December 18, 1961, the 17th division of the Indian Army, with air and naval support, launched its first attack on Goa after an attempt in 1954 that fizzled out.⁶⁸³ In 26 hours, as one would expect, the 30,000 troops of Indian forces brought about the collapse of the 450-year-old Portuguese authority, guarded by 3,000 men of Goan local government. By mid-day on December 19, Daman and Diu had also surrendered.

⁶⁷⁹ Moritz Pöllath, "'Far Away from the Atlantic...': Goa, West New Guinea and NATO's out-of-Area Policy at Bandung 1955" (2013) 11 *Journal of Transatlantic Studies* 387.

⁶⁸⁰ DP Singhal, 'Goa—End of an Epoch' (1962) 34 *The Australian Quarterly* 77.

⁶⁸¹ Singhal (n 673).

Jacob Abadi, 'The Sino-Indian Conflict of 1962—a Test Case for India's Policy of Non-Alignment' (1998) 15 *Journal of Third World Studies* 11.

⁶⁸² International Court of Justice, 'Right of Passage over Indian Territory (Portugal v. India)' <<https://www.icj-cij.org/case/32>> accessed 26 June 2023.

⁶⁸³ GOA: Invasion That Fizzled' [1954] *Time* <<https://content.time.com/time/subscriber/article/0,33009,823491,00.html>> accessed 26 June 2023.

There were different accounts of how the operation unfolded. Indian Defence Minister, Mr Menon, characterised the military action as “a swift and bloodless operation.”⁶⁸⁴ Some Indian sources said casualties on both sides were fewer than in road accidents over the Christmas weekend in Canada.⁶⁸⁵ Overall, they believed that the takeover had been carried out swiftly, efficiently, and orderly. As Prime Minister Nehru told a Washington Post reporter, this reflects “the correctness of the Indian assessment of the situation. The colonial administration had cracked up, and the people wanted and welcomed India.”⁶⁸⁶

The Portuguese side disagreed. The Portuguese Embassy in Washington insisted that Indian heavy artillery attacks and airstrikes caused severe damage to Goa’s infrastructure and caused casualties among the civilian population.⁶⁸⁷ At the end of December, Portugal reported that there was still “bloody fighting” continuing in many sections of the territory. The metropolitan government accused India of hiding the fact that they used a wholly mechanised army with naval and air support just to subdue a couple of peace-keeping garrisons in the territory, in which the troops were armed only with light weapons.

The short conflict, however, was not unexpected. Writing in a letter celebrating the liberation in December 1962, Nehru said that the complete invasion of Goa was “as if some great burden had been removed, some corroding evil had been eliminated.”⁶⁸⁸ Nehru saw Indian military action as an inevitable result of the accumulated frustration and disappointment of the previous 14 years, referring to the efforts to negotiate the peaceful return of Goa to India.

2. Legal debates

The arguments over the Goa invasion are multifaceted. They have been presented not only by different Indian actors but also by international actors, whose arguments are liable to change in accordance with the environment and the political nature of such actors. For this short analysis, I focus on three legal arguments put forward by Indian authorities and their supporters: (1) the act of self-defence, (2) self-determination and decolonisation, and (3) the transfer of territory by conquest.

India first utilised the right of self-defence to justify the invasion before the Security Council. In the letter to the President of the Security Council dated December 12, 1961, five days before the invasion, India’s representative accused the Portuguese troops stationed on the island of Anjdiv on November 17 of firing on a peaceful Indian passenger ship named “Sabarmati” and

⁶⁸⁴ ‘Indian Occupation of Portuguese Territories in India. Invasion of Goa, Daman, and Diu. - Incorporation in Indian Union’, , *Keesing’s Record of World Events (formerly Keesing’s Contemporary Archives)* (1962) 18623 <<http://web.stanford.edu/group/tomzgroup/pmwiki/uploads/1074-1962-03-KS-a-RCW.pdf>>.

⁶⁸⁵ Singhal (n 673).

⁶⁸⁶ PR Rao, *Portuguese Rule In Goa 1510-1961* (Asia Publishing House 1963) <<http://archive.org/details/in.ernet.dli.2015.127111>> accessed 7 January 2024.

⁶⁸⁷ Goa Capital Surrenders to India Invasion Force: Portuguese Say Bloody Fighting Still Continues The Washington Post, Times Herald (1959-1973); Dec 20, 1961

⁶⁸⁸ How Nehru Saw Goa a Year Ago by Selig S. Harrison The Washington Post, Times Herald (1959-1973); Dec 22, 1962

on another fishing boat on November 24.⁶⁸⁹ The first attack wounded the second engineer of the passenger ship, while the second attack killed a fisherman. It was also alleged that Portugal was intensifying oppression and terrorism against Indian and Goan citizens near or within the vicinity of Goa. Bold accusations, such as that the Portuguese continued to amass forces, attack Indian villages and penetrate deep into Indian territory, seem to be the “reasons” for India’s engagement in military action.

During the first Security Council debate on Goa, the Indian representative contended that: “In the early morning hours on December 17, [...] Portuguese colonialist forces attacked Indians inside Indian territory [...] Portugal has concentrated 12,000 soldiers in Goa where they also had mined public buildings...” He then went on to refer to Article 2 of the UN Charter, which provides that force can be used in self-defence for the protection of the people of a country. To him, “the Goans were as much Indians as any other Indians.” Quincy Wright identified several problems with this argument in his article.⁶⁹⁰ Specifically, the right to self-defence only covers the armed operation of one state within its territory (or occasionally at sea) to protect its territorial integrity and political independence. At the same time, however, it must respect any other state’s territorial integrity and political independence, including those of the violating state. An armed occupation of another territory is never accepted as a proportionate and reasonable conduct of self-defence.

Moreover, the definition of Goans as legally Indians, and hence the uncontested right of the Indian government to defend them, makes no sense in contemporary international law. These discussions have not yet analysed the fact that most of India’s claims regarding Portugal’s aggression were largely unfounded. Such conduct would also be unwise for a small administration and army like that of Portuguese Goa. However, a very consistent employment of the language of self-defence, including that of Nehru when he characterised Portuguese action as “a clear case of aggression and deliberate provocation,”⁶⁹¹ shows that India did attempt to frame the event from the perspective of international law.

The reference to the principle of self-determination and the stagnated process of decolonising Goa is a better legal discussion. In this proposition, the Indian side insisted that Goa had never been a part of an “organic” Portugal. Therefore, its whole 450 years of history was nothing more than a prolonged, exploitative foreign occupation. Authoritative international actors, including the International Court of Justice, implicitly supported some manifestations of that belief. Specifically, in the Right to Passage judgment,⁶⁹² the ICJ judges observed:

⁶⁸⁹ India, ‘Letter Dated 12 December 1961 from the Permanent Representative of India Addressed to the President of the Security Council, UN Docs S/5020’ <<https://digitallibrary.un.org/record/632002>> accessed 26 June 2023.

⁶⁹⁰ Wright, ‘The Goa Incident’ (n 678).

⁶⁹¹ ‘Indian Occupation of Portuguese Territories in India’ *Keesing’s Record of World Events (formerly Keesing’s Contemporary Archives)* (March 1962).

⁶⁹² “This case is a 1960 decision of the International Court of Justice on the territorial dispute between the States of India and Portugal. The dispute concerned the delimitation of areas under Portuguese control after India became independent in 1947. The case involved three main legal issues of contention. The first was whether the dispute could even be heard by the Court (that is, whether the case was admissible). This required both States to demonstrate that they had accepted the jurisdiction of the Court under Article 36 of the Court’s Statute. The second

“Portugal is equally unfounded in her reliance upon recognition of Portuguese sovereignty in the enclaves, either contained in a treaty of 1779 negotiated by Portugal with the Maratha Empire, or flowing from the attitude of the British or Indian Governments between 1818 and 1954;

Whereas the negotiations of 1779 never resulted in an agreement and whereas the draft treaty in contemplation in any event involved no transfer of sovereignty.”⁶⁹³

I understand that the ICJ verdict worked both ways, as it gave a sense of satisfaction to Portugal by stating that it still had the right of civil passage, and to India by stating that Portugal could not conduct an armed intervention into affairs which India claimed were internal in nature.⁶⁹⁴ However, by explicitly mentioning and questioning Portugal’s sovereignty in Goa, the Court did signal a rather unsettling view of its origin. The language of the World Court paved the way for other authoritative international organisations to step in and discuss Portugal’s claims to sovereignty over its overseas territories. As mentioned, Resolution 1514 declared that states still administering non-self-governing territories must take steps to hasten the political emancipation of these territories.

Even more specifically, in Resolution 1542 of December 15, 1960, the General Assembly identified particular territories under the administration of Portugal that should be considered non-self-governing territories within the meaning of chapter XI of the Charter, including Guinea, called Portuguese Guinea, Mozambique; Macau and dependencies and of course; Goa and dependencies, called the State of India.⁶⁹⁵ Under this resolution, the General Assembly established Portugal’s (and Spain’s) obligations to transmit any information they have under Chapter XI of the Charter concerning the territories, and to work with the Secretary-General to fulfil their responsibilities presumably set out under the Charter. However, while Spain agreed to follow these Resolutions, Portugal did not see them as enforceable. Many colonialist states at the time did not recognise the UNGA resolutions in general and this resolution in particular, yet the history of UN practice shows that the General Assembly wielded the power not only of determining but also of supervising the administration and decolonisation process of non-self-governing territories.

Nevertheless, even if the colonial status of Goa was indisputable, the use of force to “liberate” it is another issue. In international law at the time, Goa was still a part of Portugal. Its non-self-

question was whether the agreement through which Portugal was conferred a right of passage was a valid treaty under international law. This required the Court to assess if the parties had intended to enter into a binding agreement, whether they were subjects of international law, and whether either of the two parties were coerced into the agreement.”

See more from: Raghavi Viswanath, *The Right of Passage Case of the International Court of Justice* (Springer 2021) <<https://cadmus.eui.eu/handle/1814/70896>> accessed 7 January 2024.

⁶⁹³ **International Court of Justice, ‘Right of Passage over Indian Territory (Portugal v. India)’ (n 686). (Judgment of 12 April 1960. Merits)**

⁶⁹⁴ R.P. ANAND, “The International Court of Justice and the Development of International Law” (1965) 7 *International Studies* 228.

⁶⁹⁵ UNGA, ‘Res 1542 on “Transmission of Information under Article 73e of the Charter” UN Docs A/RES/1542(XV)’ <<https://digitallibrary.un.org/record/205905>> accessed 26 June 2023.

governing status and Portugal's uncooperative attitude did not qualify as an immediate act against the peace and security of the international community, let alone opening it to the use of force and occupation by India. In this legal relation between the UN General Assembly Portugal and Goa, established by the series of resolutions we have discussed, India was neither a beneficiary nor a party to the resolutions. Asserting that Goa was a non-self-governing territory, the justification for India's conduct has no basis in any interpretation of international law concerning territorial integrity.

Finally, a not very convincing but intriguing argument from the Indian side came from the Supreme Court of India. It basically recognised the right of India to conquer and annex Goa by force. In the landmark *Monteiro v. State of Goa* case, Father Monteiro was accused of overstaying his Goa residential permit, and his appeal was presented before the Supreme Court of India.⁶⁹⁶ After the annexation, Monteiro had two choices: either to apply to become an Indian citizen or to retain his Portuguese nationality. He chose the latter, but it also meant that the priest must consistently apply for his residential permit or risk becoming an "illegal alien." The high court insisted that "the occupation on December 20, 1961, was neither belligerent nor an anticipated occupation, but true annexation by conquest and subjugation." This annexation-by-conquest approach makes the court stand apart from other actors. In this way, the court did not try to defend India's action using the language of self-defence or decolonisation.

According to the court, India took over and occupied Goa by force. However, their reasoning was that the transfer of title by conquest was still recognised by international law, even after World War II. Justice Hidayatullah did not extend this position further, leaving the answer to other jurists. However, the explanations available for this argument have not been entirely convincing. For instance, author Prabhakar Singh mentioned the division of Vietnam after 1954 as a related case,⁶⁹⁷ although it is not at all relevant to the issue of Goa. In Vietnam in 1954, the Vietminh – a solely internal force – was involved in the armed struggle against the French and won the decisive battle of Dien Bien Phu.⁶⁹⁸ Then, they signed the Geneva Convention to temporarily divide the country in the hope of later reuniting with universal suffrage. However, the State of Vietnam (or South Vietnam) and its political actors did not agree with the plan. Fearing an expansion of Communism to the South, it set up its own government, with the support of the Americans. Protagonist/antagonist debates aside; few informed observers could see the Vietnam situation after 1954 as one that resulted from foreign military conquest.

Nevertheless, Justice Hidayatullah's assertion later did give more weight to the argument, especially since the judge also mentioned Stimson's doctrine:

"Some would make the title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a state of things has been brought about contrary to the Pact

⁶⁹⁶ 'India, Rev. Mons. Monteiro v. State of Goa | How Does Law Protect in War? - Online Casebook' <<https://casebook.icrc.org/case-study/india-rev-mons-monteiro-v-state-go>> accessed 26 June 2023.

⁶⁹⁷ Prabhakar Singh, 'India Before and After the Right of Passage Case' (8 November 2013) <<https://papers.ssrn.com/abstract=2351892>> accessed 26 June 2023.

⁶⁹⁸ Christopher Goscha, *The Road to Dien Bien Phu: A History of the First War for Vietnam* (Princeton University Press 2022) <<https://www.jstor.org/stable/j.ctvt1t8q8v6>> accessed 10 April 2024.

of Paris was intended to deny the root of the title conquest, but when Italy conquered Abyssinia, the conquest was recognized because it was thought that the state of affairs had come to stay.”⁶⁹⁹

Although there are many other problems we might have discussed regarding the Italian conquest of Ethiopia, the reference to a *fait accompli* by an Indian justice in a major law case is significant. And what about Portugal? Portugal’s reliance on international law was much more straightforward. In its letter to the Security Council on December 18, 1961, one day after the attack, the Portuguese government recalled the “warning” of the acting Secretary-General to India that they should refrain from doing anything that “might constitute a threat to peace and security.”⁷⁰⁰ To the Portuguese, India’s conduct was clearly a violation of the Charter, and the Security Council, they said, should immediately put a stop to the condemnable act of aggression of the Indian Union, order an immediate cease-fire and withdraw forthwith from the Portuguese territories of Goa, Damao and Diu. They were relying on Article 2 of the UN Charter. The fact that Goa was still internationally recognised as a territory under Portugal’s administration was the strongest foundation for the arguments that Portugal put forward to the Security Council.

3. Identifying Illicit Acts and Unlawful Situations

In the environment of the Cold War, the divisive reaction to the Goa incident was easy to predict, as the two camps reacted as expected. In the heated emergency meetings of the United Nations Security Council (UNSC) on December 18 and 19, in which the Indian action was discussed, two legal views on Goa manifested themselves most profoundly.⁷⁰¹

The Afro-Asian camp, with the support of the Soviet Union, saw nothing but justice in the invasion. Soviet, firstly, fiercely opposed the adoption of the Goa agenda to be discussed by the UNSC. They insisted that India’s invasion fell exclusively within the “domestic jurisdiction” of India, as the Goa situation could not be regarded as anything other than the temporary colonial domination of Portugal over India’s territory.⁷⁰² Interestingly, adding to their defence, India called the application of Article 2 of the UN Charter to the Goa situation a “narrow-minded,” purely “legalistic consideration,” as we must remember that international law itself was written by European jurists in the atmosphere of colonialism.

“[...] We accept many tenets of international law. They are certainly regulating international life today. But the tenet which says, and which is quoted in support of

⁶⁹⁹ ‘India, Rev. Mons. Monteiro v. State of Goa | How Does Law Protect in War? - Online Casebook’ (n 700).

⁷⁰⁰ Portugal, ‘Letter Dated 18 December 1961 from the Permanent Representative of Portugal Addressed to the President of the Security Council UN Docs S/5030’ <<https://digitallibrary.un.org/record/632035>> accessed 26 June 2023.

⁷⁰¹ Security Council, ‘988th Meeting Record, Docs S/PV.988’ <<https://digitallibrary.un.org/record/631428>> accessed 26 June 2023.

⁷⁰² UNSC, “987th Meeting Record” UN Docs S/PV.987’ <<https://digitallibrary.un.org/record/631425>> accessed 26 June 2023.

colonial powers having sovereign rights over which they won by conquest in Asia and Africa is no longer acceptable (emphasis added).⁷⁰³

Mr. Barnes, Liberia's representative, praised the day India decided to take back Goa, which is when "the sun has forever set." Suppose the UNSC does not want to recognise and accept the situation (that Goa belongs to India). In that case, the Council would always be troubled by not being able to get rid of the institutional legacy of colonialism. He contended that Portugal's sovereign claims over the three enclaves were nothing but a "legal fiction."⁷⁰⁴ Portugal's control over these territories should be withdrawn gracefully through negotiation, but it is their choice to shield themselves from the progressive forces of the world. The debate about the legality of India's action, according to the representative, was itself a false debate since the three enclaves had been pronounced non-self-governing territories by the United Nations General Assembly. They were, and had never been, an "integral part" of Portugal.

The representative of the United Arab Republic added support for India, saying that whereas France had peacefully followed the UNGA's recommendation and goodwill negotiation with India to return their "comptoirs" to its rightful owners, the Indian government, Portugal refused to follow these steps. It was, therefore, indisputable that the question the UNSC had to deal with was a colonial question, not a normal situation of international law.

The Western camp was also very assertive in their language to protect an essential member of NATO. Mr. Stevenson of the United States of America protested the invasion, emphasising that there was reason for alarm when an act of violence occurred involving two nations, "no matter what cause."⁷⁰⁵ He praised Gandhi as the world's saintly proponent of peace, but all that made Indian military decisions against Goa harder to understand and tolerate. There is no doubt that India was using armed force against the armed force of another State that had not committed aggressive acts against Indian territory, at least recently. The representative of the USA referred to Article 2, paragraph 4, while also acknowledging the depth of historical differences between India and Portugal. Stevenson's indirect but rather skilful language avoided discussing the status of Goa but maintained that the means that India was trying to use to achieve its aim was contrary to the Charter. The merits of the dispute, no matter what they were, should not automatically prompt the right to use armed force. This argument was echoed in the United Kingdom's presentation before the Council.

The incident was treated as a major event by the members of the Security Council, and there were meaningful debates about its legal nature. However, due to the severe Cold War polarisation, draft resolutions by both camps could not be realised. Draft resolution S/5032 by Ceylon, Liberia and the United Arab Republic rejected Portugal's complaint and demanded Portugal to cease "hostile action" and to "liquidise" her possessions of Indian territories.⁷⁰⁶ Draft resolution S/5033 by France, Turkey, USA and the UK, on the other hand, requested the

⁷⁰³ Ibid., 47

⁷⁰⁴ Ibid., 94-95

⁷⁰⁵ Ibid., Para 69, 70, 71

⁷⁰⁶ Ceylon, Liberia and United Arab Republic, 'Joint Draft Resolution /: Ceylon, Liberia, United Arab Republic' <<https://digitallibrary.un.org/record/626080>> accessed 26 June 2023.

withdrawal of Indian troops to the positions that prevailed before December 17; a complete ceasefire; and further rounds of negotiation to deal with Goa, with the support of the Secretary-General.⁷⁰⁷ The former could not achieve a majority, while the latter was vetoed by the Soviets.

More interestingly, when the UNSC seemed stuck with no useful legal input for the conflict, the General Assembly was determined to choose its side. The General Assembly also successfully identified the situation as legally and politically acceptable and pressured Portugal into accepting it.

With Resolution 1699 of December 19, 1961,⁷⁰⁸ the UNGA targeted Portugal. Specifically, the UNGA noted that the continuing deterioration of the situation in the territories under Portuguese administration led them to collectively condemn Portugal's non-compliance with its obligations under Chapter XI of the UN Charter. Portugal's non-compliance also violated Resolution 1542 and the recommendations of the Committee on Information from Non-self-governing territories. More importantly, it also requested Member States to deny Portugal any support and assistance that could be used for the "suppression" of the people of non-self-governing territories. Although Resolution 1699 made no mention of Goa, the fact that it attacked Portugal's refusal to work with UNGA-authorized committees and that it further suggested that no states should provide support to Portugal and the continuation of her overseas territories is itself an implicitly a statement supportive of Indian conduct.

In light of all the information collected, discussed and explored, Goa should not be used as an example of the failure of the principle of non-recognition. Both camps, while vigorously attacking each other, did agree on one basic fact – the unsettled status of Goa and the enclaves – and built their defence around this fact.

The Afro-Asian camp had a strong argument for India's invasion. Yet rather than rejecting the principle of non-recognition, as some authors argue, they actually found their reasoning on this principle, focusing on a different milestone – 1510. The duty to not recognise the injustice produced by Portugal's colonialism seems to be at a higher place in the moral and legal hierarchy compared to the unlawfulness of India's invasion. Because of this, even though India was accused as the aggressor, the UNGA resolutions only dealt with Portugal's non-compliance with the duty of decolonisation. On the other hand, the NATO nations also suggested applying the principle of non-recognition but emphasised the existence of Indian military operations.

⁷⁰⁷ France and others, 'Joint Draft Resolution /: France, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America' <<https://digitallibrary.un.org/record/536999>> accessed 26 June 2023.

⁷⁰⁸ UNGA, 'Res 1699(XVI) on "Non-Compliance of the Government of Portugal with Chapter XI of the Charter of the United Nations and with General Assembly Resolution 1542 (XV)" UN Docs A/RES/1699(XVI)' <<https://digitallibrary.un.org/record/204797>> accessed 26 June 2023.

Portugal recognised Indian control in 1974, after the Carnation Revolution and the fall of the Estado Novo regime, by a treaty signed on December 31, 1974,⁷⁰⁹ thereby ending the debate on the legal status of Goa.

4.C.3. The special non-recognition of Vietnam's intervention in Cambodia

(1979 – 1989)

Vietnam's intervention (or invasion) of Cambodia has left a rather conflicted legacy in the history of international law.



Image 4.C.3. French Indochina map.⁷¹⁰

In 2018, the Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Khmer Rouge war crimes trial, concluded its mission against several individuals responsible for the atrocities leading to the death of, at a conservative estimate, two million people of all ethnicities and religions.⁷¹¹ However, lest we forget that forty years prior to this

⁷⁰⁹ 'TREATY BETWEEN THE GOVERNMENT OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF PORTUGAL ON RECOGNITION OF INDIA'S SOVEREIGNTY OVER GOA, DAMAN, DIU, DADRA AND NAGAR HAVELI AND RELATED MATTERS [1974] INTSer 53' <<http://www.commonlii.org/in/other/treaties/INTSer/1974/53.html>> accessed 27 June 2023.

⁷¹⁰ '11. French Indochina/Vietnam (1941-1954)' <<https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/french-indochinavietnam-1941-1954/>> accessed 8 January 2024.

⁷¹¹ 'Never Again? The Legacy of Cambodia's Khmer Rouge Trials' (*United States Institute of Peace*) <<https://www.usip.org/publications/2022/10/never-again-legacy-cambodias-khmer-rouge-trials>> accessed 16 March 2023.

milestone, in 1979, the Vietnamese were widely ridiculed for their efforts in trying Democratic Kampuchea (DK) leaders in absentia, for reasons both right and wrong.⁷¹²

Those countries that explicitly supported and endorsed Vietnam's armed intervention – the intervention that effectively ended the humanitarian disaster in Cambodia – now all cease to breathe the air of contemporary international political life, being mostly states of the Socialist bloc. On the other hand, countries that shamefully aided the ultra-brutal genocidal regime of Khmer Rouge, financially and politically, continue to enjoy unprecedented influence in the very same country that suffered from its previous partnership, such as China.

Similarly, debates and perspectives on Vietnam's unauthorised military action against the Khmer Rouge have changed and shifted sides from time to time. Properly understanding and interpreting international reaction concerning Vietnam's armed operation and occupation and its legal implications becomes a particularly challenging task.

With this in mind, this short account of the intervention focuses on the most related discussions, opinions, statements and evidence most closely related to the non-recognition issue concerning Vietnam's military operation in Cambodia, while trying to avoid embroilment in the endlessly complex political and humanitarian aspects.

1. Preliminary political-legal analysis

Taking over the country's sovereign power in April 1975, the Communist Party of Kampuchea (commonly known as the Khmer Rouge, usually referred to by the Vietnamese as Red Khmer “Khmer Kraham” or “Khmer Đỏ”) sought to return Cambodia to its “glorious” agrarian past.⁷¹³ But just a couple years of this kind of “enlightenment” resulted in crimes against humanity on an extraordinary scale.

Members of every single community were seen as public enemies, including former regime staff and personnel, ethnic Vietnamese, ethnic Chinese, Muslims, Christians, and Buddhists... were technically wiped out, one way or another.⁷¹⁴ As the Vietnamese delegation told the General Assembly on November 12, 1979: “No country in the grip of Hitler's Fascists during the Second World War suffered a massacre of such proportions.”⁷¹⁵ As rightly pointed out by

⁷¹² Frank Selbmann, ‘The 1979 Trial of the People's Revolutionary Tribunal and Implications for ECCC’ in Simon M Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (TMC Asser Press 2016) <https://doi.org/10.1007/978-94-6265-105-0_4> accessed 16 March 2023.

Charles McDermid, ‘Looking Back at the 1979 People's Revolutionary Tribunal’ <<https://www.phnompenhpost.com/national/looking-back-1979-peoples-revolutionary-tribunal>> accessed 16 March 2023.

‘The Khmer Rouge Trials: The Good, the Bad, and the Ugly’ <<https://thediplomat.com/2018/11/the-khmer-rouge-trials-the-good-the-bad-and-the-ugly/>> accessed 16 March 2023.

⁷¹³ *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press) <<https://opil.ouplaw.com/display/10.1093/law/9780198784357.001.0001/law-9780198784357>> accessed 16 March 2023.

⁷¹⁴ Philip Short, *Pol Pot: The History of a Nightmare*. Philip Short (John Murray Publishers 2006).

⁷¹⁵ UNGA Verbatim Record (12 November 1979) UN Doc A/34/PV.62, 1195

Susan Breau, no rational person should fail to be aware of the horrors of the Pol Pot regime in Cambodia from 1975 to 1979.⁷¹⁶

However, several political foundations make many international scholars reluctant to paint Communist Vietnam as the ultimate protagonist of the story. Firstly, the Vietnamese government's affiliation with Pol Pot and Khmer Rouge had always been there. Trained, equipped and influenced by their Vietnamese mentors, it is undeniable that a large portion of the Communist Party of Kampuchea (whether loyal to or having defected under Pol Pot's leadership) had close ties with their eastern neighbour. For the record, it is important to be reminded that both Heng Samrin – the leader of the Vietnamese-backed Kampuchea United Front for National Salvation (KUFNS), and Hun Sen – now the retired iron-fisted Prime Minister of Cambodia, – were all once “clients” of Hanoi's political patrol.⁷¹⁷ Vietnam's Communist North worked comfortably with the Khmer Rouge during most of the 60s and 70s, fighting (and winning) against American-backed Lon Nol in Cambodia. In return, Cambodian territories bordering Vietnam were extremely vital, not only as a logistical connection between the North Vietnam regime and the Vietcong in the South, but also as a sanctuary for both.

Moreover, Vietnam's indifference at the beginning of the Khmer Rouge's rampagous onslaughts across Cambodia and Vietnam evoked a puzzled reaction from historians and international jurists, and later led to many questions regarding Vietnam's legal and political position. Specifically, when the Khmer Rouge had already killed hundreds of thousands of Cambodians and repeatedly raided Vietnamese border villages during 1976 and 1977, Hanoi's main concerns for most of the time were the border disputes.⁷¹⁸ As observed by Stephen P. Heder in 1979, two communist parties' raid and counterraid actions were exclusively meant to force the other to accept a disengagement proposal or an armed forces withdrawal proposal in several contested areas.⁷¹⁹ Additionally, the Vietnamese government themselves effectively hid the horrendous stories of Khmer Rouge atrocities from the world. A Hungarian journalist who had the chance to visit the devastated villages was forced to hand over his photos and notes when he returned to Ho Chi Minh City and Hanoi.⁷²⁰

Only on December 31, 1977, when the Khmer Rouge's representatives announced to the world that they were cutting diplomatic ties with Vietnam, did the Vietnamese finally reveal the ultra-

⁷¹⁶ Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (Cameron May 2005), 48

⁷¹⁷ Dmitry Mosyakov, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' in Susan E Cook (ed), Susan E Cook, *Genocide in Cambodia and Rwanda* (1st edn, Routledge 2017) <<https://www.taylorfrancis.com/books/9781351517782/chapters/10.4324/9780203790847-3>> accessed 16 March 2023.

⁷¹⁸ Sophie Quinn-Judge, 'Fraternal Aid, Self-Defence, or Self-Interest? Vietnam's Intervention in Cambodia, 1978–1989' in Brendan Simms and DJB Trim (eds), *Humanitarian Intervention: A History* (Cambridge University Press 2011) <<https://www.cambridge.org/core/books/humanitarian-intervention/fraternal-aid-selfdefence-or-selfinterest-vietnams-intervention-in-cambodia-19781989/B446149DE6FD06BC07BC227A4C37A2A6>> accessed 16 March 2023.

⁷¹⁹ Stephen P Heder, 'THE KAMPUCHEAN-VIETNAMESE CONFLICT' [1979] *Southeast Asian Affairs / ISEAS* - Yusof Ishak Institute 157.

⁷²⁰ Quinn-Judge (n 722).

violent practices of their Communist counterpart. The series of events suggests that the Vietnamese would tolerate the horrendous crimes against civilians of the Khmer Rouge as long as they could reach their preferred border settlement.

The antipathy of Cambodian nationalism toward Vietnam could also be explained from a legal-historical perspective. Vietnam's imperialism was recorded by Cambodian critics, firstly with the efforts of Emperor Minh Mang of the Nguyen Dynasty to transform Cambodia into a vassal state between 1835 and 1841.⁷²¹ Their hopes of imposing the Chinese model of international relations ultimately failed, but the Nguyen emperors continued to see their kingdom as a higher form of civilisation compared to Cambodia's, just as the Chinese "Sons of Heaven" viewed their neighbouring states as inferior. Yet, Vietnam's territories in the Southwestern front continued to expand into traditional Khmer-populated areas of the Mekong Delta (usually known by Cambodians as Khmer Krom). Such development resulted in countless Khmer-led uprisings in southern Vietnam during the 1830s and 1840s.⁷²² While it is hard to say that the Cambodian monarchy during the era had ever explicitly protested against Vietnamese expansion, the foreign pressure and frequent occupation of both Siamese and Vietnamese deep inside their country could explain why they remained silent on these issues and only hoped for a certain degree of autonomy.

Later, when the French established their protectorate over the Indochinese Federation (a geopolitical name that included Vietnam, Laos and Cambodia), the French colonial mapping of Indochina furthered these border problems. Allegedly, most border disputes between the two colonial states were resolved by France in favour of Vietnam.⁷²³ The two episodes are considered two pieces of evidence for the unresolved territorial disputes that ultimately led to the 1978 – 1989 conflict, intervention, and occupation.

2. Legal debates

It is not easy to trace a complete linear progression of the escalation of conflict between Vietnam and Cambodia. The chain of international events, ambitions, and also misinterpretations make it particularly hard to describe anyone as a "good guy" or "bad guy" in the context of the two states' conflict. Therefore, this small section is not designed to explore any debate or disagreement over the Vietnam – Cambodia armed intervention during 1973 – 1979. But on the bright side, it is not hard to realise that there are apparent differences between the tendency to interpret the conflicts during the 70s and 80s, and in more recent depictions.

⁷²¹ Alexander Barton Woodside, *Vietnam and the Chinese Model: A Comparative Study of Vietnamese and Chinese Government in the First Half of the Nineteenth Century* (Harvard University Asia Center 2020) <<https://brill.com/display/title/57912>> accessed 16 March 2023., 246–55.

⁷²² KW Taylor (ed), 'The Nguyen Dynasty', *A History of the Vietnamese* (Cambridge University Press 2013) <<https://www.cambridge.org/core/books/history-of-the-vietnamese/nguyen-dynasty/13C3DDEAF77081354795EB92475981A4>> accessed 16 March 2023., 420 – 435

⁷²³ *The Use of Force in International Law: A Case-Based Approach* (n 717). And Henry Kamm Special to The New York Times, 'Cambodia and Vietnam—Ancient Enemies' *The New York Times* (7 January 1978) <<https://www.nytimes.com/1978/01/07/archives/cambodia-and-vietnamancient-enemies-border-drawn-by-france-cambodia.html>> accessed 16 March 2023.

A. A Changing Narrative in Literature?

To cut a long story short, in the 80s, the conflict appeared to be much more neutral. For example, reading Heder's "The Kampuchean-Vietnamese Conflict," published by the authoritative Southeast Asian think tank, the Yusof Ishak Institute, readers might be led to believe that both sides should be equally blamed for the war:

- Pre-war skirmishes involved the local border security forces of both sides.
- The Vietnamese themselves had not fully retreated from Cambodian territories after the end of the Vietnam War, thus supplying justifications for the Khmer Rouge's aggression.
- While the Khmer Rouge forces landed and attacked Tho Chau Island (May 1975), Vietnam was also at fault for attacking and occupying Poulo Wai Island after receiving Pol Pot's assurances (June – July 1975) when both sides were ready for peace talks.
- Then, the political exchanges and disputes between the Communist friends turned ugly, with both sides putting forward and demanding unacceptable proposals from each other. Vietnam was also accused of using its military might to undermine Kampuchean sovereignty.⁷²⁴

Scholars and international academia gradually dropped such neutral tones, however. Considering recent publications (either in history or international law), the pattern of presenting Vietnam as a force with a higher moral stance becomes more apparent.

Gregory H Fox stated that Vietnam made several "overtures" to reach negotiations with the Khmer Rouge but could not reason with the Kampuchea leadership.⁷²⁵ The crimes of the Khmer Rouge within Cambodia and their brutal hostility against Vietnamese civilians are also explicitly mentioned.

A similar approach appears in the chronicle and seminal work *The Third Indochina War Conflict between China, Vietnam and Cambodia, 1972-79*, edited by Odd Arne Westad and Sophie Quinn-Judge. Here, it is confirmed that during 1977 and 1978, the Khmer Rouge actively pursued armed attacks across the Vietnamese border to "take back Kampuchea Krom," killing thousands of Vietnamese civilians. All this happened with their own internal violence, forcing over 150,000 Cambodians to seek refuge in Vietnam.⁷²⁶ Conversely, Vietnamese incursions into DK's territories were only "retaliatory." Furthermore, with arguments based on the legal right of self-defence, Klintworth considers Khmer Rouge's series of attacks on Vietnam in 1977 and 1978 tantamount to a severe "armed attack" that legitimated a response

⁷²⁴ Heder (n 723).

⁷²⁵ Gregory H Fox, 'The Vietnamese Intervention in Cambodia—1978', *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press) <<https://opil.ouplaw.com/display/10.1093/law/9780198784357.001.0001/law-9780198784357-chapter-21>> accessed 16 March 2023., 243

⁷²⁶ Odd Arne Westad and Sophie Quinn-Judge (eds), *The Third Indochina War: Conflict between China, Vietnam and Cambodia, 1972-79* (1st edition, Routledge 2006), 212

under Article 51 of the UN Charter.⁷²⁷ The authors also insists that the intervention was lawful and proportionate.

On the other hand, Evans and Rowley examined the Vietnamese government figures, claiming that 30,000 soldiers were killed in 1977–1978; twenty-five townships and ninety-six villages were destroyed; 250,000 people were rendered homeless, and large farmland areas were abandoned.⁷²⁸ The authors seem to support the legitimacy and legality of the intervention, as “no government can tolerate such destruction for long without striking back.”⁷²⁹ As we can see, Vietnam is eventually described as a defensive force that could not find a better solution, considering the political and historical context at the time. Vietnam tried its best to negotiate and did not implement “regime change” in Cambodia until all its diplomatic options were closed off.

In her detailed work on humanitarian intervention, Professor Susan Breau also discovered clear indications of the inactivity of the international organisations after the two parties to the conflict could not resolve their differences (this is rarely mentioned in other works concerning the Vietnam–Kampuchean conflict).⁷³⁰ Vietnam had reached out with proposals to both the UN or the Non-Aligned Movement during 1978, asking for a mission to mediate frontier problems, but none of these efforts were even considered by the international actors.

Consequently, the works of several Western diplomats, who painted Vietnam’s invasion of Cambodia as a nationalistic federalist vanguard project of the Vietnamese Communist Party,⁷³¹ are now considered under-researched. Many of them seemed to ignore the *Tung Padewat* (Revolutionary Flag – KR’s ideological journal), which had repeatedly proclaimed Pol Pot’s aggressive ambitions concerning Vietnamese territories quite openly.⁷³² The shift in the description of the war was to be expected, especially after the Duch case of the Extraordinary Chambers in the Courts of Cambodia, where the KR’s incursions and aggressiveness were detailed as the most significant contribution leading to the conflict.⁷³³ I, therefore, wishes to follow this authoritative trend without any partisan attachment to his ethnicity and nationality.

However, the above is not to say that Vietnam has always been transparent and honest with international institutions. As discussed, only in December 1977, when the Kampuchea Republic announced that it had cut all diplomatic ties with the Socialist Republic of Vietnam yet continuing to pursue military actions, did Vietnam begin to publicise the background to the

⁷²⁷ Gary Klintworth, *Vietnam’s Intervention in Cambodia in International Law* (Australian Government Publishing Service 1989), 28

⁷²⁸ Grant Evans and Kelvin Rowley, *Red Brotherhood at War: Vietnam, Cambodia and Laos since 1975* (Verso Books 1990), 107

⁷²⁹ *ibid.*

⁷³⁰ Susan Breau (n 720), 51

⁷³¹ Stephen J Morris, *Why Vietnam Invaded Cambodia: Political Culture and the Causes of War* (Stanford University Press 1999), 235.

⁷³² Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79* (Third edition, Yale University Press 2008), 359.

⁷³³ Extraordinary Chambers in the Courts of Cambodia, Cambodia, ‘The Prosecutor v. Kaing Guek Eav Alias Duch’ <<https://www.internationalcrimesdatabase.org/Case/792>> accessed 16 March 2023., 78.

violence taking place on their border with Cambodia and how hundreds of thousands of Cambodians had sought refuge inside Vietnamese-controlled territories. The intentional act of covering up these incidents certainly harmed Vietnam's credibility when it revealed them to the world after three years of letting the Khmer Rouge roam free.

Overall, we can establish that the Vietnamese themselves were not very concerned about the internal humanitarian crisis produced by the Kampuchea Communist Party. However, we can also safely assert that their decision to invade Cambodia was essentially a reactive countermeasure to the Khmer Rouge's brutality and aggression rather than an expansionist/annexationist ambition. Nevertheless, the Vietnamese only moved ahead with their invasion when there were plenty of indications that they would be welcomed as liberators by much of the Khmer populace, as was indeed the case at the beginning of their occupation.⁷³⁴

B. *Khmer Rogue's arguments*

For the Khmer Rogue government and its leadership, using international legal languages could not be more straightforward. As an independent country with its own government, and a recognised member of the United Nations, the KR government had all the legal means to call the Vietnamese the aggressors. KR's narrative manifested clearly in the letter of the Permanent Representative of Democratic Kampuchea to the United Nations in 1980 reviewing the crime of aggression by Vietnam:

"The acts of aggression it has committed in order to annex Kampuchea, [Hanoi] has violated the Charter of the United Nations, of which Viet Nam itself is a member. It has violated the universally recognized and respected principles of the non-aligned movement, of which Viet Nam is also a member. It has violated every rule of international law governing relations between States. It has violated the five principles of peaceful coexistence..."⁷³⁵

This depiction repeatedly appeared in all of Khmer Rouge's communications with the UN General Assembly and the Security Council, making the essential legal justification for their calls for non-recognition of Vietnam's conduct and the newly installed "Salvation government." In the letter addressing the President of the Security Council dated February 16, 1979 (almost one month after Vietnam took over Phnom Penh), the KR representatives detailed:

"...in order to camouflage this aggression and invasion, Viet Nam is frantically seeking to deceive the international community by attempting with unprecedented perfidiousness

⁷³⁴ Peter F (Peter Frederic) Krogh, 'Never Again?: Genocide in Cambodia' (*American Interests* (show 230), 31 May 1983) <<https://repository.library.georgetown.edu/handle/10822/552628>> accessed 16 March 2023.

⁷³⁵ Democratic Kampuchea, 'Letter Dated 8 September 1980 from the Permanent Representative of Democratic Kampuchea to the United Nations Addressed to the Secretary-General UN Docs A/35/434 - S/14154' <<https://digitallibrary.un.org/record/15425>> accessed 16 March 2023.

to obtain recognition [...] of the Vietnamese administration which it has installed in Phnom Penh by force...”⁷³⁶

The letter, thus, called for a four-point plan of non-recognition of this unlawful situation by:

- (1) Continuing to denounce and condemn the Vietnamese aggression and invasion of Democratic Kampuchea; to demand that Viet Nam halt its aggression and invasion of Democratic Kampuchea, that it withdraws all its armed forces from Kampuchea;
- (2) Continuing to reject the manoeuvres by Viet Nam designed to obtain recognition of the Vietnamese administration, which has been installed in Phnom Penh;
- (3) Halting all aid and assistance (including humanitarian aid) to Viet Nam;
- (4) Providing comprehensive support to the just struggle of the people of Kampuchea under the leadership of the Government of Democratic Kampuchea.

The above, however, does not mention the many accusations of crimes made by the KR against Vietnamese troops, including, but not limited to, the use of biological and chemical weapons,⁷³⁷ or even war crimes targeting civilians.⁷³⁸ Ironically, however, these accusations were never taken very seriously due to KR’s credibility, especially with the Khmer Rouge’s human rights track record began to be revealed by various international human rights organisations and experts.⁷³⁹

C. Vietnam’s arguments

The Hanoi government struggled with their legal premises. First and foremost, Vietnam attacked the Khmer Rouge, citing its cruelty and its grave human rights violations. The first official letter sent by the Permanent Representative of the Socialist Republic of Viet Nam to the United Nations addressed to the Secretary-General and the UNGA after the invasion was about the indictment of the Pol Pot-Ieng Sari regime by the People’s Revolutionary Tribunal.⁷⁴⁰ The Vietnamese government explained the backwardness of KR’s legal instruments and actions in this letter. It then provided the background of the victims of Pol Pot’s policies and showed that Pol Pot-Ieng Sari clique had divided its population into three categories (“Old inhabitants”, “New inhabitants” and “Collaborators of the Lon Nol regime”) with a clear intention to purge the last two entirely (eventually the first category was also victimised). People were killed for not speaking Kampuchean; for following Christianity, Buddhism or Islam; for being an intellectual; and for being a family member of former Lon Nol officers.

⁷³⁶ Letter dated 16 February 1979 from Mr. Thiounn Prasith, Ambassador Extraordinary and Plenipotentiary of Democratic Kampuchea, addressed to the President of the Security Council. S/13089 <https://digitallibrary.un.org/record/2178?ln=en>

⁷³⁷ Democratic Kampuchea. Letter, 11 Apr. 1980, concerning chemical arms used by Vietnamese troops in Kampuchea A/35/173 S/13891 <https://digitallibrary.un.org/record/11854?ln=en>

⁷³⁸ Democratic Kampuchea. Letter, 27 Dec. 1979, transmitting text entitled "Crimes perpetrated by the Vietnamese troops of aggression", E/CN.4/1384 <https://digitallibrary.un.org/record/10905?ln=en>

⁷³⁹ For several vantage points, see Kiljunen, on the Report of A Finnish Inquiry Commission in Kampuchea Decade of Genocide (1984)

⁷⁴⁰ Transmits indictment of Pol Pot-Ieng Sari regime by the People's Revolutionary Tribunal of Kampuchea held in Phnom Penh. A/C.3/34/1 <https://digitallibrary.un.org/record/4621?ln=en#record-files-collapse-header>

Hanoi made it clear to the international community that they should welcome Vietnam's human and financial investment in removing Pol Pot's regime and preventing further atrocities.

However, Vietnam shied away from using humanitarian intervention to justify its actions. This seems to fit well with the political facts and priorities of Hanoi, as mentioned above. Vietnam, unfortunately, was never actually concerned about crimes against humanity committed by the Khmer Rouge. Most of the diplomatic efforts and armed retaliations made by the Vietnamese Communist Party's leadership were to secure the borders and maintain the political stability of the Southwestern region.

The first legal claim made by Vietnam concerned self-defence. Vietnam elaborated its self-defence claim in a letter to the President of the Security Council on January 08, 1979,⁷⁴¹ when its troops were marching toward Phnom Penh. The Vietnam leadership insisted that they had shown extreme self-restraint in dealing with Pol Pot-Ieng Sary's "savage border war" against the Vietnamese people (which is a reasonable claim, considering all the evidence we have given above). Such a goodwill gesture was not returned by the Khmer Rouge. Therefore, the Vietnamese people must "exercise their legitimate right to self-defence and resolutely counter all acts of aggression in order to safeguard their independence, sovereignty and territorial integrity and to preserve the long-standing friendship between the Vietnamese and the Kampuchean people."

This claim has been received both favourably and unfavourably by international scholars. Authors including Sean Murphy and Gregory H. Fox agree that the totality of the Khmer Rouge's incursions into Vietnam territories were not only severe in terms of human casualties but also "protracted," multidivisional and extensive in scale with the massing of over 100,000 troops across the shared border. These indications surpass all the international armed conflict/armed intervention requirements set out by many international humanitarian cases.⁷⁴² However, there is disagreement on whether Vietnamese troops entering the Cambodian capital Phnom Penh, ousting the incumbent government, installing a new regime in the country that lasted for almost ten years justified a "proportionate response" in accordance with international law. Fox observes that, given the vitriolic level of anti-Vietnamese rhetoric, the brutality of the Khmer Rouge against Vietnamese civilians, and the consistency of Kampuchean attacks into Vietnam territory over a four-year period, a military operation in order to remove the opposing government was a reasonable response by Vietnam. Others, including Professor Breau and Professor Murphy, do not find this approach convincing.

⁷⁴¹ Letter dated 79/01/06 from the Permanent Representative of Viet Nam to the United Nations addressed to the President of the Security Council. Transmits statement, 6 Jan. 1979, concerning Democratic Kampuchea and Viet Nam. S/13011 <https://digitallibrary.un.org/record/1560?ln=en>

⁷⁴² In Nicaragua case, the government of Nicaragua accused the United States of intervening and supporting the "Contra" insurgent forces. In Oil Platform case, Iran challenged the U.S. Navy's destruction of three oil platforms in the Persian Gulf in 1987-1988. The Duch case awarded by the Extraordinary Chambers in the Courts of Cambodia also confirm this nature.

For more information on the threshold of international armed conflict:

Nicholas Tsagourias, *International Humanitarian Law: Cases, Materials and Commentary* (2nd ed. edition, Cambridge University Press 2023), 6 – 10.

The remaining justification from Vietnam is that its troops followed the invitation of the Kampuchea United Front for National Salvation (KUFNS). At the UNSC debate dated January 11, 1979, the Vietnamese representatives argued that there were two distinct conflicts in Cambodia at the time.⁷⁴³ The first one was between the Vietnamese and the Khmer Rouge, presented as an international armed conflict due to a border dispute. Another was between the new National Salvation and the Khmer Rouge because of the inhumane and suppressive conditions inside the country. This was argued as a civil war (or non-international armed conflict), and Vietnamese troops were simply invited to help after the United Front had already ousted the Khmer Rouge regime.

3. Identifying Illicit Act(s) and Unlawful Situation(s)

As we mentioned in the CIL chapter and the non-recognition overview chapter, the practice of non-recognition is a legal process. It should not be treated as a confined legal principle waiting to be applied. The idea of non-recognition as a process is that “whenever an international legal norm is broken, the event triggers a political decision-making process where a pluralistic community of states creates the context for final decisions on the legality and consequences of such an action.”⁷⁴⁴

Facing one of the most brutal governments since the Second World War and millions of confirmed dead as a result of this government’s intentional policies, the international community, and the United Nations specifically, must weigh between a serious violation territorial integrity of a state and the use of force to bring about the downfall of a regime that had killed millions. How the UN and other international institutions tried to frame their language and reactions clearly shows that non-recognition is a world-constitutive process of authoritative decision, designed to serve ends and values, and not hard, cold legalism.

The collective solution of the UN, its agencies and its members, as we will see, was to refrain from condemning Vietnam directly, focusing on the occupation but not the invasion, and eventually overthrowing the Khmer Rouge regime.

A. ASEAN’s Active Role in Opposing Vietnam’s Intervention

As so often in the practice of non-recognition, the role of the regional organisation, ASEAN in this case, should not be overlooked. It must be said, however, that not everyone agrees with this observation. For example, Jones and Smith downplay the significance of ASEAN in resolving the Vietnam – Cambodia conflict. They argue that the final settlement was a typical display of the politics of major powers. According to this view, “ASEAN’s actual contribution to the Cambodian settlement reveals its role to be both ambiguous and ultimately limited.”⁷⁴⁵ There are also questions about whether or not, at the time, ASEAN had evolved into an actual

⁷⁴³ UNSC, ‘Record of Meeting Held on 11 Jan. 1979. UN Docs S/PV.2108’ <<https://digitallibrary.un.org/record/1664>> accessed 16 March 2023.

⁷⁴⁴ Chapter 2.3, The international legal process theory, of this present Thesis.

⁷⁴⁵ David Martin Jones and MLR Smith, *Asean And East Asian International Relations: Regional Delusion* (Edward Elgar Pub 2006), 54 – 56.

institution. Or was it just a name that allowed hegemonic powers to do whatever fitted their interests? Looking at the political development and rhetoric of the Third Indochina War would be too complicated for the purposes of this study. However, I believe that the regional characterisation of the conflict was vital for the involvement of external powers.

Firstly, although some observers are correct to say that the Vietnam – Cambodia conflicts overlapped Cold War rivalries between the United States and the Soviet Union and also between China and the Soviet Union, at the heart of the conflict was the local bilateral dispute (Khmer-Vietnamese) and domestic power competition (intra-Khmer). The deep-seated regional Thai-Vietnamese and Sino-Vietnamese antagonisms regionalised this dynamic.⁷⁴⁶ These conflicts required regional solutions, compromise and political arrangements that were out of the reach and understanding of the external powers.

There is a general consensus in the literature that Vietnam's invasion of Cambodia greatly concerned ASEAN. The alliance between the Soviet Union and Vietnam raised doubts about Vietnam's claim to be an independent and nonaligned nation, and caused a severe loss of confidence among ASEAN members.⁷⁴⁷ In their own words, the ASEAN member countries stated that they "deeply deplore the current escalation and enlargement of the conflict between the two states in Indochina...they call upon all countries in the region to strictly respect each other's independence, sovereignty, territorial integrity and political system"⁷⁴⁸ The ASEAN foreign ministers followed this on January 12 with a joint statement confirming that the ASEAN "strongly deplored the armed intervention against the independence, sovereignty and territorial integrity of Kampuchea...[and] called for the immediate and total withdrawal of foreign forces from Kampuchean territory."⁷⁴⁹ I would argue that without ASEAN's strong stand against the intervention, there was very little chance that the United States or China could get involved in the conflict in the way that they wanted.

After all, the ASEAN states' efforts painted Vietnam as the occupier to the non-aligned movement, identified the unlawful situations, explained to the General Assembly what to do with the situation and distributed humanitarian assistance in the way that fits their views.⁷⁵⁰ Specifically, from 1978 to 1991, the ASEAN states successfully lobbied the UN to deny

⁷⁴⁶ Muthiah Alagappa, 'Regionalism and the Quest for Security: Asean and the Cambodian Conflict' (1993) 47 *Australian Journal of International Affairs* 189.

⁷⁴⁷ Chang Pao-min, 'Brother Enemy: The War after the War. By Nayan Chanda. San Diego, New York, London: Harcourt Brace Jovanovich Publishers, 1986. Pp. Xiv, 479. Plates, Notes, Index.' (1989) 20 *Journal of Southeast Asian Studies* 159.

Westad and Quinn-Judge (n 730).

William S Turley and Jeffrey Race, 'The Third Indochina War' [1980] *Foreign Policy* 92.

Laura Southgate, 'ASEAN and the Dynamics of Resistance to Sovereignty Violation: The Case of the Third Indochina War (1978–1991)' (2015) 2 *Journal of Asian Security and International Affairs* 200.

⁷⁴⁸ ASEAN Foreign Ministers. (1979). Joint statement on the current political development in the southeast Asia region, Bangkok, 12 January.

⁷⁴⁹ ASEAN Foreign Ministers. (1979). Joint statement on the current political development in the southeast Asia region, Bangkok, 12 January.

⁷⁵⁰ Laura Southgate, *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (1st edn, Bristol University Press 2019) <<https://www.jstor.org/stable/j.ctvg5bt4s>> accessed 30 June 2023., 90-100

international recognition of the regime that Vietnam had installed in Cambodia,⁷⁵¹ or, in other words, they convinced the UN to practice non-recognition of the *fait accompli* government installed by the Vietnamese. The ASEAN countries were able to garner international support for their cause by utilising their membership of organisations such as the UN, the connection of Malaysia to the Organisation of Islamic Conference, Singapore's membership of the Commonwealth, as well as ASEAN's dialogue with countries such as the United States, the European Community, Japan, Australia, Canada, and New Zealand.⁷⁵² In short, the authority of ASEAN in dealing with the regional issues made possible the interests that China and the United States shared with ASEAN in the region, not vice versa.

B. UN's acknowledgement of the brutality and illegitimacy of the Khmer Rouge

By the time of Vietnam's invasion of Cambodia in December 1978, the atrocities of the Pol Pot regime, whether committed in Cambodia or Vietnam, were well-known by the international community. It must be emphasised that as early as 1977, French journalist Stéphane Groueff had written in the *National Review* that, even taking into account the disparities in the figures and the differences of opinion over the number of deaths that could be attributed to the Khmer Rouge, "the reality of the Cambodian nightmare can no longer be questioned."⁷⁵³

Therefore, as early as April 1978, (8 months before Vietnam launched their intervention), the U.N. Human Rights Commission held public hearings, initiated investigations, and produced reports on conditions in Cambodia. In the report of the Sub-Commission under the Commission on Human Rights, mass deportations, arbitrary killings, destruction of religious sites and other crimes committed by the Khmer Rouge were made known to the world.⁷⁵⁴ From 1979, after the Vietnamese forces had successfully taken Phnom Penh, the Sub-commission continued investigating and elaborating on Khmer Rouge's crimes. The Sub – commission's analysis of January 1979 showed that in 1978, the governments of the United States of America, France, the United Kingdom and Norway; international organisations such as Amnesty International, and international experts such as Francois Ponchaud and the International Commission of Jurists all submitted their denunciation of the Khmer Rouge regime and stated that its violations human rights should be regarded as established facts.⁷⁵⁵

The international community was repeatedly reminded of the scale and seriousness of the human rights situation in Cambodia. In March 1978, Evan Luard, the British Under-Secretary of State for the Foreign and Commonwealth Office, stepped up to the podium to address the

⁷⁵¹ *ibid.*, 71

⁷⁵² Alagappa (n 750), 198 – 199.

⁷⁵³ Stéphane Groueff, *The Nations Concentration Camp*, *NATIONAL REVIEW*, Vol. 29, No. 34, Sept. 2, 1977, at 988-989.

⁷⁵⁴ SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, 'Report of the Sub-Commission under Commission on Human Rights Resolution 8 (XXIII) UN Docs E/CN.4/Sub.2/414/Add.2' <<https://digitallibrary.un.org/record/629036>> accessed 16 March 2023.

⁷⁵⁵ UN Subcommission on Prevention of Discrimination and Protection of Minorities, 'Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under Decision 9 (XXXIV) of the Commission on Human Rights.' <<https://digitallibrary.un.org/record/6653>> accessed 16 March 2023.

U.N Commission on Human Rights and to confirm to the members that there were “systematic and arbitrary executions, and other gross violations of human rights, involving many thousands of deaths within Democratic Kampuchea.”⁷⁵⁶ Until 1985, UN sub-commissions and independent experts (such as the Australian scholar Ben Kiernan)⁷⁵⁷ reached the same conclusions on the facts and nature of the crimes of Pol Pot and the Khmer Rouge, describing them as “the most serious that had occurred anywhere in the world since Nazism.”⁷⁵⁸

Consequently, despite intense debates regarding the legality of Vietnam’s intervention during meetings of the Security Council and the UNGA – an outgrowth of the Cold War context in which the invasion took place – members of both Eastern and Western blocs repeatedly and unanimously condemned Pol Pot’s regime for its “sickening brutality,” “crimes of genocide,” and “contempt for human rights.” The idea of comparing Vietnam’s intervention in Cambodia with Russia’s invasion of Ukraine became exceptionally problematic.⁷⁵⁹

C. The UN’s choice of words concerning Vietnam’s intervention

Dogfights between the two Cold War factions about the intervention were bound to arise between 1979 and the withdrawal of Vietnam from Cambodian territories in 1989. One cannot discuss the international responses to Vietnam’s intervention in Cambodia without acknowledging Cold War politics. However, what is more important to note is that in such a fierce environment, Vietnam’s intervention has never been characterised as “illegal.” Even its prolonged occupation of Cambodia never faced direct challenges in the UN’s official language.

On January 15, 1979, the Security Council considered drafts and almost passed an important resolution on Kampuchea, sponsored by seven developing states.⁷⁶⁰ This draft resolution reasserted that the preservation of sovereignty, territorial integrity, and political independence of every State is a fundamental principle of the Charter of the United Nations and demanded that all foreign forces involved in the situation in Democratic Kampuchea (which was obviously only Vietnam) immediately withdraw from the country. Written by nations that have struggled, fought, and reconciled with their own history of genocide and grave human rights violations (including Bangladesh, Bolivia, Gabon, Jamaica, Kuwait, Nigeria and Zambia), the resolution did not characterise the nature or the legality of the intervention and was passed by all thirteen members of the council. However, the Soviets vetoed the resolution.

⁷⁵⁶ Jamie Metzl, ‘The U.N. Commission on Human Rights and Cambodia, 1975-1980’ (1996) 3 Buffalo Journal of International Law 67.

⁷⁵⁷ Ben Kiernan, *Genocide and Resistance in Southeast Asia: Documentation, Denial and Justice in Cambodia and East Timor* (New Brunswick: Transaction Publishers, 2008), 217 (republished from *The Far Eastern Economic Review* (1 Mar. 1990)

⁷⁵⁸ Power, *America and the Age of Genocide*, 154.

⁷⁵⁹ Quoc Tan Trung Nguyen, ‘No, Russia’s Invasion Ukraine Is Not the Same as Vietnam’s War in Cambodia’ *The Diplomat* <<https://thediplomat.com/2022/11/no-russias-war-in-ukraine-is-not-the-same-as-vietnams-invasion-of-cambodia/>> accessed 11 December 2022.

⁷⁶⁰ UNSC, ‘Draft Resolution on Situation in Kampuchea UN Docs S/13027’ <<https://digitallibrary.un.org/record/1575>> accessed 15 April 2024.

Following the Vietnamese arguments, the Soviet Union and its allies described the entire episode as an internal affair of Cambodia. The United Front had already ousted the Khmer Rouge and lawfully invited the Vietnamese armed forces into the country to help stabilise it. Therefore, in response to the draft resolution S/13027, the Socialist Bloc presented their own interpretation of the events and corresponding solutions with the draft resolution concerning the question of the violations of human rights committed in Democratic Kampuchea via international human rights mechanism, thereby challenging the legitimacy of DK.⁷⁶¹ As expected, their efforts also did not go very far.

All considered, the established point of view of the international community could be seen as settled by the resolution of the UN General Assembly. Utilising the tradition of “Uniting for Peace” started in 1950 to overcome the lack of unanimity of the permanent members and the UNSC’s failure to exercise primary responsibility, on November 14, 1979, the UNGA passed one of its first and most important resolutions dealing with the conflict. Resolution 34/22 (1979), called for an immediate withdrawal of all “foreign forces” from Kampuchea.⁷⁶²

Resolution 34/22 described the Vietnamese invasion of Cambodia as a “dispute” and urged “all parties to the conflict to settle [...] by peaceful means.” The quasi-legal language usually employed by the UNGA in dealing with a state’s violations of international law, such as “deplore,” “condemn,” or “not to recognise” was absent from the resolution. Even the name of the resolution, which referenced the “Situation in Kampuchea,” was very selective, although Vietnam had already taken Phnom Penh and, by that time, effectively controlled most of the country. This resolution was voted favourably by 85 states, with 23 abstentions and 32 votes against.

Between 1979 and 1989, 13 UNGA resolutions were adopted. Interestingly, no resolution denounced Vietnam for violating the international norm of non-aggression. Moreover, the resolutions made no mention of “Vietnam,” continuously employing instead terms such as “foreign forces” and “outside forces.” This is a fascinating phenomenon because, until this day, dealing with Israel’s occupation or even Russia’s invasion, the UNGA has never been so careful, selective and soft in its tone and requests. The only logical explanation is that the international community found solace in the fact that there was a country that was sufficiently concerned with the situation to use its own military and its own resources to end the genocidal regime of the Khmer Rouge.

Fortunately, this explanation can be justified and confirmed by looking at records of meetings of the UNSC and UNGA during the conflict and the subsequent occupation. Besides China, which denied the nature of the Pol Pot regime, almost all countries voiced their opinion in the

⁷⁶¹ Question of the violations of human rights committed in Democratic Kampuchea : draft resolution / Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Democratic Yemen, Ethiopia, German Democratic Republic, Hungary, Mongolia, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Viet Nam.

⁷⁶² UNGA, ‘Res 34/22 on “the Situation in Kampuchea” UN Docs A/RES/34/22’ <<https://digitallibrary.un.org/record/10605>> accessed 16 March 2023.

open environment of the UNSC, and the UNGA had to distance itself from the Khmer communist government.

We could take into consideration the record of the UNGA meeting (A/34/PV.65) on November 13, 1979.⁷⁶³ As noted, the government of the United Kingdom, although it also criticised the government of Vietnam, first denounced the “sickening brutality of the Pol Pot regime towards the people of Kampuchea.” The UK government also mentioned its efforts to “persuade the international community to do something about it,” but few listened. The government of Lao, as one would expect, condemned the “crime against humanity of the Pot Pol-Ieng Sary clique.” The government of Ethiopia referred to three million victims of Pot Pol-Ieng Sary regime’s “bloody policy of genocide”. It then asserted that the Khmer Rouge government should be “placed beyond the pale by the nations of the world that truly respect civilisation and human rights and also by those that often use these concepts as pretexts for interfering in the affairs of others.” Even Indonesia, one of the major ASEAN powers that opposed Vietnam, had to recognise that “countless people have perished and many more, especially women and children, have been left starving and sick. Everything has been neglected in the pursuance by the regime of a ruthless policy towards its helpless and hapless people.” Most members who voiced their concerns also hinted that the people of Kampuchea should be enabled to establish a government *of their own choosing* or use the concept of “self-determination”, which seemed to imply that not only the Khmer Rouge regime but also the Vietnamese-backed government of Heng Sanrin must not be automatically recognised as the legitimate government of Cambodia.

4. The “special” non-recognition campaign against Vietnam’s occupation of Cambodia

Nicholas J. Wheeler, in his book *Saving Strangers*, provides a well-articulated and convincing argument supporting Vietnam’s intervention as an “exception to the rule.”⁷⁶⁴ I agree with Wheeler’s depiction of the polarised international politics at the time as “the moral bankruptcy of pluralist international society in the face of mass killing.” However, when asked why “Vietnam was being condemned and sanctioned for a breach of the rules,” Wheeler is less than cautious about the scope of “rules” and the actors involved in “sanctions.” The narratives and sanctions pushed through by the United States and China, although cynical, were certainly unable to make their way to the status of official resolutions of the United Nations. And sanction regimes against Vietnam, although fierce, were not initiated, endorsed, or carried out by any United Nations agencies.

As demonstrated in the above sections, the UNGA – the most authoritative international organ that could voice its legal-political assessment of Vietnam’s intervention – was highly conservative in the language it employed when discussing Vietnam. It did not even identify Vietnam’s intervention as “unlawful”. Therefore, technically and whether intentionally or not, the United Nations – through the international legal processes and other agencies – were doing

⁷⁶³ UNGA, ‘General Assembly Official Records, 34th Session :: 65th Plenary Meeting, UN Docs A/34/PV.65’ <<https://digitallibrary.un.org/record/754024>> accessed 16 March 2023.

⁷⁶⁴ Nicholas J Wheeler, ‘Vietnam’s Intervention in Cambodia: The Triumph of Realism Over Common Humanity?’ in Nicholas J Wheeler (ed), *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press 2002) <<https://doi.org/10.1093/0199253102.003.0004>> accessed 16 March 2023.,

precisely what Wheeler hoped for: acknowledging the legitimacy of Vietnam's conduct, which ultimately helped the UN to achieve its desired values of substantive justice and the protection of human life while also sticking to the cold procedural justice of the principle of non-interference.

A. The language of the UNGA: Non-recognition of both governments?

The UNGA's non-recognition campaign, as we have seen, shied away from condemning the unlawfulness of Vietnam's conduct due to its clear humanitarian achievement. However, this does not mean that the international community would accept any legal or political outcome produced by the Vietnamese occupying force.

The first visible part of the non-recognition campaign was the constant rejection of the Vietnamese-installed government of Heng Samrin. Despite constant efforts by Vietnam and the Soviet bloc to dislodge the Khmer Rouge from their seat and replace them with the Heng Samrin government, the UNGA always refused this suggestion, especially from 1979 to 1981, since the United Nations had not been able to devise a political alternative to the dilemma in Cambodia.⁷⁶⁵ It appears problematic that Pol Pot's seat at the UN continued to be protected, even though it was already clear that his political group had carried out a massive campaign of genocide against every single ethnic and religious community within its authority.⁷⁶⁶

However, such dedication to preserving the Khmer Rouge's seat at the UN could be interpreted in two ways. One could say that this behaviour manifests the ugly side of the UN, one of the shameful episodes on its journey to become the guardian of peace and human dignity. On the other hand, it could be said that the non-recognition by the international community of the Vietnam-installed government in Phnom Penh right after its armed intervention was just because an acceptance of such a situation could mislead public opinion and send the wrong message to other regional powerhouses around the world.

From a different angle, and also for the second part of the non-recognition aspect, we must also note that the UNGA and other United Nations agencies have tried to limit the power that the Khmer Rouge could wield in the international arena. After two years of allowing the Khmer Rouge to keep their seat, from 1981 to 1990, it was decreed that the UN seat for Cambodia was to be shared between the coalition Government of Khmer Rouge and Prince Sihanouk. The latter led one of the minor factions while one of his former ministers, Son Sann, headed the other non-Communist group. Some authors argued that this was a fig-leaf solution to keep the KR as the sole legitimate representative of the Cambodian people in the UN.⁷⁶⁷ But this is certainly not the whole picture.

⁷⁶⁵ First report of the Credentials Committee (1979) UN Doc A/34/500; GA Res 34.2A (21 September 1979) UN Doc A/Res/34/2A

⁷⁶⁶ 'The Khmer Rouge Trials: The Good, the Bad, and the Ugly' (n 716).

⁷⁶⁷ Thomas Probert - Part IV – Non European State - *Humanitarian Intervention : A History*, edited by Brendan Simms, and D. J. B. Trim, Cambridge University Press, 2011. *ProQuest Ebook Central*, <https://ebookcentral-proquest-com.ezproxy.library.uvic.ca/lib/uvic/detail.action?docID=691897>. 348

By forcing the Khmer Rouge to share its legitimacy with Sihanouk and other non-communist factions, the UN could create hope for Cambodia's future without depending on the Khmer Rouge as the only viable option, apart from the future government of Heng Samrin. And that was exactly how things turned out. It is true that the KR, with meticulous support from China, could maintain its strong voice in the coalition with its extensive armed forces. However, from the beginning of the 1980s, world opinion and the United Nations's efforts to distance themselves from the Khmer Rouge allowed Sihanouk and other factions (including the Heng Samrin government) to advance in the political environment of a new Cambodia. As noted by Steven J. Hood, the gap between Sihanouk and the Heng Samrin-Hun Sen regime was closing during 1888 – 1989, when both factions openly alleged that Pol Pot's Khmer Rouge had "committed worse crimes against the Cambodian people than those committed by Hitler's Nazis against the Jews."⁷⁶⁸ More importantly, the UN's growing understanding of the roots of the conflict and the international support for a peaceful Cambodia resulted in a clear rejection of Khmer Rouge's previous leadership position.

Evidently, from 1981 until Vietnam's withdrawal in 1989, all the UNGA's resolutions, such as Resolution 37/6 of 1983, Resolution 40/7 of 1985, or Resolution 44/22 of 1990, had the intention not to reinstall the previously recognised government of Kampuchea – the Pol Pot regime.⁷⁶⁹ The emphasis was on allowing the Cambodian people to exercise their right of self-determination and to choose their own government. The call for a new "free and fair election organised and conducted by the United Nations in a neutral political environment..." became dominant among the UNGA and the five Permanent Members,⁷⁷⁰ and the Khmer Rouge's role as leaders of the country until 1979 was utterly ignored. In Resolution 44/22 of 1990, UNGA started to refer to the Cambodian nation as "the Kampuchean people under the leadership of Sandeak Norodom Sihanouk for the independence, sovereignty territorial integrity and neutral and non-aligned status of Kampuchea..."

The direction of the international community's perception of the situation in Cambodia seemed to resemble that of Britain. Firstly, they argued that from 1979 Khmer Rouge controlled virtually no Cambodian territory and none of the population. As Cambodians all knew and had experienced the brutality of this regime at least to some extent, millions welcomed Vietnam's forces and the United Front. The Vietnamese also seemed confident and decided to stay inside

⁷⁶⁸ Steven J Hood, 'Beijing's Cambodia Gamble and the Prospects for Peace in Indochina: The Khmer Rouge or Sihanouk?' (1990) 30 *Asian Survey* 977.

⁷⁶⁹ UNGA, 'Res 37/6 on "The Situation in Kampuchea"' UN Docs A/RES/37/6' <<https://digitallibrary.un.org/record/38254>> accessed 16 March 2023.

UNGA, 'Res 40/7 on "The Situation in Kampuchea"', UN Docs A/RES/40/7' <<https://digitallibrary.un.org/record/102860>> accessed 21 March 2023.

UNGA, 'Res 44/22 on "the Situation in Kampuchea"', UN Docs A/RES/44/22' <<https://digitallibrary.un.org/record/82223>> accessed 21 March 2023.

⁷⁷⁰ Letter dated 30 Aug. 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, 'The Situation in Kampuchea: Question of Peace, Stability and Co-operation in South-East Asia', A/45/472 and S/21689, 31 Aug. 1990, p.3.

Michael Wesley, 'The Cambodian Waltz: The Khmer Rouge and United Nations Intervention' (1995) 7 *Terrorism and Political Violence* 60.

these “liberated” areas. This was the double threshold for the United Kingdom’s statement to consider the position of “no-recognition” of neither contested Cambodian parties, as Pol Pot was no longer an effective leading force of the country while the Heng Samrin regime was still overdependent on Vietnam for security and administration.⁷⁷¹

Ultimately, the non-recognition campaign against Vietnam’s conduct in Cambodia inscribed a hallmark of the United Nations’ capability to deal creatively with the principle of non-recognition of unlawful situations. While international law clearly rejects the legitimacy and legality of the Vietnamese government’s armed intervention, this intervention also brought down one of the most brutal regimes in the history of the UN era. Therefore, although the Heng Samrin / Hun Sen government cannot be recognised immediately since the Vietnamese occupying power established it, this did not prevent the UN from minimising the Khmer Rouge’s effective power and eventually excluding this genocidal faction from Cambodia’s political environment.

The United Nations Transitional Authority in Cambodia (UNTAC) was deployed in Cambodia at the beginning of the 1990s. UNTAC had a successful policy of rapprochement, with its military and electoral components working in close coordination, publicising the new national elections and registering as many Cambodians as was feasible. They registered 4.7 million Cambodians, 96 per cent of the eligible voting population. The elections yielded a Funcinpec victory, with 45.47 per cent of the vote. A unity government was formed between Funcinpec and Cambodia’s People Party (CPP), which had won 38.23 per cent. The result was endorsed by UNSC Resolution 880, the United Nations and the international community in general. The Khmer Rouge was officially removed from power.⁷⁷²

B. The NGOs and other International Agencies

However, the practice of non-recognition of unlawful acts in the Kampuchea incident did not end there, since there was another vital element of non-recognition in Cambodia: the question of international aid entered the picture. This element allows us to understand more about the possibilities of non-recognition, at its best and at its worst.

One of the clearest issues is the disproportionate distribution of international aid. The first to voice concern was a former Oxfam representative in Phnom Penh, Eva Mysliwiec. She documented the use of UN aid to Cambodia and quickly realised the significant disparity in the aid distributed to the Khmer Rouge’s followers, who made their way to the Thai border and the aid sent to help the majority of Cambodians who lived under Vietnamese-supported territories.⁷⁷³ To give some examples: Mysliwiec states that half of the \$663.9 million from Western donors channelled through UN agencies between 1979 and 1981 went to a joint

⁷⁷¹ Fox, 249, HC Deb 22 October 1979, Vol 792, cols 31-34.

⁷⁷² UNSC, ‘Res 880 on “the Transitional Period in Cambodia Following the Withdrawal of the UN Transitional Authority in Cambodia” UN Docs S/RES/880’ <<https://digitallibrary.un.org/record/176426>> accessed 21 March 2023.

Wesley (n 774), 75 - 76

⁷⁷³ Eva Mysliwiec, *Punishing the Poor: The International Isolation of Kampuchea* (Oxford: Oxfam, 1988), 72–3

UN/ICRC assistance programme for displaced people and refugees at the Thai–Cambodian border. At its height, this aid only benefited one million people at the most, but this number included the majority of the remnants of the Khmer Rouge. The other half was distributed to the government of Phnom Penh with its total of 6.5 million people.

Even worse, funds such as the Kampuchea Emergency Group or KEG, established by the US Embassy in Bangkok, was set up entirely to prolong the miserable lives of the KR as a politically able entity. As William Shawcross reported in his book *The Quality of Mercy*, the KEG’s three purposes were: (1) to increase food deliveries and improve medical care along the border (2) to explore the ways in which Cambodian resistance to the Vietnamese could be helped; (3) and to lobby for the resettlement of Cambodian refugees in the United States.⁷⁷⁴ None of these aims was focused on relieving and supporting the population that was devastated by the KR’s policies, and they were even used to boost the military capacity of the KR.

Other relief funds – the Catholic Relief Services, the UN’s World Food Program, the United Nations Border Relief Operations (UNBRO), and the UNHCR – reportedly never reach the majority of Cambodians whose lives were afflicted by the four-year rule of the Khmer Rouge. These funds were fed to border camps controlled by the KR, which helped them to replenish their strength and rebuild their networks. It should also be noted that the KR had already received mountains of Chinese supplies, including arms. On the other hand, the bulk of the Cambodian population living under the administration of the Vietnamese-sponsored government was denied development and relief aid in an almost unprecedented humanitarian aid boycott by the UN agencies.⁷⁷⁵

Only in 1986 did the leading NGOs worldwide formed an “aid coalition” and raise concerns about the Cambodian issue. The coalition also published its assessment of what was needed for Cambodia’s recovery and how the aid should be used. One of the guarantees requested was that the Khmer Rouge would not return to power.⁷⁷⁶ Vietnamese action amounted to a rare, undeclared humanitarian intervention, one of the most successful in the history of international law. As political scientist Thomas G. Weiss puts it, this was an intervention with a “very substantial humanitarian payoff.”⁷⁷⁷

Nonetheless, it was unlawful conduct that produced a classic unlawful situation. Vietnam eventually withdrew its troops, and the United Nations Transitional Authority in Cambodia (UNTAC) took over responsibility for Cambodia, with mixed results. In the context of one of the worst humanitarian crises since World War II, international responses to Vietnam’s

⁷⁷⁴ *The Quality of Mercy : Cambodia, Holocaust and Modern Conscience* (New York: Simon and Schuster, 1984), 183–4.

⁷⁷⁵ Sophie Quinn-Judge - Fraternal aid, self-defence, or self-interest? Vietnam’s intervention in Cambodia, 1978–1989, 357 – 358

⁷⁷⁶ UNSC, ‘Res 880 on “the Transitional Period in Cambodia Following the Withdrawal of the UN Transitional Authority in Cambodia” UN Docs S/RES/880’ <<https://digitallibrary.un.org/record/176426>> accessed 21 March 2023.

⁷⁷⁷ Thomas G. Weiss, *Humanitarian Intervention: War and Conflict in the Modern World* (Cambridge: Polity Press, 2007), 37.

intervention allowed legal scholars to further their knowledge and to explore the tools available in the practice of non-recognition.

4.D. Non-recognition of South Africa's apartheid regime (1946 – 1994)

Exploring the practice of non-recognition in relation to the Apartheid regime of the South African state is the most fascinating aspect of this study. With no traditional scenario, where unlawful situations are usually confined to territorial demands and regime changes, human rights violations in the case of South Africa (hereinafter referred to as “SA”) as an unlawful situation pose a significant challenge to the way we define unlawful situations and the way we judge the extent to which non-recognition practice can be applied in situations other than historical territorial questions.

First, we must acknowledge that the international campaigns concerning the legal questions in SA, although heavily focused on the human rights problem of apartheid, went well beyond the question of human rights. From the “exportation” of the apartheid regime to other parts of Africa, leading to the creation of other unlawful states, to the South African occupation in South-West Africa that prompted legal condemnations from all existing international institutions, the only way to understand South Africa's apartheid regime, and the international reactions that followed, is to comprehend how it was internationalised, intentionally or unintentionally.

I also want to stress the nature of the non-recognition campaign against SA. It is norm-making rather than norm-confirming. The historical records of international institutions, not only of the UNGA, and the UNSC but also from the Commonwealth, the International Labour Organisation, and the Economic and Social Council, have shown an unprecedented commitment on the part of newly independent African states to all international efforts to find a way to challenge SA's apartheid, despite many initial setbacks and failures. This provides us, at a glance, with examples of the vital importance of regional organisations and UN institutions in a successful non-recognition campaign. A proper understanding of the South Africa case will help us build a model to institutionalise (and also explain) future practice of non-recognition. However, a note of caution is necessary when we look at other unlawful situations concerning human rights and assume that the international campaign against the Apartheid regime is a “precedent” for every human rights violation committed. The cheerful and exciting atmosphere of decolonisation, the inherent settler colonialism nature of the South African State, and the blatant acknowledgement by South African statesmen of the existence of their apartheid policies and their practice of racial discrimination make SA an easy target for the international community. In short, there are two distinctive characteristics we should note before exploring non-recognition practice in the case of South Africa:

- (1) The internationalisation of the apartheid regime of SA, through various channels and actions of the parties involved, helped the international community to raise the initial human rights and domestic concerns regarding South Africa into a problem that “led to international friction and, if continued, might endanger international peace and security,” – to borrow the words of Resolution S/4300 of the UNSC.⁷⁷⁸

⁷⁷⁸ UNSC, ‘Res 4300, “The Situation in the Union of South Africa Arising out of the Large-Scale Killings of Unarmed and Peaceful Demonstrators in Sharpeville” Un Docs S/4300’ <<https://digitallibrary.un.org/record/619261>> accessed 12 November 2022.

- (2) On the other hand, the human rights violations in South Africa were heavily targeted due to so many more external and internal elements contributing to the situations overall, which are unlikely to occur again in the course of modern history. The heavy activism involved in the process makes it hard to conclude that the non-recognition of South Africa reflects an established state practice and *opinio juris* concerning the application of non-recognition in human rights violations.

So why will this case study still be categorised as a human rights situation suited to the study's non-recognition in the thesis? Firstly, the South Africa case provides a powerful inspiration for the future practice of non-recognition in the human rights realm. After all, most major international legal instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment (CAT) were drafted, negotiated and passed when the campaigns against the South African government were intensifying.

In fact, the fight against racism and SA's apartheid has always been considered the "driving force" of ICERD – the first human rights treaty to be adopted after the Universal Declaration of Human Rights – took effect in 1965.⁷⁷⁹ Therefore, although the South Africa case might not be exclusively about human rights issues, it was still at the core that held international consciousness together, especially on the right to self-determination, when the international community dealt with related incidents. Examining hundreds of resolutions and decisions targeted at the existence of apartheid, we will eventually confirm that human rights were, in fact, the leading legal question that the non-recognition campaign aimed to solve.

The second question to address is whether non-recognition in the case of SA reflects states' belief in applying non-recognition practices concerning human rights issues or whether it is just a "one-hit wonder" in the sea of UN political lobbying. Although the activism and persistence of African states on the international stage were what brought the fight against apartheid to fruition, the international campaign to isolate and delegitimise South Africa's Apartheid is still a classic non-recognition campaign. As observed in the commentary of the ILC, the apartheid regime itself is illegal, and the duty of non-recognition with any necessary extension of this duty should logically follow.⁷⁸⁰ Consequently, while it is true that there had been no practice that preceded the South Africa case, the sheer amount of legal and quasi-legal instruments created and the number of State opinions expressed to deal with it qualify the assumption of the possibility of normative power of non-recognition practices in dealing with human rights violations, as long as it reaches the level of South Africa's apartheid, determined by the international legal process. Overall, I believe that taking into account the legal archive

⁷⁷⁹ Maya Hertig Randall, 'The History of the Covenants: Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780198825890.003.0002>> accessed 11 September 2022.

Jean H Quataert, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (University of Pennsylvania Press 2009) <<https://www.jstor.org/stable/j.ctt3fh8mc>> accessed 27 June 2023., 69 – 70.

⁷⁸⁰ James Crawford, *The International Law Commission's Articles on State Responsibility* (1st edn, Cambridge University Press 2002), 250

and the expert approaches, studying the case of South Africa's Apartheid as a human rights violation under the framework of non-recognition is a reasonable task to undertake.

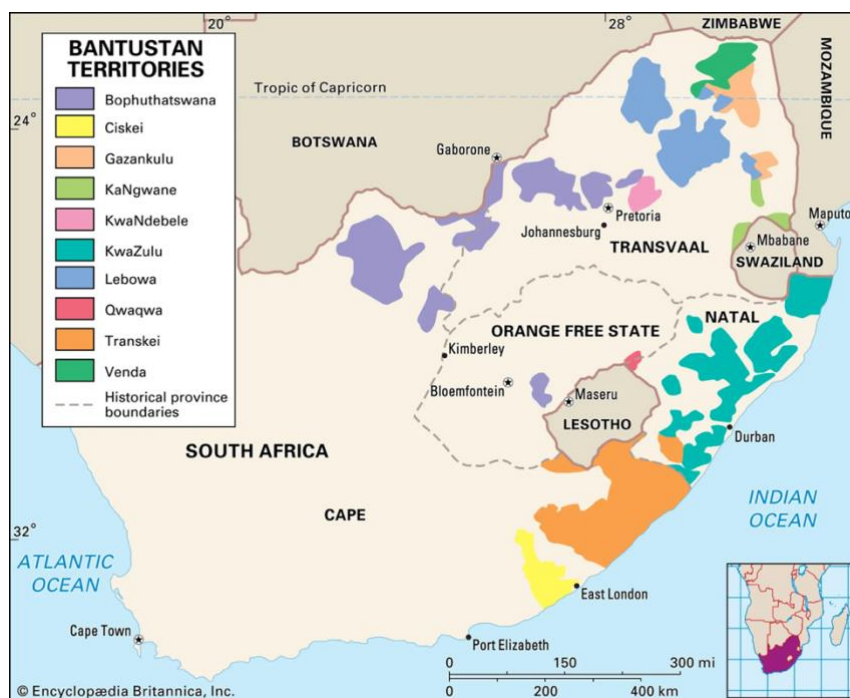


Image 4.D. South Africa and the creation of Bantustan territories.⁷⁸¹

1. Preliminary Political-legal Analysis

A. A review of South Africa's internal issues:

South Africa gained its independence with the recognition of the British Empire, starting with The Union of South Africa's inauguration on 31 May 1910, and Louis Botha was elected as its first Prime Minister.⁷⁸² However, at the time, neither racial discrimination nor segregationist policies were particularly defining features of this newly independent Union. In most colonial territories, colonised people could not vote appropriately and meaningfully. Not only that, but socio-economic discrimination and separation favoured white settlers and white officials in housing, education and jobs. This was simply "business as usual."⁷⁸³ People of colour living in the southern United States half a century following the end of the Civil War still experienced many of the same indignities as the colonised peoples of Asia and Africa.

⁷⁸¹ 'Bantustan | Definition, History, Map, & Facts | Britannica' <<https://www.britannica.com/topic/Bantustan>> accessed 11 January 2024.

⁷⁸² Robert Ross (ed), 'Unification', *A Concise History of South Africa* (2nd edn, Cambridge University Press 2008) <<https://www.cambridge.org/core/books/concise-history-of-south-africa/unification/4D26C4A0C8B13517B15B78D203DCC41D>> accessed 12 September 2022., 87

⁷⁸³ Nancy L Clark and William H Worger, *South Africa: The Rise and Fall of Apartheid* (3rd edn, Routledge 2016), 3

However, after World War II and the exhaustion of imperial resources, the decolonisation process began with a very abrupt end to colonialism in many countries, including Africa. This made apartheid, eventually, an unwelcomed remnant of colonialism. While “apartheid” itself was originally an expression of Afrikaners to remind them to maintain a cultural identity separate from that of English-speaking Europeans in South Africa,⁷⁸⁴ it was subsequently used to appeal for the political support of an Afrikaans-speaking, urban, working-class electorate that felt exploited by British imperialism, but also felt threatened by the cheaper wages of black workers. The two most dominant political parties at the time - the United and National parties - engaged in a campaign of race-baiting. From 1947 – 1948, “apartheid” in the public lexicon became dominantly known as the support for physical separation of black and white, achieved through legislation and a state-endorsed policy. The apartheid regime, before its demise, produced over 300 legal instruments that expanded and strengthened the white establishment.⁷⁸⁵

Apartheid arguably began with a trio of legislation: the Representation of Natives Act of 1936, the Natives Trust and Land Act of 1936 and the Native Laws Amendment Act of 1937. All of them sought to establish control over the growing local African workforce, and this endeavour soon developed into a coherent apartheid system.⁷⁸⁶ But to understand how uniquely inhumane apartheid was, we must understand how its supporting legislation ran deep into every corner of South African’s lives. The backbone of South Africa’s coercion policy against non-whites was built with instruments that included the Suppression of Communism Act of 1950, the Public Safety Act of 1953, and the Criminal Law Amendment Act of 1953. For instance, the Suppression of Communism Act defined communist activities and its aims so broadly that it was quickly used to target any African organisations pushing for equal rights or universal suffrage. This framework was then reinforced with the General Law Amendment Act of 1966 and the Terrorism Act of 1967. These documents created tools to limit protest, ban certain forms of organisations and suppress freedom of the press.

The system spanned many areas, such as the ban on almost every “sexual contact” between whites and non-whites by means of the Immorality Act and the Mixed Marriage Act of 1949. Systematic segregation was installed by the Population Registration Act of 1950, the Railways and Harbours Amendment Acts of 1949, and the Bantu Education Act (1950) We should also mention the role of the Reservation and Separate Amenities Act of 1953. The apartheid regime was also trying to control non-whites’s ability to find jobs and their right to freedom concerning labour contracts, with the continuation of the Master and Servants Act from 1834. This act lasted for decades until it was replaced in 1974,⁷⁸⁷ yet the conditions of African labourers were not improved in any significant sense.

With such a comprehensive and explicit system of laws and policies, the brutality and absurdity of apartheid were almost always ready to project themselves into the public opinion of the

⁷⁸⁴ *ibid.*

⁷⁸⁵ Randall (n 783).

⁷⁸⁶ *ibid.*, “native representation”, 105 - 106.

⁷⁸⁷ Christopher Merrett, ‘Masters and Servants: African Trade Unionism in Pietermaritzburg and the Natal Midlands before the Early 1980s’ (2018) 48 *Journal of the Natal Society Foundation* 22.

international community. For example, the absurdity of apartheid manifested itself with the awards ceremony at the 1963 Natal Open golf championship, which was won by the Indian-South African Sewsunker ‘Papwa’ Sewgolum. Although they permitted him to play in open spaces like golf courses, he could not access the clubhouse during the award ceremony. Consequently, the trophy was handed to him through a window, creating one of the most ridiculous scenes in the history of modern sport. In addition, the South African Broadcasting Corporation suspended its news reporting of the tournament because its regulations did not allow it to cover “mixed” sports.⁷⁸⁸

The use of violent tactics to deal with African protests escalated into nationwide confrontations. A crowd of 20,000 people converged on Evaton police station, and 4,000 people protested before the Vanderbijlpark police station until they were dispersed with baton charges and intimidating low-flying aircraft. A demonstration of 5,000 people in front of Sharpeville police station in 1960 asking for justice and equality ended in tragedy. The Sharpeville police (either intentionally or through panic) fired on the crowd, resulting in the death of sixty-nine people — including eight women and ten children, and 180 other persons wounded.⁷⁸⁹ This was a pivotal event for the internal movement against apartheid and also had deep implications for the international perception of apartheid.

But without the element of violence, normal life for a normal African was still unbearable for non-whites, and the discriminative atmosphere was easily detectable. The requirement of the “passbook,” created by the Natives Act of 1952, led to the arbitrary arrests and detention of 621,380 in 1970 alone. 27 per cent of all of these cases were sent up for trial.⁷⁹⁰ Similarly, the Group Areas Act of 1950, with several of its amendments, provided for the institutionalised separation of races in housing and property ownership. By 1970, more than 111,000 families of white/coloured and Asian origin had been forced to move. Black families were not counted in that figure as, in theory, they were not even allowed to live in the urban areas on a permanent basis.⁷⁹¹ All of the information above is just the tip of the iceberg in understanding the complete picture of the repressiveness of apartheid. It was simultaneously ridiculous, explicit, cruel, and unbearable, yet also able to prolong its existence for almost half of a century.

B. South Africa’s “Internationalisation” of Apartheid:

A critical element of South Africa’s apartheid regime and its human rights violations is the internationalisation of the entire affair. Unlike many current human rights violations that continue to be committed by modern governments nowadays (and sometimes they are just as bad as apartheid), South Africa’s apartheid quickly antagonised the newly established anti-colonial state of India. The reason for this was that India’s “domiciled community” had long

⁷⁸⁸ Malcolm MacLean, ‘Revisiting (and Revising?) Sports Boycotts: From Rugby against South Africa to Soccer in Israel’ (2014) 31 *The International Journal of the History of Sport* 1832.

⁷⁸⁹ Robert Ross (ed), ‘Apartheid’, *A Concise History of South Africa* (2nd edn, Cambridge University Press 2008) <<https://www.cambridge.org/core/books/concise-history-of-south-africa/apartheid/9BCBD4754D3F2F4BB4BB3BA236CDB224>> accessed 13 September 2022. 138 - 139.

⁷⁹⁰ Bissell (n 281), 8

⁷⁹¹ *Ibid*, 9 – 10.

suffered discrimination and even rejection of their citizenship rights in many other parts of the British Empire. India protested against this treatment in international forums that were older than the United Nations and the modern independence of India itself. The issue had been raised at the Imperial War Conferences in 1917 and 1918; and then again by an Indian resolution at the Imperial Conference of 1921. More importantly, at the 1923 Imperial Conference, Tej Bahadur Sapru - a key figure in India's struggle for independence - warned that if this discrimination against the Indian-domiciled communities persisted, the issue would cease to be domestic.⁷⁹² And that was precisely what happened.

In 1939, ignoring all warnings and pleas, the South African Union government came up with a scheme for the segregation of Indians, subsequently embodied in the Asiatic Land Tenure and Indian Representation Act of 1946. As Mahatma Gandhi warned: "There is no doubt that the proposed measure, if it becomes the law of the Union of South Africa, will mean the slow death of the Indian community there. It is the fashion of the day to condemn many of Herr Hitler's acts as so many breaches of the pact. What is it if the proposed measure is not an attempt to commit a flagrant breach of the Cape Town Agreement of 1927 and subsequent declarations of the Union Government?"⁷⁹³ With no sign of the decline of Afrikaner racialism even after World War II, the new Indian government took the matter into its own hands. The tabling by India of a General Assembly resolution and the process leading to the vote on December 08 1946, which condemned the South African treatment of Indians, formed the first recorded example of *world legal opinion* on the policy of apartheid in general.

Resolution 44 iterated that "the treatment of Indians in the Union [South Africa] should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter."⁷⁹⁴ This public international disapproval of the South African government's illiberal, discriminatory policies, although unable to maintain its momentum during the 1940s and the 1950s, manifested the first international aspects of the anti-apartheid movement and, more importantly, foreshadowed the formative impact that anti-colonial states would have on the UN, the alliance of the Afro-Asian bloc (later the wider group of Global South),⁷⁹⁵ and ultimately the outlawing of apartheid using the language of international law.

Yet, the Indian communities and the Indian government were not the only political actors that South Africa's apartheid regime managed to offend. Specifically, South Africa's sponsored and supported (or enforced) an "apartheid independence movement" in the region (such as the incidence of Rhodesia, the creation of independent Transkei and other Bantustans) ensured that even the closest allies of South Africa could no longer feel comfortable accompanying and supporting the regime in the international arena.

⁷⁹² H Venkatasubbiah, 'INDIA AND THE "APARTHEID" QUESTION' (1977) 33 *India Quarterly* 62., 62-63.

⁷⁹³ Indian Overseas General Association, Report of Public Meeting in Delhi h April 1930 (New Delhi), 19

⁷⁹⁴ UNGA, 'Res 44 "Treatment of Indians in the Union of South Africa" UN Docs A/RES/44(I)' <<https://digitallibrary.un.org/record/209760>> accessed 14 September 2022.

⁷⁹⁵ Alanna O'malley, 'India, Apartheid and the New World Order at the UN, 1946–1962' (2020) 31 *Journal of World History* 195.

The Rhodesia territory did not necessarily have a history of closeness with South Africa, and the relations between them or with the British Empire are too complicated to decode here. However, the direct question of the “exportation” of South African apartheid could be discussed from 1965 onwards, when Rhodesia's declaration of independence from the British Empire was officially announced.⁷⁹⁶ South African white politicians recognised many significant differences between South Africa and other European-settler territories in Africa, including Rhodesia. However, they also saw that both political entities, SA and Rhodesia, “stood together” in their shared belief in themselves as “the permanent pillars of White civilisation in Southern Africa.”⁷⁹⁷

While there were many debates and different opinions inside the South African government on whether they should maintain neutrality or extend official support to the Rhodesian government, their tacit approval of this new government was evident. After all, if the apartheid regime did not provide the white “revolutionary government” of Rhodesia with at least de facto recognition and extraordinary assistance and Rhodesia was forced by the international community to abandon its policy, the security of South Africa's white population would be vitally affected. The temporary alliance between South African and Rhodesian politicians could be seen when SA Prime Minister Balthazar J. Vorster piercingly criticised Britain for taking the dispute to the United Nations and pushing for the application of sanctions against Rhodesia.⁷⁹⁸ In addition, SA also refused to enforce the United Nations sanctions against Rhodesia. For instance, the trade that Rhodesia lost from Britain was compensated by South Africa's support.

There were “understandable” reasons why SA had to support Rhodesia, such as ensuring there was no hostile African regime being set up on its border and demonstrating that sanctions against apartheid-like governments would not work. The South African leadership understood that their adventure into the Rhodesian dispute constituted a grave threat to the delicate harmony that they were trying to establish, with partially successful efforts, with other African states. SA's support for Rhodesia also attracted more resentment against the apartheid system, with the South African government now seen as the ringleader of the entire unlawful movement. On November 07, 1968, the United Nations General Assembly adopted a resolution concerning the “Questions on Rhodesia” reestablishing that the racist regime in Rhodesia was ‘illegal’ and condemning the South African government for providing economic, financial and military assistance to the minority government in Rhodesia.⁷⁹⁹

Similar, to a certain extent, was the creation of the nominally independent Transkei in 1976. The idea of this independence was relatively straightforward, but also shockingly disturbing.

⁷⁹⁶ The National Archives (n 279).

⁷⁹⁷ Amry Vandenbosch, *South Africa and the World: The Foreign Policy of Apartheid* (University Press of Kentucky 1970) <<http://www.jstor.org/stable/j.ctt130jc4z>> accessed 14 September 2022., 148 - 149.

⁷⁹⁸ ‘VORSTER APPEALS FOR ACCORD NOW; Believes Settlement Possible but Criticizes Britain’ *The New York Times* (7 December 1966) <<https://www.nytimes.com/1966/12/07/archives/vorster-appeals-for-accord-now-believes-settlement-possible-but.html>> accessed 15 September 2022.

⁷⁹⁹ Question of Rhodesia [1968] UNGA 8; A/RES/2383 (XXIII) (7 November 1968) <http://www.worldlii.org/int/other/UNGA/1968/8.pdf>

Knowing that they could not maintain the system of apartheid for too long, given the constant international pressure, the SA government created the independent state of Transkei, where black Africans with language ties to a region would be forced to move to the corresponding Bantustan, whether or not they lived there. They lost their South African citizenship and were tied to the new country. For SA politicians, Transkeian independence demonstrated to the world that white South Africans could participate in the decolonisation process by granting freedom to the separate “peoples” and allocating them separate “territories.”⁸⁰⁰ This is now known as the Bantustan concept, originating in the Bantu Authorities Act. From 1951, this act parcelled the entire population of black Africans of South Africa into ten ethnically defined self-governing “homelands” or bantustans.⁸⁰¹ Four of them, including Qwaqwa and Ciskei, were eventually given so-called “independence,” but in 1976, Transkei was considered the model Bantustan.

Attracting renewed scholarly interests of historians during the 2010s, we now have a considerable amount of literature on Bantustans. Most scholars agree that they were nothing more than a twisted version of apartheid, engineered solely to maintain the power of the white government in South Africa.⁸⁰² It called for the “transfer” of non-white peoples to these regions to create independent nations, a process that would involve ethnic cleansing one way or another. Moreover, white officials continued to occupy senior roles in the new governments. The dependence of these artificial nations on SA was too significant, economically and institutionally, for the process to be considered a genuine decolonisation effort.

Again, the “solution” of the independence of Transkei and other Bantustans only exacerbated international animosity toward South Africa’s apartheid system. With Resolution 31/6 of 1976, the UNGA made it extremely clear that “the establishment of Bantustans as designed to consolidate the inhuman policies of apartheid”; South Africa violated “the territorial integrity of the country;” it perpetuated ‘white minority domination’; and it dispossessed “the people of South Africa of their inalienable rights.”⁸⁰³ The solution that the South African government hoped for only further antagonised the international community.

The final nail in the coffin that made South Africa “the human rights violator of the century” was its prolonged unlawful occupation of South-West Africa. South-West Africa was originally a German colony. However, after Germany lost the First World War and, by means of the subsequent Treaty of Versailles, the principal Allied and Associated Powers took over the German colonies. The mandate over South-West Africa was given to “His Britannic Majesty to be exercised on his behalf by the Union of South Africa.” However, after the demise of the League of Nations in 1939, South Africa argued that there was no successor of the League to which the mandate could be transferred and that it was up to the South African government to

⁸⁰⁰ Roger J Southall, ‘Independence for the Transkei: Mystification and Diversion in the Model Bantustan’, *Southern Africa Since the Portuguese Coup* (Routledge 1980), 138 - 139.

⁸⁰¹ Arianna Lissoni and Shireen Ally, “‘Bantustan States’” (2018) 50 *African Historical Review* 1.

⁸⁰² Shireen Ally and Arianna Lissoni (eds), *New Histories of South Africa’s Apartheid-Era Bantustans* (Routledge 2018).

⁸⁰³ UNGA, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ <<https://digitallibrary.un.org/record/637263>> accessed 15 September 2022.

decide the sovereign fate of South-West Africa. This narrative was quickly rejected by the new-born international organisation, the United Nations, in 1945. The General Assembly specifically requested South Africa to put South-West Africa territory under UN trusteeship, but the South African government refused to comply and demanded the territory's incorporation into the union.⁸⁰⁴ More importantly, by refusing to relinquish its hold over the South-West Africa region, the SA government also continued to apply its apartheid system in this region, prompting another anti-apartheid movement in South-West Africa, the principal opposition group being the South West African Peoples' Organization (SWAPO). Apartheid was internationalised again with the SA government's inflexible determination to reject UN trusteeship over the territory. The responses from international institutions were strong and consistent, and came from the UNGA, the UNSC, and also the ICJ.

2. Legal Debates

South Africa's strategy to deal with the international campaigns against apartheid was quite straightforward and simple. First, they did not dispute that apartheid was currently a central policy of the South African government. Unlike contemporary human rights violators, South Africa even expressed its intention to see apartheid as the state ideology. SA also accepted that apartheid was generally a political question. Bissell notes this as a "quirk" in the response of the South African government, which had done nothing to depoliticise apartheid.⁸⁰⁵ The South African government's only defence was to insist that such political questions were a purely internal matter and, therefore, of no concern to the United Nations. This makes the incident very different from other human rights issues, where governments often deny the existence of any violations under the territory they control or which are carried out on their instructions (for example, in the allegation concerning the Chinese government's treatment of Uyghurs, Beijing denies the existence of any repression).⁸⁰⁶ The fact that South Africa dared to acknowledge and then defend apartheid publicly turned its government into a "sitting duck" for international criticism.

In this primary battle over apartheid as "domestic jurisdiction", South Africa's depiction of apartheid as a purely internal affair was also unsuccessful since it was rejected not only by the authority of the UNGA but also, for sound reasons by the UN Member States. For example, in 1953, South Africa submitted to the UNGA and the ad hoc Political Committee of the UNGA a draft resolution asking both entities to decide that they had no competence to discuss or report on the sovereign right of a Member State in legislate its own domestic matters, including "land tenure, conditions of employment in public services, regulation of transport and the like..."⁸⁰⁷

⁸⁰⁴ Najmul Hasan, 'NAMIBIA: SOUTH— WEST AFRICA' (1975) 28 Pakistan Horizon 61.

⁸⁰⁵ Bissell (n 144), 15

⁸⁰⁶ 'China's Repression of Uyghurs in Xinjiang' (*Council on Foreign Relations*) <<https://www.cfr.org/background/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>> accessed 27 June 2023.

⁸⁰⁷ Ad Hoc Political Committee, '8th Session, 37th Meeting Record, Tuesday, 1 December 1953, New York' <<https://digitallibrary.un.org/record/1293972>> accessed 27 September 2022.

This draft resolution was heavily defeated with the voting record of 7 in support, 47 against, and 7 abstaining.

South Africa also relied on the provisions of Article 2(7) of the UN Charter and evidence from the San Francisco Conference, where Commission II of the United Nations noted that “nothing contained in Chapter XI can be construed as giving authority to the Organization to intervene in the domestic affairs of Member States.”⁸⁰⁸ Although the argument seemed reasonable, in several meetings of the Special Political Committee (SPC), many Member States raised their opposition to this view.

The Philippines, for instance, agreed that the UN must contain and avoid the transgression of passing judgment on a country’s domestic affairs. However, the country’s representative also emphasised that it was the UN’s duty to ensure that all of its members acted in conformity with the principles and purposes of the Charter.⁸⁰⁹ Norway, on the other hand, called for the SPC’s attention to Articles 55 and 56 of the Charter. Norwegian representatives pointed out that the Charter promoted “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.” Article 55 has always been the direction of the United Nations. In Article 56, the Charter also notes that “all members pledge themselves to take joint and separate action...” to promote these universal values. As the principal aim of apartheid was not only racial separation but also deadly and harmful political repression, such policy was, therefore, in the opposite direction of what was envisioned by the UN Charter.

Many countries voiced their concerns and their opposition to the apartheid regime, and to cite all of them is to go beyond the scope of this case study. However, we can safely conclude that South Africa’s government strategy of depicting its systematic human rights violations as a “domestic affair” did not resonate well with its conduct and led to the internationalisation of apartheid through several proxy disputes outside South Africa’s borders. Its strategy was also not accepted by all the authoritative UN organs, including the UNGA, the UNSC and the ICJ.

3. Identifying Illicit Acts and Unlawful Situations

With a brief but substantive understanding of the apartheid regime, its human rights concerns inside the country and also how it was internationalised through various international and regional disputes, we now explore how the international community and institutions defined the illicit conduct of SA and, subsequently, the unlawful situations that needed to be dealt with. With the above information concerning apartheid, we have a relatively chronological timeline of South Africa’s allegedly illicit conduct in the framework of international law.

⁸⁰⁸ ‘Documents of the United Nations Conference on International Organization, San Francisco, 1945 = Documents de La Conférence Des Nations Unies Sur l’organisation Internationale, San Francisco, 1945’ (United Nations Information Organizations, 1945) <<https://digitallibrary.un.org/record/1300969>> accessed 27 June 2023., 79. See the debates and discussion in A/PV. 803, September 22, 1959, p. 109

⁸⁰⁹ ‘General Assembly, 14th Session :: 811th Plenary Meeting, Monday, 28 September 1959, New York’ <<https://digitallibrary.un.org/record/738282>> accessed 27 June 2023. 227-33.

- Systematic discrimination against non-whites

First is the question of the treatment under apartheid of South African non-white residents, with the initial emphasis on those of Indian origin. However, the international community eventually realised that the issue of apartheid in South Africa was much more significant and problematic than they had expected. The Sharpeville shootings, the Passbook riots and the 1976 Soweto disturbances were all tragic consequences of apartheid. Domestic unrest and blatant human rights violations, together with South Africa's internal policies and legislation, turned apartheid itself into an unlawful situation.

In the beginning, apartheid had yet to be identified as unlawful. Although Resolution 44 (1947) did publicly denounce the racial practices of South Africa, the UNGA's expression stopped at "is of the opinion", and justified the intervention because SA's policy had "impaired... friendly relation between Member States."⁸¹⁰ Therefore, for a certain period, apartheid and its domestic manifestations were not considered illegal *per se* in international law, and the existence of the apartheid government was tolerated by international law. The reason for this tolerance was SA's membership of virtually all credible international organisations. This neutral stand on apartheid continued to dominate discourses on the subject for almost a decade.

For example, with *Resolution 395(V)* (1951), the UNGA suggested *negotiation* between India, Pakistan and South Africa in order to resolve their disputes, "bearing in mind the provisions of the United Nations Charter and the Universal Declaration of Human Rights."⁸¹¹ Some international instruments were included as guidelines for the consideration of the parties involved, but the absolute sovereignty of the State retained its primary importance. In two other resolutions, *Resolution 615 and 616 (VII)* (1952), UNGA only endorsed the establishment of the United Nations Good Office Commission, consisting of three individual members.⁸¹² This commission was entrusted with facilitating and assisting the negotiation between the Member States. Although there was no definitive legal stand about apartheid and the South African regime, we can see how the idea of necessary intervention into a state's affairs, if such a state perpetuates racial discriminative and repressive policies, began to crystalise. These resolutions read:

"[...] the *purpose* of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion."; and

"[...] enduring peace will not be secured solely by collective security arrangements against breaches of international peace and sets of aggression.... a genuine and lasting peace depends also upon the observance of all the Principles and Purposes established in

⁸¹⁰ UNGA, 'Res 44 "Treatment of Indians in the Union of South Africa" UN Docs A/RES/44(I)' 44 <<https://digitallibrary.un.org/record/209760>> accessed 14 September 2022.

⁸¹¹ UNGA, 'Res 395(V) "Treatment of People of Indian Origin in the Union of South Africa" UN Doc A/RES/395(V)' <<https://digitallibrary.un.org/record/209555>> accessed 16 September 2022.

⁸¹² UNGA, 'Res 615(VII) "The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa" UN Docs A/RES/615(VII)[B]' <<https://digitallibrary.un.org/record/666110>> accessed 16 September 2022.

the Charter of the United Nations, [...], especially upon respect for an observance of human rights and fundamental freedoms for all....”⁸¹³

One could argue that there was nothing in the UNGA’s resolutions, from the 40s to the end of the 50s, that had either the intention to settle the question of the legality of apartheid nor the power to do so. Yet, we can also see the tendency of UNGA’s legal arguments:

- Apartheid should be scrutinised under the lens of international human rights law; and
- principles and purposes enshrined in the UN Charter encourage international intervention in response to gross human rights situations since genuine collective security can only be ensured if Member States observe the proper spirit of the UN Charter and the Universal Declaration on Human Rights.

Consequently, even though political will was not yet there, a general understanding of the unlawfulness of the situation, and experience in setting up institutions to deal with apartheid (including the works of the Ad Hoc Political Committee, or the Commission on the Racial Situation in South Africa) created a momentum in reserve for future legal actions.

Starting in the 1960s, both national and international contexts changed dramatically. Inside South Africa, public demonstrations and other anti-apartheid activities became more organised and widespread, and the nature of the apartheid regime showed its true colours, with the Sharpeville shooting as the wake-up call. Outside, the birth of newly independent African states fortified the Asian-African coalition and changed the landscape of the UNGA, and thus the pressure they were able to impose.⁸¹⁴

On March 25, 1960, just four days after the Sharpeville shootings, twenty-eight African and Asian members of the UN submitted a request to the Security Council for an emergency meeting. In letter No. S/4279, Member States with diverse backgrounds, from Thailand, Burma, Cambodia, Japan; Ethiopia, Ghana, India; Turkey, Saudi Arabia, the United Arab Republic, and Yemen, requested the UNSC to review and discuss the Sharpeville incident. They specifically insisted that:

“Under instructions from our Governments and in accordance with Article 25(1) of the United Nations Charter, ... we consider that this is a situation with grave potentialities for

⁸¹³ These terms and arguments were repeated in many other UNGA resolutions, including UNGA, ‘Res 721 (VIII) “The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa” UN Docs A/RES/721(VIII)’ <<https://digitallibrary.un.org/record/211615>> accessed 16 September 2022.

⁸¹⁴ Georges M Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline Symposium: International Law Standards in an Era of Rapid Historical Change: Leading Article’ (1962) 8 *Howard Law Journal* 95.

CH Alexandrowicz, ‘The New States and International Law (1974)’ in CH Alexandrowicz, David Armitage and Jennifer Pitts (eds), *The Law of Nations in Global History* (Oxford University Press 2017) <<https://doi.org/10.1093/acprof:oso/9780198766070.003.0029>> accessed 27 June 2023.

international friction, which endangers the maintenance of international peace and security.”⁸¹⁵

This was the turning point for the international anti-apartheid movement, as the human rights issues within the territory of South Africa were portrayed as a danger to “international peace and security”.

With public opinion aroused and countries representing all regions of the world voicing their legal antipathy to the apartheid regime of South Africa, the UNSC could not refuse to hear and resolve the incident in the spirit of international law. This led to the birth of Resolution 4300 of April 1, 1960, *the first UNSC resolution dealing with apartheid*.⁸¹⁶ Although the language of the resolution is not as strong as some Asian and African states would have liked, there were two main achievements regarding the legal opinion of the UNSC. It recognised:

“...that the situation in the Union of South Africa is one that has led to international friction and, if continued, might endanger international peace and security...”

I would not argue that this was the official international characterisation of the apartheid regime as an unlawful situation per se. It is clear from a perusal of the meeting record of the UNSC before the vote took place (S/PV.856), and the language of the UNSC and many other members who were able to take the floor and express their opinion that the tone continued to be mild. Even the strongest positions, those adopted by Ceylon and Poland only demanded the friendly and willing cooperation of the SA government with the principal UN organs such as the UNGA or the UNSC.⁸¹⁷ No one had yet affirmed the existence of apartheid as outright unlawful.

However, one positive note is that this resolution was passed with the overwhelming support of the UNSC members, including the United States of America, the Union of Soviet Socialist Republics and China (the Nationalist government). France and the United Kingdom abstained from voting and voiced concerns about the scope of power of the UNSC. The final vote count was nine in favour, none against and three abstentions. The operative paragraph from the UNSC, quoted above, allowed the anti-apartheid movement's narrative to become bolder and more explicit.

In 1961, however, with no further explanation or authorisation from the UNSC's resolution, the UNGA affirmed that “the racial policies being pursued by the Government of the Union of South Africa are in *flagrant violation* (emphasis added) of the Charter of the United Nations and the Universal Declaration of Human Rights and are inconsistent with the obligations of a

⁸¹⁵ Asian-African States, ‘Letter Dated 60/03/25 from the Representatives of Afghanistan, Burma, Cambodia, Ceylon, Ethiopia, Federation of Malaya, Ghana, Guinea, India, Indonesia, Iran, Iraq, Japan, Jordan, Lebanon, Liberia, Libya, Morocco, Nepal, Pakistan, Philippines, Saudi Arabia, Sudan, Thailand, Tunisia, Turkey, United Arab Republic and Yemen Addressed to the President of the Security Council’ <<https://digitallibrary.un.org/record/619940>> accessed 17 September 2022.

⁸¹⁶ UNSC, ‘Res 4300, “The Situation in the Union of South Africa Arising out of the Large-Scale Killings of Unarmed and Peaceful Demonstrators in Sharpeville” Un Docs S/4300’ (n 782).

⁸¹⁷ UNSC, ‘Security Council, 15th Year: 856th Meeting. UN Docs S/PV.856’ <<https://digitallibrary.un.org/record/629489>> accessed 18 September 2022.

Member State.”⁸¹⁸ In the span of only one year, UNGA Resolution 1598 marked the transformation of apartheid from a diplomatic contention that the international community was hoping that SA would negotiate and resolve in good faith into an unmistakable violation of both human rights norms and general international law.

In the political background, we must include the Bandung Conferences,⁸¹⁹ the Afro - Asian Peoples' Conference (AAPC),⁸²⁰ and the Accra “Positive Action” Conference, and all the effort that these countries put into plans of isolation and sanction against SA, if we are to understand how the provisions of UNGA’s resolution 1598 were drafted. No matter how politically committed they were, the strong and assertive language that was employed in Resolution 1598 could mean only one thing: a major collective of states believed they were making law. Many scholars have shared this observation. Richard Bissell, for example, noted that African members of the UNGA believed that the Assembly was a world legislative body that could create standards to be enforced by all international organisations, whether it was an organisation inside the UN (the ILO, UNESCO...) or an organisation that was entirely outside the structure of the UN (such as the Commonwealth).⁸²¹

And this bold approach actually became a reality. Resolution 1598 paved the way for the official categorisation of the existence of the apartheid government in South Africa as internationally unlawful. In 1962, the UNSC remained inactive on the matter, but they were reminded of the legal stand of the UNGA with UNGA Resolution 1663 (which repeats the content of Resolution 1598). This resolution was communicated to the President of the Security Council by the Acting Secretary-General in a letter dated January 10, 1962.⁸²²

In 1963, the UNSC was pressured to support UNGA Resolution 1761 (XVII) and issued its resolution No. S/5386.⁸²³ In this resolution, there are two important items:

- (1) The UNSC deprecated the policies of racial discrimination in South Africa as “inconsistent with the principles contained in the Charter of the United Nations and contrary to its obligations as a Member state of the United Nation.” The existence of apartheid officially threatened the legality of South Africa’s role as a member of the UN.

⁸¹⁸ UNGA, ‘Res 1598 “Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa” UN Docs A/RES/1598 (XV)’ <<https://digitallibrary.un.org/record/206151>> accessed 18 September 2022.

⁸¹⁹ Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/bandung-global-history-and-international-law/34236E0CAB3D3F96F715C755879D3BF8>> accessed 7 May 2023.

⁸²⁰ Obiora C Okafor, ‘The Bandung Ethic and International Human Rights Praxis: Yesterday, Today and Tomorrow’, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017).

⁸²¹ Bissell (n 281), 45-46

⁸²² UN Acting Secretary-General, ‘Letter Dated 62/01/10 from the Acting Secretary-General Addressed to the President of the Security Council’ <<https://digitallibrary.un.org/record/626146>> accessed 21 September 2022.

⁸²³ UNSC, ‘Res 5386 on the Situation of South Africa’ <<https://digitallibrary.un.org/record/615029>> accessed 21 September 2022.

- (2) The UNSC also “calls upon all States to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa.”

From this point on, there was no primary opposition asserting the legality of apartheid and the legitimacy of the South African government in the United Nations arena. The uniform vision of the organisation directed and guided almost all other international and regional organisations for decades, until the fall of apartheid.

- Bantustanisation and Rhodesia

Dealing with the unlawfulness of South Africa’s support for Rhodesia, the creation of independent Transkei and other Bantustans (which was called the “Bantustanisation” by UNGA resolutions such as Resolution 35/206),⁸²⁴ and also South Africa’s occupation of Southwest Africa, was neither complex nor controversial for the international community.

Regarding the declaration of independence of the minority regime in Rhodesia, the UNGA reached its conclusions as early as 1962 on the legal status of Rhodesia as a non-self-governing territory. It approved the report of the Special Committee on “the Situation with regard to the Implementation of the Declaration on Granting of Independence of Colonial Countries and the People of Southern Rhodesia,” with Resolution 1747(XVI) of 1962.⁸²⁵ From 1962 to 1965, the UNGA issued several resolutions each year, all of a similar spirit, stating that “the United Nations will oppose any declaration of independence which is not based on universal suffrage” and that any support given to this minority regime would be condemned whether it came from the United Kingdom, Portugal or South Africa.⁸²⁶

With the tremendous pressure from the UNGA, one month after Res. 2022 was adopted, the UNSC concluded its position on the question of Rhodesia in December 1965 with Resolution 217.⁸²⁷ Specifically, the UNSC condemned “the unilateral declaration of independence made by a racist minority in Southern Rhodesia” and decided “to call upon all States not to recognise this illegal, racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.”

As we briefly mentioned above, South Africa’s plan to create the pseudo-independence of Transkei and other Bantustans did not sit well with the conscience of the international community. UNGA resolution 31/6 of 1976 spelt out all the legal problems with the “independence” of Transkei, including “the inhumane policies of apartheid,” SA’s violation of

⁸²⁴ UNGA, ‘Res 35/206[E] “Cultural, Academic and Other Boycotts of South Africa” UN Docs.A/RES/35/206[E]’ <<https://digitallibrary.un.org/record/614065>> accessed 3 October 2022.

⁸²⁵ UNGA, ‘Res 1747(XVI) “The Question of Southern Rhodesia” UN Docs A/RES/1747(XVI)’ <<https://digitallibrary.un.org/record/205657>> accessed 26 September 2022.

⁸²⁶ This phrase is from

UNGA, ‘Res 2022(XX) “Question of Southern Rhodesia” Un Docs A/RES/2022(XX)’ <<https://digitallibrary.un.org/record/203554>> accessed 26 September 2022.

⁸²⁷ UNSC, ‘Resolution 217 (1965) “on the Proclamation of Independence by the Minority Régime in Southern Rhodesia” UN Docs S/RES/217(1965)’ <<https://digitallibrary.un.org/record/90484>> accessed 26 September 2022.

“the territorial integrity of the country,” “white minority domination,” and the dispossession of the “people of South Africa of their inalienable rights.”⁸²⁸ One year later, the UNSC - while not explicitly talking about the legality of the independence of Transkei - strongly confirmed their support for the government of Lesotho in the non-recognition campaign against the so-called state of Transkei and recognised the burdens that Lesotho had to bear facing the pressure of the government of South Africa.⁸²⁹ With Resolution 407, the UNSC also requested many of the UN agencies, such as the Agriculture Organization of the United Nations, the International Fund for Agricultural Development, the United Nations Educational, Scientific and Cultural Organization, the United Nations Conference on Trade and Development, to assist Lesotho in their non-recognition campaign. It is also important to note that, with the UNSC endorsing the non-recognition campaign against SA’s planned independence of Transkei without any prior UNSC resolution, the UNSC seemed to accept the authoritative nature of UNGA’s legal assessment of the situation.

- South Africa’s Occupation of South West Africa

Finally, South Africa’s occupation of the territory of South West Africa and its intention to expand the apartheid system in this territory faced the most severe legal and political resistance from the international community. The UNSC started to get involved in the South West Africa dispute at a fairly late stage, in 1968, with Resolution 245 (1968).⁸³⁰ So again, most of the UNGA’s initiatives and efforts seemed to establish the unlawfulness of the South West Africa situation.

South West Africa, as a mandate of the United Nations decolonisation project, became a topic for UNGA’s discussion in 1947. The debate on South West Africa intensified from 1955 to 1962. Resolution 1360 (1960), for example, confirmed that the Union of South Africa’s conduct was contrary to the United Nations and the UNGA’s authoritative decolonisation plan. It also asserted that SA alone could not modify the international status of the Territory of South West Africa by its actions.⁸³¹ Fast forward to 1961, UNGA’s Resolution 1568 (XV), with no UNSC’s prior categorisation of the situation, established that South Africa’s occupation of the territory of South West Africa was a situation that constituted “a serious threat to international peace and security,” while deploring the policy of the Union of South Africa as *contrary* to its obligations under the authorised mandate of December 17, 1920 under the International Trusteeship System, the Charter of the United Nations, and the Universal Declaration of Human Rights...⁸³² On October 27, 1966, the General Assembly decided that the Mandate for South West Africa was terminated and in Resolution 2145 that South Africa had no other right

⁸²⁸ UNGA, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ (n 807) 6.

⁸²⁹ UNSC, ‘Res 407 on “assistance to Lesotho” UN Docs S/RES/407(1977)’ <<https://digitallibrary.un.org/record/66635>> accessed 26 September 2022.

⁸³⁰ UNSC, ‘Resolution 245 “On South West Africans Detained by South Africa” UN Docs S/RES/246(1968)’ <<https://digitallibrary.un.org/record/90745>> accessed 26 September 2022.

⁸³¹ ‘Res 1360 “Question of South West Africa” UN Docs A/RES/1360(XIV)’ <<https://digitallibrary.un.org/record/206562>> accessed 26 September 2022.

⁸³² UNGA, ‘Resolution 1568 on “Question of South West Africa” UN Docs A/RES/1568(XV)’ <<https://digitallibrary.un.org/record/206009>> accessed 19 March 2024.

to administer the Territory.⁸³³ The Security Council requested South Africa to withdraw its administration from the Territory on January 30, 1970 with Resolution 264.⁸³⁴ It officially declared, with Resolution 276 that the continued presence of the South African authorities in Namibia was illegal.⁸³⁵

The question was also discussed by the ICJ in its famous advisory opinion concerning *The Legal Consequences for States of the Continued Presence of South Africa in Namibia*. The ICJ contended that the announcement of a situation as illegal “does not itself put an end to it,”⁸³⁶ and when confronted with “such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf.”⁸³⁷ Overall, we can observe again that identifying the unlawful situation is the most challenging task of the entire non-recognition process. Moreover, the weight of the UNGA’s legal assessment in the South Africa case also confirms the general hypothesis of this dissertation that the UNGA does have an authoritative voice in many aspects of dealing with internationally unlawful situations, although the UN Charter does not authorise such power to the UNGA.

4. The Campaign of Non-recognition

With the question of legality - the biggest question of the “procedure” of non-recognition - addressed in the SA case, the international community naturally involved themselves with the consequences of the illegal act: various forms of non-recognition.

A. Non-recognition as declaratory rejection and non-maintenance concerning apartheid

As discussed previously in several cases and also in the theoretical chapter on non-recognition, non-recognition first manifests itself as the international rejection of the continuation of a situation resulting from an illegal act. Any aid or assistance provided by third States to maintain such a situation is also considered contrary to the requirements of the practice of non-recognition.

In the case of South Africa, since the apartheid regime itself was identified as the unlawful situation, the non-recognition campaign was basically the international rejection and isolation of the South African government (but not the statehood of South Africa). Not recognising a functioning government that is also a regional economic powerhouse is not an easy task. The

⁸³³ UNGA, ‘Res 2145 on “Question of South West Africa” UN Docs A/RES/2145(XXI)’ (n 556).

⁸³⁴ UNSC, ‘Res 264 on “on South African Administration of Namibia” UN Docs S/RES/264(1969)’ <<https://digitallibrary.un.org/record/90763>> accessed 28 June 2023.

⁸³⁵ UNSC, ‘Res 276 “on Establishment of an Ad Hoc Subcommittee of the Council to Study Ways to Implement Council Resolutions Regarding Namibia” UN Docs S/RES/276(1970)’ <<https://digitallibrary.un.org/record/90776>> accessed 28 June 2023.

⁸³⁶ International Court of Justice, ‘Advisory Opinion on “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”’ (n 64), para 111

⁸³⁷ Ibid., para 112

relevant international organisations and the international community as a whole came up with several strategies.

The first major international organisation that rejected the apartheid government was also the one closest to it - the Commonwealth. Although the British Empire had its own history of racial supremacy and colonialism, the Commonwealth tried to foster decolonisation and pursue racial equality.⁸³⁸ To the credit of Great Britain and its Commonwealth partners, the transition from the dominance of the British Empire to the equal and universal Commonwealth has been peaceful and consultative compared to the decolonisation process of other empires (such as those of France or Portugal).⁸³⁹ Hence, the racist policy of South Africa was clearly incompatible with the multiracial nature of the Commonwealth association. This view was confirmed by the leaders of Commonwealth countries in their Prime Ministerial meeting in May 1960, where Tunku Abdul Rahman of Malaysia declared that:

“The Commonwealth had to preserve its standards of conduct and its moral principles of equality of men irrespective of colour, and of justice and fair play.

The policies of the Government of South Africa [...] seemed to many people to be at variance with these principles; and while we had no intention of interfering in the domestic affairs of another country, recent events in South Africa had exceeded the limits of purely domestic concern.”⁸⁴⁰

In the 1961 meeting, the anti-apartheid movement was at an even higher pitch and South Africa’s membership in the Commonwealth was officially rejected. Indian Prime Minister Nehru, in a speech in Lok Sabha, expressed his satisfaction with the result:

“This was a very significant step that the Commonwealth took, but I believe that it has strengthened it and certainly not weakened it. It has even wider significance than it might appear at first sight, because thereby the question of racial equality has been put on the highest level in the world context. As a matter of fact, the United Nations Charter itself.”⁸⁴¹

As Nehru insisted, the non-recognition campaign against apartheid quickly took over the UNGA’s agenda. For the record, we should note that the spirit of non-recognition regarding apartheid policies appears much earlier in the UNGA’s discussions and decisions. For instance, in UNGA resolution 395(V) of 1950, the UNGA was only involved as a mediator for India, Pakistan and the Union of South Africa in the negotiation concerning possibly discriminative effects on the Indian-origin population with the introduction of “Group Areas Act” in the

⁸³⁸ Frank Hayes, ‘South Africa’s Departure from the Commonwealth, 1960-1961’ (1980) 2 *The International History Review* 453.

⁸³⁹ John W Holmes, *The Better Part of Valour: Essays on Canadian Diplomacy* (McGill-Queen’s Press - MQUP 1970), 121

⁸⁴⁰ Hayes (n 842).

⁸⁴¹ Bissell (n 144).

Union.⁸⁴² But even in this resolution, the UNGA had asked member states to “refrain from taking any steps which would prejudice the success of [the] negotiations, in particular, the implementation or enforcement of the provisions of ‘The Group Areas Act’, pending the conclusion of such negotiations...” This is certainly a part of the non-recognition mindset of the UNGA members when considering the legality, legitimacy, and validity of apartheid legislation.

One year after Resolution 1598, UNGA adopted Resolution 1761 (1962), at the time one of its most controversial and contentious documents dealing with apartheid.⁸⁴³ Here, the General Assembly (collectively):

“4. Requests Member States to take the following measures, separately or collectively in conformity with the Charter of the United Nations, to bring about the abandonment of those policies:

(a) Breaking off diplomatic relations with the Government of the Republic of South Africa, or refraining from establishing such relations,

(b) Closing the ports of each State to all vessels flying the South African flag,

(c) Enacting legislation prohibiting the ships of each State from entering South African ports,

(d) Boycotting all South African goods and refraining from exporting goods, including all arms and ammunition, to South Africa,

(e) Refusing landing and passage facilities to all aircraft belonging to the Government and companies registered under laws of the Republic of South Africa;’ (emphasis added)”

Although the provision contains a lot of information and different types of non-recognition strategies, the first three embody the rejection and non-maintenance aspects of non-recognition. As long as the government of the Republic of South Africa continued its practice of apartheid, the UNGA asked its members to break or refrain from forming official diplomatic relations with SA - a symbolic breakaway act - but strongly confirming the unlawfulness of apartheid policies and the illegitimacy of South African government if their policies continued in the same direction. Closing ports to all vessels flying the South African flag or prohibiting one’s national ships from using South African ports would also not be much of a burden to states that had significant trading with SA. However, the fact that it was acceptable to remove the presence of apartheid South Africa from a vivid part of international life at this time (maritime trading) marked a fundamental shift in the international perception of isolating South Africa.

⁸⁴² UNGA, ‘Res 395(V) “Treatment of People of Indian Origin in the Union of South Africa” UN Doc A/RES/395(V)’ (n 815).

⁸⁴³ UNGA, ‘Res 1761 “The Policies of Apartheid of the Government of the Republic of South Africa” UN Docs A/RES/1761(XVII)’ <<https://digitallibrary.un.org/record/204274>> accessed 28 September 2022.

More importantly, the *UN Special Committee on Apartheid* was also established to keep South Africa's racial policies under review and report to both the General Assembly and the Security Council. This was one important element of the non-recognition campaign, as it ensured that the campaign now was not just a combination of separate United Nations resolutions but a comprehensive plan with a dedicated monitoring system. At this time, the Special Committee was composed of 18 member states: Algeria, the German Democratic Republic, Ghana, Guinea, Haiti, Hungary, India, Indonesia, Malaysia, Nepal, Nigeria, Peru, Philippines, Somalia, Sudan, the Syrian Arab Republic, Trinidad and Tobago and the Ukrainian Soviet Socialist Republic.

The resolution was passed by the General Assembly by a vote of 60-16-21. Although this was an outstanding majority, considering how radical the resolution's language was, a 5:1 ratio between supporting and opposing states and a 3:1 ratio between supporting and abstaining states seemed not to be authoritative and was nowhere near a consensus. However, as we can see over the years, the symbolic rejection and non-maintenance against the apartheid regime of the international community only increased, which helps us to clear the doubt about the UNGA's authoritativeness, at least in the case of South Africa. One year later, in 1963, the idea that the apartheid government should not be recognised because it was not "representative" of the people of South Africa began to circle around the UNGA's discussions and debates, spearheaded by Algeria, Liberia and the USSR.⁸⁴⁴ This led to the eventual corrosion of the credibility, reputation and even legality of the South African government.

At the close of the 22nd session of the UNGA on 22 December 1965, the UNGA decided for the first time to withhold approval of the "credentials" of the South African delegation (53 votes were in favour, 12 were against, and there were 9 abstentions). Withholding approval of the credentials of the South African delegation did not mean that they were unseated or barred from voting. However, it is in line with the symbolic rejection and non-maintenance meaning of the first type of non-recognition that we are discussing.

The practice of withholding South African government credentials started to be universally accepted by the members of UNGA with Resolution 2636 (XXV) of 1970 (adopted without a vote),⁸⁴⁵ which specifically noted that it:

*"Approves the first report of the Credentials Committee, except with regard to the credentials of the representatives of the Government of South Africa."*⁸⁴⁶

The apartheid government continued to face this non-recognition of their credentials in the UNGA Resolutions 2862 (XXVT) of December 20, 1971, 2948 (XXVII) of December 08, 1972 and its decision of October 5, 1973.⁸⁴⁷ From 1974, it seemed like every progressive state was

⁸⁴⁴ *ibid.*

⁸⁴⁵ Dan Ciobanu, 'Credentials of Delegations and Representation of Member States at the United Nations' (1976) 25 *The International and Comparative Law Quarterly* 351.

⁸⁴⁶ UNGA, 'Res 2636 (XXV) "Credentials of Representatives to the 25th Session of the General Assembly"' UN Docs A/RES/2636(XXV)[B] <<https://digitallibrary.un.org/record/645482>> accessed 3 October 2022.

⁸⁴⁷ UNGA, 'Res 3206 "Credentials of Representatives to the 29th Session of the General Assembly"' UN Docs A/RES/3206(XXIX) <<https://digitallibrary.un.org/record/189828>> accessed 3 October 2022.

on board with not recognising the South African government in this way. The Credentials Committee of UNGA itself automatically rejected the credentials of the representatives of the South African government for the first time. At the same time, this rejection was adopted by the UNGA by a record-high supporting vote of 98 in favour to 23 against and only 14 abstentions.⁸⁴⁸

While the Asian-African bloc could not convince the UNSC and the UNGA to go so far as to expel South Africa from the UN as they had hoped (which is also not very reasonable since South Africa would still be recognised as a State, and expulsion would mean the rejection of South Africa's statehood), the majority of the UNGA reached the conclusion that the apartheid government could no longer be considered the lawful and legitimate government of the South African State. *In resolution 3151 (XXVIII)[G]*, the UNGA explicitly declared that:

“[...] the South African regime has no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people.”⁸⁴⁹

Consequently, all UN specialised agencies and other inter-government organisations were requested to deny membership or privileges to the South African regime. For the rest of the existence of the apartheid regime, that is until the 1990s, South Africa was either expelled or forced to withdraw from many important agencies and organisations, including the Food and Agriculture Organization (FAO), the International Labour Organization (ILO), the World Health Organization (WHO), the U.N. Educational, Scientific and Cultural Organization (UNESCO).⁸⁵⁰ Overall, the legality and the authoritativeness of the UNGA position on the apartheid regime was very effective, and had a major impact on the entire administrative system of the United Nations.

B. Non-recognition as declaratory rejection and non-maintenance concerning Bantustans and the occupation of Namibia

With other peripheral incidents related to South Africa's apartheid, including the “independence” of Transkei and South Africa's occupation of South West Africa (Namibia), the rejection and non-maintenance aspects of the non-recognition campaign made it even easier to gain acceptance from the international community, since there was no longer concern about these events being a “domestic affair” or infringing the “sovereignty” of South Africa.

The UNSC rejected the independence of Transkei and other Bantustans as an initiative of South Africa with Resolution 407 (1977), standing alongside the UNGA's Resolution 31/6 (1977) rejecting the declaration of independence of Transkei and other Bantustans.⁸⁵¹ The most

⁸⁴⁸ Raymond Suttner, ‘Has South Africa Been Illegally Excluded from the United Nations General Assembly?’ (1984) 17 *The Comparative and International Law Journal of Southern Africa* 279.

⁸⁴⁹ UNGA, ‘Res 3151 (XXVIII) “Dissemination of Information on Apartheid” UN Docs A/RES/3151(XXVIII)’ <<https://digitallibrary.un.org/record/642336>> accessed 3 October 2022.

⁸⁵⁰ Vernon D Johnson and Eliot Dickinson, ‘International Norms and the End of Apartheid in South Africa’ (2015) 16 *Safundi* 355.

⁸⁵¹ UNSC, ‘Res 407 on “assistance to Lesotho” UN Docs S/RES/407(1977)’ (n 833).

powerful organ of the United Nations, from the beginning of the 1970s, also took a more decisive stand in opposing South Africa's aggressive behaviour in the territories of South West Africa and others. With Resolution 276 (1970), the UNSC officially recognised the UNGA's legal position of terminating the South African mandate over Namibia.⁸⁵² And with resolution 283 (1970), an entire system of non-recognition was explicitly spelt out by the UNSC, including:

1. Requesting all States to refrain from any relations - diplomatic, consular or otherwise - with South Africa implying recognition of the authority of the Government of South Africa over the Territory of Namibia;
2. Calling upon all States maintaining diplomatic or consular relations with South Africa to issue a formal declaration to the Government of South Africa to the effect that they did not recognise any authority of South Africa with regard to Namibia and that they considered South Africa's continued presence in Namibia illegal,
3. Calling upon all States maintaining such relations to terminate existing diplomatic and consular representations insofar as they extended to Namibia. and to withdraw any diplomatic or consular missions or representatives residing in the Territory:
4. [...]
13. Requesting all States to report to the Secretary-General on measures they have taken in order to give effect to the provisions set forth in the present resolution.⁸⁵³

The position of the UNSC was further explained and endorsed, in legal terms, by the ICJ advisory opinion on the legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa).⁸⁵⁴ The Court vehemently contended that:

“A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence”.⁸⁵⁵

Therefore, the Court spent 11 paragraphs (from 111 to 127) detailing how States (including South Africa) should comply with the decision of the UNSC in accordance with the UN Charter and the spirit of international law, including to refrain “from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia”, and to “abstain from

UNGA, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ (n 807).

⁸⁵² UNSC, ‘Resolution 276 (1970) /’ (n 839).

⁸⁵³ Year: 1970, ‘Resolution 283 (1970) “Requesting All States to Refrain from Any Relations with South Africa Implying Recognition of South African Authority over Namibia” UN Docs S/RES/283(1970)’ <<https://digitallibrary.un.org/record/90777>> accessed 3 October 2022.

⁸⁵⁴ International Court of Justice, ‘Advisory Opinion on “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”’ (n 64).

⁸⁵⁵ Ibid., para 117

entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia.” Other diplomatic, commercial and regular international cooperation or conduct, in which their performance could imply the recognition of the situation in Namibia, was also deemed unlawful. The ICJ recognised only a few exceptions in humanitarian, environmental, and human rights aspects of international cooperation benefiting the Namibian population.

Overall, the international practice of non-recognition as a means of rejection and non-maintenance of unlawful situations in South Africa was manifested clearly, consistently and authoritatively by all the UN’s principal organs and specialised agencies. The spirit of non-recognition was also confirmed with the ICJ’s legal opinion, authorised and endorsed by both UNSC and UNGA, that “a situation is illegal cannot remain without consequence”. Non-recognition, therefore, became a very natural part of the international legal system in general, the law of state responsibility, and an organic legal response to illegal conduct.

C. Academic, Cultural and Sports Boycotts as a Popular Practice of Non-recognition

As we briefly explained in the previous chapter, public opinion inside a country plays a vital role in influencing a government’s response to certain international events. As the global and interconnected economy boomed in the Western hegemony after World War II,⁸⁵⁶ alongside the rise of televised global news phenomenon during the 70s and 80s, apartheid was deemed as one of the world’s racist, imperialist antagonists by many non-state actors. Therefore, even before the UNGA intervened with a comprehensive programme against apartheid in “cultural, academic, sport and other boycotts of South Africa”,⁸⁵⁷ these boycotts were initiated and sustained by mostly non-governmental organisations and associations.

Sport, in general, was one of the most important fronts of international boycotts and non-recognition campaigns directed at South Africa, especially in view of the fact that the apartheid regime had a very comprehensive system of discrimination against athletes based on their assigned racial groups. The legal foundation provided by, most importantly, the Group Areas Act (1950) and the Reservation of Separate Amenities Act (1953) had a profound impact on South Africa’s sports landscape. From not allowing news outlets and broadcasting services to cover “mixed sports” to the absurdity of prohibiting visiting international teams from having athletes of colour in their run-up, it is easy to understand why the practice of apartheid in South African sport was constantly turning into an international dispute.

In 1960, for example, one of the largest protests and civic movements in the history of modern New Zealand was about the decision of New Zealand’s rugby team not to pick any players of Māori descent, due to South Africa’s strict segregationist policies.⁸⁵⁸ The Citizens’ All Black

⁸⁵⁶ ‘A Brief History of Globalization’ (*World Economic Forum*) <<https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/>> accessed 3 October 2022.

⁸⁵⁷ Please see resolutions such as UNGA, ‘Res 35/206[E] “Cultural, Academic and Other Boycotts of South Africa” UN Docs.A/RES/35/206[E]’ (n 828) 206.

⁸⁵⁸ “‘No Maoris - No Tour’ Poster, 1959’ (*New Zealand History - New Zealand Government*) <<https://nzhistory.govt.nz/media/photo/no-maoris-no-tour-poster>> accessed 3 October 2022.

Tour Association campaigned under the slogan “No Maoris, No Tour” and there were over 150,000 signatories to petitions, and also street demonstrations. The New Zealand public requested New Zealand’s Labour government to intervene and to refuse to participate in the tour for a rematch between two world powerhouses of rugby. Although the tour continued without any changes, it signalled a very uncomfortable position for apartheid among normal societies worldwide. As South African Council on Sport (SACOS) popular slogan proclaimed “No normal sports in an abnormal society.”

The sports struggle against apartheid eventually developed and took place in two different categories: first was the global sports system of the Olympic games, and second was the initiatives of other international sports associations. The International Olympic Committee (IOC) proved its role as a transnational sports organisation since its direct relations with a national government such as South Africa became as important as normal diplomatic relations. As observed by authors such as MacIntosh, Cantelon and McDermott, the IOC and its Olympic games are first “an attractive global product” that ensures fierce competition for bidding and holding the Olympic Games.⁸⁵⁹ The Olympics also represent a chance to attract global attention and to demonstrate to the world that a nation is modern, successful, and has fully embraced international accommodationism. In the case of Tokyo, the hosting of the 1964 Summer Olympics symbolised Japan’s “full rehabilitation after the Second World War into international life.”⁸⁶⁰ Therefore, to attract all states and all nations and to promote “Olympism”, the IOC, as early as 1958, established a principle for its games: “*No discrimination is allowed against any country or person on grounds of race, religion or politics.*”⁸⁶¹

Although the IOC was still very cautious about singling out South Africa due to the “no-politics” principle and the application of segregation policies even in the US, from the beginning of the 1960s, the authoritative positions of UNGA allowed the IOC to re-examine their relationship with the South African government. It was clear to the majority of the committee members that the Olympic ideal of universal participation was in jeopardy in South Africa.⁸⁶² Adding fuel to the fire was again the South African government itself. In September 1963, the South African special police shot and wounded Dennis Brutus, the President of the South African Non-Racial Olympic Committee (SAN-ROC) - one of the influential sports associations in South Africa campaigning for equality in South African sports. The SAN-ROC was eventually banned and had to relocate to London due to the repression and crackdown against it in South Africa.⁸⁶³ In 1964, the IOC sidelined the demands to consider allegations

⁸⁵⁹ Donald MacIntosh, Hart Cantelon and Lisa McDermott, ‘The IOC and South Africa: A Lesson in Transnational Relations’ (1993) 28 *International Review for the Sociology of Sport* 373.

⁸⁶⁰ Trevor Taylor, ‘Politics and the Seoul Olympics’ (1988) 1 *The Pacific Review* 190.

⁸⁶¹ International Olympic Committee, ‘The Olympic Games : Fundamental Principles, Rules and Regulations, General Information / International Olympic Committee’ <<https://library.olympics.com/Default/doc/SYRACUSE/61944/the-olympic-games-fundamental-principles-rules-and-regulations-general-information-international-oly>> accessed 4 October 2022.

⁸⁶² Donald MacIntosh, Hart Cantelon and Lisa McDermott, ‘The IOC and South Africa: A Lesson in Transnational Relations’ (1993) 28 *International Review for the Sociology of Sport* 373.

⁸⁶³ Shayne P. Quick, “‘Black Knight Checks White King’ the Conflict between Avery Brundage and the African Nations Over South African Membership in the IOC’ (1990) 21 *Sport History Review* <<https://journals.humankinetics.com/view/journals/shr/21/2/article-p20.xml>> accessed 4 October 2022.

against the South African National Olympic Committee (SANOC) that violated the Olympic Charter by practising racial discrimination. However, although no action was taken against South Africa, the all-white South African team was ousted from the Olympics just before the 1964 Summer Games in Tokyo.⁸⁶⁴

In December 1966, 32 African nations banded together and created what would be called the Supreme Council for Sport in Africa (SCSA) with the commitment to end racial discrimination in South Africa. The following year, SCSA was formally recognized by the Organization for African Unity (OAU). Here, we can see again the importance of regional organisations in facilitating and maintaining the momentum of non-recognition campaigns. In 1968, the Olympic invitation to the South African team was withdrawn (with an IOC voting record of 46 to 14). And in 1970, the IOC voted 35 to 28 (with three abstentions) to strip South Africa of its IOC membership.⁸⁶⁵

Although it was not the end of the story, we can safely affirm the full participation of the IOC in the non-recognition practice against the apartheid regime. With the success of this initiative, the African states' effort finally gained traction in other campaigns to expel the South African federations from international sports governing bodies, including rugby, men's cricket, netball, football, basketball, cycling and swimming.⁸⁶⁶ These independent campaigns raised even more international awareness of apartheid. It made the injustice of apartheid not only a matter for the political consideration of governments but also a daily topic of discussion among the public.

The first United Nations activity directed toward establishing a cultural boycott of South Africa was Resolution 2396, which the General Assembly adopted on December 2, 1968. The resolution requested "All states and organisations to suspend cultural, educational, sporting, and other exchanges with the racist regime and with other organisations or institutions in South Africa which practice apartheid."⁸⁶⁷ And Resolution 3324 of 1974 found the General Assembly requesting "all governments to prohibit all cultural, educational, scientific, sporting and other contacts with the racist regime. . ."⁸⁶⁸

Sports boycotts were intensified and soon became almost mandatory in 1977 with the International Declaration against Apartheid in Sports.⁸⁶⁹ Three years later, the UNGA mandated cultural and academic boycotts and created other programmes to 'eradicate' the Apartheid

⁸⁶⁴ Michael Janofsky and Special To the New York Times, 'OLYMPICS; I.O.C. AMPLIFIES ITS STAND ON APARTHEID' *The New York Times* (22 June 1988) <<https://www.nytimes.com/1988/06/22/sports/olympics-ioc-amplifies-its-stand-on-apartheid.html>> accessed 4 October 2022.

⁸⁶⁵ Richard E Lapchick, 'The Olympic Movement and Racism: An Analysis in Historical Perspective' (1970) 17 *Africa Today* 14.

⁸⁶⁶ MacLean (n 792); Malcolm MacLean, 'Revisiting (and Revising?) Sports Boycotts: From Rugby against South Africa to Soccer in Israel' (2014) 31 *The International Journal of the History of Sport* 1832.

⁸⁶⁷ UNGA, 'Res 2396 on 'the Policies of Apartheid of the Government of South Africa UN Docs A/RES/2396(XXIII)' <<https://digitallibrary.un.org/record/202567>> accessed 11 February 2024., para 12.

⁸⁶⁸ UN General Assembly (29th UNGA, 'Res 3324 on "Situation in South Africa" UN Docs A/RES/3324(XXIX)' <<https://digitallibrary.un.org/record/640879>> accessed 11 February 2024.

⁸⁶⁹ UNGA Res 32/105[M] (20 December 1977) 'International Declaration against Apartheid in Sports' UN Doc A/RES/32/105[M].

regime.⁸⁷⁰ By the end of the 1980s, South Africa was banned from almost every major world sports federation.

In retrospect, there are many reasons to list sports boycotts as one of the symbolic foundations of non-recognition campaigns against apartheid South Africa. At the time, with the diplomatic isolation and international pressure of the South African government, white residents and white politicians of the country saw international sports tours and matches as the focal point of their cultural identities. To them, triumph in sports matches demonstrated in some way the symbolic power of white South Africa.⁸⁷¹

This argument is in line with the findings of many studies. For instance, McLean observes that sports like rugby were “vital markers of national dynamism and power and essential to the integrity of Afrikaner masculinity as the epitome of national vigour.”⁸⁷² Similarly, Rob Nixon notes that sporting internationals served as occasions for “national legitimization and self-scrutiny.”⁸⁷³ Triumphant performance of the national team serves as a relief for the national anxiety about birthright and the nation’s prospects and future in the international area. Therefore, sports boycotts became essential: apartheid could not be opposed while at the same time the self-esteem of white South Africans was being nurtured, and their sensation of being a global force and their visibility on the world stage remained undiminished.

Having arisen as a humane and sympathetic reaction of various communities around the world against apartheid, the dynamics between grassroots activism, transnational organisations, national governments and the United Nations turned sports boycotts into a proper quasi-legal response to the unlawful situations of apartheid in South Africa. As we can see in future cases, sports boycotts have officially become a political/legal tool in the non-recognition arsenal due to their symbolic, low-cost, and psychologically effective nature.

Academic and cultural boycotts were much more complex topics. In sport, we can see a clear connection between a South African presence in international sports arenas, apartheid policies (the prohibition of non-white athletes and discrimination against mixed sports) and the white supremacy identity of the Afrikaners. But with academia and culture, what exactly was the connection? And would a blanket ban against scholars who just happen to be white South Africans really contribute anything to the just cause of the non-recognition of apartheid? These questions have been raised frequently by international scholars.

For example, Phillip Tobias lists several forms of academic boycott that were being carried out, including the ban on South African scholars from participation in congresses abroad, meetings, and symposiums and also a ban on entry to a country for academic purposes. Sometimes, universities would debar persons from South Africa from visiting their specific

⁸⁷⁰ UNGA Res 32/206[E] (16 December 1980) ‘Cultural, academic and other boycotts of South Africa’ UN Doc A/RES/35/206[E].

⁸⁷¹ ‘British Citizens Protest Apartheid South African Sports Tours (Stop the Seventy Tour), 1969-1970 | Global Nonviolent Action Database’ <<https://nvdatabase.swarthmore.edu/content/british-citizens-protest-apartheid-south-african-sports-tours-stop-seventy-tour-1969-1970>> accessed 4 October 2022.

⁸⁷² MacLean (n 792).

⁸⁷³ Rob Nixon, ‘Apartheid on the Run: The South African Sports Boycott’ [1992] *Transition* 68.

laboratories or departments.⁸⁷⁴ Tobias mentioned a case in the Netherlands where the government advised all universities to “minimise contact with South Africa and South African scholars.” Therefore, even though a white South African doctoral student was admitted to a fellowship in the field of biochemistry, several other departments “denied him access” to their facilities. Tobias argued that the exclusion of scholars simply because they happen to be white South African-born basically infringes on their right to freedom of access to knowledge, freedom of movement, and many other fundamental rights that have nothing to do with apartheid. Tobias, therefore, suggested a system of selective boycotts where international bodies, including the African National Congress Committee or the Anti-Apartheid Movement in London, could theoretically identify an individual’s political standpoint and recommend a personal boycott. Still, Tobias turns readers’ attention to other US and European scholars who were sympathisers of apartheid. These groups freely entered, participated, and promulgated their views without any repercussions because of their “outsider” nationality status.

Authors such as Jonathan Hyslop, Salim Vally and Shireen Hassim also find Tobias’s concerns justified.⁸⁷⁵ The authors mention the case of sociologist Eddie Webster, who played a crucial role in the development of South African trade unionism and who was arrested and charged for his activism inside the country. When Webster arrived in the United Kingdom to speak at several British university campuses during the 1980s and 1990s, he was picketed by the local anti-apartheid movement for breaking the boycott. On the other hand, authors, including Solomon Benatar (a Professor in Medicine, University of Cape Town), raised concern about the effect of these academic boycotts on medical education, health care, scientific endeavour, and the spirit of international collaboration.⁸⁷⁶

Overall, we must expect some hiccups, inconsistency and contradictions in the practice of boycotts since they have been carried out and maintained in a very decentralised manner. Nevertheless, academic boycotts against apartheid became a codified practice with UNGA Resolution 35/206 (1980),⁸⁷⁷ which at the time looked increasingly like a law to many inter-governmental organisations and national governments. In this resolution, the UNGA :

“1. Requests all States to take steps to prevent all cultural, academic, sports and other exchanges with South Africa:

2. Also requests States which have not yet done so:

(a) To abrogate and cancel all cultural agreements and similar arrangements entered into between their governments and the racist régime of South Africa:

⁸⁷⁴ Phillip V Tobias, ‘Thoughts on Academic Boycotts’ (1988) 26 *Minerva* 575.

⁸⁷⁵ Jonathan Hyslop, Salim Vally and Shireen Hassim, ‘The South African Boycott Experience’ (2006) 92 *Academe* 59.

⁸⁷⁶ Benatar, Solomon. "An Alternative to Academic Boycott." *Nature* 343 (February 1990): 505-6.

⁸⁷⁷ UNGA, ‘Res 35/206[E]’ “Cultural, Academic and Other Boycotts of South Africa” UN Docs.A/RES/35/206[E]’ (n 828).

(b) To cease any cultural and academic collaboration with South Africa, including the exchange of scientists, students and academic personalities, as well as cooperation in research programmes:

(c) To prevent any promotion of tourism to South Africa:

(d) To terminate visa-free entry privileges to South African nationals.

(e) To prohibit emigration to South Africa:

3. To appeal to writers, artists, musicians and other personalities to boycott South Africa;

4. To urge all academic and cultural institutions to terminate all links with South Africa.

5. To encourage anti-apartheid and solidarity movements in their campaigns for cultural, academic and sports boycotts of South Africa;

6. To request the Special Committee against Apartheid to promote such boycotts against South Africa.”

According to the UNGA, therefore, the stubbornness of the apartheid regime and the continuation of internal repression against the black population make the total isolation of South Africa from every aspect of international life justifiable. I acknowledge the fact that it was challenging to differentiate the political and legal aspects of UNGA’s resolutions concerning the issue of academic and cultural boycotts. People often see the international struggle against apartheid as a struggle of moral codes and ethical principles, not of legal concerns.⁸⁷⁸ And it was even more challenging for observers to distinguish between actors who chose to boycott South Africa academically because they believed in the legal principles set out by UNGA and those who acted out of simple solidarity with the South African Black community.

However, it is clear that the authoritative endorsement of UNGA’s resolutions from 1980 concerning this tactic was the main reason for the surge of cultural and academic boycotts in the two subsequent decades. These resolutions provided guidance to national governments and gave the legal and moral justification for the implementation of boycotts. Hundred of universities in South Africa and thousands of the country’s scholars faced academic boycotts in one form to another. These could include rejection of manuscripts, denial of participation in conferences outside South Africa, refusal of international scholars to visit South Africa, or refusal to collaborate with South African scholars.⁸⁷⁹ Although the weight of academic boycotts did not fall equally, since the social science and humanities universities might take the boycotts more seriously than their natural science counterparts, the fact that major educational partners

⁸⁷⁸ Benatar (n 285).

⁸⁷⁹ Lorraine J. Haricombe, ‘The Effect of an Academic Boycott on Academics in South Africa’ niversity of Illinois at Urbana-Champaign <<https://www.proquest.com/openview/3644227df777d3d58522f35db568447a/1?pq-origsite=gscholar&cbl=18750&diss=y>> accessed 5 October 2022.

of South Africa, including the Netherlands, the United Kingdom and the United States,⁸⁸⁰ all took the position of recognising the unlawfulness of apartheid emphasises the universal role of the United Nations organs in communicating and coordinating proper understanding and responses to an internationally unlawful situation. Without the mandatory and comprehensive non-recognition system against South Africa in place, it is unlikely that national academic institutions would have been able find a common voice in this political issue.

UNGA-sponsored cultural boycotts, as we briefly mentioned, followed the same development as academic and sports boycotts. The most famous cases that resurrected and renewed the international cultural boycott of South Africa were the tours of two world-famous Americans: Millie Jackson and Frank Sinatra. In both cases (1980 and 1981, respectively), MDALI (Music, Drama and Literature Institute - an arts and culture organisation associated with the Black Consciousness Movement) met and asked the singers to cancel their tours. The justification put forward by the organisation was to support the United Nations-sanctioned cultural boycotts.⁸⁸¹ Again, we can see that UNGA's resolutions continued to provide authority, legal justification, and moral support for non-state actors in their struggle against apartheid. Although MDALI was unsuccessful in convincing the singers, a rising number of American artists who did not follow Sinatra's and Jackson's example not only rejuvenated the movement of anti-apartheid activists in the United States to enforce the cultural boycotts but also motivated the UN Committee Against Apartheid to monitor and intensify their efforts within the United Nations.

The international campaign against the apartheid regime in South Africa constitutes to this day the most enduring, comprehensive, determined and authoritative non-recognition practice. Even more interestingly, the practice opposes a non-conventional unlawful situation - a grave violation of human rights. With over 600 UNGA resolutions and decisions, over 50 UNSC resolutions and decisions, two major ICJ advisory opinions and many other forms of international communication, the principle of non-recognition has been explicitly recorded, discussed and endorsed in all of them. The practice once again normalises the legal position that a situation that is illegal cannot remain without consequence in international law and therefore strengthens our thesis that non-recognition of unlawful situations is an established component of customary international law.

⁸⁸⁰ See more from Otto Terblanche, 'Die Nederlandse Akademiese Boikot Teen Suid-Afrika: 'n Ontleding: The Dutch Academic Boycott against South Africa: An Analysis.' (2016) 56 *Tydskrif vir Geesteswetenskappe* 1113. And Lorraine Haricombe and F. W. Lancaster, *Out in the Cold: Academic Boycotts & the Isolation of South Africa* (Michigan: University of Michigan 1995).

⁸⁸¹ Beaubien (n 285).

4.E. Non-recognition concerning Russia's invasion of Ukraine (2014 – Now)

1. The legal clarity of Ukraine's situation

A. Territorial issues

Prior to Russia's unexpected invasion and annexation of Crimea, the status of every inch of Ukrainian territory had not been challenged or doubted by any of the stakeholders involved (including Russia and Belarus), or by the international community during its entire existence. In fact, Ukraine was one of the most stable republics, territorially and ethnically, after the fall of the Soviet Union.

Ukraine was an official member of the United Nations as early as 1945, under the name of the Ukrainian Soviet Socialist Republic. However, the birth of contemporary independent Ukraine was commenced with a "civilised divorce" between the most significant members of the Soviet Union: Ukraine, Belarus, and Russia.⁸⁸² In 1922, a treaty between Russia, Ukraine, Belarus and Transcaucasia (modern Georgia, Armenia and Azerbaijan) marked the foundation of the Union of Soviet Socialist Republics (USSR); sixty-nine years later, in the winter of 1991, three leaders of abovementioned republics happily signed a historic document announcing the parting of their ways. On 25 December, President Gorbachev resigned, and the USSR was no more.⁸⁸³

For our further discussion, it should also be noted that the Ukrainian representative – President Leonid Kravchuk – did not come to this negotiation table on December 7 without popular approval. From December 1, 1991, Ukrainians of all ethnic backgrounds were asked to decide their fate. The Ukrainian leadership was very optimistic, but the results were mind-boggling for even the most optimistic advocates of Ukrainian independence: The turnout was 84 per cent, and voters supporting independence accounted for 90% of the votes.⁸⁸⁴

For each region, the numbers are still considered impressive until this day, although, of course, they reflected the political divisions of the country, which continue to this day. In Western Ukraine, the voting ratio was a remarkable 99 per cent in favour. The centre, south, and even the east were not far behind. In central Ukraine, 95 per cent voted for independence. In Odesa, to the south, it was 85 per cent, and the Donetsk region in the east recorded a striking 83 per cent. Even in Crimea, more than half of the voters supported independence, with 57 per cent in Sevastopol and 54 per cent in the peninsula as a whole.

While we can identify some of the contemporary political divisions in the all-Ukrainian referendum of 1991, we can also see a country that was tolerant and reasonable when it came to peacefully resolving the questions of independence and unification between different

⁸⁸² Paul J D'Anieri, *Ukraine and Russia: From Civilized Divorce to Uncivil War* (Cambridge University Press 2019).

⁸⁸³ 'How Three Men Signed the USSR's Death Warrant' *BBC News* (24 December 2016) <<https://www.bbc.com/news/magazine-38416657>> accessed 4 September 2022.

⁸⁸⁴ Plokhyy Serhii, *The Gates of Europe: A History of Ukraine* (Basic Books 2015), 320 – 325

political regions. Overall, Ukraine's official statehood was blessed with both external legality and internal legitimacy.

The inviolable status of Ukraine as a sovereign state and respect for its existing borders and territorial integrity was also reaffirmed in the Budapest Memorandum of 1994.⁸⁸⁵ As the result of protracted behind-the-scenes negotiations aimed at managing the consequences of the collapse of the Soviet Union. The Budapest Memorandum on Security Assurances was signed by the British Prime Minister, the Presidents of Russia, the President of Ukraine, and the United States. This important document was also accompanied by the unilateral declaration of France and China. In short, it received endorsement and assurance from all P5 members of the Security Council.

Concerning its content, the Memorandum confirmed commitments to respect Ukraine's independence, sovereignty, and existing borders (emphasis added); to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and from any use of weapons against Ukraine; and to refrain from economic coercion designed to subordinate the exercise by Ukraine of the rights inherent in its sovereignty.⁸⁸⁶ In exchange, Ukraine would transfer the Soviet-made nuclear weapons on its soil to Russia, hand over or destroy the associated delivery systems and infrastructure, and accede to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as a non-nuclear-weapon State (NNWS). The term "memorandum" could be confusing with regard to the legality of the assurance. However, the fact that the document was very carefully worded and supported by all permanent members of UNSC shows that the Budapest Memorandum was more than a 'pro forma' declaration intended to pacify the Ukrainians.⁸⁸⁷

More importantly, the Budapest Memorandum is an ultimate acknowledgment to the world, including Russia, of the existing borders and the territorial integrity of Ukraine. This territory includes Crimea, the coal-rich Donbas, and all of East Ukraine. If we understand this historical development and context, we realise how deluded and dangerous was President Putin's insistence that "Crimea is our common historical legacy and a very important factor in regional stability. And this strategic territory should be part of a strong and stable sovereignty, which today can only be Russian".⁸⁸⁸

B. Human rights and humanitarian conditions in Ukraine

Now that we have established the crystal-clear status of all Ukrainian territories, we should note that facing large-scale humanitarian crises, the international community has resorted to

⁸⁸⁵ Please see more detailed analysis and historical discourses from YURI KOSTENKO, *Ukraine's Nuclear Disarmament: A History*. (Svitlana Krasynska ed, Harvard University Press 2020).

⁸⁸⁶ Please see Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (5 December 1994) UNTS 3007.

⁸⁸⁷ DAVID S YOST, 'The Budapest Memorandum and Russia's Intervention in Ukraine' (2015) 91 *International Affairs* (Royal Institute of International Affairs 1944-) 505.

⁸⁸⁸ President of Russia, 'Address by President of the Russian Federation' (*Government of Russia*) <<http://en.kremlin.ru/events/president/news/20603>> accessed 4 September 2022., paragraph 26.

certain remedies in trying to reconcile the principle of territorial integrity and the humanitarian crisis.

The UN era did see the necessity of this “exemption” (this term is only used here for interpretative purposes), as in Bangladesh, where political conflicts led to the forgotten genocide committed by the Pakistan government,⁸⁸⁹ and in Kosovo, where war crimes and crimes against humanity were tolerated and even directed by the Serbian government.⁸⁹⁰ In both of these cases, in view of the gravely inhumane and institutionalised practices against ethnic minorities, the international community agreed to validate several legal innovations to ensure international peace and to limit future human rights violations. But apart from some of these cases, the practices of the UN and the international community have never strayed from their assertion of the territorial integrity principle. More importantly, both actors that had to employ armed intervention in these situation - India and NATO, respectively - had no territorial incentives in the conflicts.

In their war against Ukraine, however, the Russians frequently use the rhetoric of “rescuing” those of Russian ethnicity, who are allegedly in peril in Ukraine to justify their deadly armed aggression and their aim of forceful annexation. For instance, in the meeting between Russia’s head of state, Vladimir Putin, and the United Nations chief António Guterres, Putin asserted that the case of Kosovo provides “legal precedent” for Russia’s actions in Crimea, Donbas, and the two puppet republics in East Ukraine.⁸⁹¹ He was probably trying to suggest that the human rights conditions in these areas triggers the idea of “remedial secession”.⁸⁹² However, Putin brushed aside further discussion when Guterres rightly pointed out that UN bodies never officially recognised Kosovo (although of course, the scholarly community has since offered better arguments than those of Guterres).

Similarly, as the International Court of Justice observes, Putin, Russian state organs, and senior representatives of the Russian Federation have repeatedly referred in official statements to the commission of acts of genocide by Ukraine in the Luhansk and Donetsk regions. There are even ongoing criminal proceedings against high-ranking Ukrainian officials regarding the alleged commission of acts of genocide against the Russian-speaking population living in the above-mentioned regions “in violation of the 1948 Convention on the Prevention and

⁸⁸⁹ Please see the excellent works such as ‘Bargaining Away Justice: India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide on JSTOR’ <https://www-jstor-org.ezproxy.library.uvic.ca/stable/24916751#metadata_info_tab_contents> accessed 4 September 2022; Gary J Bass, ‘Bargaining Away Justice: India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide’ (2016) 41 *International Security* 140.

⁸⁹⁰ The differences between Kosovo and Crimea has been analysed very skilfully by international scholars, such as this work of Bering: Juergen Bering, ‘The Prohibition on Annexation: Lessons from Crimea’ (2017) 49 *New York University Journal of International Law & Politics* 747.

⁸⁹¹ Dave Lawler, ‘Putin Defends Ukraine Invasion in Meeting with UN Chief’ (*Axios*, 26 April 2022) <<https://www.axios.com/2022/04/26/guterres-meet-putin-russia-invasion-ukraine>> accessed 4 September 2022.

⁸⁹² This concept has been studied extensively by international lawyers. For instance, we can look at Jure Vidmar, ‘Remedial Secession in International Law: Theory and (Lack of) Practice’ (2010) 6 *St Antony’s International Review* 37.; or

Duncan French, *Statehood and Self-Determination : Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013).

Punishment of the Crime of Genocide”, instituted by the Investigative Committee of the Russian Federation - an official State organ.⁸⁹³ In an address made on February 21, 2022, Putin also described the situation in Donbas as a “horror and genocide, which almost 4 million people are facing”.

This genocide rhetoric, however, never resonates with any actual evidence, international organisation, or independent report.⁸⁹⁴ It is not even in line with Russia’s own former statements. For example, in the 2012 – 2013 Universal Periodic Review cycle (“UPR”) for Ukraine, one year before the Russian government claimed that “the very existence of the people of Russian origin” was threatened in Ukraine, these words are to be found in their UPR comments to the government of Ukraine:

“to welcome the progress made in reforming legislation, the judiciary, law enforcement and the penitentiary system, as well as the work done to combat all forms of intolerance, xenophobia and racial discrimination.

[...]

The Russian Federation noted the improvement in conditions of detention centres.”⁸⁹⁵

Until the end of 2013, the most problematic racial issues concerned the Crimea Tatar communities in Ukraine, as reflected in Ukraine’s Sixth Periodic Report under the International Covenant on Economic, Social, and Cultural Rights.⁸⁹⁶ As we mentioned above, if the human rights problem in Crimea or any territory Russia has claimed had been so severe and unresolvable as to justify secession, then the situation would have necessarily affected a large part of the population and lasted for a considerable amount of time, with repeated failed attempts to address the situation. Yet, authoritative assessments and investigations of the situation have never found any systemic threats against Russian-speaking populations.

In April 2014, after visiting areas in Ukraine, including Crimea, the High Commissioner for Human Rights (OHCHR) concluded that the alleged violations of the rights of ethnic Russians seemed to be “neither widespread nor systemic”.⁸⁹⁷ And in 2021, after six years on the ground monitoring the human rights conditions of civilians in the contested areas (especially East Ukraine, as Russia did not allow access to Crimea), the OHCHR found that more human rights

⁸⁹³ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Order of Provisional Measures) [2022] ICJ, paragraph 35, 36, and 37.

⁸⁹⁴ Thomas D Grant, ‘Annexation of Crimea’ (2015) 109 *The American Journal of International Law* 68.

⁸⁹⁵ Human Rights Council (HRC), Report of the Working Group on the Universal Periodic Review, Ukraine, para. 46, UN Doc. A/HRC/22/7 (Dec. 20, 2012)

⁸⁹⁶ UN Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights: Consideration of the Sixth Periodic Reports of States Parties Under Articles 16 and 17 of the Covenant, Ukraine, paras. 393–410, UN Doc. E/C.12/UKR6 (Dec. 27, 2012 & Apr. 1, 2014)

⁸⁹⁷ OHCHR, Report on the Human Rights Situation in Ukraine, para. 73 (Apr. 15, 2014) in Report of the Office of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine, UN Doc A/HRC/27/75 (Sept. 19, 2014)

violations had been committed by the secessionist forces than by the Ukrainian government, including forced recruitment, denial of freedom of movement, arbitrary detention and ill-treatment.⁸⁹⁸ Civilian deaths have also been carefully recorded and have shown a downward trend, thanks to serious ceasefire efforts. This is clear and authoritative evidence against Russia's disinformation campaign.

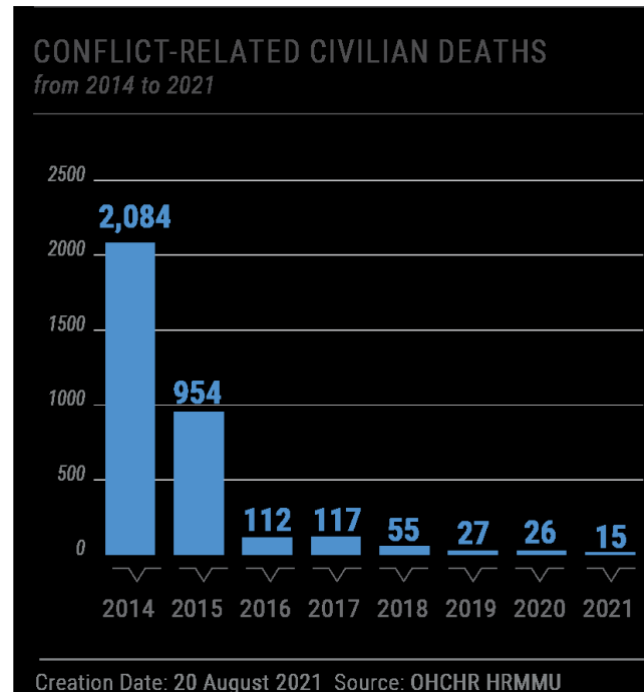


Image 4.E. OHCHR's report of conflict-related civilian deaths in Eastern Ukraine (2014-2021)

In 2016, the International Criminal Court, although disappointingly refusing to initiate the criminal case against Russia and secessionist factions, also asserted that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation, in which the Russian Federation was the perpetrator by deploying members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government.⁸⁹⁹ The ICC also detailed violations by both sides of the conflict, most notably abductions and detention without due process.

Overall, it has never been recorded by any independent investigation or authoritative international agency that there has been a systemic or institutionalised oppression or grave human rights violations perpetrated by the Ukrainian government against the Russian-speaking groups that would be equivalent in seriousness to what the international community witnessed

⁸⁹⁸ OHCHR, Report on The Human Rights Situation in Ukraine, 1 February to 31 July 2021 (21 September 2021) <<https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-february-31-july-2021>> accessed 04 September 2022.

⁸⁹⁹ Report on Preliminary Examination Activities, International Criminal Court (2016) < <https://www.icc-cpi.int/news/report-preliminary-examination-activities-2016>> accessed 04 September 2022.

in Kosovo or Bangladesh. It is safe to argue that until this point, there is no human rights problem intentionally and systematically designed to affect the ethnic Russian population.⁹⁰⁰

2. Against Russia's invasions: is it a pinnacle of non-recognition practice?

The analyses above allow us to reach two conclusions. Firstly, Ukrainian territories are never debatable. The sheer number of international documents that have mentioned and recognised the modern border of Ukrainian territories is more than enough to establish its status of non-degradability. Secondly, the Russian invasion of Ukraine is unjustifiable in the language of international law, with no legal "grey zone" such as we have seen in severe humanitarian crises or the uncertainties of the decolonisation process.

We can then safely proceed with the assurance that the Ukraine case can serve as a textbook case for the practice of non-recognition: a territorial situation created by a universally condemned invasion. Could international responses in this incident constitute a pinnacle case-study for non-recognition and establish the principle of non-recognition further into the realm of customary international law?

A. *The United Nations Security Council*

It is safe to start with the United Nations Security Council. The resolutions and other decisions of the UNSC carry legal value and political implications as stated in the UN Charter. Also, permanent members of the UNSC are generally capable of the employment of economic and military power to uphold and carry out certain values and norms that ordinary members of the international community cannot (for example, military intervention by invitation,⁹⁰¹ space exploration and non-proliferation of nuclear weapons). On the other hand, non-permanent members elected to the Council usually possess, to a reasonable degree, international prestige, credibility and a law-abiding attitude. Therefore, the practice of the UNSC as a whole and the legal opinions of its members are among the most potent examples to consider when looking for elements of custom.

Facing one of the most dangerous threats to international peace and security since the Cold War, the reaction of the members of the UNSC seems intelligible and predictable. During the Crimea crisis, there were 15 meetings of the UNSC in 2014 alone, all debating the Crimea situation and how to deal with the crisis. Analysing them might give us confirmation of states' practice and *opinio juris* at the very start of this conflict. Fortunately, the records of these meetings expose Russia's rhetoric, confirm the stance of the majority of the Security Council

⁹⁰⁰ Certain individual complaints from members of the ethnic Russian (local) majority in Crimea were largely addressed under existing international law procedures. We can see information from cases such as: *Bulgakov v. Ukraine*, Communication No. 1803/2008, UN Doc. CCPR/C/106/D/1803/2008 (May 23, 2008); *Bulgakov v. Ukraine*, App. No. 59894/00, paras. 53–54 (Eur. Ct. H.R. Sept. 11, 2007).

These complaints were minor in comparison to the systemic collapse of public order and gross human rights violations that had presaged unilateral secession in Kosovo and Bangladesh.

⁹⁰¹ Quoc Tan Trung Nguyen, 'Rethinking the Legality of Intervention by Invitation: Toward Neutrality' (2019) 24 *Journal of Conflict and Security Law* 201.

and therefore contribute to the consolidation of my hypothesis on the importance of non-recognition.

The first UNSC meetings discussing the issue of Crimea were on March 1, 2014, and March 3, 2014, at the request of the Ukrainian representative.⁹⁰² In the meetings, the Ukrainian government highlighted the fact that Russian troops, with no military markings, often called the “little green men” by the media,⁹⁰³ surrounded and overwhelmed the state security forces in Crimea with the clear intention of occupying Ukrainian territories. The Ukrainian representative stated that his government had tried to reach out and discuss the issue bilaterally via Article 7 of the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 1997.⁹⁰⁴ Ukraine’s Parliament also tried to contact the President of the Russian Federation to urge compliance with the terms of the agreement on its Black Sea fleet’s temporary presence in Ukraine’s territory and called for the withdrawal of Russian troops to their bases.⁹⁰⁵ All of these requests were rejected by Russia.

Russia’s responses to this information before the Council were evasive and unsatisfactory. After condemning the internal political process of Ukraine, which ousted President Yanukovich, Russia insisted that the President of the Russian Federation had not decided on the use of armed forces on the territory of Ukraine and denied their involvement. But only two days later, in the UNSC meeting of March 3, the Russians announced that they had been obliged to take military action to defend their citizens and compatriots and to ensure human rights. And within two weeks, Russian troops and armoured vehicles were in complete control of Crimea. On March 16, there was a referendum sponsored by Russia to validate the Crimean lawmakers’ decision to join the Russian Federation.⁹⁰⁶

Dealing with this hypocritical and deceptive interpretation of events by Russia, members of the Security Council maintained a uniform and consistent attitude to deal with the situation under the guidance of the UN Charter.

During the meetings on March 1 and 3, the US and the UK representatives gave their assertive legal opinion, which reminded the Russian representative of the UN Charter, the sovereignty and the territorial integrity principles that protected all UN member States, and also of the treaty obligations of Russia according to the 1994 Budapest Memorandum in which the US, the UK and Russia agreed to ensure the security of Ukraine and its inviolable territory in exchange for its denuclearisation. Then before the so-called “referendum” in Crimea, almost 40 UN member

⁹⁰² ‘Security Council, 69th Year, 7124th Meeting Record’ <<https://digitallibrary.un.org/record/766546>> accessed 4 September 2022.

⁹⁰³ ““Little Green Men” or “Russian Invaders”?” *BBC News* (11 March 2014) <<https://www.bbc.com/news/world-europe-26532154>> accessed 4 September 2022.

⁹⁰⁴ Page 3 of the March 01 meeting .

⁹⁰⁵ ‘Security Council, 69th Year, 7125th Meeting Record’ (3 March 2014) <<https://digitallibrary.un.org/record/766547>> accessed 4 September 2022.

⁹⁰⁶ ‘UN Security Council Action on Crimea Referendum Blocked’ (*UN News*, 15 March 2014) <<https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>> accessed 4 September 2022.

States took legal action co-sponsoring a draft UNSC resolution, and a meeting was held on March, 15 2014 with the participation of many stakeholders in the conflict.

Firstly, the draft resolution shows in unambiguous language the non-recognition of an unlawful situation.⁹⁰⁷ The first item of the draft resolution, naturally, reasserted the commitment of the UNSC and the UN in general to the “sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognised borders”. The fifth item of the resolution declared that the referendum held by Russia in Crimea) had “no validity” and could not be a basis for “any alteration of the status of Crimea”. More importantly, it calls upon all States, international organisations and specialised agencies “not to recognise any alteration of the status of Crimea” and “to refrain from any action or dealing that might be interpreted as recognising any such altered status.” Though vetoed by Russia for obvious reasons, we need to acknowledge the fact that forty States unanimously produced the draft and explicitly referred to the non-recognition principle. The draft was also approved by a convincing majority of 13 members of the UNSC, with Russia voting against it and only China abstaining, clearly demonstrating Russia's complete isolation on the matter.

During the UNSC meeting of March 15, 2014, all parties (except Russia) again expressed their opinion supporting the fundamental principles enshrined in the UN Charter. The neutral African States, such as Nigeria and Rwanda, emphasised the importance of the UN Charter and how “law-abiding nations” can peacefully settle their territorial differences. Mrs Ogwu of Nigeria pointed out that Nigeria's voluntary submission concerning their territorial dispute with Rwanda “should serve as a beacon and an inspiration” for this conflict. She affirmed that the unilateral declaration and the referendum accompanied by forceful succession that would alter the configuration of the State is something “better imagined” but should not be described or justified by the language of international law. While Luxemburg’s representative closed the opinion section of this meeting by concluding that “The international community can in no way recognise its outcome [Crimean referendum]”.⁹⁰⁸ From that point on, UNSC members have continued to be very conscious of the illegality of the Russian occupation of Crimea.

One year later, on December 11, 2015, a UNSC meeting was held to consider the political and humanitarian situations in Eastern Ukraine and Crimea. Although the focus of the meeting was the Special Monitoring Mission concerning the Ukraine situation, many members (including China) highlighted the separatist’s tendency to block UN humanitarian aid and the human rights abuses in those non-government-controlled territories perpetrated by the separatists. These abuses included killings, torture and ill-treatment, illegal detention, disappearance of pro-Ukrainian activists and forced labour).⁹⁰⁹ In addition, members of the UNSC continued to uphold its legal stance with regard to the occupation of Crimea and affirmed that the same fate

⁹⁰⁷ Albania and others, ‘Draft Resolution on the Situation in Ukraine UN Docs S/2014/189’ <<https://digitallibrary.un.org/record/767020>> accessed 29 September 2022.

⁹⁰⁸ ‘Security Council, 69th Year, 7138th Meeting’ <<https://digitallibrary.un.org/record/767358>> accessed 5 September 2022., 10

⁹⁰⁹ ‘Security Council, 70th Year, 7576th Meeting’ <<https://digitallibrary.un.org/record/814361>> accessed 5 September 2022.

would) not befall Eastern Ukraine, regardless of how international agreements, such as Minsk, were implemented.

Lithuania, for example, called the Crimean parliament's succession vote and popular referendum a “gunpoint referendum”. The Lithuanian representative also stressed that Crimea was still an integral part of Ukraine and that it was occupied in breach of fundamental principles of international law, the Charter of the United Nations and the Budapest Memorandum.⁹¹⁰ France reminded the Council's members that France did not “recognise its [Crimea's] illegal annexation” while also highlighting the ongoing human rights issues of the peninsula.⁹¹¹ The United Kingdom, in a similar manner, noted that “Crimea remains illegally annexed.” The representative from Malaysia, although not directly mentioning the non-recognition principle regarding the annexation of Crimea, referred to the pro-Russian Crimean government as the “de facto government”, implying rejection of the lawful status of that government. The Malaysian representative also recalled the General Assembly resolution 68/262 on the status of the Autonomous Republic of Crimea, in which it was stated that Crimea belongs to Ukraine.

After over twenty UNSC meetings concerning Ukraine's political and humanitarian conditions (that also directly mentioned Crimea) from 2014 to 2021, all of them re-established, again and again, the unlawful situation of Crimea and how the Council members will not accept this as legal. In one of the later UNSC meetings on Crimea (held on July 16, 2019),⁹¹² the USA again reasserted that “Russia must end its occupation of Ukraine's Crimean Peninsula” and its aggression in Eastern Ukraine before they could reconsider any international sanctions that were in place. France repeated its usual commitment that the French government “does not and will not recognise the illegal annexation of Crimea”. The United Kingdom officially and repeatedly referred to Crimea as “illegally annexed Crimea” territory. Poland referred to many “illegal elections” in non-government-controlled areas of Ukraine during 2018. Poland also criticised Russia for the official recognition of documents used by the “illegal military bodies” in certain parts of Donbas. South Africa also called Crimea “occupied Crimea” in a speech at the meeting.

It is indisputably established that non-recognition practice is a part of how the UNSC and a convincing majority of its members deal with the unlawful situations created by Russia's invasion and occupation of Ukraine. The fact that all of these members consistently used terms such as “illegal”, “occupied”, “de facto”, and “not recognised” to describe Crimea serves to illustrate the member states' solid legal beliefs with regard to the situation and by what means it could be lawfully resolved.

The consistency continues to challenge Russia's total invasion of Ukraine under the banner of a “military operation” in 2022. UNSC's first legal response to the total invasion was draft

⁹¹⁰ Ibid., 10

⁹¹¹ Ibid., 12

⁹¹² ‘Security Council, 74th Year, 8575th Meeting’ <<https://digitallibrary.un.org/record/3812821>> accessed 5 September 2022.

Resolution S/2022/155, which was sponsored by over 30 states, inside and outside the Council.⁹¹³ Here, there are two direct connections with the principle of non-recognition. First is the reaffirmation by members of the “territorial integrity of Ukraine within its internationally recognised borders” (Item number 1). The second was the non-recognition of the Russian Federation’s unilateral declaration concerning areas of the Donetsk and Luhansk regions of Ukraine (Item number 5).

The members deplored Russia’s decision to annex Donetsk and Luhansk as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations. The draft, submitted by Albania and the United States, garnered overwhelming support from eleven members of the UNSC, while China, India, and the United Arab Emirates abstained.⁹¹⁴ The practice of the UNSC members was again confirmed.

But equally important, in the 8979th meeting on February 25, 2022, members of the UNSC had the chance to voice their legal opinion on the Russian invasion.⁹¹⁵ All member States (apart from the aggressor) agreed that any territorial fait accompli brought forward by unlawful conduct would not be recognised. Specifically, representatives of Albania, the United States, Ghana, Norway, and Mexico asserted the inviolable nature of Ukraine’s “internationally recognised borders” and showed their most robust commitment to these borders.

On the other hand, the minority of countries that abstained nevertheless reiterated their support for the legal principle of the territorial integrity of Ukraine, although some statements shied away from explaining why they abstained from a conclusive vote. The United Arab Emirates affirmed their devotion to the principle of “territorial integrity, sovereignty and independence of all Member States of the United Nations.” India reminded member states of the UN’s “need to honour those principles [territorial integrity] in finding a constructive way forward”. The representative also expressed concerns “about the welfare and security of the Indian community, including a large number of Indian students in Ukraine.” But then India proceeded to reach a peculiar decision: it abstained from voting without providing any justification.

The Chinese representative expressed a belief in “the sovereignty and territorial integrity of all States” and affirmed that the “purposes and principles of the Charter of the United Nations should be jointly upheld”. There was a certain hypocrisy in the representative’s comments, as he asserted the value of national sovereignty but demanded that Ukraine must be a “bridge” for Russia’s security concerns. This was China’s counterargument to the language of the resolution and the reason why it abstained. But what if the Ukrainian people and their working institutions did not wish to be a “bridge” for Russia? Does such a wish entitle Russia to resort to using force against the population? There would be debates between realists, who placed an emphasis

⁹¹³ Draft resolution UNSC (25 February 2022), UN Doc S/2022/155 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/271/07/PDF/N2227107.pdf?OpenElement>> accessed 05 September 2022.

⁹¹⁴ ‘Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto | UN Press’ <<https://press.un.org/en/2022/sc14808.doc.htm>> accessed 5 September 2022.

⁹¹⁵ ‘Security Council, 77th Year, 8979th Meeting’ <<https://digitallibrary.un.org/record/3963720>> accessed 5 September 2022.

on post-Soviet Eastern European geopolitics, and idealists who believed that a resolution of the question is to be founded on morality and a just international order.

However, one positive outcome of the resolution was that none of the abstaining countries tried to support or hint at their intentions to endorse any situation created by Russia's invasion in 2022. The fact that the principle of territorial integrity and the sovereignty of Ukraine has been constantly respected by all members of the UNSC provides a secure assumption on both the practice and the *opinio juris* of UNSC members on the status of Ukraine, and not only about the general principles of international law, such as territorial integrity.

Unfortunately, for the entirety of 2022, the UNSC could not produce any resolution or decision that was appropriate to the severity of the armed aggression against Ukraine. The only document that to some extent reflected the view of the UNSC as a whole is the statement made by the President on behalf of the Security Council at the 9028th meeting on 06 May 2022.⁹¹⁶ The statement included four items (1) it expressed "deep concern regarding the maintenance of peace and security of Ukraine", (2) it reminded "all Member States [of their obligations] to settle their international disputes by peaceful means" (3) it supported "the search for a peaceful solution", and (4) established the duty of the Secretary-General "to brief the Security Council in due course". The statement is underwhelming, with no real legal implications, but that was understandable, since the UNSC knew that only a mild version could be passed, due to Russia's veto power.

But this did not prevent the majority of the UNSC members express their legal beliefs, supporting the principle of non-recognition and generally condemning the Russian invasion of Ukraine during the official meetings between the members. From January to July of 2022, in a total of 34 meetings the UNSC meetings covered many topics relating to the war in Ukraine, including gender equality, gender-based violence during conflicts, children's rights,⁹¹⁷ disinformation in international relations,⁹¹⁸ the use of biological weapons,⁹¹⁹ humanitarian campaigns and international arbitration as an option of resolving the armed conflicts.⁹²⁰ In every one of them, UNSC members asserted their commitment to the "recognised international

⁹¹⁶ Statements made by the President of the Security Council (06 May 2022), UN Doc S/PRST/2022/3, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/341/96/PDF/N2234196.pdf?OpenElement>> accessed 05 September 2022

⁹¹⁷ 'Security Council, 77th Year, 9096th Meeting' <<https://digitallibrary.un.org/record/3981813>> accessed 5 September 2022.

⁹¹⁸ 'Ukraine: Briefing on "Incitement to Violence Leading to Atrocity Crimes": What's In Blue : Security Council Report' <<https://www.securitycouncilreport.org/whatsinblue/2022/06/ukraine-briefing-on-incitement-to-violence-leading-to-atrocity-crimes.php>> accessed 5 September 2022.

And

'Security Council, 77th Year, 9069th Meeting' <<https://digitallibrary.un.org/record/3978663>> accessed 5 September 2022.

⁹¹⁹ 'Security Council, 77th Year, 9033rd Meeting' <<https://digitallibrary.un.org/record/3973727>> accessed 5 September 2022.

⁹²⁰ 'Security Council, 77th Year, 9052nd Meeting' <<https://digitallibrary.un.org/record/3976593>> accessed 5 September 2022.

borders” of Ukraine and to demand that Russia respect the sovereignty, territorial integrity, and the inviolable unity of Ukraine as a whole.

On March 23, 2022, the UNSC held a meeting to consider the draft resolution submitted by Russia on the “humanitarian concerns” in Ukraine.⁹²¹ The draft was so unilaterally and heavily modified from the suggestions of France and Mexico that both of those countries withdrew their support for it. France accused Russia of “obstruction” of their efforts in good faith to obtain the immediate cessation of hostilities. There was condemnation by Mexico of Russia’s behaviour as “a contradiction of the willingness to engage in dialogue” in which Mexico had led the process from the start. The draft resolution was overwhelmingly rejected, with only two votes in favour (from Russia and China).

Not only that, members of the UNSC also pointed out that this draft resolution purposefully left out important clauses that they perceived as imperative in a UNSC resolution dealing with this war. According to the members, legal confirmations must include the “territorial integrity and political independence of States” (from Mexico, Norway), a recognition of the “unprovoked”, “unjustified”, and “illegal” war and occupation for which Russia is solely responsible (from the USA and Albania). Again, in this meeting, we can see that almost every country that expressed its opinions insisted on the absolute necessity to include proper recognition of Ukraine’s territorial integrity and, therefore, the non-recognition of any territorial gains that Russia made.

In another UNSC discussion on June 02, 2022, concerning international accountability and the role of international tribunals, such as the International Criminal Court and the International Court of Justice, in addressing human rights, humanitarian and other gross violations of international law (in situations like those of Syria, Myanmar, the Palestinian territories and Ukraine) Member States of the UNSC continued to confirm their stance on the non-recognition of Russia gains in Ukrainian territories.⁹²²

For example, the Malaysian representative mentioned General Assembly Resolution 76/262, which institutionalises a standing mandate for the General Assembly to hold a debate whenever a veto is cast in the Security Council. The representative challenged the neutral status of a country inside the UNSC that is a direct party to the conflict (implying that the party was Russia). He insisted that the UNSC must reject any compromises concerning the use of force against the territorial integrity or political independence of any State, regardless of the motive. Romania described Russia’s invasion of Ukraine as “a brutal, unjustified and unprovoked illegal military aggression”. The representative continued to use the language of non-recognition, encouraged the international community to “stand firm against Russia’s aggression”, and called for a “unified and consistent response of the international community” that would serve as proof of the international rule of law against illegal acts in the future. Joining Romania were Liechtenstein, Luxembourg and the Czech Republic, who also

⁹²¹ ‘Security Council, 77th Year, 9002nd Meeting’ <<https://digitallibrary.un.org/record/3966844>> accessed 5 September 2022.

⁹²² ‘Security Council, 77th Year, 9052nd Meeting’ (n 924).

reaffirmed their support for the International Court of Justice’s provisional order requesting the cessation and withdrawal of Russian troops from all Ukrainian territories.

The UNSC meetings also addressed other topics, such as hate speech, cyber-attack, incitation of violence and racism. On June 21, 2022, member States and also independent actors from civil society, condemned the genocidal tendencies and the hate speeches of Russian politicians.⁹²³ Mr Cohen (Chief Executive Officer of Jigsaw and Adjunct Senior Fellow at the Council on Foreign Relations) stressed the problematic cyberattacks and disinformation campaigns related to Russian “occupied Ukrainian territories” in Crimea, Donbas and Eastern Ukraine. He noted the danger of contested lands and stressed his view that the international community must also focus on the “frozen” digital frontier in these occupied territories.

The French representative emphasised that Bucha and Mariupol were “occupied” and criticised atrocities committed by the Russian-occupying forces. Ireland, Ghana, and Lithuania drew attention to the inviolable territorial integrity of Ukraine and the ways in which pro-Kremlin disinformation and propaganda campaigns threatened this foundational principle of the UN Charter. They suggested that this information war must be put to an end and that any territorial gains by Russia and their manipulative tactics should be rejected. The above information should be read mindful with the fact that every single year from 2014 to 2022, five new non-permanent members of the UNSC were elected by the UNGA.⁹²⁴

Table 4.E. UNSC members rotation (2014 – 2022)

Year	UNSC’s Permanent Five	UNSC’s non-permanent members
2014	The United States of America, United Kingdom, France, Russia, China.	Chad, Nigeria, Rwanda, Jordan, South Korea, Chile, Argentina, Australia, Luxembourg, and Lithuania.
2015		Chad, Nigeria, Angola, Jordan, Malaysia, Chile, Venezuela, New Zealand, Spain, and Lithuania.
2016		Egypt, Senegal, Angola, Japan, Malaysia, Uruguay, Venezuela, New Zealand, Spain, and Ukraine.

⁹²³ ‘Security Council, 77th Year, 9069th Meeting’ (n 922).

⁹²⁴ Data from ‘Countries Elected Members | United Nations Security Council’ <<https://www.un.org/securitycouncil/content/countries-elected-members>> accessed 5 September 2022.

2017		Egypt, Senegal, Ethiopia, Japan, Kazakhstan, Uruguay, Bolivia, Italia, Sweden, and Ukraine.
2018		Equatorial Guinea, Ivory Coast, Ethiopia, Kuwait, Kazakhstan, Peru, Bolivia, Netherland, Sweden, and Poland.
2019		Equatorial Guinea, Ivory Coast, South Africa, Kuwait, Indonesia, Peru, Dominican Republic, Belgium, Germany, and Poland.
2020		Niger, Tunisia, South Africa, Vietnam, Indonesia, Saint Vincent and the Grenadines, Dominican Republic, Belgium, Germany, Estonia.
2021		Niger, Tunisia, Kenya, Vietnam, India, Saint Vincent and the Grenadines, Mexico, Ireland, Norway, and Estonia.
2022		Gabon, Ghana, Kenya, United Arab Emirates, India, Brazil, Mexico, Ireland, Norway, Albania.

With constant changes in membership structure, diverse geographical backgrounds and many conflicting political interests, the number of States rejecting Russia's occupation of Ukrainian territories and its so-called tactics of “referendum” and “self-determination” to establish title over the occupied population has maintained an overwhelming majority. Although countries such as China, India, and the United Arab Emirates sometimes argued on behalf of Russia, even they have never suggested that the situations that Russia created in Ukraine are legally justified. This confirms a very stable and predictable outlook of the UNSC as a whole.

The practice (through voting and drafting resolutions) and the *opinio juris* (through discussion and official correspondence between countries' representatives) of the UNSC members all directly mention the principle of non-recognition. Terms and phrases such as “not to recognise”, “reject”, “has no validity”, “cannot alter (the lawful territorial status)”, “to refrain from any action or dealing that might be interpreted as recognising any such” (unlawful situation) ... have been presented decisively by a convincing majority of the UNSC.

Sometimes, however, UNSC members use more general terms and phrases to depict Russia's conduct, the status of Ukrainian territories and the call for an international response. They

comprise “illegal (acts, annexation or situations)”, “occupied Ukrainian territories” – “occupied Crimea”, “Ukraine's internationally recognised borders”, “de facto”, and even more classic expressions such as “territorial integrity, sovereignty and independence of all Member States of the United Nations”. But no matter how the language is used, it is beyond dispute that, within the UNSC, the practice and the opinion juris of all member States concerning non-recognition of the unlawful situations that Russia has created in the Ukrainian territories has been established.

B. United Nations General Assembly: The “Comfort-zone” of Non-recognition

The UNSC has authoritative power to identify, arbitrate, settle and enforce resolutions concerning violations of international law, but it is always vulnerable to politics in the form of the P5 veto power. However, the UNGA and its majority voting system allow certain beliefs of the international community to be reflected and materialised into influential interpretations of international law and order. I am, of course, aware that these “voting records” and “public statements” are not enough to prove that non-recognition possesses international legality. Two prominent ICJ judges, Stephen M. Schwebel and Hersch Lauterpacht, have warned us of the problem with state expression as evidence for international law-making. Schwebel points out that the members of the General Assembly typically vote in response to political rather than legal considerations.⁹²⁵ They vote as they do because to vote differently would make them unpopular: they do not conceive of themselves as creating or changing international law. And Lauterpacht reminds us that an announcement of a declaration of non-recognition, however important, does not qualify as an immediate acknowledgement of the “principle” of non-recognition.⁹²⁶

I do not intend to argue otherwise. However, while I agree that we should not rush to the conclusion on the legality of non-recognition practice after one or two international resolutions and opinions of States, the fact that non-recognition has been consistently mentioned and resorted to as the only legitimate way to deal with Russia's illegal conducts by the UNSC members presupposes the possibility of this practice having normative power in international relations and international law. If the members of the UNGA could show a similar commitment to the principle during almost a decade of the Ukraine crisis, then the assumption of its legality would be further fortified.

From 2014 until 2022, UNGA has produced 13 resolutions that directly mentioned or dealt with the unlawful situations in Crimea.⁹²⁷ All of them have an element of non-recognition practice, either directly or indirectly. One resolution that we already covered in the above section is the UNGA's resolution 68/262, announcing that the referendums in the Autonomous Republic of Crimea and the city of Sevastopol during March 2014 have no validity and will

⁹²⁵ Schwebel (n 330).

⁹²⁶ Lauterpacht (n 217).

⁹²⁷ A brief search of UNGA's resolutions which include the term “Crimea” in its title:

<https://digitallibrary.un.org/search?ln=en&p=Crimea&f=&rm=&ln=en&sf=&so=d&rg=50&c=Resource%20Type&c=UN%20Bodies&c=&of=hb&fti=0&fct_2=General%20Assembly&fct_1=Resolutions%20and%20Decisions&fti=0&fct_2=General%20Assembly> accessed 05 September 2022.

not be recognised. It also called upon Member States “not to recognize any alteration” of the status of the Autonomous Republic of Crimea and the city of Sevastopol, and “to refrain from any action or dealing that might be interpreted as recognizing any such altered status.”⁹²⁸ This resolution however, has been questioned by some scholars because of its indecisive majority. 100 members voted to support the resolution. And while only 11 members opposed the resolution, 58 decided to abstain from the voting. Does this mean that practice of States is still divided considering non-recognition practice in the case of Ukraine?

Analysis of the legal opinion of these states in the UNGA meeting that abstained confirms that they still indeed supported the idea of non-recognition of any territorial changes against international law.⁹²⁹ Almost all of the representatives who had the time to explain their abstention - Saint Vincent and the Grenadines, Uruguay, El Salvador, Argentina, Egypt, Vietnam, Ecuador, Algeria and Botswana, all insisted on strict adherence to the principle of territorial integrity, political independence and sovereignty, as enshrined in the Charter of the United Nations. Ms King of Saint Vincent and the Grenadines asserted that self-determination and “non-implanted populations” are “sacrosanct” principles of the international legal system in defence of the Ukrainian people. The reference to “implanted populations” is, is extremely interesting insofar as she was using the term with reference to the situation in Crimea.

Uruguay’s representative also went far as to revisit Kosovo’s unilateral declaration of independence and the referendum of the people of the Falkland Islands (Malvinas), saying that their governments rejected both of these referendums. Similarly, they were committed to reject any declaration or referendum concerning the situation in the Crimean peninsula that is not in line with the constitution of the Ukrainian State. Uruguay would not recognise any alteration of the internationally recognized borders of Ukraine that contravened the principle of the territorial integrity of States, as in the UN Charter. Algeria reminded the Assembly that their abstention does not mean that they refused any of the principles mentioned in the resolution.

The only state that presented its ideas but showed sympathy for the referendum was Kazakhstan. In their speech, Kazakhstan suggested that “*faits accomplis* and current realities’ should be considered in “today’s circumstances”. Kazakhstan’s use of the concept of “effectiveness” was proposed as an appropriate response to the situation in Crimea was the only example of its kind during the entire meeting of 191 States.⁹³⁰

We can safely assert that although the abstention rate looks high, it did not come from the state’s belief that the situation in Crimea was justified, valid, legal, or legitimate - any positive term that we could imagine in the vocabulary of international law. Their problems usually derive from the selective pattern of powerful States in dealing with these incidents (e.g., Egypt), and from the changing opinions of the “legal defenders” and “dissenters” in every situation due

⁹²⁸ UNGA Res 68/262 (no 33)

⁹²⁹ UNGA meeting record, 68th session: 80th plenary meeting (27 March 2014) UN Doc A/68/PV.80 <<https://digitallibrary.un.org/record/768577?ln=en>> accessed 05 September 2022.

⁹³⁰ Please revisit the work of Professor Milano and his argument supporting effectiveness: Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Brill Nijhoff 2005).

to political bias (e.g., Saint Vincent and the Grenadines), or “political elements” that should not be in the resolution (the concerns of Uruguay). While I recognise these concerns about the weaknesses and the selective bias of the United Nations mechanism in general, the argument can also be made that a general sense of belief in the principle of non-recognition is always there, even though member States might question the UNGA resolutions, in this case, Resolution 68/262. Yet, Resolution 68/262 was just the start of a much more meticulous and detailed series of resolutions that repeatedly outline the legal framework for an understanding of the Crimea crisis, showing a consistent legal *opinio juris* of States concerning the situation and, therefore, bringing to life the principle of non-recognition.

In Resolution 76/70 of UNGA (2021) dealing with “the militarisation of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov”, members of UNGA endorsed a draft that repeatedly spells out the entire validation of the principle of non-recognition and explains the position with regard to Russia’s conduct in Ukraine, both in the preamble and the actual items of the resolution.⁹³¹ For example, within the preamble, the resolution firstly reasserts the position set out in Resolution 3314 (XXIX) of 14 December 1974 that no territorial acquisition or unique advantage resulting from aggression is or shall be recognised as lawful. The first mention of non-recognition in the resolution, it seems, was to remind States and their readers that non-recognition is an established normative practice that has been observed and respected for a very long time - at least in the realm of territorial integrity endangered by aggression. And then, the “ritual” of supporting non-recognition continues in every preamble sentence. With the next sentence, the resolution condemns the ongoing “occupation” of the territory of Ukraine, including the Autonomous Republic of Crimea and the city of Sevastopol. At the end of the sentence, we see again the phrase “reaffirming the non-recognition of its annexation”. Another sentence explains why Russia’s “temporary occupation” is against its own general commitment, such as that made in Ukraine’s Accession to the Treaty on the Non- Proliferation of Nuclear Weapons Budapest Memorandum of 5 December 1994; and the principle of territorial integrity or political independence enshrined in the UN Charter. This sentence also concludes with a reminder about the sovereign status of Ukraine’s existing borders. The resolution goes on to reject the Russian Federation’s justification for its violations of the arms control regime in the area. Finally, we have another confirmation of the principle of non-recognition where member States contend that the seizure of Crimea by force is illegal and a violation of international law, and that those territories must be immediately returned. In short, non-recognition of Russia’s conduct and the situations that it created are present predominantly in the preamble of Resolution 76/70, and for a very good reason.

The actual items of the resolution also do not stray from this theme. The first item calls the Russian Federation the “occupying Power” and requests unconditional withdrawal of its military from Crimea and any other occupied territory. The second item is another manifestation of the principle of non-recognition that calls upon the Member States and relevant international organisations to “refrain from any action or dealing with the Russian

⁹³¹ UNGA Res 76/70 (16 December 2021) UN Doc A/RES/76/70 <<https://digitallibrary.un.org/record/3952032?ln=en>> accessed 05 September 2022.

Federation regarding Crimea that is inconsistent” with the aim of ending the Russian occupation. The final item - the 24th - also “calls upon all Member States, as well as international organisations and specialised agencies, to refrain from any visits to Crimea that are not agreed with Ukraine”. Overall, Resolution 76/70 seems like an embodiment of the non-recognition principle. Unfortunately, the voting record showed us another even worse division between the Member States, and the motion was passed by only 62 votes to 22, with 55 abstentions.⁹³² Although the resolution's language is strong and consistent, and the objection votes were minimal, how can we say that the non-recognition of an unlawful situation as a principle received strong support from a majority of the UNGA when 55 states abstained from voting?

On a more positive side, it can be said that none of the states that voted challenged the principle of non-recognition. Indonesia and the Republic of Korea, for example, professed their opposition to the annexation and illegal territorial occupation of any sovereign country or territory. UNGA Resolution 76/70 (2021) is a good sample of how most members of the UNGA frame their legal language and tone to describe the situation in Crimea as unlawful and how they would not recognise such a situation.

Resolution 71/205 (of 19 December 2016),⁹³³ Resolution 73/263 (of 22 December 2018),⁹³⁴ Resolution 75/192 (2020),⁹³⁵ Resolutions 73/194 (of 17 December 2018), Resolution 74/17 (of 9 December 2019) and Resolution 75/29 (of 7 December 2020) on the problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov, to name a few of the issues, prove that the majority of UNGA’s view on the duty of non recognising Russian illegal conduct in Crimea has been held closely, establishing a coherent outlook of this organ about the situation.

In 2022, the UNGA issued four resolutions and met several times to discuss Russia’s invasion of Ukraine. Faced with the increasingly dangerous behaviour of the Kremlin and its blatant violations of the basic principles of international law, the voting grew from a simple majority in previous resolutions (over 60 supporting States), to a new, more decisive majority. Resolution ES - 11/1 and Resolution ES - 11/2 were both passed, with 141 voting in favour, respectively. Although a clear unlawful situation has yet to be identified in this invasion (as the areas controlled by the occupier and by Ukrainian liberation forces are constantly changing), the reaffirmation of Ukraine’s “sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters” appeared in both emergency resolutions.

⁹³² General Assembly Seventy-sixth session, 48th plenary meeting record (9 December 2021) UN Doc A/76/PV.48

⁹³³ UNGA Res 71/205 (01 February 2017) UN Doc A/RES/71/205 <<https://digitallibrary.un.org/record/858544?ln=en>> accessed 05 September 2022.

⁹³⁴ UNGA Res 73/263 (21 January 2019) UN Doc A/RES/73/262 <<https://digitallibrary.un.org/record/1661351?ln=en>> accessed 05 September 2022.

⁹³⁵ UNGA 75/192 (28 December 2020) UN Doc A/RES/75/192 <<https://digitallibrary.un.org/record/3896447?ln=en>> access 05 September 2022.

During September 2022, when Russia held the illegal referendums to annex four provinces of Ukraine, all classic elements of non-recognition were mentioned in Resolution ES-11/4:

“ [...]

2. Condemns the organisation by the Russian Federation of illegal so-called referendums in regions within the internationally recognised borders of Ukraine and the attempted illegal annexation of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine, following the organisation of the above-mentioned referendums;

3. Declares that the unlawful actions of the Russian Federation with regard to the illegal so-called referendums held from 23 to 27, September 2022 in parts of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine that, in part, are or have been under the temporary military control of the Russian Federation, and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine;

4. Calls upon all States, international organisations and United Nations specialised agencies not to recognise any alteration by the Russian Federation of the status of any or all of the Donetsk, Kherson, Luhansk or Zaporizhzhia regions of Ukraine, and to refrain from any action or dealing that might be interpreted as recognising any such altered status...”⁹³⁶

Resolution ES-11/4 is the prime example of how the UNGA is essential to the centralised ascertainment procedure without the UNSC. The Assembly not only establishes the illegality of the conduct (item 2), spells out the consequences of the situation (item 3), and calls for the practice of non-recognition (item 4). For nearly a decade within the diversity environment of the UNGA, the decision to maintain the narrative of non-recognition was upheld. With renewed and more substantial support from Member States, the authors consider these resolutions as prime examples for advancing the duty of non-recognition as an indispensable part of international law.

C. European Union’s and United Nations’ Agents, Entities and Bodies

Now with convincing proof that non-recognition has been employed in the practice and thinking of the UNSC, the UNGA, and the majority of their members, as the guiding principle to address the unlawful situations created by Russia in the Ukrainian crisis, we continue to examine the language that other entities of the United Nations have used over time. This will again allow us to consider whether or not the concept of non-recognition of unlawful situations is respected in dealing with Crimea, Sevastopol, Eastern Ukraine and then the whole war against Ukraine. If the attitude and the positions of the UNSC and the UNGA members are

⁹³⁶ UNGA, ‘Res ES-11/4 on “Territorial Integrity of Ukraine : Defending the Principles of the Charter of the United Nations” UN Docs A/RES/ES-11/4’ <<https://digitallibrary.un.org/record/3990673>> accessed 8 November 2022.

transferred to the everyday activities of other UN entities, we can make a safe assumption that non-recognition does have legal significance to the world's organs.

However, before examining the practices of these agencies, it is vital to briefly understand how the European Union (EU), as a regional organisation, contributes to the crystallisation of non-recognition in this crisis. Although neither Ukraine nor Russia are members of the European Union and other related institutions, the history and the geographical proximity of both countries inherently connect to the development of the EU's politics and economies.⁹³⁷ Recently, before the Russian aggression against the territorial integrity of Ukraine (particularly in 2014), the EU was one of the most vocal supporters of Russia's application to the World Trade Organisation, alongside extensive connections in finance, energy, agriculture, commerce and even defence sectors.⁹³⁸ If we could find the EU's commitment and coordination with the United Nations in the practice of non-recognition against Russia despite the disruption against their vital interests, such finding will allow us to continue to press on the relevance of affected states theory in the identification of non-recognition as customary law. And such commitment is precisely what we discover.

Besides EU's members being the sponsors of most UNSC and UNGA's draft resolutions on the Russian invasion of Ukraine,⁹³⁹ EU itself continues to keep in place a coherent and strict system of non-recognition (plus economic sanctions) to maintain its legal position that the territorial situations created by Russian aggression shall neither implicitly nor explicitly be recognised. For instance, we could mention the consistent practice of referring to Russia's conduct as "aggression" and Crimea and annexed other territories as the "Russian-occupied territories of Ukraine".⁹⁴⁰ The communicative aspect of non-recognition is followed by restrictive measures such as (1) banning goods originating from areas of Ukraine that are illegally occupied and controlled by Russia (including Donetsk, Luhansk, Zaporizhia, Kherson, Crimea and Sevastopol);⁹⁴¹ (2) rejecting of Russian travel documents issued in, or to persons

⁹³⁷ Oliver Schmidtke and Serhy Yekelchuk, *Europe's Last Frontier?: Belarus, Moldova, and Ukraine between Russia and the European Union* (1st ed., Palgrave Macmillan 2008).

⁹³⁸ 'Russia | Fact Sheets on the European Union | European Parliament' (31 October 2023) <<https://www.europarl.europa.eu/factsheets/en/sheet/177/russia>> accessed 14 April 2024.

⁹³⁹ The draft UNGA Resolution ES-11/L1, for example, was sponsored by almost all EU members. UNGA, 'Draft Resolution on "Aggression against Ukraine"' UN Docs A/ES-11/L.1' <<https://digitallibrary.un.org/record/3958976>> accessed 14 April 2024.

⁹⁴⁰ See, for example, several resolutions of the European Parliament, including:

European Parliament, 'Situation at the Ukrainian Border and in Russian-Occupied Territories of Ukraine P9_TA(2021)0515, 2021/3010(RSP))' <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0515_EN.html> accessed 14 April 2024.

European Parliament, 'Invasion of Ukraine by Russia, P7_TA(2014)0248, 2014/2627(RSP)' <https://www.europarl.europa.eu/doceo/document/TA-7-2014-0248_EN.html> accessed 14 April 2024.

⁹⁴¹ Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol 2014 (OJ L).

Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas 2022 (OJ L).

resident in, Russian-occupied regions in Ukraine for obtaining a visa or crossing the borders of the Schengen area;⁹⁴² (3) sanctioning individuals that spread disinformation and fake news about the war and historical/legal origin of Ukraine and its territories...⁹⁴³ These measures are only a few of many that I find have a direct connection with the unlawful situations in the thirteen packages of sanctions that introduced by the EU to deal with Russia's illicit conduct.⁹⁴⁴

Within EU member states, the most significant law case that should be mentioned concerns Crimean artifacts loaned to the Allard Pierson Museum, an archaeological museum at the University of Amsterdam, before the Russian invasion and annexation of Crimea.⁹⁴⁵ The four Crimean museums, now controlled by the Russian government, argue that the original loan agreements were between them and the Dutch museum and that they are the owner of these artifacts. The Ukrainian government disagrees, citing the illegality of Russian occupation and the endangered identity of Ukraine. After almost a decade of legal battle, the Dutch Supreme Court sides with the Ukrainian government.⁹⁴⁶ The judgement refers to resolutions and other legislative documents of the EU, the UNGA, and also UNESCO to insist on the sovereign nature of the heritage ownership and the lack of institutional recognition of the Russian annexation of Crimea. The "EU layers" not only strengthen but also complement the UN agencies' practice of non-recognition.

The United Nations Human Rights Office of the High Commissioner (OHCHR) is arguably the most active UN agent that follows the Ukraine conflict with in-depth knowledge and extensive research into the situation. There is an entire archive on the development of the Ukraine situation and it is continuously updated.⁹⁴⁷ While I cannot present and discuss them all, a cut into this archive would be enough for us to explore how OHCHR maintains its stand concerning the *fait accompli* in Ukraine.

Read more from: Summary of EU Legislation, 'EU Restrictive Measures in View of Russia's Invasion of Ukraine | EUR-Lex' <<https://eur-lex.europa.eu/EN/legal-content/summary/eu-restrictive-measures-in-view-of-russia-s-invasion-of-ukraine.html>> accessed 14 April 2024.

⁹⁴² The Council of European Union, 'Council Adopts Decision Not to Accept Russian Documents Issued in Ukraine and Georgia' (European Union 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/08/council-adopts-decision-not-to-accept-russian-documents-issued-in-ukraine-and-georgia/>> accessed 14 April 2024.

⁹⁴³ The Council of European Union, 'EU Adopts Its Latest Package of Sanctions against Russia over the Illegal Annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson Regions' (6 October 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/10/06/eu-adopts-its-latest-package-of-sanctions-against-russia-over-the-illegal-annexation-of-ukraine-s-donetsk-luhansk-zaporizhzhia-and-kherson-regions/>> accessed 14 April 2024.

⁹⁴⁴ European Commission, 'Sanctions Adopted Following Russia's Military Aggression against Ukraine - European Commission' <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en> accessed 14 April 2024.

⁹⁴⁵ Smithsonian Magazine and Julia Binswanger, 'Hundreds of Crimean Treasures Return to Ukraine After Long Legal Battle' (*Smithsonian Magazine*) <<https://www.smithsonianmag.com/smart-news/hundreds-of-crimean-treasures-return-to-kyiv-after-long-legal-battle-180983328/>> accessed 14 April 2024.

⁹⁴⁶ Molly Quell, 'Dutch Supreme Court Orders Museum Artifacts Borrowed from Crimea Returned to Ukraine' *AP News* (9 June 2023) <<https://apnews.com/article/crimea-ukraine-russia-museum-artifacts-54b6463f9df7512dd407fa3941b9d773>> accessed 14 April 2024.

⁹⁴⁷ 'OHCHR | Ukraine' (*OHCHR*) <<https://www.ohchr.org/en/countries/ukraine>> accessed 5 September 2022.

The joint report of OHCHR and the UN Secretary-General on the human rights situation in the Autonomous Republic of Crimea and the city of Sevastopol on May 27, 2021 is exemplary.⁹⁴⁸ Its title, firstly, respects the fact that the autonomous republic and Sevastopol are Ukrainian. In the introduction, the two political entities are described as “occupied” by the Russian Federation, and references to Russia will include the term “occupying authorities”. Under UNGA resolution 75/192, the OHCHR contacted the Russian Federation to discuss arrangements for a mission to Crimea. However, Russia requested that such a visit be “organised in compliance with the rules regulating visits to the territory of the Russian Federation”, and consequently, the OHCHR refused to comply with this requirement.

Consequently, the organisation carried out their fieldwork and monitoring, conducted through the contact line between Ukraine and the Autonomous Republic of Crimea. The report shows a clear commitment of the OHCHR that their mission to Crimea should not be used to recognise that Crimea was a part of Russia. Throughout the document, the language chosen by the OHCHR and the Secretary-General is extremely careful and selective. For instance, the boundary between Crimea and inner Ukraine is called “the Administrative Boundary Line between Crimea and other parts of Ukraine” (page 10).

There is also a series of country biannual reports on the human rights situation in Ukraine that continue to follow non-recognition practice very closely, not only in Crimea but also in the Eastern Ukraine territories controlled by separatist armed groups.

In Ukraine’s irregular human rights update from August 1 to October 31, 2021 of the OHCHR, the Donetsk and Luhansk successionist territories are properly labelled “self-proclaimed”, while Crimea and Sevastopol are considered “occupied by the Russian Federation”.⁹⁴⁹ Through the update, we can see that any attempt to refer to these entities or its related conducts is put into quotation marks, with examples such as “republic”, “people’s republic”, “self-proclaimed republic”, “decrees” (on forced recruitment instrument). This gives a clear impression that these terms are made up and not endorsed by the OHCHR.

In another full report for the period of February 1 to July 31, 2021, the language used is mindful and deliberative.⁹⁵⁰ The Autonomous Republic of Crimea and the city of Sevastopol are confirmed again to be Ukrainian and only “occupied” by the Russian Federation. Maps and other diagrams utilised in this report clearly reflect the firm commitment of the agent to the territorial integrity of Ukraine and the non-recognition principle in relation to Russia’s conduct.

⁹⁴⁸ Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General on ‘Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine’ (27 May 2021) UN Doc A/HRC/47/58 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/113/64/PDF/G2111364.pdf?OpenElement>> accessed 05 September 2022.

⁹⁴⁹ OHCHR, ‘Update on the Human Rights Situation in Ukraine:1 August — 31 October 2021’ <<https://www.ohchr.org/sites/default/files/2021-11/HRMMU-Update-2021-11-01-EN.pdf>> accessed 05 September 2022.

⁹⁵⁰ OHCHR, ‘Report on the Human Rights Situation in Ukraine:1 February— 31 July 2021’ (23 September 2021) <<https://www.ohchr.org/sites/default/files/Documents/Countries/UA/32ndReportUkraine-en.pdf>> accessed 05 September 2022.

In the human rights report of the first half of 2022⁹⁵¹, although the focus is on compliance with international humanitarian law during international armed conflict and other human rights, specific reminders of non-recognition can be found. For instance, cities are still considered “Ukrainian” and only “controlled” by Russian armed forces and affiliated armed groups.⁹⁵² The Russian Federation’s temporary territorial gains after February 2022 are rightly called “its occupation of the territory of Ukraine”,⁹⁵³ and its role as an occupying Power pursuant to IHL is emphasised.

Another UN agency that has a symbolic role in rejecting unlawful situations in Ukraine is the Universal Postal Union (UPU). The UPU coordinates postal policies among Member States and the worldwide postal system. In July 2014, Ukraine sent a letter to UPU concerning issuing postage stamp series called “Russia. Regions. The Republic of Crimea” and “Russia. Regions. The City with Federal Status Sevastopol”.⁹⁵⁴ The State Enterprise of Post, Ukrposhta, cited the UNGA resolution 68/262, Article 8 of the Universal Postal Convention, and general principles of sovereignty, political independence, unity and territorial integrity protected for Ukraine. Ukrposhta then requested non-recognition of the stamp issues. In line with the UN General Assembly’s call on specialised agencies not to recognise an alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol, the UPU does not recognise the annexation of Crimea. European countries have mostly severed their postal relations with the occupied Crimea territory, with Deutsche Post leading the way.⁹⁵⁵ It is now tough to send international postage to Crimea, as most post offices worldwide reject “Crimea, Russia” as a mailing destination. However, we should also note that this is not a complete isolation of Crimea from the international postal system. “Post of Crimea” was created in 2014 and directed by the Kremlin.

After the Russian invasion of Ukraine, the Director General of the International Bureau of UPU issued a statement supporting Ukraine and expressed hopes for an immediate cessation of the hostilities.⁹⁵⁶ Besides the so-called “postal solidarity” programme, where Member States voluntarily provide certain incentives to send postage to Ukraine, no other action has been

⁹⁵¹ OHCHR, ‘Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation’ (29 June 2022) <<https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>> accessed 05 September 2022.

⁹⁵² Ibid., 6

⁹⁵³ Ibid., 46

⁹⁵⁴ Ukraine – Statement concerning postage stamp issues (28 July 2014) <<https://www.upu.int/UPU/media/upu/DL.PHIL/Circulaires/2014-136/English.pdf>> accessed 05 September 2022. as

⁹⁵⁵ GPIL, ‘Legal Consequences of Germany’s Non-Recognition of the Russian Annexation of Crimea’ (*GPIL - German Practice in International Law*, 27 August 2021) <<https://gpil.jura.uni-bonn.de/2021/08/legal-consequences-of-germanys-non-recognition-of-the-russian-annexation-of-crimea/>> accessed 5 September 2022.

⁹⁵⁶ ‘Statement by the Director General of the International Bureau of the UPU on the Conflict in Ukraine’ <<https://www.upu.int/en/News/2022/3/Statement-by-the-Director-General-of-the-International-Bureau-of-the-UPU-on-the-conflict-in-Ukraine>> accessed 5 September 2022.

taken.⁹⁵⁷ This is primarily because the armed conflict in Ukraine has not been settled. We can expect the UPU to step in and amend its services and recognition, just as in the case of Crimea.

Another UN-specialised agency that can participate in the practice of non-recognition of Russia's occupation of Crimea is the International Civil Aviation Organization (ICAO). The ICAO plays an important role in Russia's public image vis-a-vis Crimea and the Russian disinformation apparatus has tried to spread fake news, alleging that the ICAO had recognized Crimea as part of Russia.⁹⁵⁸ However, the ICAO subsequently affirmed that Crimean airspace is Ukrainian,⁹⁵⁹ and that no international flight could be registered directly to Crimea. In support of ICAO, Eurocontrol (the European Organization for the Safety of Air Navigation) has banned European airlines from flying to any airports in Crimea or passing through the region. Both ICAO and Eurocontrol will not recognise any unilateral declaration of air navigation service provision over any part of Ukrainian airspace other than from the Ukrainian authorities. After the Russian invasion in 2022, the ICAO Council issued a statement to show solidarity with the Ukrainian people. It directly aligned with the sentiments expressed in UNGA Resolution ES - 11/1 to Resolution ES - 11/4.⁹⁶⁰

Another target of the Russian disinformation campaign is the UN agency - the International Telecommunication Union (ITU). Generally, ITU plays a vital role in facilitating cooperation and standardisation of wireless/radio communications, internet access, transport protocols, voice and video compression and home networking. ITU's standards allow the communication system to work globally.

In 2018, Russian media cited Russian Communication Minister Nikolay Nikoiforov's assertion in official documents that the International Telecommunication Union had recognised Crimea as a territory in Russia's communications network.⁹⁶¹ This is, in fact, untrue. In the ITU operational bulletin of 2017, the organisation issued Russian area codes for the Republic of Crimea and the city of Sevastopol. However, they also specifically noted that: "Information published upon request of Russian Federation. This does not imply the expression of any opinion on the part of ITU or its secretariat on the status of these territories."⁹⁶² I believe that it

⁹⁵⁷ 'Postal Solidarity in Action' <<https://www.upu.int/en/Members-Centre/Postal-solidarity-in-action>> accessed 5 September 2022.

⁹⁵⁸ Alexei Lossan and RBTH, 'Updated: ICAO Calls Crimean Airspace as Ukrainian, Denies Reports' (*Russia Beyond*, 8 July 2014) <https://www.rbth.com/business/2014/07/07/icao_recognizes_crimean_airspace_as_russian_37997.html> accessed 5 September 2022.

⁹⁵⁹ 'Crimean Airspace Belongs to Ukraine, Aviation Group Says' *Washington Post* <<https://www.washingtonpost.com/news/checkpoint/wp/2014/07/08/crimean-airspace-belongs-to-ukraine-icao-says/>> accessed 5 September 2022.

⁹⁶⁰ 'ICAO Council Condemns Violation of Territorial Integrity and Airspace of Ukraine' <<https://www.icao.int/Newsroom/Pages/ICAO-Council-condemns-invasion-of-Ukraine.aspx>> accessed 5 September 2022.

⁹⁶¹ Vika Romanyuk, 'Fake: UN Recognizes Russian Telephone Code for Crimea' (*StopFake*, 19 March 2018) <<https://www.stopfake.org/en/fake-un-recognizes-russian-telephone-code-for-crimea/>> accessed 5 September 2022.

⁹⁶² ITU Operational Bulletin, No. 1127, 1.VII.2017 (16 June 2017) <https://www.itu.int/dms_pub/itu-t/opb/sp/T-SP-OB.1127-2017-OAS-PDF-E.pdf> accessed 05 September 2022.

would be legally better if ITU had refused to issue the area code altogether, but the disclaimer was enough for us to prove the practice of non-recognition on the part of the ITU. As early as 2014, after the forceful and illegal annexation of Crimea, the ITU had already held a plenary meeting for its members to express official opinions on the annexation.⁹⁶³ Needless to say, the minutes of the meeting showed overwhelming support for Ukraine and its commitment to UNGA Resolution 68/262 (2014). The ITU Secretary-General, in a separate statement during the meeting, confirmed that the ITU would follow the instruction of Resolution 68/262 (2014) “not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol” and “to refrain from any action or dealing that might be interpreted as recognising any such altered status”. ITU has acted in accordance with its statements and the requirements of the UNGA. The Autonomous Republic of Crimea and Sevastopol City are usually referred to in ITU documents as “temporarily occupied territories”.⁹⁶⁴

Finally, the role of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and its participation in the non-recognition campaign should not be overlooked. From 2014 onwards, UNESCO (via the Director-General or the Executive Board) has issued an annual update on the conditions of rights, culture and education in Crimea. And with these documents, Ukrainian sovereignty over Crimea, the city of Sevastopol and the other cultural heritage within these territories has been repeatedly affirmed.

For example, in the Decision adopted by the Member States at the 196th session of the UNESCO Executive Board on “Follow up of the Situation in the Autonomous Republic of Crimea (Ukraine) in 2015,”⁹⁶⁵ it was asserted that UNESCO actions would be guided by UNGA Resolution 68/262. Items 5, 6, 7 and 8 of the decision made it abundantly clear that Crimea and the city of Sevastopol remained under the sovereignty of Ukraine. The decision also invited other NGOs and international organisations, such as the OHCHR, the Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE), to monitor and discuss the human rights situations in the territories. This call was later followed up and implemented by Irina Bokova, at the time Director-General of UNESCO, in a separate address.⁹⁶⁶

In 2021, another complete “follow-up”, including the decisions and resolutions of UNESCO on Crimea, was issued.⁹⁶⁷ As with all previous documents, the Autonomous Republic of Crimea

⁹⁶³ ITU, Minutes of the Sixteenth Plenary Meeting (12 November 2022) <<https://www.itu.int/md/S14-PP-C-0174/en>> accessed 05 September 2022.

⁹⁶⁴ ITU / Telecommunications Development Bureau, ‘Country Brief on Ukraine Communications/Telecommunications’ (September 2015) <<https://www.itu.int/en/ITU-D/Regional-Presence/CIS/Documents/Ukraine.pdf>> accessed 05 September 2022.

⁹⁶⁵ UNESCO, ‘Decisions Adopted by the Executive Board at Its 196th Session, 196 EX/Decisions’ <<https://unesdoc.unesco.org/ark:/48223/pf0000232890?posInSet=2&queryId=44109e78-4e29-4486-b9b3-f9e51509a0eb>> accessed 5 September 2022.

⁹⁶⁶ ‘Address by Irina Bokova, Director-General of UNESCO, on the Occasion of the Information Meeting: Follow up of the Situation in the Autonomous Republic of Crimea (Ukraine); UNESCO, 2 June 2015 - UNESCO Digital Library’ <<https://unesdoc.unesco.org/ark:/48223/pf0000233227?posInSet=4&queryId=6f09c765-1a4c-42c8-9cbc-533e7cd941a0>> accessed 5 September 2022.

⁹⁶⁷ ‘Follow-up to Decisions and Resolutions Adopted by the Executive Board and the General Conference at Their Previous Sessions, Part I: Programme Issues, E. Follow-up of the Situation in the Autonomous Republic of Crimea (Ukraine) -’ <<https://unesdoc.unesco.org/ark:/48223/pf0000378910>> accessed 5 September 2022.

and the city of Sevastopol are properly considered Ukrainian and “temporarily occupied by the Russian Federation”. Recently, UNESCO initiated an official project to monitor heritage sites that were damaged or destroyed by the Russians after the invasion began.⁹⁶⁸ In the list, as expected, UNESCO asserted that Kharkiv, Zaporizhzhya, Donetsk and Luhansk were Ukrainian territories.

Other stakeholders, such as OHCHR, Amnesty International, and OSCE, confirmed their position that Crimea was illegally occupied and annexed. All authorities in these territories with Russian overseers are referred to as the “de facto authority” or the “de facto court”, which again confirms the rejection of the legitimacy and legality of those entities.

3. Conclusion

In view of all the information provided and analysed above, there is a compelling case that the principle of non-recognition has been upheld and monitored uniformly throughout all of the UN organs, which then confirm both the practice and *opinio juris* of States when it comes to non-recognition in the case of the Ukraine crisis.

Considering the UNSC, while this organ has been unable to offer any legally authoritative documents, which was to be expected due to Russia’s permanent seat, it has time and time again shown that the overwhelming majority of the UNSC rejects any legal consequences and refuses to accept Russia’s actions as *faits accomplis*. Examining the meeting records of the UNSC and bearing in mind the fact that there are five new members elected to the Council every year, it is clear that the entire international community has never supported Russia nor abandoned its position of not recognising unlawful situations in Ukraine. This amounts to an intense and persistent message from every corner of the world that the principle of non-recognition is the right and just response to unlawful situations created by acts contrary to international law.

The UNGA, without the restraint of the perpetrator's permanent seat, has been able to produce dozens of essential resolutions concerning Crimea, Sevastopol and Eastern Ukraine that have become the guiding legal framework for almost every international organisation around the world. From Resolution 68/262 of 2014 to Resolution ES - 11/1 and ES - 11/4, most members of the international community have been explicitly clear about the practice of non-recognition as the established conduct to deal with unlawful situations.

Finally, the guidelines set up by UNGA, although often labelled “non-authoritative” and “non-binding”, have been quickly followed by important UN agents, entities and bodies who govern many aspects of international life. Their consistent contribution over almost a decade to the practice of non-recognition of the situations in Ukraine is significant. Through them, the manifestation of non-recognition has gone beyond statements and expressions of solidarity and has been expressed in day-to-day administrative tasks. From travel, tourism and international flights to the management of cultural and environmental issues, the reproduction and rule

⁹⁶⁸ UNESCO, ‘Damaged Cultural Sites in Ukraine Verified by UNESCO’ <<https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>> accessed 31 May 2023.

maintenance in the case of Ukraine helps us to define clearly the values, goals and the role of non-recognition in international governance.

5. The Principle of Non-recognition of Unlawful Situations: An Established Custom?

The previous chapter includes eight controversial cases of international significance. It describes international processes and their variations in dealing with unlawful situations in international law. It also suggests that the alleged inconsistency of non-recognition practice is often misinterpreted with strong presumptions concerning the legality of each event. The collective voice of nation-states (which can reflect their *opinio juris*), when dealing with accusations of rule violation and unlawful situations, also confirms how conscious international society has been of the complexity of events and the possibility of contradictions and illegitimate behaviour.

Nevertheless, the case study chapter is still just an attempt to deconstruct non-recognition practices into categorisable and recognisable parts, with their differences and similarities. In this chapter, I would like to combine all of the information and knowledge from the case study chapter into a coherent and meaningful argument concerning the customary status of the principle of non-recognition. This chapter will also contest other challenges to the status of non-recognition.

5.1. Identifying the Main Challenges

Non-recognition is still in the twilight zone of academic research. Indeed, the scholarly “tolerance” of non-recognition has increased significantly during the five years in which I have been studying the topic (2020- 2024). Some authors have even adopted the view that non-recognition “is a part of general international law”, although this does not mean that the principle has received universal endorsement. Each of the previous case studies is basically a “miniature battleground” where I provide detailed information, address concerns and challenge the assumptions and arguments of other authors who do not envisage non-recognition as being a part of the legal arrangement of each case. Within its limited objective, each case study seems to accomplish its tasks.

However, it is apparent that these case studies have not yet been woven together into a systematic argumentation that can support the proposition that the principle of non-recognition as part of customary international law. Therefore, this chapter is primarily designed to prove that the duty of non-recognition and its manifestations fit with the traditional idea of custom, as explained by the work of the ILC and Micheal Wood on the formation, evidence and identification of CIL.⁹⁶⁹

To be considered anywhere near the “customary” level, non-recognition must be a general practice, proven by looking into diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference; conduct in connection with treaties; executive conduct. The practice must be reasonably widespread, representative, and consistent.

⁹⁶⁹ See more from the first report <https://digitallibrary.un.org/record/751888?ln=en> , to the fifth report and the final text adopted by UNGA <https://digitallibrary.un.org/record/1660343?ln=en>

In addition, non-recognition must be perceived as law, which could be proven by using public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; or conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.” All this information is available in the case study chapter and could be briefly referenced to connect the dots and prove the propositions contained in the thesis.

Yet, while trying to cover all the bases of traditional ways to identify CIL in the design of this chapter, the analyses will also directly respond to challenges to the nature of non-recognition and its possible legal status of custom. Overall, drawing the information of the previous chapters, mainly Chapter 2 and Chapter 3, I can identify three significant challenges to the further development of international law that have been put forward by scholars, judges and the international law literature.

(1) *Challenges to the consistency in “inputs and outcomes” of non-recognition*

The practice of non-recognition, if it happens, is in nature widespread and universal, as we see in most cases presented in this dissertation. Still, the accusation of inconsistency is one of the most apparent hindrances against the ascent of non-recognition to the status of customary international law. Understandably, if the non-recognition principle is applied in one case but not in another, then there is a clear selective political bias in its implementation, with unpredictable consequences. Associating non-recognition with the status of customary international law would then be a task fraught with difficulty.

However, I will argue that the observation paints non-recognition as a hit-or-miss principle, often wrongly focusing just on the “inputs” and “outputs” of non-recognition. Without full knowledge of the *decision-making processes*, we can misinterpret historical events. The dissertation proposes the analysis model, which studies the consistency of the “due process” of non-recognition, as will be explained shortly after.

(2) *Challenges to the consistency of the content of non-recognition*

As I have shown, the exact content of the non-recognition principle is constantly questioned by authors. Although international materials have not been very descriptive with regard to non-recognition, the rich and detailed cases at my disposal offer compelling evidence that the content of non-recognition has been well-recorded with a high degree of consensus among states and with some highly innovative approaches. More interestingly, it has been the nations of the Global South that have developed new shapes and forms of non-recognition.

(3) *Challenges to the understanding of the opinio juris of states in non-recognition*

The primary explanation for implementing non-recognition is that it is a state-centric activity. The state examines the situation. The state identifies the legality of conduct. The state then chooses its reaction and strategies of non-recognition. In this interpretation, the motives and intentions of the state are overstated and depicted as the most essential factor

of the duty of non-recognition. However, as pointed out in the theories and arguments of Chapter 3, one cannot argue that an obligatory norm is a legal rule while allowing a rule-bearer the complete freedom to interpret and implement it. That would be a recipe for disaster.

This dissertation argues that although state consent (and *opinio juris*) still play a primary role in non-recognition (and in international law), the case study chapter has shown that state consent has not played the role that scholars often assume it plays. The state-centric idea, in the case of the principle of non-recognition, can sometimes be misleading and illogical.

The aforementioned challenges will be addressed based on a thorough and interconnected examination of the studied cases, with additional information and arguments from cases not previously mentioned. Together, they harmonise and refine our approach to understanding the “general practice” and “*opinio juris*” of non-recognition.

5.2. Non-recognition as a Custom: Consistency in International “Due Process”

In this section, isolated incidents and conduct will be avoided, and the focus will be on the overall contexts and development and the long-term impacts of collective action in each case. In other words, even though it is true that the legal input and outcomes of the case studies are not always uniform, we need to find out whether the processes in place are comprehensible, with proper legal consideration and predictability, that is, qualities that closely resemble the concept of “due process”.⁹⁷⁰

I perform this task under the guidance of the international legal process theory in customary law identification. As mentioned in Chapters 2 and 3, international legal process theory allows users to move away from a static, positivist perception of international rules. Instead, international law should be understood as a world-constitutive process of authoritative decisions, designed to serve particular ends and values.

First, the theory provides a chronological and historical mindset, inviting the researchers to look beyond their presumed point of reference in the non-recognition process. Evidently, the observation is incomplete if the observer stops at the event where non-recognition was not applied in one case and jumps to conclusions, not knowing what happened in the prior political decision-making process and what regulatory regimes and retaliation actions were carried out afterwards.

More importantly, the theory helps researchers always to be prepared for the idea that non-recognition could not be understood as “the neutral application of rules”⁹⁷¹ (as no law has ever been). It is a political decision-making process where a community of states create the context for final decisions on the legality and consequences of such an action. What matters is that the

⁹⁷⁰ ‘Due Process | Definition, Examples, & Facts | Britannica’ (13 April 2023) <<https://www.britannica.com/topic/due-process>> accessed 6 June 2023.

⁹⁷¹ Rosalyn Higgins (n 82), 267

ends, values, and objectives of international institutions are preserved through a predictable and legitimate process of non-recognition.

With the theoretical foundation in mind, I examine the available information in the case study database. Under this new approach, the practice of non-recognition begins to make sense.

Table 5.2. The “due process” of non-recognition

The “flow” of the non-recognition process					
					
Situation(s)	Rules Allegedly Violated	Illegality (Authoritatively Assessed)	Non-Recognition Implementation	Short-term Commitment	Resolved Status in the Long-term
Pre-Charter Era					
1. Japanese occupation of Manchuria / The creation of the State of “Manchukuo” (1932 - 1945)	“External aggression” against the territorial integrity and existing political independence of all Members of the League (Article 10 - the Covenant of League of Nations)	Confirmed League of Nations Assembly’s Resolutions	Yes (From 1932 - 1945)	Partially Confirmed Japan left the League of Nations. Non-recognition mechanisms continued, although weak and sometimes unattended.	Non-recognition of the unlawful situation was upheld. It was meaningful in long-term rule maintenance. According to the Cairo Conference’s Joint Communique (1943), Manchuria was “stolen” by Japan, and, with the main exception of the Axis Powers, it had never been accorded de jure recognition by the League of Nations/international community. ⁹⁷² Manchuria was liberated by the Soviet Union in

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					1945 and returned to China. ⁹⁷³
2. Italy's annexation of Ethiopia (1934 - 1945)	“Resort to War” without referring the matter to the Council of the League of Nations (Article 12 - the Covenant of League of Nations) “External aggression” against the territorial integrity and existing political independence of all Members of the League (Article 10 - the Covenant of League of Nations)	Confirmed Reports of the League of Nations Council Committee (October 1935)	Yes (But only from 1935 - 1936)	Confirmed but Failed <i>Most states recognised the conquest by the end of 1938 (including United Kingdom and France).</i> Non-recognition was abandoned as a method of collective security, which was the final blow in the process of destruction of the League of Nations.	Non-recognition was still meaningful in long-term rule maintenance. Ethiopia regained its quasi-independence in 1941 with the support of the imperial British army. Thanks to the previous efforts/ inter-states communications/international declarations related to the non-recognition efforts against Italian colonial occupation, Ethiopia was consistently seen as a colonial territory of Italy and its final status was resolved via United Nations' mechanism.
Charter era's Practices					
3. The Indian “Invasion” and “Annexation” of Goa (1950 - 1971)	“Unlawful use of force against the territorial integrity and political independence of states”	Not Confirmed	No	Not Confirmed	Non-recognition is not affected by this incident. Although there are authors who argue that Goa is the failed application of non-recognition, our detailed

⁹⁷³ The Chinese Civil war was still going on in mainland China between the Chinese Communist Party and Chinese Nationalist Government. This is outside of the scope of study of the thesis, but readers can visit these articles to have a brief understanding:

O Edmund Clubb, ‘Manchuria in the Balance, 1945-1946’ (1957) 26 Pacific Historical Review 377; Daniel H Lew, ‘Manchurian Booty and International Law’ (1946) 40 The American Journal of International Law 584.

	(Article 2.4 - the United Nations Charter)				case study shows that authoritative international organisations had never identified India's conduct as unlawful. If there is any say, it was the UNGA's consistent democratic support for the India's decolonisation narrative.
4. China's Invasion and Annexation of Tibet (1951 - 1959) (1959 - 1961)	"Violation" of the independence of Tibet "Violation against the right to self-determination of Tibetan people"	Not confirmed (1951: Consideration adjourned) (1959: Call for respect of Tibetan human rights) The original scholarly misunderstanding of the concept of "tributary system".	No	Not Confirmed After the UN consideration for Tibet request adjourned, Tibetan leadership unfortunately accepted the territorial claim of Beijing. Historians argue that the 1959 uprising was never a part of Tibetan struggle for independence.	Non-recognition is not affected by this incident. The incorporation of Tibet into China's territory is an unfortunate development of the decolonisation history right after 1945. With most knowledgeable actors withheld their knowledge (India and Nationalist China) and the official acquiescence of the legitimate Tibetan government of Chinese rule, the problems lied elsewhere.
5. Israeli Occupation of and Expanding Settlement in Palestinian, Lebanese, Syrian and Egyptian Territories	"Unlawful use of force against the territorial integrity and political independence of states" "Unlawful occupation"	Confirmed Numerous legal and quasi-legal resolutions of UNSC, UNGA, ICJ...	Yes (1967 - Now)	Confirmed The almost unanimous support for the Palestinian, Lebanese, Syrian and Egyptian territorial integrity put	Non-recognition of the unlawful situation upheld with long-term impact. Until now, although the situation is turning into a frozen conflicts with unpredictable violence, the universal knowledge that East Jerusalem,

(1949/1967 - Now)	“Violation against the right to self-determination of Palestinian people”			immense pressure on Israel, led to the return of several key territories.	West Bank, Gaza Strip shall not be considered a part of Israel and that Israel de facto occupations of Palestine is unlawful is embedded in every aspect of international life.
6. Unlawful situations created by South Africa: The regime of apartheid / Rhodesia's declaration of independence / The creation of the nominally independent Bantustans / South Africa's occupation of South-West Africa (Namibia) (1947 - 1994)	“Friction to International peace and security” “Flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights” “Violation of the territorial integrity of South Africa's popular sovereignty”	Confirmed Numerous legal and quasi-legal resolutions of UNSC and UNGA (International Peace and Security)	Yes (Officially and steadily from 1960 to 1994)	Confirmed Although starting slow, commitment against the governance model of apartheid signified with the exclusion of South African government from all majors international organisations. South African government was also denied credentials at UN meetings.	Non-recognition of the unlawful situation upheld with long-term impact. With over 600 UNGA resolutions and decisions, over 50 UNSC resolutions and decisions, two major ICJ advisory opinions and many other forms of international communication, the principle of non-recognition has been explicitly recorded, discussed and endorsed in the case of South Africa. The campaign of non-recognition of apartheid contributed significantly to the downfall of South African apartheid.
7. Vietnam's intervention, occupation of Cambodia / The creation of Heng Samrin's government	The principle of peaceful dispute settlement and non-interference in internal affair (Against Vietnam) “Gross Violations of Human Rights”	Confirmed	Yes (Two-way non-recognition) (1979 - 1989)	Confirmed The Cold War setting makes it seemed like there was no internationally accepted non-recognition practices (with the Soviet bloc	Non-recognition of the unlawful situation upheld with long-term impact. The international practices targeted both the Pol Pot regime (endorsed by China) and the Heng Samrin's

(and special application of non-recognition) (1978 - 1989)	(Against the Pol Pot Regime)			recognising Vietnamese-installed government and China/Western states continuing to aid Pol Pot regime). However, the democratic international process of UN produced predictable and reasonable practice of non-recognition in this case.	government (endorsed by Vietnam). The final solution for the Cambodian crisis resolved (technically) with the UN-led/observed general election to honour the right to self-determination of the Cambodian people in 1993-1994.
8. Russian intervention and invasion of Ukraine (2014 - now)	Independence and Territorial integrity of Ukraine (Article 2 - UN Charter)	Confirmed (2014 - UNGA Resolution 69/262) (2022 - UNGA Resolution ES - 11/1) (International Peace and Security)	Yes	Confirmed (By UNSC's majority persistent legal opinion to UNGA's majority consistent language, and the extensive role of other UN's agencies)	Non-recognition of the unlawful situation upheld with long-term impact. The campaign against Russia is picking momentum and becoming stronger.
Honourable Mentions					
9. NATO's intervention and Kosovo Declaration of Independence	Territorial integrity of Yugoslavia (Article 2.4 - UN Charter)	Not Confirmed Resolution 1199 and Resolution 1203 (1998), allowing the	No The creation of the Republic of Kosovo only came to fruition in	Not Confirmed	Non-recognition is not affected by this incident.

(1999 / 2008)		political intervention of NATO and EU in Kosovo crisis. UNSC's members prominently calls for armed intervention. UNSC majority (12 to 3) reject the draft S/1999/328, trying to characterise NATO's intervention as unlawful.	2008, ten years after the intervention. There is no direct correlation between the intervention and the declaration of independence.		
10. United States' Invasion of Afghanistan (2001)	Sovereignty and Independence of Afghanistan (Article 2 - UN Charter)	Not Confirmed The UNSC unanimously passed Resolution 1378, blessed the U.S. armed intervention in Afghanistan, authorised the country's political regime's transition, and recognised Afghanistan's situation as lawful with a new government.	No Although this is another questionable incident of international law, it was the collective and democratic process of international institutions, with their own consideration, that chose not to identify the invasion as unlawful.	Not Confirmed (Because the UN collectively supported the war and the new government)	Non-recognition is not affected by this incident.

			After all, the Taliban rulership in Afghanistan was universally not recognised by the United Nations.		

In the above table, we can see that non-recognition practices are divided by the flow between six primary stages:

- (1) Questionable conduct and the situation that arises as a consequence;
- (2) International debates concerning the alleged violations;
- (3) The identification of the illegality of the conduct by authoritative international agencies;
- (4) The practice of non-recognition confirmed (or not confirmed) as a response to such a situation;
- (5) The implementation of non-recognition in the short-term; and
- (6) The overall result and the implication with regard to the importance of non-recognition.

However, when analysing the principle of non-recognition, some scholars often rely on only a few stages and use these to determine the effectiveness and consistency of the practice. For instance, when Milano suggests that cases such as Goa, Tibet, the US invasion of Afghanistan and NATO's intervention in Kosovo are proof that non-recognition is unpredictable, he argues that consideration of concepts such as "effectiveness", "legitimacy", and "invalidity" is necessary in these cases. Although we should all acknowledge the outstanding work that Milano put into explaining these concepts and their practical relevance, the claim that these cases manifest the inconsistency of non-recognition practice misses several stages of our studied process.

Understandably, if we take into account only Stage Four (highlighted - application of non-recognition as a collective response to an alleged violation of international law), and perhaps Stage Five (implementation and commitment to non-recognition in the short-term), then there are five out of ten cases in the analysis table where non-recognition was not applied. The conclusion seems obvious to some scholars: non-recognition is not applied universally when there is an allegation of rule violations, and therefore it does not qualify as a customary norm. This argument overlooks the previous stages of international processes and assumes that its own characterisation of the illegality of the conduct is more meaningful than the actual international process that happened.

For example, the opposition to the US war in Afghanistan always firmly condemned the war as an act of aggression against the state of Afghanistan. Ryan T. Williams, writing in the *University of Pennsylvania Journal of International Law*, asserts that the war is illegal and that the U.S. presence in the country is an unlawful occupation.⁹⁷⁴ Other authors seem to be so confident in their hypotheses that they conclude that both the war and the subsequent events in Afghanistan are illegal, a position they claim to be “established” in the literature.⁹⁷⁵ But these “conclusions” are not shared by everyone.

We need only to look at the UNSC Resolution 1378, passed *unanimously* on December 14 of 2001, only three days after the official armed intervention of the US in Afghanistan. In this resolution, all 15 members of the UNSC were in collective agreement with regard to:

“Supporting international efforts to root out terrorism...”;

“Condemning the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network...”; and more importantly:

“Encouraging Member States to support efforts to ensure the safety and security of areas of Afghanistan no longer under Taliban control.”

In other words, the UNSC unanimously endorsed the U.S. intervention, authorised the country’s transition to a democratic political regime and recognised Afghanistan’s new government as lawful. Given these facts, the assertion that it was “established” that the Afghanistan war was “illegal” is a statement clearly detached from reality. Authors who use their own judgment to assert the status of the American war in Afghanistan and then question the legitimacy or relevancy of the duty of non-recognition miss the first and foremost point of non-recognition, i.e., that it requires an authoritative conclusion that a state’s conduct is illegal, which leads to the existence of an unlawful situation. Without this vital consideration, one cannot seriously challenge the legitimacy of non-recognition itself.

The Indian invasion of Portuguese Goa is another prime example of the need to study non-recognition as a process or to risk misunderstanding the concept in international law. For the record, several authors have mentioned Goa as one of the proofs of *effectiveness* over *legality*. Yet, had the legality of the Goa situation ever been fully established by an authoritative institution? The answer is no. Despite the fact that the Goa invasion was the subject of heated debates among UNSC Members during the 1960s, neither side in the Cold War was able to successfully push their legal interpretation of the event to the front.

Draft Resolution S/5032 by Ceylon, Liberia, and the United Arab Republic rejected Portugal’s complaint and demanded that Portugal should cease “hostile action” and “liquidise” her

⁹⁷⁴ Ryan T Williams, ‘Dangerous Precedent: America’s Illegal War in Afghanistan’ (2012) 33 *University of Pennsylvania Journal of International Law* <<https://papers.ssrn.com/abstract=1923956>> accessed 17 December 2022.

⁹⁷⁵ Rabia Khan, ‘Was the NATO Invasion of Afghanistan Legal?’ (*E-International Relations*, 6 November 2013) <<https://www.e-ir.info/2013/11/06/was-the-nato-invasion-of-afghanistan-legal/>> accessed 17 December 2022.

possession of Indian territories.⁹⁷⁶ Draft Resolution S/5033 by France, Turkey, the USA and the UK, on the other hand, with the support of the Secretary-General, requested the withdrawal of Indian troops to the positions that prevailed before December 17, a complete cease-fire and other rounds of negotiation to deal with Goa.⁹⁷⁷ The former resolution could not reach a majority, while the latter was vetoed by the Soviets.

However, on the UNGA stage, the question concerning Goa's territorial affiliation had never been considered a contentious point for most developing nations. In Resolution 1542 of December 15, 1960 (one year before the invasion), the General Assembly identified particular territories under the administration of Portugal that were considered non-self-governing territories within the meaning of chapter XI of the Charter, including Guinea, called Portuguese Guinea, Mozambique, Macau and dependencies, and of course, Goa and dependencies called the State of India.⁹⁷⁸ It was apparent that Portugal was already considered to be under an obligation to decolonise their overseas territories, including Goa - the territory that was deemed an original part of modern India. Thus, the debate on India's "violation" of Portugal's territorial integrity became less relevant than it seemed in the confrontation between the two Cold War camps.

More importantly, in Resolution 1699 of December 19, 1961 (one day after the invasion), the UNGA targeted Portugal, even though it was India that employed armed forces.⁹⁷⁹ Specifically, the continuing deterioration of the situation in the territories under Portuguese administration led the UNGA to collectively condemn the non-compliance of Portugal with its obligation under Chapter XI of UN Charter, Resolution 1542 and the Committee on Information from Non-self-governing Territories. More importantly, it also requested that Member States deny Portugal any support and assistance that could be used to suppress the people of non-self-governing territories. It could not be more evident that the language of Resolution 1699 intended to justify the Indian invasion and legitimise its consequences.

Indeed, one could argue that the process of identifying legality in international law is prone to bias and politics. However, it is still the only tool with enough legal and political legitimacy to officially define the difference between an illicit act and normal conduct. Any observation or assumption beyond this point of reference is often unsustainable. Since the Indian invasion of Goa had never been identified as unlawful and has even received a certain degree of official international support, the assumption that non-recognition should have been employed in this case is ill-founded.

With the above details, we need to remember that the general legal aspiration was to complete the decolonisation process that existed at the time. By understanding these legal and political developments, one is less confident in claiming that the international community acquiesced to

⁹⁷⁶ Ceylon, Liberia and Republic (n 710).

⁹⁷⁷ France and others (n 711).

⁹⁷⁸ A/PV.948 15 Dec. 1960 68-6-17 A/4651 Transmission of information under Article 73 e of the Charter [https://undocs.org/en/A/RES/1542\(XV\)](https://undocs.org/en/A/RES/1542(XV)) / A/RES/15/1-A/RES/15/.

⁹⁷⁹ 36 UNGA 113; A/RES/1699 (XVI) (19 December 1961) <http://www.worldlii.org/int/other/UNGA/1961/113.pdf>

the *fait accompli* that India created. On the contrary, it is clear that the dominant sentiment, the communicative interaction, the political commitment, and the jurisprudence of the United Nations, prepared decades before the incident, all led to the apparent endorsement of Indian conduct by the United Nations machinery. Although I myself also suggest, in the Goa case study section, that India's justification for its conduct has no basis in any interpretation of international law concerning territorial integrity, the international legal process theory helps us to realise that particular objectives and values of most of international society at the time was decolonisation and not Portugal's "pseudo" territorial integrity of parts of the country that the United Nations had clearly identified as colonised territories. The political and legal contexts explain why India's invasion of Goa was never authoritatively categorised as unlawful. And since the community did not view and identify India's conduct as illicit, it is illogical to ask why the community did not apply the principle of non-recognition.

The most interesting case is that of Kosovo. Kosovo must be included here because it is cited by Putinista groups and by Putin himself as evidence that international law in general, and non-recognition specifically, does not oppose his invasion of Ukraine and the attempts to annex many Ukrainian territories.⁹⁸⁰ In his meeting with the United Nations Secretary-General, Antonio Guterres in September 2022, Putin cited the so-called "Kosovo precedent", insisting that the world has recognised the unlawful situation that NATO brought against the territorial integrity of Serbia,⁹⁸¹ and that Russia's conduct is therefore legally justifiable. This claim is unconvincing.

First and foremost, there are considerable differences in the legal context of these conflicts. The Kosovo incident was a part of the painful and brutal disintegration process of the former Yugoslavia. This historical background does not apply elsewhere, especially when the comparison is Russia's covert invasion of Crimea and the Russian-sponsored secessionist movements in Eastern Ukraine. In addition, ten years of Serb-led genocides and other gross violations of international law, evidenced by the establishment of the UNSC-authorized International Criminal Tribunal for the former Yugoslavia ("ICTY") and many of its individual trials, suggest that the Yugoslavian wars involved a far worse humanitarian crisis.

Support for Putin's analogy indicates a deficient understanding of the international legal processes involved. UNSC Resolution 819 (1993) strongly condemned the "ethnic cleansing" campaign of Bosnian Serb paramilitary forces, supported by the Yugoslav government.⁹⁸² Also, UNSC Resolution 1004 (1995), unanimously condemned Bosnian Serb forces' continuous

⁹⁸⁰ To understand the concept of Putinistas groups, please visit: Quoc Tan Trung Nguyen, 'How Vietnamese "Putinistas" Are Spreading Disinformation about Ukrainians' (*The Conversation*) <<http://theconversation.com/how-vietnamese-putinistas-are-spreading-disinformation-about-ukrainians-181131>> accessed 28 December 2022.

A summary of Putin's Kosovo rhetoric: Jade McGlynn, 'Why Putin Keeps Talking About Kosovo' (*Foreign Policy*) <<https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/>> accessed 28 December 2022.

⁹⁸¹ McGlynn (n 984).

Dave Lawler, 'Putin Defends Ukraine Invasion in Meeting with UN Chief' (*Axios*, 26 April 2022) <<https://www.axios.com/2022/04/26/guterres-meet-putin-russia-invasion-ukraine>> accessed 4 September 2022.

⁹⁸² UNSC, 'Res 819 on "Demanding That Srebrenica and the Surrounding Areas, Bosnia and Herzegovina, Be Treated as a Safe Area"' <<https://digitallibrary.un.org/record/164939>> accessed 16 May 2023.

violation of other UNSC resolutions, the safety of the United Nations Protection Force, and other ceasefire agreements.⁹⁸³ Then, with the establishment of ICTY and many of its individual trials,⁹⁸⁴ there were clear indications that international sentiment at the time was predominantly against the Serbian-led wars, and there were also serious concerns about crimes of genocide. The eventual independence of Bosnia and Herzegovina, Croatia, and Slovenia led to the belief that the Serbian dominant socio-political model in the former Yugoslavia state was outdated and problematic. By understanding international sentiment at the time and the prioritised values, the international legal process that dealt with Kosovo at the UN became clearer.

Although the UNSC did not authorise NATO's three-month intervention in the Kosovo-Serbia affair, NATO and Europe were authorised by the UNSC to monitor the cease-fire obligations of both parties. With Resolution 1199 and Resolution 1203 (passed with only China being absent), the Security Council officially intervened in Serbia's "internal affairs". They also set up monitoring mechanisms, including OSCE's Kosovo Verification Mission (KVM) and NATO's Air Verification Mission (AVM). Both resolutions already imposed considerable restraint on Serbian armed forces even before any actual intervention due to international fears that war crimes and genocide of the kind that happened in Bosnia could be perpetrated against the Kosovar communities. The resolutions also mean that OSCE and NATO were tasked with the authority to determine the situations in the field. Unfortunately, Serbia's cooperation with the UNSC-installed system was so unsatisfactory that there were calls for armed intervention from most members of the UNSC, as in the declaration of the Permanent Representative of Slovenia, Mr Danilo Türk:

"The use of force by the Belgrade Government against the civilian population created a situation that made the current military action inevitable."⁹⁸⁵

This argument is also summarised and explained in detail in the work of Juan Francisco Escudero Espinosa – *Self-Determination and Humanitarian Secession in International Law of a Globalized World* (Kosovo v. Crimea) – one of the perfect legal analyses connecting the link between the legal rhetoric of the case of Kosovo and the case of Crimea.⁹⁸⁶ Espinosa provides evidence of what was later called *legal ratification post festum* in Kosovo where, although NATO's intervention did not receive prior authorisation from the UNSC, it was nevertheless supported by a different kind of decision by this powerful organ: majority rejection of a condemnatory draft resolution.

⁹⁸³ UN Security Council (50th UNSC, 'Res 1004 on "Demanding Withdrawal of the Bosnian Serb Forces from the Safe Area of Srebrenica, Bosnia and Herzegovina"' <<https://digitallibrary.un.org/record/198686>> accessed 16 May 2023.

⁹⁸⁴ 'S/1999/328: UN Documents: Security Council Report' <<https://www.securitycouncilreport.org/un-documents/document/kos-s-1999-328.php>> accessed 16 May 2023.

⁹⁸⁵ Intervention of Mr. Türk (Slovenia), UN Doc. S/PV.3989.

⁹⁸⁶ Juan Francisco Escudero Espinosa, *Self-Determination and Humanitarian Secession in International Law of a Globalized World* (Springer International Publishing 2017) <<http://link.springer.com/10.1007/978-3-319-72622-9>> accessed 28 December 2022.

Specifically, on March 26, 1999, Belarus, India, and the Russian Federation drafted document no. S/1999/328 as their legal reaction against NATO, hoping the intervention would be declared illegal.⁹⁸⁷ There are two major points in this document:

- (1) It determined that “[...] the use of force by NATO against the Federal Republic of Yugoslavia constitutes a threat to international peace and security”; and
- (2) It demands “[...] an immediate cessation of the use of force against the Federal Republic of Yugoslavia and an urgent resumption of negotiations”.

However, it was evident that most of the UNSC members believed that armed intervention was necessary. On the same day, the draft resolution was rejected by 12 votes, with only three votes in favour. States that supported the NATO intervention included Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. It is important to point this out since the draft resolution was not vetoed, unlike the recent UNSC draft resolution concerning Ukraine, which Russia vetoed. That resolution showed solid international support for NATO after lengthy and tiresome conflicts in the Balkans, where the Serbian government was already perceived as the antagonist. The Russians never succeeded in using the “Uniting for Peace” procedure either, which ultimately had the effect of transforming the rejection of the draft resolution into a success for those in the international community who favoured intervention. Even if readers might find the conclusion that the international community *supported* NATO’s intervention questionable, there was nevertheless no authoritative characterisation of this intervention as unlawful, even in the much more neutral and balanced international arena of the UNGA.

On the other hand, the question of Kosovo’s independence had not become central to the international community ten years later when the Kosovar government independently announced their departure from Serbia in 2008 - which is another legal drama that is beyond the scope of this study.⁹⁸⁸ Since no illicit act was identified, there could be no unlawful situation. Therefore, what happened in the Kosovo case cannot be used as evidence against the empirical consistency of non-recognition.

It was obvious that the international legal process of the United Nations in 1999 saw the intervention as necessary for the betterment of the political condition of the former Yugoslavia and international peace and security – which is the most crucial objective of the United Nations as an institution and as a legal order. And therefore, there was no reason for the international community to consider the principle of non-recognition in the first place.

⁹⁸⁷ ‘S/1999/328 : UN Documents : Security Council Report’ (n 988).

⁹⁸⁸ Christopher J Borgen, ‘Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition’ *American Society of International Law: ASIL INSIGHT* <<http://www.asil.org/insights/2008/02/insights080229.html>>.

Daniel Fierstein, ‘KOSOVO’S DECLARATION OF INDEPENDENCE: AN INCIDENT ANALYSIS OF LEGALITY, POLICY AND FUTURE IMPLICATIONS’ 26 *Boston University International Law Journal*.

With six stages to consider when studying non-recognition, the consistency of the application of non-recognition could not be studied adequately if we continue to assume that one situation is unlawful. The analysis also proves that non-recognition practice has a relatively long-term effect, which is what I call “the collective legal memory” of unlawfulness and non-recognition. It simply means that, although the political commitment of the international society might, for some reason, allow the perpetrator’s behaviour to go unsanctioned at the time, it is inevitable that the documentation of the duty of non-recognition will come back to resolve the injustice in the future.

During the Manchuria crisis, nation-states were not known for their strong political and legal commitment to ending the so-called State of Manchukuo, although they all agreed not to recognise it. Historians also often blame states’ attitudes and insist that the non-recognition campaigns against Manchukuo were a failure. Yet, the fact that the League of Nations Assembly was able to reach a consensus on the illegality of Japan’s conduct and implement several non-recognition tools to preserve the territorial integrity of China provided the crucial legal continuity and legitimacy for later measures dealing with the Empire of Japan and its occupied territories in East and South East Asia after the end of World War II.

Similarly, in Ethiopia’s case, most of the European and South American states at the time failed to uphold their duty of non-recognition of the Italian conquest of Ethiopia. Yet, a legal duty is a legal duty nonetheless. And because the documentation of Italy’s illicit armed aggression against the North African state had been consistent, with no ambiguity, the successor of the League of Nations - the United Nations - could confirm the basic premise, the very minimum threshold of the international rule of law: acts of lawlessness do not create legal rights. Ethiopia’s territorial and sovereignty issues were eventually dealt with according to the principles of law and justice.

In cases within the UN era, where the situations become protracted political (and armed) conflicts, non-recognition practices have not disappeared but have increased. The language and legal communicative acts have become more precise. More international institutions participate in the interpretation and condemnation of illicit situations. Most importantly, the unlawfulness of such a situation has become universally acknowledged, and there has been greater institutional experience in carrying out non-recognition campaigns. We will discuss how and why in the following two sections, but for now, there is a mountain of evidence to show that the legal processes of non-recognition are uniform and robust.

As we can see in the table and in our case studies, even pre-UN Charter cases like the Manchuria crisis offer a coherent process of non-recognition that is intelligible in the language of contemporary international law. It seems that the perceptions of states and their ways of practising non-recognition are the natural consequence of a universal belief/practice in the rule of law (international and domestic), as in the millennia-old maxim “*ex injuria jus no oritur*”. The only incident where the international community deviated from the international legal process of non-recognition is another pre-UN Charter incident - the Abyssinian crisis. However, I would not use it as an example to challenge the consistency of non-recognition as a belief of law, because the abandonment of the non-recognition thinking of the international community in response to the Italian conquest of Ethiopia was the final nail in the coffin of the

League of Nations' international legal order. It was when the arrangement and hope for a collective security system failed, and states retreated into regional groupings, appeasement, and power politics.⁹⁸⁹

In short, the breakdown of the non-recognition principle brought the breakdown of the entire system. This seems to confirm what Judge Lauterpacht suggested long before this dissertation was undertaken: Refusal to recognise a conquest and territorial situation accomplished by violating international law constitutes the very "minimum" obligation to respect the order that the system created.⁹⁹⁰ Apart from well-defined exceptions, international law (or no law in general) cannot afford such *suo vigore* source of legal rights without severely damaging the legitimacy of its own existence.

Therefore, non-recognition has never been just another "expendable" principle of the international legal system: it is the last line of defence in this decentralised system of law. Such a position proves that the Ethiopian crisis, where the international community acknowledged the unlawfulness of Italy's actions but recognised the conquest anyway, was a sign of the systematic downfall and the eventual death of the League's international law. We therefore have even stronger reasons to argue in favour of protecting and recognising the customary *jus cogens* status of the principle of non-recognition.

5.3. Non-recognition as a Custom: Consistency in Content

Exploring, identifying and categorising the content of non-recognition practice is a demanding task. Because non-recognition has never been at the forefront of international scholarly attention, no existing literature directly discusses the content of the principle and practice of non-recognition. The dissertation explored this issue in Chapter Three. As a reminder, we can mention that, for Stefan Talmon, the major question (and the major challenge) to the principle of non-recognition is its exact content. Relying on loose codifications and judicial acknowledgement, including the ICS's Daft Articles on State Responsibility, the ICJ's advisory opinions, or the 1964 Definition of Aggression, Talmon concludes that the precise content of the obligation is uncertain. Although I would insist that Talmon has been looking in the wrong places, Talmon does point out one correct problem: "Most authors do not address the question of the content of the duty at all."⁹⁹¹ We have also cited the words of Judge Kooijmans, in his separate opinion in the advisory opinion on the Wall in the Occupied Palestinian Territory, regarding the difficulties "in understanding what the duty not to recognize an illegal fact involves."⁹⁹²

In general, studies have been unsuccessful in determining the specific content details of non-recognition. And unfortunately, this current stage of research leads to several incorrect

⁹⁸⁹ O'Mahoney (n 202)., 104

⁹⁹⁰ Lauterpacht (n 217)., 417

⁹⁹¹ Talmon, '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' (n 268)., 107

⁹⁹² 'ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT - Separate Opinion of Judge Kooijmans - ICJ Document - Question of Palestine' <<https://www.un.org/unispal/document/auto-insert-203873/>> accessed 31 October 2023.

assumptions by international scholars, especially if we compare their assumptions with the way the international legal process of non-recognition is carried out in practice:

(1) *“The duty of non-recognition is free from collective restraints and regulations”*

Brownlie pioneered the belief that non-recognition “is a legal assessment of a situation by individual states”.⁹⁹³ At the same time, Talmon insists that “the obligation and content of non-recognition do not depend upon any action by the appropriate political organs of the United Nations”.⁹⁹⁴ The assumptions contained in these statements may be the reason why most authors do not explore the content of the principle of non-recognition in detail. If it is presupposed that states are free to choose whatever measures they like when confronting an unlawful situation, the idea of studying non-recognition content becomes obsolete. This section rejects the state-centric assumption in the practice of non-recognition, by drawing from the evidence and experience of international organisations.

(2) *The “auto-correction” of non-recognition into economic sanctions*

Recently, Professor Diane Desierto demonstrated this belief again in academia by categorising Germany’s suspension of the Nord Stream 2 gas pipeline as a fulfilment of its Article 41(2) duty not to recognise the unlawful situation created by the Russian Federation’s continuing annexation actions in Ukraine.⁹⁹⁵ Although she also rightly observes that the broad scope of non-recognition can encompass many other policy tools, including economic sanctions and coercion, the obsession of international scholars with economic sanctions in many ways undermines the contribution of other tools of non-recognition and the creativity of the international initiatives when facing coordination problems in the military or economic fields.

Since there has already been an analysis of the relationship between economic sanctions and non-recognition in Chapter Three, we will not review it again in this section. However, considering the mixed impact of economic sanctions, procedural uncertainty and the limited participation of international players in those sanctions, the *mythical role* of sanctions in the international legal process of non-recognition and its connection with general international law must be suitably debunked. Indeed, economic sanctions constitute support for a non-recognition campaign. However, we shall not use economic sanctions as the only indication or threshold in evaluating non-recognition as a part of general customary rules.

5.3.1. Table of Analysis for Content of Non-recognition

After voicing disagreement with contemporary literature on non-recognition content, I feel obliged to explain my theoretical approaches. Again, I strongly believe in the effectiveness and

⁹⁹³ Brownlie, ‘The Principle of Non-Recognition’ (n 15).

⁹⁹⁴ Talmon, ‘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’ (n 268)., 113

⁹⁹⁵ Diane Desierto, ‘Non-Recognition’ (*EJIL: Talk!*, 22 February 2022) <<https://www.ejiltalk.org/non-recognition/>> accessed 21 May 2023.

relevance of CIL theories, including international legal process theories, the constructivist approach to CIL, and the theory of relative consent. And non-recognition collective practices and their actual content have shown clear, repeated patterns, with convincing legal reasoning for these theoretical patterns. The claim is supported by the details and information provided by the case study chapter. In categorising and arranging the available information in a way that highlights the patterns, there are theoretical arguments to guide the process:

- 1) The “flow” of non-recognition practice, as examined in the previous section, shows us that the collective decisions of appropriate international organisations are an essential starting point for a campaign of non-recognition. Similarly, the information the dissertation has gathered proves that UN fora also determined the tone, framework and direction for implementing non-recognition internationally. While member states retain some autonomy in their daily international administrative and diplomatic affairs, international organisations have centralised elements of non-recognition campaigns that do not necessarily require the state's explicit consent. As a result, the language, communication, and activities used within these institutions are crucial to non-recognition efforts.

By taking into consideration these commonly overlooked practices, the argument of the dissertation becomes stronger. The state's isolated and fragmented diplomatic and legal actions towards an illegal situation are insufficient compared to the continuous flow of communications, decisions, actions, and policies from international organisations and agencies, which already involve all relevant states.

- 2) Secondly, following the approach of Judge Lauterpacht, this section argues that understanding the content of non-recognition does not depend primarily upon the degree of immediate hardship and inconvenience of the rule breaker.⁹⁹⁶ The assumption that non-recognition has to be punitive with undelaying effects against unlawful situations misses the whole point of the history and the recent codification of non-recognition. Non-recognition should never be seen as punishment or restitution but as a tool of deterrence, political assurance and rule maintenance. The proposition requires me to rethink the importance of each non-recognition tool and remember, ultimately, who is charged with implementing it.

When it comes to holding violators accountable, the content used to establish non-recognition does not necessarily have to be convincing or compelling. What is important is that it helps international institutions establish a shared understanding of the situation (or, in the words of Searle, “institutional facts”) and creates opportunities to reaffirm the importance of following international laws. Additionally, it can neutralise the arguments of those who may support the violators.

Table 5.3. Content of non-recognition

⁹⁹⁶ Lauterpacht (n 215), 433

Unlawful Situation(s)	“Content” of Non-recognition			
	<i>Communicative Legal Non-recognition</i>	<i>Institutional Non-recognition</i>	<i>Cultural, Sport, Academic and other international forms of Non-recognition</i>	<i>Economic Measures</i>
1. Japanese occupation of Manchuria / The creation of the State of “Manchukuo” (1932 - 1945)	Confirmed States consistently participated and used non-recognition language when referring to the Manchuria crisis, especially in the international arena of the League of Nations The resolutions and reports of the League of Nations provided consistent and continuing practices of the League’s communication.	Confirmed The League of Nations used its power to ensure that implication for recognition of the State of “Manchukuo” could not appear, at least within their institutional influence. This includes the prevention of the Japanese-backed government of Manchuria entering into any of the League’s closed or open conventions. The utilisation of the Universal Postal Union to reject “Manchukuo”’s way of communicating with other parts of the world is also illustrative.	Unconfirmed There was one initiative coming from the League of Nations. It requested members not to accept passports issued by the “Manchukuo” government. However, as the connection between this region and the world (and many other aspects of international life in general) was not very vibrant in the 1930s, there were no noteworthy forms of non-recognition within this environment to consider its significance.	Unconfirmed There are certain measures concerning the discontinuation of foreign business establishments in Manchuria. However, most of these measures were not coordinated and extended in an internationally approved scale. It is nevertheless a proof that states and organisations often look at an unlawful situation and resort to economic sanctions. However, it is certain that economic measures were not confirmed as the backbone of the non-recognition campaign during the Manchuria crisis.
2. Italy’s annexation of Ethiopia	Confirmed Shortly after the invasion, the	Partially Confirmed		

(1934 - 1945)	language of non-recognition was employed extensively in all of League’s committees, agencies and in the Assembly. Even the efforts and interventions of the League prior to the invasion (such as the Lake Tana incident) show that it was trying to control colonial interests over sovereign members of the League and uphold its principles.	As mentioned in the previous section, the failure of the League of Nations in applying non-recognition to the Italian conquest of Ethiopia led to the downfall of the entire system. However, it is worth noting that the League did try with all of its economic and institutional power to prevent and not to recognise Italy’s illicit conduct. There was an arms embargo, a ban on the export of war materials, a ban on Italian goods, and even suggestions for an oil embargo. All of them were introduced and implemented often in a more timely manner than the modern international system. Ultimately its efforts failed due to the appeasement and colonial mindset of League’s most powerful members., The fact that the League collapsed right after this event shows that non-recognition is the last line of defence and extremely vital to the survival of a fair and functioning international order.		
3. The Indian “Invasion” and “Annexation” of Goa (1950 - 1971)	Not Applicable			
4. China’s Invasion and Annexation of Tibet (1951 - 1959) (1959 - 1961)	Not Applicable			
5. Israeli Occupation of and Expanding Settlements in Palestinian, Lebanese, Syrian and	Confirmed Over decades, there is established non-recognition language and	Confirmed The unified language and united practices of the entire system of the United Nations in the case of Palestine are features	Partially Confirmed Cultural-Sport-Academic tools in the arsenal of non-recognition	Partially Confirmed Along with cultural-sport-academic boycotts against Israel, there

Egyptian Territories (1949/1967 - Now)	universal knowledge concerning the unlawfulness of Israel's conduct in Arab territories. Non-recognition communicative measures have been used in all principal organs of the United Nations, including the UNGA, UNSC and the ICJ. It should also be noted that the Palestine case is comprised of many incidents over a long time span. However, the international legal processes of the UN have managed to deal with all of them effectively with a consistent and comprehensive communicative method.	of one of the most successful institutional non-recognition campaign. The participation of major UN organs and agencies that have a strong say in international life have been extremely effective in limiting Israel's legal rhetoric and political influence. These organs and agencies include the World Bank, the UNESCO, the Human Rights Council, the OHCHR, and especially the Committee on the Exercise of the Inalienable Rights of the Palestinian People (CEIRPP). This is not to mention other organisations including the Commonwealth, the European Union, the African Union, the Islamic Cooperation Organisation...	are utilised to a certain extent in this case.⁹⁹⁷ They have been efficiently recorded and monitored. However, since there has not yet been a comprehensive and authoritative system for Cultural-Sport-Academic non-recognition in the case of Palestine, I refrain from confirming the full relevance of these practices.	are other economic measures to isolate and punish its behaviour.⁹⁹⁸ However, due to the infrequency and lack of universality of these measures, we can only see them as additional options of non-recognition within the whole history of Israel-Palestinian discourse.
6. Unlawful situations created by South Africa: The regime of apartheid / Rhodesia's	Confirmed This is a textbook example of a successful campaign of legal communicative non-recognition.	Confirmed The institutional non-recognition campaign against South Africa's apartheid government (and other consequences brought forward by this	Confirmed With the explicit support of UNGA, the innovative Cultural-Sport-Academic non-	Confirmed There are still debates concerning the effectiveness of economic sanctions and other economic measures in cases

⁹⁹⁷ Benatar (n 285).

Yael Peled, 'The Ethics of Boycotting as Collective Anti-Normalisation' (2019) 36 Journal of Applied Philosophy 527.

⁹⁹⁸ Gil Feiler, *From Boycott to Economic Cooperation: The Political Economy of the Arab Boycott of Israel* (Routledge 2013).

declaration of independence / The creation of the nominally independent Transkei / South Africa's occupation of South-West Africa (Namibia) (1947 - 1994)	Unlawful situations concerning the problems surrounding South Africa were comprised of many other major crises, such as the Rhodesia issue, nominally independent Transkei and South Africa's occupation and implementation of apartheid in Namibia. Yet the legal language and assertions concerning the situations were skilfully employed in all cases with an impressive consistency.	regime) again show the true power of organs like the UNGA in shaping international life and society. The participation and establishment of major agencies that shape international life and narratives, just as in the case of Palestine, allowed the continuity and embeddedness of non-recognition knowledge into every fabric of international society. Those organs and agencies include: the UN Special Committee on Apartheid, the Food and Agriculture Organization (FAO), the International Labour Organization (ILO), the World Health Organization (WHO), the U.N. Educational, Scientific and Cultural Organization (UNESCO)...	recognition campaigns were recorded and recognised as a form of non-recognition to be reckoned with. As shown in the case study chapter, they all played an extremely vital psychological role in isolating Afrikaners' self-image and national pride.	of non-recognition campaigns against South Africa's apartheid government and other related unlawful situations. However, economic measures against South African Apartheid were authorised, requested and employed by both the UNSC and the UNGA. They are an official part of non-recognition in this case.
7. Vietnam's intervention, occupation of Cambodia / The creation of Heng Samrin's government (and special application of non-recognition) (1978 - 1989)	Confirmed As we discussed in the case study chapter, the legal communicative non-recognition of Vietnam's installed government was initiated and maintained solely by the power of the General Assembly. Yet, as in most cases, the	Confirmed While the legal guidance came from the UNGA, all other institutions within the United Nations or actively connected with the United Nations followed suit and created the political administrative environment where there was no possibility that Heng Samrin's government could become a legitimate representative	Partially Confirmed At this time, the climate of Cold War made it very difficult to differentiate between "social" non-recognition and the political disagreements between Western and	Partially Confirmed Although there are studies and documentation of the fierce economic sanctions against Vietnam, none of them were endorsed, supported or suggested by any UN organ. Vietnam's economic problems

	democratic legal opinion of the UNGA became the guiding principle of the entire legal encounter. On the other hand, within its communications and debates, the UNGA and its sub organs also employed tactics and tools to isolate and reduce the power of the brutal Pol Pot regime.	of the people of Cambodia. The role of relief funds and UN agencies, including the UN's World Food Program, United Nations Border Relief Operations (UNBRO), and also the UNHCR, were recorded and confirmed.	Communist blocs.	mostly came from its self-isolation and clinging to its political ideology and its political conflict with two major powerhouses in Asia Pacific: China and the United States. The UNGA's characterisation of Vietnam's intervention and the way they avoided name-calling or openly condemning Vietnam shows the caution of the international legal process in dealing with Vietnam's intervention and the brutality of the Pol Pot regime.
8. Russian intervention and invasion of Ukraine (2014 - now)	Confirmed In some ways similar to the case of Vietnam, the UNSC has been unable to act due to the veto vote of Russia. However, after almost 10 years and dozens of changes in the UNSC's composition, the consistent legal communication between majority of members of the UNSC have shown a strong	Confirmed After the success of the institutional non-recognition campaign against South Africa, one can argue that the Russian invasion of Ukraine is the next great example of how the institutional power of the United Nations over international life creates the perfect environment for non-recognition. With the participation of major agencies and international organs including the OHCHR, the Universal Postal Union (UPU), the International Civil	Partially Confirmed Although not yet announced in a UNGA resolution, the cultural, sports and academic boycotts against Russia seem to follow naturally from the UNGA's legal determination of the situation. More importantly, these organisations	Partially Confirmed After the invasion, Russia became the most-sanctioned country on earth, with extensive financial, trade, technological and energy versions of economic sanctions. Obviously, there are debates concerning the universality and the applicability of the concept of non-recognition in the ongoing economic

	legal practice of non-recognition. On the other hand, the legal communicative non-recognition carried out by the UNGA has become more and more universal with stronger representation of states and clearer messages to the invader. The ICJ is also on the way to deliver their legal opinion on the issue very soon.	Aviation Organization (ICAO), the International Telecommunication Union (ITU)... the exclusion of Russia's rhetoric and legalisation attempts is not just on paper, but a part of the reality of international activities.	have acted independently, making us consider the role of non-state actors overall in the principle of non-recognition.	sanctions. I have to note that most (if not all) of the initiatives have been coming from "Western" powers, i.e, the United States and the European Union. Most international scholars only see this as "counter-measures". However, considering the fact that most of these sanctions are tolerated and even adhered by other countries, with no serious objection, we could say that economic sanctions are still in the political playbook of the principle of non-recognition in the case of Ukraine.

As we can see in the analysis table above, I argue that there are four possible elements of a customary non-recognition, including (1) Communicative Legal Non-recognition; (2) Institutional Non-recognition; (3) Cultural-Sports-Academic Non-recognition and (4) Economic measures. All of them come from a variety of separate literature, from the non-recognition literature to historical/political studies of the cases of South Africa, Israel, Ukraine and Vietnam-Cambodia.

5.3.2. Communicative Legal Non-recognition

A. Forms and Functions

Communicative Legal Non-recognition is categorised as an element in the analysis (and evidently a stable part of non-recognition practice), taking inspiration from some well-known concepts used in talking about non-recognition, such as the symbolic/low-cost sanctions of

O'Mahoney,⁹⁹⁹ and the declaratory maintenance of the authority of the law of Lauterpatch.¹⁰⁰⁰ More importantly, it is the interpretation closest to the ARSIWA and the Draft Conclusion's language of "not to recognise". Although "not to recognise" sounds more like a duty of absence, of not doing something, the active participation of a state to explicitly announce its non-recognition as a legal intention through international organisations (most notably the UN) is its ultimate declaration of acceptance of such duty. More importantly, the duty of a state is now being amplified and transferred onto the international plane with the possibility of turning into the final legal assessment of the event. It alienates violators and accomplices while also creating the continuing duty for that state's succeeding government.

As asserted throughout the thesis, non-recognition is neither about punishing the perpetrators nor restoring lawful conditions. It is an idea about an international community that re-emphasises its established rule. Although there is no resort to coercion and violence, the isolation of the targeted state and the refusal to cooperate with it with regard to the unlawful situation establishes a shared knowledge of the situation, the restraint of self-interest and free-riding behaviour among members; signals the illegitimacy of current events; and, if possible, exhausts all of the violators' sources or forums for rhetoric and normalisation. This is what some scholars call "governance by information".¹⁰⁰¹

In such a scenario, legal communicative acts become extremely important.

- (1) They have to be clear so that there is no other loose interpretation that legitimises the unlawfulness.
- (2) They have to be multilateral and democratic and capture a certain majority threshold to retain their own relevance and legitimacy.
- (3) They have to have political and legal weight, with predictable patterns and language, to ensure that the future of the non-recognition campaign is securely re-producible.

Therefore, even though some observations insist that the communicative aspects of non-recognition are symbolic with "no teeth", it is still where the test of legal commitment, social practice and preferred public appearance for member states takes place. It might seem trivial, but the repetition of the non-recognition practice of unlawful situations is the last barrier between international justice and lawlessness, as the case of Ethiopia shows us. Consequently, the communicative conduct of international organisations (comprising conduct of individual nation-states), regardless of legal, quasi-legal or political intentions, helps to consolidate the foundation of communicative legal non-recognition as the first and foremost practice of non-recognition.

Back to the data, our analysis table shows that as long as there is an authoritative identification of a situation as unlawful and one state's conduct is contrary to international rules, we can be

⁹⁹⁹ O'Mahoney (n 202).

¹⁰⁰⁰ Lauterpacht (n 217), 430

¹⁰⁰¹ Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115.,

very confident that the communicative legal non-recognition is the first and stable implementation of a campaign of non-recognition. As the name suggests, within the communication between the organs of the United Nations and its member states, the language of non-recognition becomes exclusive in describing the situation and actors involved. It should be noted that the terminology used depends on the situation and legal principles at stake.

For example, in unlawful territorial situations concerning Palestine, terms, word choices, and language often come from international humanitarian law, the customary definition of aggression, and the foundational principles of international law, including Article 2.4 of the UN Charter. We can list some of the language used by both the UNSC and the UNGA, for example:

- Reminding the international community that “the acquisition of territory by force is inadmissible”;¹⁰⁰²
- Calling states “not to recognise the ‘basic law’ and other such actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”;¹⁰⁰³
- [The UNSC] “Underlines that it will not recognise any changes to the June 4, 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations”;¹⁰⁰⁴
- Establishing that the situation created by Israel is “unlawful”, “invalid”, “null and void”, and “in violation of international law and of the relevant United Nations resolutions”.
- Calling upon “all States, international organisations and specialised agencies not to recognise or co-operate with, or assist in any manner in, any measures undertaken by the occupying Power to exploit the resources of the occupied territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories”;¹⁰⁰⁵
- Referring to Israel as the “Occupier”, or “Occupying Powers” in all communications relating to the territories.

An identical solution could be found in the case of the Russian invasion of Ukraine. Although the UNSC has been unable to act due to Russia’s veto vote, we can look at their meeting minutes to see what the member states are communicating and we can indeed support the argument with the language of the UNGA.

- The language of non-recognition of the majority of the UNSC members covers a wide range of use: such as criticising the “unprovoked”, “unjustified” and “illegal” war and “occupation” of Russia; or asserting that they do not and will not “recognise the illegal annexation” of Ukrainian territories; or requesting that “Russia must end its occupation

¹⁰⁰² UNSC, ‘Res 242 Concerns Achievement of a Peaceful and Accepted Settlement in the Middle East UN Docs S/RES/242(1967)’ <<https://digitallibrary.un.org/record/90717>> accessed 9 February 2023.

¹⁰⁰³ UNSC, ‘Res 478 on the Status of Jerusalem UN Docs S/RES/478(1980)’ <<https://digitallibrary.un.org/record/25618>> accessed 16 February 2023.

¹⁰⁰⁴ UNSC, ‘Resolution 2334 (2016)’ (n 585).

¹⁰⁰⁵ UNGA, ‘Res 3336 on “Permanent Sovereignty over National Resources in the Occupied Arab Territories” UN Docs A/RES/3336(XXIX)’ <<https://digitallibrary.un.org/record/190163>> accessed 28 February 2023.

- of Ukraine’s Crimean Peninsula”; or continuing to refer to the territories that had referendums to join Russia as “occupied territories”;
- Aiding the UNSC members who cannot produce a resolution, UNGA also calls upon the Member States “not to recognise any alteration” of the status of the Autonomous Republic of Crimea and the city of Sevastopol and also declares that the “temporary military control of the Russian Federation and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine”.¹⁰⁰⁶

The same practice of using legal language to articulate the unlawfulness and invalidity of a created situation can be found in other cases, such as the Manchuria crisis (forceful creation of a new state), Ethiopia (invasion and annexation), South Africa (human rights and international peace and security), and Cambodia (foreign intervention and regime change). This is not to mention many other cases that go beyond the scope of this research, such as the Iraqi invasion of Kuwait (invasion and annexation), the creation of the Turkish Republic of Northern Cyprus (foreign intervention and the creation of a new state).

As international political life is conducted chiefly through the language of United Nations organs, these communicative languages form the primary legal reference for all other international discussions and interactions. As soon as unlawful situations are identified, the appropriate organs of international organisations (here, we mainly talk about the UNGA and UNSC) immediately engage in communicative legal non-recognition. The effect and presence of non-recognition, therefore, are felt immediately. Even if there is a rejection of the UN’s official position, there must be an acknowledgement of the existence of such legal/quasi-legal positions and navigation through the platforms and languages already used by UN organs.

As we have mentioned already in the thesis, some authors argue that a motion “calling for” or “requesting” members... does not necessarily confirm the duty or principle of non-recognition – and this is technically correct. Yet, for such motions to be passed, we can argue that a majority of members of the international community support the practice of non-recognition and are themselves participating in such a non-recognition campaign. One call or request for non-recognition could be viewed as a desperate and isolated attempt to combat a *fait accompli*. But when there are twenty of these requests with a consistent legal tone, it should be seen instead as guidance for the democratic representation of the international community concerning the situation.

B. Time commitment

Communicative legal non-recognition of an unlawful situation does not consolidate the norm if the communication ends abruptly and unwantedly, with no internationally endorsed settlement. Fortunately, our detailed case study shows beyond doubt that time is not a problem for this form of non-recognition.

¹⁰⁰⁶ Please refer to the Ukraine case study (4.E) for further references.

- With the Manchuria crisis, the communication of non-recognition of the so-called “Machukuo state” lasted six years before World War II officially began. After the war, with solid political means and a legal foundation, Manchuria was returned to the state of China.¹⁰⁰⁷
- In the case of Israel’s occupation of Palestine, the unlawful situations materialised in 1967. However, the United Nations and other international organisations have maintained non-recognition for over 60 years. There is no indication that this legal communicative non-recognition will end in the foreseeable future.¹⁰⁰⁸
- Regarding the international efforts to contain South Africa’s apartheid and its regional influences, the international community dedicated over 50 years to communicative legal non-recognition. The campaign became more sophisticated and determined in the later decades, demystifying the idea that the international community’s non-recognition campaigns would eventually succumb to effectiveness.¹⁰⁰⁹
- In the case of Vietnam’s intervention in Cambodia (and other measures against the Pol Pot regime), the international legal processes creatively sustained non-recognition of the Vietnamese-installed government of Heng Samrin while limiting the power of the Khmer Rogue. This process lasted ten years before the successful internationally organised and monitored general election.¹⁰¹⁰
- The most updated practice of non-recognition, the Russian invasion(s) of Ukraine, has been challenged for almost ten years. From 2014 to 2021, dealing with Russia’s annexation of Crimea and the city of Sevastopol, the UNGA passed 13 resolutions, with each of the resolutions being an embodiment of the principle of non-recognition. Although these resolutions suffered low supporting votes, they nonetheless won the majority and they succeeded in translating the majority’s will into institutional non-recognition, as will be examined shortly.

After Russia’s armed invasion of Ukraine in 2022, the international community saw that Russia intended to undermine all the basic principles of international law. Four resolutions in 2022 alone obtained majority votes, with over 140 countries acknowledging and endorsing the practice of non-recognition. The UNSC, as an organ, could not officially participate in the campaigns of non-recognition. Yet, its member states’ political expressions, legal discussions and debates within the environment of the UNSC continue to prove the superiority of member states who support the practice of non-recognition in the case of Ukraine, despite the fact that five new members are elected to the UNSC every year. The composition of the UNSC changes constantly yet could still generate a majority (consistently over 12, with 2 abstentions in addition to Russia’s veto);

¹⁰⁰⁷ Please refer to the Manchuria case study (4.A.1) for detailed references.

¹⁰⁰⁸ Please refer to the Palestine case study (4.B) for detailed references.

¹⁰⁰⁹ Please refer to the South Africa case study (4.D) for detailed references.

¹⁰¹⁰ Please refer to the Kampuchea case study (4.C.3) for detailed references.

we can see that the commitment of most community members to non-recognition practices has been highly consistent.¹⁰¹¹

We can assert that communicative legal non-recognition is the most foundational and primary part of non-recognition. Such a characterisation agrees with the way most scholars, envision the elementary aspects of this principle. Now, with the practices coming from the most controversial and famous cases of the non-recognition principle, the conclusion is greatly strengthened.

5.3.3. Institutional Non-recognition

The name “Institutional non-recognition” is my personal contribution. One thing I notice in the non-recognition literature is that authors often dismiss the effectiveness and meaning of non-recognition by arguing that the previously discussed Communicative Legal Non-recognition, even if repeated by authoritative international documents, does not produce any real-life effects. This again overlooks the international legal process of non-recognition with a general assumption concerning the inconclusive nature of international quasi-legal documents, such as the resolutions of the UNGA.

On the contrary, our case study has shown that acknowledging and practising institutional non-recognition explains how the majority of the international community, through the political and legal structure of the United Nations, the UNGA’s “non-binding” resolution and its active agencies, could reinforce the common perception concerning an unlawful situation among governments, and even animate non-recognition through daily international activities. Acknowledging and exploring institutional non-recognition helps me go beyond the boundaries set by the existing literature and demonstrate how vivid and lively a non-recognition campaign can be despite the claims often made by skeptics. Institutional non-recognition has been so consistent, natural and easily incorporated into states’ practice and daily international life that it is a surprise no authors have delved into such a rich field of primary sources.

- During the non-recognition campaign concerning the Manchurian crisis, with limited international interaction at the time, the League of Nations managed to use its early agencies, such as the Universal Post Union, to limit the normalisation of “Machukuo”’s international presence. They also banned Machukuo from the League’s open and closed conventions systems.¹⁰¹²
- In the case of the Israeli occupation of Palestine and other Arab territories, we can see the involvement of UN agencies evolved with the complexity of the UN system. As we have shown, these organs and agencies wield immense powers and have effectively neutralised the political and legal rhetoric of Israel. The World Bank employed UNGA’s non-recognition language to describe and refer to the situations in their reports and communications. This institution also limits Israel’s access to World Bank loans and related funds. UNESCO basically rejects Israel’s demands to claim sites recognised as

¹⁰¹¹ Please refer to the Ukraine case study (4.E) for detailed references.

¹⁰¹² Please refer to the Manchuria case study (4.A.1) for detailed references.

World Heritages in occupied territories and consistently lists them as Palestinian heritage sites instead. Last but not least, the Human Rights Council, the OHCHR, and the Committee on the Exercise of the Inalienable Rights of the Palestinian People (CEIRPP) have been highly operative with a condensed series of works on Israel and Palestine each year. Their language also reflects the consistent practice of non-recognition.¹⁰¹³

- Concerning the long but successful campaign of the international agencies against apartheid, we can see again the power of institutional non-recognition. As soon as the UNGA started to identify various situations in South Africa as violations of the principles of international human rights law that were contrary to the very purposes of the organisation, institutions within the United Nations acted in accordance with UNGA's legal position set up in the resolution. As we noted in the case study chapter, the International Labour Organisation played a vital role in recognising and legitimising black independent unions despite the protest of the incumbent South African government. Until the 1980s, the ILO also excluded and denied the credentials of the representatives appointed by the South African governments. The roles of OHCHR and FAO were also exceptional in the continuing practice of non-recognition.¹⁰¹⁴
- With regard to Vietnam's intervention in Cambodia, the role of the World Food Program and United Nations Border Relief Operations (UNBRO) was relevant in isolating Heng Samrin's government.¹⁰¹⁵
- Since the Russian invasion of Ukraine, UN agencies have demonstrated impressive coordination and effectiveness in implementing non-recognition policies. Although some scholars view Resolution 68/262 as inconclusive due to a questionable majority, it is nevertheless a UNGA resolution, and the United Nations has launched a commendable non-recognition campaign. The International Civil Aviation Organization (ICAO) has declared that Crimean airspace belongs to Ukraine and has collaborated with Eurocontrol to restrict access to international civil flights. Additionally, organisations such as UNESCO, UPU, OHCHR, and ITU have contributed their areas of expertise to ensure that non-recognition campaigns are successfully implemented on relevant issues. Since 2022, the non-recognition campaigns have received "superiority vote" support from the UNGA. This is not to mention the rich administrative and diplomatic practices of non-recognition of the Russian-controlled territories by the principal regional organisation – the EU and other neighbouring states.¹⁰¹⁶

Indeed, *not every UN agency participates equally in seeking non-recognition of unlawful situations*. The International Atomic Energy Agency (IAEA) certainly has a minimal role in conventional armed intervention and occupation, such as in Cambodia or Palestine. But this should not be a problem for our argument. Some agencies do not participate in the non-recognition process simply because they have no relevant connection and authority to be

¹⁰¹³ Please refer to the Palestine case study (4.B) for detailed references.

¹⁰¹⁴ Please refer to the South Africa case study (4.D) for detailed references.

¹⁰¹⁵ Please refer to the Kampuchea case study (4.C.3) for detailed references.

¹⁰¹⁶ Please refer to the Ukraine case study (4.E) for detailed references.

involved. What's more important is every relevant agency involved adopts and practices non-recognition in accordance with UNGA and UNSC resolutions, which is the legal reality. Several agencies are particularly active and effective in maintaining the international outlook on these kinds of events. The OHCHR's reports and fact-finding missions in armed conflicts, ICAO's powers to disrupt airspace and commercial flights and UNESCO's often-undermined cultural power concerning the legitimacy and recognition of historical heritages and other international cooperation. Overall, this web of international activities provides strong evidence for a predictable and achievable framework of non-recognition.

On a separate note, not only are these institutional measures supported by many members of the international community, but they also force the absent or opposed states to adhere to their legal position and political/legal measures. Ultimately, these agencies could affect how other states participate in international life, receive international support and funding, and improve states' status overall. Member states of UNESCO who hope to have their cultural sites listed as world heritages or receive an international boost in tourism image and other benefits, already explicitly recognise UNESCO's authority in dealing with cultural heritage sites. Therefore, they are bound to a certain extent by the agency's decisions regarding cultural heritage sites in armed conflicts (such as those in Ukraine and Palestine). They have no choice but to acquiesce to the decision, even though they might oppose it politically. A similar story can be told in the case of the OHCHR, the ICAO and the ILO. The structural and institutional practices of these agencies within the UN system challenge the assumption that the duty and the implementation of non-recognition require strict state consent and that the UNGA's resolutions possess no legal power.

5.3.4. Cultural and Economic Approaches to Non-recognition

As globalisation continues to develop and international cooperation strengthens, international social interactions become more and more frequent, and non-recognition seems to evolve with more varied ways of expression. The cultural, sports and academic approach (cultural approach for short) to non-recognition has become a point of discussion as a part of non-recognition since the campaign against the South African apartheid government. The cultural approach to the principle of non-recognition, it could be argued, is an evolution of non-recognition in a more globalised world, with many aspects of cultural life now becoming internationalised. In the case of South Africa, the effectiveness, intensity and consistency of these anti-apartheid campaigns, supported by official resolutions from the UNGA, obliged scholars to treat the cultural approach to non-recognition seriously. Additionally, in today's televised, socially mediated world, not only states but also the general population have a say in the public perception of non-recognition and unlawful situations.

As Daniel Joyce argues in his work *Informed Publics, Media and International Law*, international law depends on an informed global public to address the complex global problems we face.¹⁰¹⁷ Even a symbolic punishment in the cultural arena (such as the national football team being excluded from the FIFA World Cup, tennis players not displaying the national flag, or the right to host an international sports event being revoked, or suspension of the privilege

¹⁰¹⁷ Daniel Joyce, *Informed Publics, Media and International Law* (Hart Publishing 2020).

of participating in the regional cultural contest) signals to the worldwide public the existence of unlawful and unacceptable wrongdoings on the side of such a country.

Can such measures be viewed negatively by a specific population? It certainly can. In Vietnam, there have been extensive disinformation campaigns to discredit the international rule of law and the struggle of the Ukrainian people against the Russian invasion.¹⁰¹⁸ Nevertheless, the fact that the international audience has a chance to see how a deviation from international law is being “punished” might suggest to them that an international rule exists and matters. The consequences for such a violation not only hurt that country in legal, political, and diplomatic terms, which are often remote from the public imagination, but could also manifest through something about which they feel strongly, such as a football match or a singing contest.

On the other hand, economic measures should not be undermined in the overall process of non-recognition. Returning to Chapter 3, we already explored the effectiveness and the endless possibility of economic sanctions against Russia. Yet, as we also pointed out, economic sanctions could be labelled differently, such as the Security Council’s measures in accordance with Articles 25 and 41 of the UN Charter,¹⁰¹⁹ or state voluntary countermeasures, established and explained through literature.¹⁰²⁰ Therefore, although there are mentions of economic sanctions in the analysis table, it mostly reconstructs the ways in which economic tools have been utilised and allows us to identify a more precise pattern of economic sanctions.

The fact that cultural and economic approaches to non-recognition have become increasingly sophisticated opens the door to interpreting their role in non-recognition campaigns. Unfortunately, as our table of analysis and our case studies show, neither approach is an organic part of the non-recognition process as they require extra steps, commitment, and attention from both states and international organisations. This is not to say that cultural and economic approaches cannot be a tool in the arsenal of non-recognition. I would instead argue that they do not equate to the inherent duty of international organisations, agencies and their member states. In the future, we can expect further evolution of non-recognition practices if both cultural and economic measures increase their relevance and presence.

5.4. Non-recognition as a Custom: Consistency in *Opinio juris*

In a manner similar to that of the above analyses, we rely on several highly-regarded theories concerning the identification of customary international law to build the section’s table of analysis and to find supporting evidence for the claim that the idea of non-recognition is indeed perceived and accepted as law (or *opinio juris*). We will not engage again in debates concerning customary international law because Chapter Two of this dissertation already did so

¹⁰¹⁸ Nguyen, ‘How Vietnamese “Putinistas” Are Spreading Disinformation about Ukrainians’ (n 984).

¹⁰¹⁹ ‘Sanctions | United Nations Security Council’ <<https://www.un.org/securitycouncil/sanctions/information>> accessed 28 May 2023.

¹⁰²⁰ Lori Fisler Damrosch, ‘The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts’ (2011) 105 *Berkely Journal of International Law* 497.

Peter Trooboff and Laurence Boisson de Chazournes, ‘Economic Countermeasures in an Interdependent World’ (1995) 89 *Proceedings of the Annual Meeting (American Society of International Law)* 337.

extensively. Nevertheless, it is helpful to re-interpret and re-assess what the theoretical foundation of this particular table will be.

Firstly, the CIL theory of relative consent play a fundamental role in how the dissertation positions *opinio juris*. Establishing the threshold of *opinio juris* is not about proving that all member states of the international community have explicitly consented to a specific norm. As already mentioned, proving a norm *is perceived* as law does not mean proving that such a norm *is consented* to as law.

As the theory of relative consent shows, consent is vital in ensuring CIL's legitimacy and procedural validation. However, in many cases, states could have no choice but to perceive a customary norm as a legal obligation, although they might wish to do otherwise. As the name suggests, this kind of consent is loosely defined. Why is that? It could be because the norms are embedded into the system, and rejecting them means rejecting the system itself. Or it might be because the political and legal practices concerning the norm from most international organisations and agencies that govern international life have become overwhelming. A state cannot continue to maintain its international connections without acquiescing to the practices. On the other hand, the belief that state governments always possess the rationality to consent to a norm that furthers its interests without the guidance of established common sense has already been thoroughly debunked. Last but not least, strict consent cannot be the sole basis of CIL because, historically, states have consented and cooperated to do bad things, yet no one has ever endorsed these arrangements as law.

Overall, CIL is not generally an environment for “forum shopping”, where states can be picky and choose whatever is most convenient. The theory of *relative consent* reminds us that when examining *opinio juris*, it is crucial to consider prevailing beliefs and principles rather than strict numerical thresholds. In cases of discrepancies, only significant differences between states or international/regional organisations should be considered. The opinions of individual states acting outside the norm should not be given undue prominence.

Similarly, the consideration of affected states provides a weighty starting point for the quest of finding *opinio juris* concerning non-recognition. As the history of international law and customary international law have taught us, not all of a state's legal opinions are treated equally in forming customs. This is not about the inequality in international relations but rather historical evolution and political pragmatism. There are customs formed by the consistent practice and lobbying of only one state for centuries. In addition, the formation of customs tends to favour states directly related to the issues under discussion. The relative consent theory suggests we look for the *opinio juris* by being mindful of role categorisation and role consistency. In the case of non-recognition, I contend that victim states, affected states (most importantly through regional organisations), and other closely related organisations, and finally move to the universal system of belief in order to see to what extent they support non-recognition. Endorsed by prominent authors, including Anthony Clark Arend and Niels Petersen,¹⁰²¹ and the historical development of CIL, the “Affected States” elements in relative consent theory is undoubtedly another valuable criterion for the analysis table.

¹⁰²¹ Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press 1999).

Finally, the theory of constructivism in the formation of CIL is a thought-provoking addition to the foundation of non-recognition. Following Guzman's concept of the "constitutive relationship between agents and structures,"¹⁰²² or Reus Smit's idea of "self-perceived identity", "principle of sovereignty",¹⁰²³ and the "systemic norm of justice" in different epochs of international society, I believe that examining states' legal beliefs or intentions alone does not really reflect the developing common *opinio juris*. Whether or not an obligation is perceived as law requires our attention concerning the interaction between states, what happens in the fora of international organisations, and the participation of non-state actors in non-recognition campaigns. This is because constructivists often argue that the world is built through speech acts. Social norms constantly exchanged between state/non-state actors and international/domestic actors will generate, fortify and even "domesticate" legal beliefs. The constructivist approach to international law requires observers to expand their observations considering non-recognition, and how that could affect, or even change, a state's legal outlook.

Table 5.4. Layers of *opinio juris* concerning Non-recognition

Cases/Stages		Victim state(s)	Affected States (Notably through regional organisations)	International Organisations (Governmental)	Other International Actors (Non-governmental)
Manchuria	Acknowledgement of Non-recognition	Confirmed	Unavailable	Confirmed (Superiority)	Unavailable
	Maintenance of Non-recognition	Confirmed	Unavailable	Confirmed (Superiority)	Unavailable
Ethiopia	Identification of Unlawful Situations	Confirmed	Unavailable	Confirmed (Superiority)	Unavailable

Niels Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' in Brian D Lepar (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/reexamining-customary-international-law/role-of-consent-and-uncertainty-in-the-formation-of-customary-international-law/99F1567E322A1D40A6098C055D9B3D98>> accessed 15 March 2023.

¹⁰²² Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) <<https://doi.org/10.1093/acprof:oso/9780195305562.001.0001>>.

¹⁰²³ Christian Reus-Smit, *The Moral Purpose of the State* (Princeton University Press 1999).

	Maintainance of Non-recognition	Confirmed	Unavailable	Abandoned (Although some states confirmed)	Unavailable
Goa	Identification of Unlawful Situations	Confirmed	Rejected	Rejected (Majority)	Not confirmed
	Maintainance of Non-recognition	Confirmed	Rejected	Rejected (Majority)	Not confirmed
Tibet	Identification of Unlawful Situations	Confirmed	Not confirmed (Lack of democratic regional organisations)	Not confirmed	Unavailable
	Maintainance of Non-recognition	Abandoned	Not confirmed (Lack of democratic regional organisations)	Abandoned	Unavailable
Palestine	Identification of Unlawful Situations	Confirmed	Confirmed (including majors regional organisations such as the African Union or the Islamic Cooperation Organisation)	Confirmed (Superiority)	Confirmed (independent from intergovernmental institutions)
	Maintainance of Non-recognition	Confirmed	Confirmed (including major regional organisations such as the African Union or	Confirmed (Superiority)	Confirmed (independent from political international institutions)

			the Islamic Cooperation Organisation)		
South Africa	Identification of Unlawful Situations	Confirmed	Confirmed (including major regional organisations such as the African Union and other African intergovernmental organisations)	Confirmed (Superiority)	Confirmed
	Maintainance of Non-recognition	Confirmed	Confirmed (including major regional organisations such as the African Union and other African intergovernmental organisations)	Confirmed (Superiority)	Confirmed
Cambodia	Identification of Unlawful Situations	Confirmed	Confirmed (Initiation of ASEAN)	Confirmed (Majority)	Confirmed
	Maintainance of Non-recognition	Confirmed	Confirmed (Initiations of ASEAN)	Confirmed (Majority)	Confirmed
Ukraine	Identification of Unlawful Situations	Confirmed	Confirmed (Initiations of EU)	Confirmed (From Majority to Superiority)	Confirmed (Independent of political international institutions)

	Maintainance of Non-recognition	Confirmed	Confirmed (Initiations of EU)	Confirmed (From Majority to Superiority)	Confirmed (Independent of political international institutions)

(Confirmed: Explicit support / Not Confirmed: Does not provide explicit support / Unavailable: The political entity did not exist at the time, or we have no information on their participation / Rejected: Explicitly refused to support / Bold text: Unconventional, non-uniform response)

Table 5.4. clearly displays a pattern of the ways international actors have viewed non-recognition over time and supports my hypothesis. There are strong connections and influences between different actors that shape their perspectives on the legal status of non-recognition.

For the first two cases of Manchuria and Ethiopia, when there were no regional organisations and a lacklustre, ineffective small number of international organisations, it is reasonable that we should only look at the beliefs of victim states, the beliefs displayed in the arena of international organisations and the international organisations themselves. Yet, we can still find a high level of legal consciousness of and commitment to the legal concept of non-recognition.

In both cases, the government of the Republic of China and the exiled Emperor Haile Selassie of Abyssinia did not expect the international community to use their resources and troops to reverse the unlawful events. Instead, their skilful use and interpretation of the League's legal instruments, mostly Articles 13, 14, 15 and 16 of the Covenant, created a common theme for the principle of non-recognition in which all member states eventually professed their belief and support as law. Articles 13, 14 and 15 outlined the procedure for identifying illicit conduct and unlawful situations, either by judicial organs or collectively by the League itself. Article 16, on the other hand, suggested measures to deal with a "covenant-breaking state" and the consequences of its actions. Arguably, the calls of both China and Ethiopia were consistent, with strong conviction in the clarity of the duty not to recognise the unlawful situations created by Japan and Italy. And such calls were met with commitment and certainty as the League responded promptly to both requests. And like we have examined in detail in our case studies, the League's tools were extensive and expressive for its time. Together with superiority votes, the collective actions signal the strong faith of Member States at the time in employing both expressive and institutional tools against unlawful situations as a way to "not recognise" them.

Indeed, the League's non-recognition was still a product of its age. The lack of regional and other non-governmental international organisations means that non-recognition could not penetrate more into domestic systems of belief and strengthen its standing as a part of the law. With its abandonment of the duty of collective non-recognition concerning the Italian conquest of Ethiopia, the League's system of common security and international rule of law failed and, as we know, led to the official outbreak of World War II. Nevertheless, the fact that the majority of states approved both non-recognition campaigns and their acknowledgement of many fact-

finding and legal reports about these events allow me to contend that non-recognition was considered an integral part of the legal system at that time. The failure of non-recognition was not the failure of the principle itself but was due to the downfall of the entire belief system.

The cases of Goa and Tibet during the early days of the United Nations system tell some unconventional stories. Still, they did not really affect the *opinio juris* of UN Member States concerning non-recognition. In the case of Goa, despite the territorial claims pushed by Portugal, it was evident that the unlawful situation *at the core* of international concerns and discussions was not about India's use of force but Portugal's continuing colonial presence in South Asia and their refusal to work with authorised organs and agencies of the United Nations. The dissertation did hint in the case study chapter that the hierarchy of norms was clearly determined by active members of the UN between the so-called "territorial integrity" of a colonised saltwater region and the obligation of decolonisation. The legal opinion that India's conduct was justifiable or even legal was not because the states disregarded the principle of non-recognition of unlawful situations. On the contrary, it was because states argued that India's armed invasion had already *ended the unlawful situation* (i.e., Portugal's colonial legacy). This legal assertion was supported and pushed vigorously through the UN system by both African states' organisations and the South Asian community as evidence for regional *opinio juris*. The legal belief was transplanted into the United Nations with Resolution 1699 of December 19, 1961.¹⁰²⁴ And as we will discover, regional organisations have an influential power in explaining and interpreting an event to international audiences, and even shaping world legal opinion, ensuring the consistency of the "flow" of state *opinio juris*.

China's annexation of Tibet is a tragic example of the early failure of the United Nations. Yet again, it is more about the incomplete legal environment, the lack of flow of information and the power politics tendency of the 1950s era. From the fact that the victim – the legitimate government of Tibet itself – succumbed and accepted Communist Chinese rule (and was actually an active part of it) to the obstruction of justice by regional imperialist powers such as India (by providing wrong information to the authorised committee), the conditions did not allow the principle of non-recognition to be a part of the international process in this case.

In our contemporary international law environment, the model for studying *opinio juris* of the duty of non-recognition has been completed with four significant cases of unlawful situations in Palestine, South Africa, Cambodia, and Ukraine. The victims of each case, whether a state or non-state actor, have strongly determined that their violated rights shall not result in legal benefits for the perpetrators. In Palestine, it was the Palestinian people, and their representative organisations. In South Africa, it was the South African revolutionary national parties and alliances. In Cambodia, it was the combination of the Pol Pot regime and the Cambodian Royal family. And in Ukraine, it is the incumbent government. Despite different legal statuses and objectives, unfortunate states fell into the victim role in each case have all committed to the idea that the international community should not recognise unlawful situations. This is the first layer of *opinio juris* of non-recognition.

¹⁰²⁴ UNGA 113; A/RES/1699 (XVI) (19 December 1961) <http://www.worldlii.org/int/other/UNGA/1961/113.pdf>

Concerning affected states, we mean states that might have some connections with unlawful situations and probably suffer from the situation. In today's political climate, the regional community of states and organisations are exemplary in their connections with the territories, their close proximity and their economic interests tied to the area. In addition to their advantages concerning size, regional organisations are perfect targets to study local *opinio juris* of non-recognition. As shown in the case studies, we can argue that respective regional organisations have supported this legal concept as much as they can in their powers, especially if they perceive the situation as a severe injustice, a risk to regional peace and security. In four cases, regional organisations are the leading players who push the narrative of the situation's legality and appropriate non-recognition measures.

With the situation in Cambodia, ASEAN played a central role in interpreting Vietnam's violation to an international audience while skilfully manoeuvring the international humanitarian aid and other issues within their consultation to make sure that the Heng Samrin's government in Vietnam's temporarily occupied Phnom Penh could not get the benefit of being seen as a legitimate government. They also saw the legitimacy problems with Pol Pot and designed measures to limit the future power of this group. ASEAN's *opinio juris* concerning the non-recognition of the Vietnam-installed Heng Samrin's government and, eventually also, the Pol Pot clique is beyond doubt.

Regarding the cases of Palestine and South Africa, although there are many intertwined incidents and situations, regional governments formed official intergovernmental organisations and temporary regional organisations to pursue their campaigns for non-recognition. We can mention the Organisation of Islamic Cooperation and the Organisation of African Unity as the main force behind decades of initiatives and campaigns fighting against the efforts of normalising unlawful situations by the governments of Israel and South Africa, respectively. With the recent Russian invasion of Ukraine, the sophisticated administrative system of the European Union is deluged with evidence of a legal belief concerning non-recognition of Russia's annexation of Ukrainian territories.

In short, the regional organisations and their extensive and unanimous support for the victims facing unlawful situations offer another layer of *opinio juris* concerning the legal duty of non-recognition. These states and their regional organs, with local knowledge and understanding, with their direct interests at stake, could never support the prolongation and normalisation of situations created by lawless conduct directed against its members. Decades of these regional organisations practising non-recognition strengthen the theoretical assumption of the relative consent theory and the prospect of a customary non-recognition.

Finally, when it comes to governmental and non-governmental international organisations, it is as I expected. The United Nations – the current embodiment of a universal organisation – has thoroughly practised and endorsed the duty of non-recognition. One thing we should highlight is that there have been no significant differences or disagreements between regional institutions and the UN regarding the identification of unlawful situations and fulfilment of the duty of non-recognition. The harmonisation and close coordination between regional and international organisations strongly support the “accepted as law” aspect of non-recognition. Again, as I have repeatedly noted, many scholars refuse to look at the UN documents, the

resolutions of its organs and its agencies' applications of non-recognition as proof of *opinio juris* since they are not "representative" enough of the state's legal belief. But where then do we find authentic sources of a state's legal belief?

With significant support from the literature, I am confident that the formation of CIL as a state-centric, quantitative test does not hold any proof or relevance in the contemporary and future climate of international law. Consent does not mean all states must at all times expressly consent to every part of the body of rules constituting international law.¹⁰²⁵ Many international scholars and even state governments have shown clearly that all contemporary administrations are very well aware that their conduct, behaviour and statements, whatever their cause, can lead to the establishment of a new customary norm.¹⁰²⁶ Thus, we can see their extra caution in every declaration, communication, and debate before the United Nations' forum.

Consequently, the main problem is whether or not states have expressed an undoubted commitment to the norms. In this aspect, we can confirm that most states have shown consistent support for non-recognition. As we have already seen in the case study chapter, during the Israeli occupation of Palestine (lasting over 50 years), South Africa's long history of apartheid practices (almost 50 years), and even the ten-year occupation of the Vietnamese armed forces in Cambodia, the longer the transgressions lasted, the more resources, the more information and the more creativity were put into the non-recognition tools to which the international community resorted. In the case of Ukraine, the number of states that supported non-recognition and rejected the illegal Russian annexations went from a questionable "majority" in 2014 to superiority in 2022 when the real ambitions of Russia and its profound impact on the future of the international rule of law were fully realised.

Such a commitment on the part of the UN allows us to conclude that the international community's approval of the duty of non-recognition (as soon as they have an authoritative determination of illegal conduct and unlawful situations) commands wide acceptance. This authoritative assessment of the United Nations also paves the way for the domestication of non-recognition and its incorporation into the administrative, legislative and judicial branches of countries – especially countries of the relevant regional organisations. The argument also sits well with recent developments in the literature concerning the role of international organisations in creating custom. For example, Kristina Daugirdas has argued that states' intentions when establishing an international institution, its implied power and its state-authorized capacity to operate on the international plane already reflect state's acceptance to the norm-making procedure of such international organisation.¹⁰²⁷ As a result, the view that non-recognition could and should be seen as a collective *opinio juris* has every reason to be normalised and standardised.

¹⁰²⁵ Oppenheim's *International Law: Volume 1 Peace* (n 118), 14-15

¹⁰²⁶ Karol Wolfke, *Custom in Present International Law: Second Revised Edition* (Brill Nijhoff 1993) <<https://brill.com/view/title/9284>> accessed 18 October 2022., 66-67

¹⁰²⁷ Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31 *European Journal of International Law* 201.

Another point is in order. Through the extensive and comprehensive international campaigns of non-recognition and the interpretative regimes of the United Nations, non-recognition sometimes authorises and sometimes inspires voluntary practices of non-recognition on the part of non-governmental international organisations. This is still an open opportunity for the further integration of non-recognition into the international life of states and the general public's imagination and perception of international law and its effectiveness.

For example, the International Olympic Commission is basically an independent NGO (non-governmental organisation). The United Nations has no control over the IOC, and the IOC has no obligation to consult with the United Nations through the Economic and Social Council under the provisions of Article 71 of the United Nations Charter.¹⁰²⁸ The IOC is basically a neutral organisation that repeatedly refuses to allow activism or political gestures to appear in its games.¹⁰²⁹ Yet, this organisation has been actively involved in non-recognition campaigns most notably the ban on South African apartheid teams and, most recently, the ban against Russian and Belarusian athletes.¹⁰³⁰ To a certain extent, this dedication proves that non-governmental organisations see the UN's identification of unlawful situations virtually as legal requirements. And the UN's recommendations or calls for non-recognition seem to be perceived as legitimate and lawful measures against illicit acts, which can be practised without having to take "political neutrality" into account. From a constructivist point of view, these are the communications and the interpretations of norms between international actors that eventually legalise and internalise the *opinio juris* of non-recognition.

I acknowledge that the role of NGOs is not particularly well-defined in the system of non-recognition. Besides the institutionalised campaign led by the UN organs in the fight against South African apartheid, the participation of NGOs in the campaign was mainly voluntary and at a degree of commitment that the United Nations could not really predict. The IOC, for instance, could have dropped their ban on the Russian teams without facing legal consequences. Nevertheless, the fact that the majority of cultural, sports and academic NGOs decided to participate in non-recognition campaigns and held their positions until the unlawful situations were resolved implies that the duty of non-recognition could be perceived as law even by the non-political, ordinary elements of international life – an interactional law that doesn't always need coercive enforcement.

With this reinforced view on the constructivist approach to international law, I reject the idea that state practice can only be studied by manually hand-picking all countries that exist to date and their related conducts or that a custom is formed only when all country's practices are the same. Even if some states do not explicitly endorse non-recognition, as long as non-recognition is chosen as the legal narrative of the international institutions and is communicated with clear

¹⁰²⁸ Steve Charnovitz, 'Nongovernmental Organizations and International Law Centennial Essays - In Honor of the 100th Anniversary of the AJIL and the ASIL' (2006) 100 American Journal of International Law 348.

¹⁰²⁹ 'Opinion | Governments Triumph over Athletes in Olympic Committee's Latest Hypocrisy' (NBC News, 16 January 2020) <<https://www.nbcnews.com/think/opinion/olympics-are-political-ioc-ban-denies-reality-athletes-their-voice-ncna1117306>> accessed 6 June 2023.

¹⁰³⁰ Lapchick (n 869).

MacIntosh, Cantelon and Mcdermott (n 866).

and adequate information, the constitutive relationship between agents and structures eventually bends the language, identity, and interests of states and what they perceive as acceptable.

For example, in the case of Ukraine, the constant interactions/communications between the UNGA, the UNSC, the United Nations agencies and other international economic enterprises eventually formed social acceptance and rule maintenance for non-recognition. While they do not necessarily wholly change the political stance of some states, we can see how they force governments to adapt and accept the legal reality within international organisations. China, India, Brazil and Vietnam have been the countries that consistently abstained from voting for the resolutions that contain language describing Russia as an “aggressor” or Russia’s conduct in Ukraine as “aggression”. However, as the constructivist theory argues, the constant communicative acts between international/national actors with prescriptive statements slowly “construct” states’ beliefs, ideas, political habits and identity, as shown in recent developments, where the aforementioned countries voted for the following motion:

"Recognizing also that the unprecedented challenges now facing Europe following the aggression by the Russian Federation against Ukraine, and against Georgia prior to that, and the cessation of the membership of the Russian Federation in the Council of Europe, (we) call for strengthened cooperation between the United Nations and the Council of Europe."¹⁰³¹

In an attempt to correct the reason for its vote, the Chinese representatives explained that China’s position on the Ukraine issue has not changed since the war started.¹⁰³² Other countries remain silent. It shows that the grand narrative of major international institutions such as the UN and the strong presence of UN agencies in international life normalise the shared expectations concerning non-recognition campaigns against the situations created by the Russian invasion of Ukraine. Reus-Smit notes that international interactions and communicative acts create deep-seated normative and ideological assumptions of each era that lead states to formulate and pursue their interests within certain boundaries.¹⁰³³ Therefore, some forms of conduct are regarded as legal obligations and mandatory, while some are unimaginable.

In general, *opinio juris* of states concerning non-recognition should not be proven by hand-picking a number of states and listing some practices. Rather, the proposition is supported through a progressive model of acceptance. Starting with the victim states, who all confirmed and even actively requested the campaigns of non-recognition to regional organisations that were particularly active in the area of non-recognition, the obligatory perception of non-recognition is universalised within the communications of the United Nations, which in turn

¹⁰³¹ UNGA, ‘Res 77/284 on “Cooperation between the United Nations and the Council of Europe” UN Docs A/RES/77/284’ <<https://digitallibrary.un.org/record/4010475>> accessed 13 May 2023.

¹⁰³² ‘China Says Its Stand on Ukraine War “Has Not Changed” after UN Vote’ (*South China Morning Post*, 4 May 2023) <<https://www.scmp.com/news/china/diplomacy/article/3219290/china-says-its-stand-ukraine-war-has-not-changed-after-un-vote>> accessed 13 May 2023.

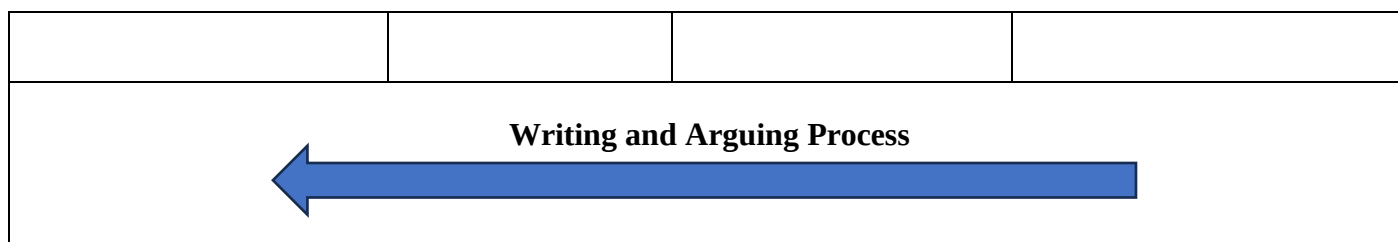
¹⁰³³ Christian Reus-Smit (n 132).32 - 33.

influences non-political international organisations also to perceive non-recognition as a lawful practice in which to be involved.

6. Conclusion: The Ideal Model of Non-recognition

Until now, the dissertation has covered significant interconnected topics, arguments and case studies. From pondering the nature of customary international law and how we should understand the application of this legal phenomenon to the concept of non-recognition in both political and legal senses; from analysing cases that involved non-recognition individually to weaving them collectively together as different parts of a comprehensive legal continuity, the dissertation might seem so overloaded with information that it sometimes feels disconnected. However, revisiting the “Reading and Thinking Process” map of the dissertation in Chapter One will allow us to remap everything to reach the conclusions of the thesis.

Reading and Thinking Process 			
Technicality of Non-recognition	Research Question	Detailed questions	Hypotheses
<i>The problem with breached norms</i>	<i>Is the duty of non-recognition a part of international customary law?</i> <i>And if it is, how should it operate?</i>	<i>How can we understand the principle of non-recognition in the historical, philosophical and practical contexts of international law?</i>	The roots of non-recognition rest in the philosophy of international law and justice. (1)
<i>The problem with collective determination</i>		<i>Have States’ practices and opinio juris been as inconsistent and fragile as scholars usually claim?</i>	The pattern of non-recognition is much more comprehensive than we had previously imagined. (2)
<i>The problem with content</i>		<i>What should the “ideal practice” of non-recognition look like?</i>	Non-recognition is not a substantive “treaty obligation.” (3)



In Chapters One and Two, the dissertation establishes that, although non-recognition has appeared from time to time in vital legal and political documents of international law and relations, its content and characteristics are so fragmentary that we could hardly imagine a duty of non-recognition as a component of the international treaty law system. However, the ubiquitous appearance of the language of non-recognition in so many areas of international legal thought does not allow us to dismiss it as irrelevant. The third hypothesis/detailed question of the dissertation (3), as presented in the table, is the proposition that non-recognition is not a substantive “treaty obligation”. That hypothesis leads us to two subsequent theoretical positions.

Firstly, because non-recognition is not a treaty obligation, the only way to prove that it is a part of the working international legal system is to determine whether it is customary international law. Secondly, because non-recognition is not a substantive obligation, it is advisable not to burden the descriptive and exhaustive nature of ordinary legal norms on non-recognition. With this two-element hypothesis in mind, Chapter Two provides the groundwork for identifying non-recognition as CIL:

- (1) Customary international law is undoubtedly law, and the nihilistic attacks against its implementation and credibility are unjustified.
- (2) The theoretical foundations of CIL, including “Relative Consent theory”, the “Constructivist approach”, and “International Legal Process theory,” are the most relevant and valuable to the study and identification of a customary norm. All of them will be closely examined in Chapter Three and Chapter Five.

Chapter Three picks up the pace and immediately addresses the conceptions and the legal/political/theoretical contexts of non-recognition. This chapter intends to answer the first hypothesis/detailed question on the roots of non-recognition (1).

The first section of Chapter Three examines a rare comprehensive theory of non-recognition offered by O’Mahonney and hints at the theoretical aspects of non-recognition, which reassembles the foundations of CIL, as explored in Chapter Two. Under this rubric, non-recognition could only be understood as a process (familiar to the CIL’s international process theory). Non-recognition is necessary not because of its deterrent power but because it reiterates, re-negotiates, and re-establishes threatened norms (resembling the CIL’s constructivist approach). Non-recognition is democratically acceptable because it requires the collective

announcement of illegality and rejection (in a way that is similar to the CIL's relative consent theory).

After forming a politically and legally plausible theory of non-recognition, Chapter Three delves into non-recognition as a modern legal concept and its possible connection to other norms. From understanding the internal dynamics of the properties of non-recognition to its external relationship with other legal phenomena, such as economic sanctions and the law of recognition, Chapter Three confirms that non-recognition is an established and organic part of international law, which has developed in-depth legal components and has become distinguishable from other political, legal concept dealing with international unlawfulness.

Finally, Chapter Three addresses non-recognition under the lens of the Third World Approach to International Law ("TWAIL") and the emerging school of post-colonialism in international law. The chapter examines these critical schools and their endeavours to expose remnants of colonialism and imperialism in international law. The claims of these schools are examined, while the contribution made to non-recognition by the non-European world is emphasised.

Chapter Four is the backbone of the dissertation and contains its essential originality, i.e., detailed legal case studies of non-recognition. With eight cases covering high-profile non-recognition practices, including Asian experiences with non-recognition and even pre-Charter era non-recognition, the chapter prepares all the ingredients for readers to accept non-recognition as a part of functioning customary international law. Each case is presented and analysed in four sub-sections: (1) Preliminary political/legal analysis, (2) Legal debates, (3) Identification of illicit acts and unlawful situations, and (4) Non-recognition campaigns. This arrangement allows the chapter to explore all the arguments, debates, or information that international scholars have previously omitted.

Chapter Five, which builds upon the foundation of Chapter Four, is a direct answer to the second hypothesis/detailed question (2). Applying the CIL identification theories of Chapter Two, combining them with existing knowledge on non-recognition in Chapter Three and the rich data from Chapter Four, Chapter Five strongly asserts that non-recognition is indeed a CIL norm. Contrary to many other claims that the practice and *opinio juris* concerning non-recognition is not consistent and should not be qualified as CIL, this chapter goes over and beyond to prove non-recognition has been consistent through its collective practice and implementation, while states' perception of the necessity and the legal nature of non-recognition has also been uniform.

With all three hypotheses and detailed research questions answered the dissertation can confidently pose the main research question: "Is the duty of non-recognition a part of international customary law?" The answer is that non-recognition is indeed a part of CIL. Non-recognition is a part of CIL because it satisfies all the requirements as set out by the work of the ILC and Special Rapporteur Michael Wood on the formation, evidence and identification

of CIL.¹⁰³⁴ Also, non-recognition is a part of CIL because the theories, the history, and the roots of non-recognition clearly show that it has been an organic part of functional international customs. The only remaining concern for the dissertation now is the question: “How should non-recognition be made operational?”, which is basically the technicality of non-recognition that I first encountered when working on the dissertation and is the final task in the writing process. In other words, if non-recognition is now established as CIL, how can the international community implement it?

- **What breached norms initiate the non-recognition process?**

This is the first question that the international community has to deal with, and with all the information and arguments that the dissertation has presented, it becomes more straightforward than expected. First and foremost is the idea that we are dealing with breached norms, including “serious breaches of peremptory norms”, as described by the ARSIWA and the Jus Cogens Draft Conclusions. Not all international violations necessitate a resort to non-recognition. Serious targets of non-recognition include transgressions against fundamental concepts of modern international law, such as unlawful use of force, territorial acquisition and gross infringement of human rights. However, it should be remembered that this type of list is non-exhaustive. This is because the dissertation finds several theoretical approaches of leading international law teachers, including Rosalyn Higgins and Lauterpacht, practically relevant and prevalent in the practice of states.

As observed by Higgins, the international legal process itself plays a determinative role in examining the situation and spelling out the violation.¹⁰³⁵ Once the international community has identified a situation as unlawful and decided that it should not be recognised, the duty of non-recognition is established, even if the threshold of seriousness or peremptory norms are yet to be analysed to their fullest extent. Similarly, Lauterpacht insists that non-recognition is “the minimum of resistance” of a weakly organised but law-binding and law-aspiring community against illegality and a continuous challenge to legal wrongdoing.¹⁰³⁶ While Lauterpacht examines non-recognition almost exclusively in cases of territorial acquisition, due to the limitations of international legal practice of his time (i.e., the 1940s), he did not attempt to tie non-recognition to any type of “special” international legal violation. Non-recognition is a natural possession of international law, or as he puts it, the principle “adds substantial emphasis to the legal character of international law.”¹⁰³⁷ Denying the role of non-recognition and succumbing to any acts of international lawlessness derogates international law to nothing but a series of violent and random facts. These approaches help fuel the international community's creativity in addressing the real-life challenge of unlawful situations.

In the case of the apartheid government of South Africa, the language of violation ranged from “Friction to international peace and security” to “Flagrant violation of the Charter of the United

¹⁰³⁴ UNGA, ‘Identification of Customary International Law’ (n 56).

¹⁰³⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

¹⁰³⁶ Lauterpacht (n 215), 431

¹⁰³⁷ *ibid.*

Nations and the Universal Declaration of Human Rights” to “Violation of the territorial integrity of South Africa’s popular sovereignty”... all of which are general international legal language and unlikely to fit the *jus cogens* norms of that time. The non-recognition campaign in the Vietnam-Kampuchea conflicts was even more creative and included both measures against Vietnam’s occupation of Kampuchea (traditional norms concerning “the use of force”, “non-interference”, and “political independence”) and against the Pol Pot regime itself (such as “gross violations of human rights”, since the language of genocide was not used). The selective language used by UN organs and agencies when they talked about Vietnam, the determination that the Pol Pot regime would not be reinstalled and that the peaceful transition of the country would be followed by a free and fair election demonstrate the flexibility and creativity of the international legal process in categorising and prioritising norms in the practice of non-recognition. The case of Goa case is also illustrative regarding the manoeuvrability of the UN when dealing with two normative norms of international law: the assumed territorial integrity of Portugal and the duty of decolonisation of traditional and historic Indian land.

In short, while the legal concepts and terminology suggested by the ILC offer a direction to understand which kind of international norms could trigger non-recognition, it is international organisations that use authoritative decision-making and related procedures to determine the legality and consequences of actions. More importantly, the processes are not arbitrary. They require mobilising a pluralistic community of states with particular goals and values. The states themselves identify violations, discuss their justification, debate their merits, interpret the law, and reach conclusions based on a set of predetermined normative rules. Such a “living institution” allows us to understand how international law addresses the violation of traditional norms and also how it renews and establishes more norms that could potentially give rise to the duty of non-recognition.

• **The Role of Collective Ascertainment**

At this point in the thesis, I am confident we cannot view non-recognition under the usual state-centric lens. To claim that the individual state has the right to determine the legality of a contested situation or to assert that the state has the ultimate right to do whatever it sees fit after there is an international legal assessment of the situation does not fit any theoretical or practice framework of non-recognition that has been examined in the thesis.

In Chapter Five, we saw that the victim state, the regional communities of states and member states of more universal organisations, such as the United Nations, never see non-recognition as a norm that can be isolated from the collective. Victim states and their supporters always try to find a way to discuss and debate, if necessary, and conclude on the legality of a harmful act in the authoritative international arena. And unless there is some shape or form of international ascertainment, non-recognition cannot materialise.

As early as the Manchuria crisis and the Ethiopia crisis, the idea that non-recognition is a practice of the community had been firmly established. The Nationalist government of China and Emperor Haile Selassie of Abyssinia both presented their cases before the League of Nations and asked for institutional measures provided by the League’s covenant. Especially in case of Ethiopia, the USSR representative, Maxim Litvino, the Chinese delegate, Wellington

Koo, and the New Zealand delegate, William Jordan, already argued that allowing individual state discretion on non-recognition was to surrender to aggression.¹⁰³⁸

In recent developments, the rise of regional organisations has created a new layer of this collective practice. It is the regional organisations that first examine the political and legal consequences of the unlawful situations before presenting their views to the United Nations. As we have shown, the legal ascertainment of a particular situation often displays a striking similarity between regional organisations and the United Nations, thus allowing observers to doubly-validate the soundness, consistency and predictability of this procedure.

The ASEAN, the most important regional organisation related to the Kampuchea crisis, proactively announced the illegality of Vietnam's intervention in Kampuchea and their subsequent lobbies at the United Nations, leading to a relatively solid and uniform international stance, even though Vietnam was backed by a different side in the Cold War. Similarly, the role of the Islamic Cooperation Organisation and related Middle-Eastern countries in forming a united front against Israel's territorial ambitions in Occupied Palestinian Territories was essential to the success of the non-recognition campaign against Israel's fifty-year occupation. Undoubtedly, the European Union's sophisticated legal system and its characterisation of the Russian invasion of Ukraine as unlawful has extended and animated the non-recognition practices of the United Nations in Europe. The measures employed included banning international flights to Crimea and refusing to cooperate with the Russian occupying administration in matters such as cultural heritage.

Even when considering judicial interventions such as the legal opinions of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* - all were made possible by the collective process of member states. The judicial opinions, in return, affirm or even strengthen the collective power of both the UNSC and the UNGA in the face of unlawful situations.

The collective ascertainment of the legality of state conduct and its consequences is an integral part of the duty of non-recognition. One cannot practice non-recognition without the authoritative role of regional and international organisations. More importantly, through the case studies, we can also confirm the established power of the General Assembly and not just the Security Council. Such accreditation of the UNGA in non-recognition is critical because we can confidently say that with the UNGA's intervention, there is no legal "deadlock" in the international legal process against unlawful situations.

• Content of the Duty of Non-recognition

The dissertation proposes that non-recognition has two foundational properties for its content: communicative non-recognition and institutional non-recognition. Communicative non-recognition materialises through international channels and documents. They are basically the

¹⁰³⁸ O'Mahoney (n 202)., 106-107.

declaration of unlawfulness and express a commitment not to recognise any *fait accompli* that might arise from such unlawfulness.

Theoretically, they are necessary because (1) Political institutions (especially international organisations) govern through information; (2) The decentralised system of international law needs these public rituals to re-negotiate and re-establish its essential norms; (3) The confirmation of communicative non-recognition initiates institutional non-recognition. We have analysed the connection between communicative acts and international law in Chapters Two and Five, so there is no need to repeat it here. But at the core, communicative non-recognition and its repetition in the international arena is sometimes the last barrier between international order and lawlessness. Communicative non-recognition is, in its practice, a firm and integral part of the non-recognition process. It is the first measure to be considered by the authoritative organs and is tailored in a specific language so that the communication is clear, democratic, legitimate and predictable. The fact that communicative non-recognition maintains an impressive consistency throughout the case studies, from the pre-Charter era to the Russian invasion of Ukraine, demonstrates that it is an essential prior component of non-recognition duty.

Institutional non-recognition, on the other hand, naturally flows from communicative non-recognition. Through UN agencies and other special committees, institutional non-recognition animates and enforces the UNSC's "binding" resolutions and even UNGA's "non-binding" resolutions to an extent many often overlook. From finance to aviation, from cultural heritage to human rights records, from international labour issues to telecommunication, non-recognition of unlawful situations has always been a part of international life and effectively influences the activities and language of states in these aspects.

We also must stress that cultural/academic/sports boycotts and economic sanctions are not an indispensable part of non-recognition content. While there have been notable institutional and widespread applications of boycotts and economic sanctions in the case of South Africa and Israel, they are unpredictable within the framework of non-recognition. Although there are possibilities that non-recognition campaigns can entail both of these measures, it is essential to note that they are optional and should not be used to evaluate the fullness and effectiveness of the duty of non-recognition.

I firmly believe that non-recognition is an organic element of international law. Although often overlooked, non-recognition is the first and last defence against lawlessness. Without it, shared knowledge, reassurance of acceptable behaviour, and the construction of the international identity of states is impossible. This assertion is backed up by an abundance of practical and theoretical evidence.

Non-recognition is a part of customary international law, and although it is commonly accused of being inconsistent, we have shown throughout the dissertation that it fulfils all the requirements of state practice and *opinio juris*. States understand how non-recognition works, follow it closely and collectively and expect others to follow it as law.

Non-recognition is predictable and achievable. These characteristics are the most meaningful contribution to the duty of non-recognition, even though they do not necessarily strengthen the legal scholarship surrounding non-recognition. Specifically, the duty non-recognition with two of its components, communicative non-recognition and institutional non-recognition, has always been applied successfully in the face of unlawfulness and is crucial to the continuity of the international system itself.

Bibliography

'11. French Indochina/Vietnam (1941-1954)' <<https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/french-indochinavietnam-1941-1954/>> accessed 8 January 2024

'1967 War: Six Days That Changed the Middle East' *BBC News* (4 June 2017) <<https://www.bbc.com/news/world-middle-east-39960461>> accessed 19 January 2023

'A Brief History of Globalization' (*World Economic Forum*) <<https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/>> accessed 3 October 2022

Abadi J, 'The Sino-Indian Conflict of 1962—a Test Case for India's Policy of Non-Alignment' (1998) 15 *Journal of Third World Studies* 11

Abi-Saab GM, 'The Newly Independent States and the Rules of International Law: An Outline Symposium: International Law Standards in an Era of Rapid Historical Change: Leading Article' (1962) 8 *Howard Law Journal* 95

Acemoglu D and others, 'Indirect Rule and State Weakness in Africa: Sierra Leone in Comparative Perspective', *African Successes, Volume IV: Sustainable Growth* (University of Chicago Press 2014) <<https://www.nber.org/books-and-chapters/african-successes-volume-iv-sustainable-growth/indirect-rule-and-state-weakness-africa-sierra-leone-comparative-perspective>> accessed 20 June 2023

Ad Hoc Political Committee, '8th Session, 37th Meeting Record, Tuesday, 1 December 1953, New York' <<https://digitallibrary.un.org/record/1293972>> accessed 27 September 2022

'Address by Irina Bokova, Director-General of UNESCO, on the Occasion of the Information Meeting: Follow up of the Situation in the Autonomous Republic of Crimea (Ukraine); UNESCO, 2 June 2015 - UNESCO Digital Library' <<https://unesdoc.unesco.org/ark:/48223/pf0000233227?posInSet=4&queryId=6f09c765-1a4c-42c8-9cbc-533e7cd941a0>> accessed 5 September 2022

'Agreement between the United Kingdom, France, and Italy, Respecting Abyssinia, Signed at London, December 13, 1906' (1907) 1 *The American Journal of International Law* 226

Akram S and Lynk M, 'The Wall and the Law: A Tale of Two Judgements' (2006) 24 *Netherlands Quarterly of Human Rights* 61

Alagappa M, 'Regionalism and the Quest for Security: Asean and the Cambodian Conflict' (1993) 47 *Australian Journal of International Affairs* 189

Albania and others, 'Draft Resolution on the Situation in Ukraine UN Docs S/2014/189' <<https://digitallibrary.un.org/record/767020>> accessed 29 September 2022

Alexandrowicz CH, 'The New States and International Law (1974)' in CH Alexandrowicz, David Armitage and Jennifer Pitts (eds), *The Law of Nations in Global History* (Oxford University Press 2017) <<https://doi.org/10.1093/acprof:oso/9780198766070.003.0029>> accessed 27 June 2023

Allain J, 'Slavery in International Law: Of Human Exploitation and Trafficking', *Slavery in International Law* (Brill Nijhoff 2012) <<https://brill.com/display/title/18831>> accessed 5 July 2023

Ally S and Lissoni A (eds), *New Histories of South Africa's Apartheid-Era Bantustans* (Routledge 2018)

Alvarez-Jiménez A, 'METHODS FOR THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE INTERNATIONAL COURT OF JUSTICE'S JURISPRUDENCE: 2000–2009' (2011) 60 *International & Comparative Law Quarterly* 681

Anaya SJ, 'European Conquest and the Rights of Indigenous Peoples. The Moral Backwardness of International Society. By Paul Keal' (2005) 99 *American Journal of International Law* 306

Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', *Regime Theory and International Relations* (Oxford University Press 1995)

Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) <<https://www.cambridge.org/core/books/imperialism-sovereignty-and-the-making-of-international-law/8AFA91E6F502B2C4996BB14E1A548E7A>> accessed 22 March 2023

—, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 *European Journal of International Law* 7

Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press 1999)

—, *Legal Rules and International Society* (Oxford University Press 1999)

Arangio-Ruiz G, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations with an Appendix on the Concept of International Law and the Theory of International Organisation (Volume 137)', *Collected Courses of the Hague Academy of International Law* (Brill 1972) <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028602441_06> accessed 2 July 2023

Asian-African States, 'Letter Dated 60/03/25 from the Representatives of Afghanistan, Burma, Cambodia, Ceylon, Ethiopia, Federation of Malaya, Ghana, Guinea, India, Indonesia, Iran, Iraq, Japan, Jordan, Lebanon, Liberia, Libya, Morocco, Nepal, Pakistan, Philippines, Saudi Arabia, Sudan, Thailand,

Tunisia, Turkey, United Arab Republic and Yemen Addressed to the President of the Security Council' <<https://digitallibrary.un.org/record/619940>> accessed 17 September 2022

Aust A, *Handbook of International Law* (Cambridge University Press 2005) <<https://www.cambridge.org/core/books/handbook-of-international-law/479B9666071D82DBF0B59C2BF9FACBDF>> accessed 5 July 2023

Ayala FJ, 'The Difference of Being Human: Morality' (2010) 107 *Proceedings of the National Academy of Sciences* 9015

Baer GW, *The Coming of the Italian-Ethiopian War*: (Harvard University Press 1967)

—, 'Sanctions and Security: The League of Nations and the Italian–Ethiopian War, 1935–1936' (1973) 27 *International Organization* 165

Baker R (Rudy) B, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *European Journal of International Law* 173

Baldanza K, *Ming China and Vietnam: Negotiating Borders in Early Modern Asia* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/ming-china-and-vietnam/2113FB7FA7F2C110BE11AC3008B388BE>> accessed 29 November 2022

Balfour J, 'The Balfour Declaration' (*Yale Law School, Avalon Project*, 2 November 1917) <https://avalon.law.yale.edu/20th_century/balfour.asp> accessed 17 January 2023

Banivanua Mar T (ed), 'Saltwater: The Separation of People and Territory', *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/decolonisation-and-the-pacific/saltwater-the-separation-of-people-and-territory/1927CEBC2272645E87C034690E73A0D4>> accessed 26 June 2023

'Bantustan | Definition, History, Map, & Facts | Britannica' <<https://www.britannica.com/topic/Bantustan>> accessed 11 January 2024

Barahmeh S, 'The Palestinians, the PLO, and Political Representation': [2014] *International Centre for the Study of Radicalisation and Political Violence* (ICSR)

Barak-Erez D, 'Israel: The Security Barrier—between International Law, Constitutional Law, and Domestic Judicial Review' (2006) 4 *International Journal of Constitutional Law* 540

Barber J, 'Economic Sanctions As a Policy Instrument' (1979) 55 *International Affairs* (Royal Institute of International Affairs 1944-) 367

Barber R, 'The Evolving Role of the General Assembly Vis-à-Vis the Security Council in the Maintenance of Peace' (2023) 25 *Journal of International Peacekeeping* 305

'Bargaining Away Justice: India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide on JSTOR' <<https://www.jstor->

org.ezproxy.library.uvic.ca/stable/24916751#metadata_info_tab_contents> accessed 4 September 2022

Bartal S, 'The Peel Commission Report of 1937 and the Origins of the Partition Concept' (2017) 28 Jewish Political Studies Review 51

Bass GJ, 'Bargaining Away Justice: India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide' (2016) 41 International Security 140

Beaubien MC, 'The Cultural Boycott of South Africa' (1982) 29 Africa Today 5

Benatar SR, 'Academic Boycott--Political Strategy or Moral Imperative? Selective Support as a Justifiable Alternative' (1991) 79 South African Medical Journal = Suid-Afrikaanse Tydskrif Vir Geneeskunde 660

Benmelech E and Berrebi C, 'Human Capital and the Productivity of Suicide Bombers' (2007) 21 Journal of Economic Perspectives 223

Ben-Nun G, 'Territorial Conquest: Its Prevalence, Demise, and Resurfacing: 1880s – The Present' (27 June 2023) <<http://www.connections.clio-online.net/article/id/fda-133260>> accessed 26 June 2023

Bering J, 'The Prohibition on Annexation: Lessons from Crimea' (2017) 49 New York University Journal of International Law & Politics 747

Biger G, 'The Boundaries of Israel—Palestine Past, Present, and Future: A Critical Geographical View' (2008) 13 Israel Studies 68

Bissell RE, *Apartheid and International Organizations* (Routledge 2019)

—, *Apartheid and International Organizations* (Routledge 2019)

Boed R, 'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda' (2002) 13 Criminal Law Forum 293

Boeke JH and Holland WL, *The Structure Of Netherlands Indian Economy* (Literary Licensing, LLC 2012)

Borgen CJ, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' American Society of International Law: ASIL INSIGHT <<http://www.asil.org/insights/2008/02/insights080229.html>>

Boulden J, 'Mandates Matter: An Exploration of Impartiality in United Nations Operations' (2005) 11 Global Governance 147

Brady LJ, 'The Utility of Economic Sanctions as a Policy Instrument', *The Utility of Economic Sanctions* (1st edn, Routledg 2017)

Breau S, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016)

Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010)

—, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010)

Brichambaut MPD, 'The Role of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2001)

<<https://doi.org/10.1093/acprof:oso/9780199244027.003.0014>> accessed 28 September 2023

Brierly JL, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1963)

Bring O, 'The Westphalian Peace Tradition in International Law: From Jus Ad Bellum to Jus Contra Bellum'

'British Citizens Protest Apartheid South African Sports Tours (Stop the Seventy Tour), 1969-1970 | Global Nonviolent Action Database' <<https://nvdatabase.swarthmore.edu/content/british-citizens-protest-apartheid-south-african-sports-tours-stop-seventy-tour-1969-1970>> accessed 4 October 2022

Brook T, *The Troubled Empire: China in the Yuan and Ming Dynasties* (Belknap Press 2013)

Brownlie I, 'The Principle of Non-Recognition' in Ian Brownlie (ed), *International Law and the Use of Force by States* (Oxford University Press 1963)

<<https://doi.org/10.1093/acprof:oso/9780198251583.003.0025>> accessed 9 May 2023

—, *Principles of Public International Law* (Clarendon Press 1979)

—, *Principles of Public International Law* (6th edition, Oxford University Press 2003)

—, *International Law and the Use of Force by States* (1st edn, Oxford University Press)

Brunnée J and Toope SJ, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (1st edn, Cambridge University Press 2012)

<https://www.cambridge.org/core/product/identifier/CBO9781139107310A014/type/book_part> accessed 25 October 2022

Bull E by H and Watson A (eds), *The Expansion of International Society* (Oxford University Press)

Bull H, *The Anarchical Society* (Macmillan Education UK 1977)

<<https://link.springer.com/10.1007/978-1-349-24028-9>> accessed 5 April 2023

Bullock, Lord and Deakin W, 'The Manchurian Crisis: The European Powers and the Far East' in Zara Steiner (ed), *The Lights that Failed: European International History 1919-1933* (Oxford University Press 2005) <<https://doi.org/10.1093/acprof:oso/9780198221142.003.0015>> accessed 9 November 2022

—, 'The Manchurian Crisis: The European Powers and the Far East' in Zara Steiner (ed), *The Lights that Failed: European International History 1919-1933* (Oxford University Press 2005) <<https://doi.org/10.1093/acprof:oso/9780198221142.003.0015>> accessed 9 November 2022

Burkett J, 'The Campaign for Nuclear Disarmament and Changing Attitudes towards the Earth in the Nuclear Age' (2012) 45 *The British Journal for the History of Science* 625

Burkman TW, 'The Idea of a League' in Thomas W Burkman (ed), *Japan and the League of Nations: Empire and World Order, 1914-1938* (University of Hawai'i Press 2007) <<https://doi.org/10.21313/hawaii/9780824829827.003.0002>> accessed 13 January 2024

—, *Japan and the League of Nations: Empire and World Order, 1914-1938* (University of Hawai'i Press 2008) <<https://www.jstor.org/stable/j.ctt6wqrcq>> accessed 6 July 2023

Byers M, 'Custom, Power, and the Power of Rules' (1995) 17 *Michigan Journal of International Law* 109

Cai KG, 'The One Belt One Road and the Asian Infrastructure Investment Bank: Beijing's New Strategy of Geoeconomics and Geopolitics' (2018) 27 *Journal of Contemporary China* 831

Cain PJ, 'Character, "Ordered Liberty", and the Mission to Civilise: British Moral Justification of Empire, 1870-1914' (2012) 40 *The Journal of Imperial and Commonwealth History* 557

'"Campaign" Definition and Meaning | Collins English Dictionary' (24 June 2024) <<https://www.collinsdictionary.com/dictionary/english/campaign>> accessed 24 June 2024

Cappelen C and Sorens J, 'Pre-Colonial Centralisation, Traditional Indirect Rule, and State Capacity in Africa' (2018) 56 *Commonwealth & Comparative Politics* 195

Carswell AJ, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18 *Journal of Conflict and Security Law* 453

Carty A, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986)

— (eds), 'The Moral Responsibility of Rulers: Going Back Beyond the Liberal Rule of Law for World Order', *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0001>> accessed 30 March 2023

Carty A and Nijman JE, *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (First edition, University Press 2018)

Cassels A, *Mussolini's Early Diplomacy* (Princeton University Press 2016)

Cassimatis A, *Public International Law* (Oxford University Press Australia & New Zealand 2021)

Castellino J, 'Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection' in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds) (Torkel Opsahl Academic EPublisher (TOAEP) 2020) <<https://www.legal-tools.org/doc/2rkcrx/>> accessed 21 April 2023

Centre UWH, '41 COM 8B.1 - Decision' (*UNESCO World Heritage Centre*, 2017) <<https://whc.unesco.org/en/decisions/6875/>> accessed 8 March 2023

—, '43 COM 7A.29 - Decision' (*UNESCO World Heritage Centre*, 2019) <<https://whc.unesco.org/en/decisions/7522/>> accessed 8 March 2023

—, '36 COM 8B.5 - Decision' (*UNESCO World Heritage Centre*) <<https://whc.unesco.org/en/decisions/4776/>> accessed 8 March 2023

Ceylon, Liberia and Republic UA, 'Joint Draft Resolution /: Ceylon, Liberia, United Arab Republic' <<https://digitallibrary.un.org/record/626080>> accessed 26 June 2023

Chai W, 'China and the United Nations: Problems of Representation and Alternatives' (1970) 10 *Asian Survey* 397

Chan H and others, *China Under Mongol Rule* (Princeton University Press 1981) <<https://www.jstor.org/stable/j.ctt7zv4pr>> accessed 30 June 2023

Charnovitz S, 'Nongovernmental Organizations and International Law Centennial Essays - In Honor of the 100th Anniversary of the AJIL and the ASIL' (2006) 100 *American Journal of International Law* 348

Chase-Dunn C and Lerro B, *Social Change: Globalization from the Stone Age to the Present* (1st edition, Paradigm Publishers 2013)

Chayes A, *The Cuban Missile Crisis: International Crises and the Role of Law* (University Press of America 1987)

Chayes A, Ehrlich T and Lowenfeld AF, *International Legal Process: Materials for an Introductory Course* (Little, Brown 1968)

Chen T-C, *The International Law of Recognition* (Рипол Классик 1951)

Chen (陳尚勝) S, 'The Chinese Tributary System and Traditional International Order in East Asia during the Ming and Qing Dynasties from the Sixteenth to Nineteenth Century' (2020) 5 *Journal of Chinese Humanities* 171

Chesterman S and Pouligny B, 'Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations' (2003) 9 *Global Governance* 503

China Institute of International Affairs (ed), *China and the United Nations: Report of a Study Group Set up by the China Institute of International Affairs* (Published for the Carnegie Endowment for International Peace by Manhattan Pub Co 1959)

‘China Says Its Stand on Ukraine War “Has Not Changed” after UN Vote’ (*South China Morning Post*, 4 May 2023) <<https://www.scmp.com/news/china/diplomacy/article/3219290/china-says-its-stand-ukraine-war-has-not-changed-after-un-vote>> accessed 13 May 2023

‘China’s Repression of Uyghurs in Xinjiang’ (*Council on Foreign Relations*) <<https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>> accessed 27 June 2023

Chinen MA, ‘Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner’ 23 *Michigan Journal of International Law* 143

Choi SJ and Gulati M, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/customs-future/customary-international-law-how-do-courts-do-it/C6A32B28F7204AB26D0221C9976F961D>> accessed 29 August 2022

—, ‘Customary International Law: How Do Courts Do It?’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016) <<https://www.cambridge.org/core/books/customs-future/customary-international-law-how-do-courts-do-it/C6A32B28F7204AB26D0221C9976F961D>> accessed 29 August 2022

Christian D, *Maps of Time: An Introduction to Big History, With a New Preface* (2nd edn, 2011)

Christian Reus-Smit, *The Moral Purpose of the State* (Princeton University Press 1999) <<https://press.princeton.edu/books/hardcover/9780691027357/the-moral-purpose-of-the-state>> accessed 14 March 2023

—, *The Moral Purpose of the State* (Princeton University Press 1999)

Ciobanu D, ‘Credentials of Delegations and Representation of Member States at the United Nations’ (1976) 25 *The International and Comparative Law Quarterly* 351

Clark NL and Worger WH, *South Africa: The Rise and Fall of Apartheid* (3rd edn, Routledge 2016)

Clubb OE, ‘Manchuria in the Balance, 1945-1946’ (1957) 26 *Pacific Historical Review* 377

Cohen BJ, *The Question of Imperialism: The Political Economy of Dominance and Dependence* (Macmillan 1974)

Cohen HG, ‘Can International Law Work? A Constructivist Expansion’ *Digital Commons / University of Georgia - School of Law* 40

Collins JA, ‘Self-Determination in International Law: The Palestinians’ 12 *Case Western Reserve Journal of International Law* 137

'Comments by Governments, "73rd Session of the International Law Commission" UN Docs A/CN.4/748' <https://legal.un.org/ilc/guide/1_14.shtml>

Committee IO, 'The Olympic Games : Fundamental Principles, Rules and Regulations, General Information / International Olympic Committee' <<https://library.olympics.com/Default/doc/SYRACUSE/61944/the-olympic-games-fundamental-principles-rules-and-regulations-general-information-international-oly>> accessed 4 October 2022

Committee on the Exercise of the Inalienable Rights of the Palestinian People, '2021 Annual Report of Committee on the Exercise of the Inalienable Rights of the Palestinian People to the General Assembly UN Docs A/76/35' <<https://www.un.org/unispal/document/2021-annual-report-of-committee-on-the-exercise-of-the-inalienable-rights-of-the-palestinian-people-to-the-un-general-assembly-a-76-35/>> accessed 1 March 2023

Coordination Committee, 'Declaration on Mutual Support' (1936) 30 *The American Journal of International Law* 41

'Countries Elected Members | United Nations Security Council' <<https://www.un.org/securitycouncil/content/countries-elected-members>> accessed 5 September 2022

Crawford J, *The International Law Commission's Articles on State Responsibility* (1st edn, Cambridge University Press 2002)

—, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press 2002)

CRAWFORD J, 'Statehood and Recognition' in James R Crawford (ed), *The Creation of States in International Law* (Oxford University Press 2007) <<https://doi.org/10.1093/acprof:oso/9780199228423.003.0001>> accessed 5 January 2023

Crawford J, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press 2019)

'Crimean Airspace Belongs to Ukraine, Aviation Group Says' *Washington Post* <<https://www.washingtonpost.com/news/checkpoint/wp/2014/07/08/crimean-airspace-belongs-to-ukraine-icao-says/>> accessed 5 September 2022

Crossley PK, *A Translucent Mirror: History and Identity in Qing Imperial Ideology* (University of California Press 2002)

d'Aspremont J, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2015* (Oxford University Press 2016) <<https://doi.org/10.1093/acprof:oso/9780190647759.003.0002>> accessed 2 July 2023

D'Amato A, 'The Theory of Customary International Law' (1988) 82 *Proceedings of the Annual Meeting* (American Society of International Law) 242

D'Amato AA, *The Concept of Custom in International Law* (Cornell University Press 1971)

Damrosch LF, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts' (2011) 105 *Berkely Journal of International Law* 497

D'Anieri, PJ, *Ukraine and Russia : From Civilized Divorce to Uncivil War* (Cambridge University Press 2019)

Darwin C, Bonner JT and May RM, *The Descent of Man, and Selection in Relation to Sex* (REV-Revised, Princeton University Press 1981) <<https://www.jstor.org/stable/j.ctt19zbz6c>> accessed 5 July 2023

Database ECF, 'Resolution of San Remo Conference' (1920) <<https://ecf.org.il/issues/issue/251>> accessed 17 January 2023

—, 'League of Nations Mandate for Palestine (1922)' <<https://ecf.org.il/issues/issue/232>> accessed 16 January 2023

Daugirdas K, 'International Organizations and the Creation of Customary International Law' (2020) 31 *European Journal of International Law* 201

David Leyton-Brown ed., *The Utility of International Economic Sanctions* (1st edn, Routledg 2017)

Davidson J, 'Italy, British Resolve and the 1935-1936 Italo-Ethiopian War' [2014] *Cahiers de la Méditerranée* 69

Dawidowicz M, 'The Obligation of Non-Recognition of an Unlawful Situation', *The Law of International Responsibility* (Oxford University Press 2010)
<<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-484261>> accessed 6 November 2022

De Beer AC, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill Nijhoff 2019)

Deplano R, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law' (2017) 14 *International Organizations Law Review* 227

Desierto D, 'Non-Recognition' (*EJIL: Talk!*, 22 February 2022) <<https://www.ejiltalk.org/non-recognition/>> accessed 21 May 2023

Diamond J, *Guns, Germs, and Steel* (5th Printing edition, WW Norton 1999)

Dirks NB, 'Castes of Mind' [1992] *Representations* 56

'Documents of the United Nations Conference on International Organization, San Francisco, 1945 = Documents de La Conférence Des Nations Unies Sur l'organisation Internationale, San Francisco, 1945' (United Nations Information Organizations, 1945)
<<https://digitallibrary.un.org/record/1300969>> accessed 27 June 2023

Dold GWF and Joubert CP, *The Union of South Africa: The Development of Its Laws and Constitution* (Stevens 1955)

Donnelly J, *Realism and International Relations* (Cambridge University Press 2000)

<<https://www.cambridge.org/core/books/realism-and-international-relations/AA4EC871B7537C202559CCD21C1E5338>> accessed 31 March 2023

Doyle MW and Suntharalingam N, 'The UN in Cambodia: Lessons for Complex Peacekeeping' (1994) 1 *International Peacekeeping* 117

'Due Process | Definition, Examples, & Facts | Britannica' (13 April 2023)

<<https://www.britannica.com/topic/due-process>> accessed 6 June 2023

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

Eagleton C, 'Palestine and the Constitutional Law of the United Nations' (1948) 42 *American Journal of International Law* 397

Emperor Haile Selassie of Ethiopia, 'Appeal to the League of Nations'

<<https://www.blackpast.org/global-african-history/1936-emperor-haile-selassie-ethiopia-appeal-league-nations/>> accessed 20 June 2023

Erlanger S and Sayare S, 'Unesco Accepts Palestinians as Full Members' *The New York Times* (31 October 2011) <<https://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html>> accessed 17 April 2024

Escudero Espinosa JF, *Self-Determination and Humanitarian Secession in International Law of a Globalized World* (Springer International Publishing 2017) <<http://link.springer.com/10.1007/978-3-319-72622-9>> accessed 28 December 2022

—, 'The Principle of Non-Recognition of States Arising from Serious Breaches of Peremptory Norms of International Law' (2022) 21 *Chinese Journal of International Law* 79

Eslava L, Fakhri M and Nesiah V (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017)

<<https://www.cambridge.org/core/books/bandung-global-history-and-international-law/34236E0CAB3D3F96F715C755879D3BF8>> accessed 7 May 2023

—, 'The Spirit of Bandung' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017)

<<https://www.cambridge.org/core/books/bandung-global-history-and-international-law/spirit-of-bandung/5C0F2DC4165E532553D31B0F7C4F2095>> accessed 7 May 2023

Esquirol JL, 'Latin America' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012)

<<https://doi.org/10.1093/law/9780199599752.003.0024>> accessed 10 July 2023

'Ethiopia: 3rd October 1935 – the Italian Invasion Begins' (*Martin Plaut*, 29 July 2013) <<https://martinplaut.com/2013/07/29/ethiopia-3rd-october-1935-the-italian-invasion-begins/>> accessed 24 December 2023

European Commission, 'Sanctions Adopted Following Russia's Military Aggression against Ukraine - European Commission' <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en> accessed 14 April 2024

European Parliament, 'Invasion of Ukraine by Russia, P7_TA(2014)0248, 2014/2627(RSP)' <https://www.europarl.europa.eu/doceo/document/TA-7-2014-0248_EN.html> accessed 14 April 2024

—, 'Situation at the Ukrainian Border and in Russian-Occupied Territories of Ukraine P9_TA(2021)0515, 2021/3010(RSP)' <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0515_EN.html> accessed 14 April 2024

Evans G and Rowley K, *Red Brotherhood at War: Vietnam, Cambodia and Laos since 1975* (Verso Books 1990)

Extraordinary Chambers in the Courts of Cambodia, Cambodia, 'The Prosecutor v. Kaing Guek Eav Alias Duch' <<https://www.internationalcrimesdatabase.org/Case/792>> accessed 16 March 2023

Fairbank JK (ed), *The Chinese World Order; Traditional China's Foreign Relations* (Harvard University Press 1968) <<http://unisg.link/hm00276850>> accessed 30 August 2022

Fan CS, 'War Rape and "Comfort Women"', *Culture, Institution, and Development in China* (Routledge 2016)

Feiler G, *From Boycott to Economic Cooperation: The Political Economy of the Arab Boycott of Israel* (Routledge 2013)

Feldman I, *Police Encounters: Security and Surveillance in Gaza under Egyptian Rule* (Stanford University Press 2015)

Fierstein D, 'KOSOVO'S DECLARATION OF INDEPENDENCE: AN INCIDENT ANALYSIS OF LEGALITY, POLICY AND FUTURE IMPLICATIONS' 26 Boston University International Law Journal

Fisher MW and Rose LE, 'Ladakh and the Sino-Indian Border Crisis' (1962) 2 Asian Survey 27

Flapan S, *The Birth of Israel: Myths and Realities* (Pantheon Books 1987)

'Follow-up to Decisions and Resolutions Adopted by the Executive Board and the General Conference at Their Previous Sessions, Part I: Programme Issues, E. Follow-up of the Situation in the Autonomous Republic of Crimea (Ukraine) -' <<https://unesdoc.unesco.org/ark:/48223/pf0000378910>> accessed 5 September 2022

Fox GH, 'The Vietnamese Intervention in Cambodia—1978', *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press)

<<https://opil.ouplaw.com/display/10.1093/law/9780198784357.001.0001/law-9780198784357-chapter-21>> accessed 16 March 2023

France and others, 'Joint Draft Resolution /: France, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America' <<https://digitallibrary.un.org/record/536999>> accessed 26 June 2023

Franceschini C, 'UNESCO, Religious Freedoms and World Cultural Heritage in the Old City of Jerusalem: The Line of Fire between Challenges, Comparisons and New Perspectives' (2018) 0 *Stato, Chiese e Pluralismo Con confessionale*

<<https://riviste.unimi.it/index.php/statoechiese/article/view/10838>> accessed 7 March 2023

Franke H, *From Tribal Chieftain to Universal Emperor and God: The Legitimation of the Yüan Dynasty* (Verlag der Baerischen Akademie der Wissenschaften 1978)

Fraser TG, *The USA and the Middle East Since World War 2* (Springer 1989)

French D, *Statehood and Self-Determination : Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013)

Frontier Tibet: Patterns of Change in the Sino-Tibetan Borderlands (Amsterdam University Press 2019) <<https://www.jstor.org/stable/j.ctvt1sgw7>> accessed 30 June 2023

'General Assembly, 14th Session :: 811th Plenary Meeting, Monday, 28 September 1959, New York' <<https://digitallibrary.un.org/record/738282>> accessed 27 June 2023

Geoffrey R. Watson, 'Mara'abe v. Prime Minister of Israel. Case No. HCJ 7957/04' (2006) 100 *The American Journal of International Law*

Gera G, 'Israel and the June 1967 War: 25 Years Later' (1992) 46 *Middle East Journal* 229

Geronik A, 'Israel-UN Relations: Three Phases and Three Questions' (2020) 25 *Israel Studies* 73

'GOA: Invasion That Fizzled' [1954] *Time*

<<https://content.time.com/time/subscriber/article/0,33009,823491,00.html>> accessed 26 June 2023

'Goa—End of an Epoch on JSTOR' <<https://www.jstor.org/stable/20633766>> accessed 26 June 2023

Goldsmith JL and Posner EA, *The Limits of International Law* (Oxford University Press 2006)

—, *The Limits of International Law* (Oxford University Press 2006)

Goldstein JL and Gulotty R, 'Negotiating in the Early GATT: Norms, Rules and the US Tariff Schedule' in Bernard Hoekman, Joost Pauwelyn and Manfred Elsig (eds), *Assessing the World Trade Organization: Fit for Purpose?: Volume undefined: World Trade Forum* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/assessing-the-world-trade->

organization/negotiating-in-the-early-gatt/6EFDC040B226B3C1650B7AEF27EF38C9> accessed 14 March 2023

Goldstein M, 'Tibet: After the Fall of Chamdo' (1991) 16 *The Tibet Journal* 58

Goldstein MC, *A History of Modern Tibet, Volume 2: The Calm before the Storm: 1951-1955* (First Edition, University of California Press 2009)

—, *A History of Modern Tibet, Volume 4: In the Eye of the Storm, 1957-1959* (First Edition, University of California Press 2019)

Goldstein MC, Sherap D and Siebenschuh WR, '13. To Lhasa Again', *A Tibetan Revolutionary* (University of California Press 2004)
<<https://www.degruyter.com/document/doi/10.1525/9780520940307-019/html?lang=en>> accessed 17 April 2024

Gordon R, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 91 *Proceedings of the ASIL Annual Meeting* 420

Goscha C, *The Road to Dien Bien Phu: A History of the First War for Vietnam* (Princeton University Press 2022) <<https://www.jstor.org/stable/j.ctv1t8q8v6>> accessed 10 April 2024

GPIL, 'Legal Consequences of Germany's Non-Recognition of the Russian Annexation of Crimea' (*GPIL - German Practice in International Law*, 27 August 2021) <<https://gpil.jura.uni-bonn.de/2021/08/legal-consequences-of-germanys-non-recognition-of-the-russian-annexation-of-crimea/>> accessed 5 September 2022

Grant TD, 'Annexation of Crimea' (2015) 109 *The American Journal of International Law* 68

Greenberg R, 'Extreme Exposure: Archaeology in Jerusalem 1967–2007' (2009) 11 *Conservation and Management of Archaeological Sites* 262

Grewe WG, *The Epochs of International Law* (De Gruyter 2013)
<<https://www.degruyter.com/document/doi/10.1515/9783110902907/html?lang=en>> accessed 6 December 2022

GRUPPER SM, 'The Manchu Imperial Cult of the Early Ch'ing Dynasty: Texts and Studies on the Tantric Sanctuary of Mahakala at Mukden' (PhD, Indiana University 1979)
<<https://www.proquest.com/docview/288078403/abstract/CD06F617A5EA4FF0PQ/1>> accessed 30 June 2023

Grupper SM, 'Manchu Patronage and Tibetan Buddhism during the First Half of the Ch'ing Dynasty' <<http://www.dspace.cam.ac.uk/handle/1810/227072>> accessed 30 June 2023

Guzman A, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008)
<<https://doi.org/10.1093/acprof:oso/9780195305562.001.0001>>

—, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008)
<<https://doi.org/10.1093/acprof:oso/9780195305562.001.0001>>

Guzman AT, 'The Consent Problem in International Law' [2011] SSRN Electronic Journal
<<http://www.ssrn.com/abstract=1862354>> accessed 15 November 2022

—, 'The Consent Problem in International Law' [2011] SSRN Electronic Journal
<<http://www.ssrn.com/abstract=1862354>> accessed 15 November 2022

H Geiger R, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011)
<<https://doi.org/10.1093/acprof:oso/9780199588817.003.0043>> accessed 2 July 2023

Haboush JK, 'Contesting Chinese Time, Nationalizing Temporal Space: Temporal Inscription in Late Chosŏn Korea', *Time, Temporality, and Imperial Transition* (University of Hawaii Press 2005)
<<https://www.degruyter.com/document/doi/10.1515/9780824873905-007/html>> accessed 22 November 2022

Halper LB and Halper S, *Tibet: An Unfinished Story* (Illustrated edition, Oxford University Press 2014)

Harari YN, *Sapiens: A Brief History of Humankind* (Signal 2016)

Hariri JG, 'The Autocratic Legacy of Early Statehood' (2012) 106 *American Political Science Review* 471

Hart HLA and Green L, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edition, Oxford University Press 2012)

'Has Beijing's Investment in the Region Won over Tibetans?' (*Nikkei Asia*)
<<https://asia.nikkei.com/Politics/Has-Beijing-s-investment-in-the-region-won-over-Tibetans>>
accessed 30 June 2023

Hasan N, 'NAMIBIA: SOUTH— WEST AFRICA' (1975) 28 *Pakistan Horizon* 61

Hastings A, *The Construction of Nationhood: Ethnicity, Religion, and Nationalism* (Cambridge University Press 1997)

Hathaway OA and Lavinbuk AN, 'Rationalism and Revisionism in International Law' (2006) 119 *Harvard Law Review* 1404

Hayes F, 'South Africa's Departure from the Commonwealth, 1960-1961' (1980) 2 *The International History Review* 453

Heder SP, 'THE KAMPUCHEAN-VIETNAMESE CONFLICT' [1979] *Southeast Asian Affairs / ISEAS - Yusof Ishak Institute* 157

Henkin L, 'International Law: Politics and Values', *International Law: Politics and Values* (Brill Nijhoff 1995) <<https://brill.com/display/title/9387>> accessed 5 July 2023

Hernandez G, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014)

Hessler P, 'Tibet Through Chinese Eyes' (*The Atlantic*, 1 February 1999) <<https://www.theatlantic.com/magazine/archive/1999/02/tibet-through-chinese-eyes/306395/>> accessed 30 June 2023

Hevia J, 'Lamas, Emperors, and Rituals: Political Implications in Qing Imperial Ceremonies' [1993] *Journal of the International Association of Buddhist Studies* 243

'Hidden Apartheid' [2007] Human Rights Watch <<https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables>> accessed 30 June 2023

Higgins Dbe Qc R, 'Separate Opinion of Judge Higgins Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion' in Rosalyn Higgins (ed), *Themes and Theories* (Oxford University Press 2009) <<https://doi.org/10.1093/acprof:oso/9780198262350.003.0094>> accessed 29 August 2022

Hirsch M, 'Game Theory, International Law, and Future Environmental Cooperation in the Middle East' 27

Hisham H. Ahmed, 'From the Balfour Declaration to World War II: The U.S. Stand on Palestinian Self-Determination' <https://referenceworks.brillonline.com/entries/the-shafr-guide-online/*-SIM110060058> accessed 25 January 2023

Hoffman B, 'The Bombing of The King David Hotel, July 1946' (2020) 31 *Small Wars & Insurgencies* 594

—, 'Understanding Hamas's Genocidal Ideology' (*The Atlantic*, 10 October 2023) <<https://www.theatlantic.com/international/archive/2023/10/hamas-covenant-israel-attack-war-genocide/675602/>> accessed 26 December 2023

Holmes JW, *The Better Part of Valour: Essays on Canadian Diplomacy* (McGill-Queen's Press - MQUP 1970)

Hood SJ, 'Beijing's Cambodia Gamble and the Prospects for Peace in Indochina: The Khmer Rouge or Sihanouk?' (1990) 30 *Asian Survey* 977

'How Three Men Signed the USSR's Death Warrant' *BBC News* (24 December 2016) <<https://www.bbc.com/news/magazine-38416657>> accessed 4 September 2022

Hudson MO, 'The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute' (1933) 27 *The American Journal of International Law* 300

Hummel AW (ed), 'Eminent Chinese of the Ch'ing Period, 1644-1912 (2 Vols)', *Eminent Chinese of the Ch'ing Period, 1644-1912 (2 vols)* (Brill 2010) <<https://brill.com/edcollbook/title/19457>> accessed 30 June 2023

Huntington E, *The Anglo-Russian Agreement as to Tibet, Afghanistan, and Persia* (Bulletin of the American Geographical Society 1907) <<http://archive.org/details/jstor-198436>> accessed 30 June 2023

Hyslop J, Vally S and Hassim S, 'The South African Boycott Experience' (2006) 92 *Academe* 59

Iadarola A, 'The Anglo-Italian Agreement of 1925: Mussolini's "Carte Blanche" for War against Ethiopia' (1979) 1 *Northeast African Studies* 45

'ICAO Council Condemns Violation of Territorial Integrity and Airspace of Ukraine' <<https://www.icao.int/Newsroom/Pages/ICAO-Council-condemns-invasion-of-Ukraine.aspx>> accessed 5 September 2022

ICJ, 'North Sea Continental Shelf (Federal Republic of Germany/Netherlands)' <<https://www.icj-cij.org/case/52>> accessed 15 March 2023

'ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT - Separate Opinion of Judge Kooijmans - ICJ Document - Question of Palestine' <<https://www.un.org/unispal/document/auto-insert-203873/>> accessed 31 October 2023

India, 'Letter Dated 12 December 1961 from the Permanent Representative of India Addressed to the President of the Security Council, UN Docs S/5020' <<https://digitallibrary.un.org/record/632002>> accessed 26 June 2023

'India, Rev. Mons. Monteiro v. State of Goa | How Does Law Protect in War? - Online Casebook' <<https://casebook.icrc.org/case-study/india-rev-mons-monteiro-v-state-go>> accessed 26 June 2023

'Indian Occupation of Portuguese Territories in India' *Keesing's Record of World Events (formerly Keesing's Contemporary Archives)* (March 1962)

'Indian Occupation of Portuguese Territories in India. Invasion of Goa, Daman, and Diu. - Incorporation in Indian Union', , *Keesing's Record of World Events (formerly Keesing's Contemporary Archives)* (1962) 18623 <<http://web.stanford.edu/group/tomzgroup/pmwiki/uploads/1074-1962-03-KS-a-RCW.pdf>>

Inside Story - China Banking Checkmate? (Directed by Al Jazeera English, 2015) <<https://www.youtube.com/watch?v=yioaSWu3fUY>> accessed 2 March 2023

International Court of Justice, 'Advisory Opinion on "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)"' <<https://www.icj-cij.org/case/53>>

—, 'Advisory Opinion on the "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965"' <<https://www.icj-cij.org/case/169>>

—, ‘Right of Passage over Indian Territory (Portugal v. India)’ <<https://www.icj-cij.org/case/32>> accessed 26 June 2023

Interntaional Court of Justice (ICJ), ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (9 July 2004) <<https://www.icj-cij.org/en/case/131>> accessed 12 November 2022

—, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (9 July 2004) <<https://www.icj-cij.org/en/case/131>> accessed 12 November 2022

‘Invasion of Manchuria | Harry S. Truman’ <<https://www.trumanlibrary.gov/education/presidential-inquiries/invasion-manchuria>> accessed 14 March 2023

Iovane M, ‘Non-Recognition of Territorial Acquisitions by the Use of Armed Force: The Status of Jerusalem before Italian Courts’ (2022) 2 Italian Review of International and Comparative Law 1

—, ‘Non-Recognition of Territorial Acquisitions by the Use of Armed Force: The Status of Jerusalem before Italian Courts’ (2022) 2 Italian Review of International and Comparative Law 1

Iriye A, *After Imperialism: The Search for a New Order in the Far East, 1921-1931* (Harvard University Press 1965)

Ismaik H, ‘Unite Jordan and Palestine—Again’ (*Foreign Policy*) <<https://foreignpolicy.com/2021/10/15/jordan-palestine-israel-annex-west-bank-israel-occupation/>> accessed 19 January 2023

‘Israel and the Occupied Territories: The Place of the Fence/Wall in International Law’ (*Amnesty International*) <<https://www.amnesty.org/en/documents/mde15/016/2004/en/>> accessed 20 January 2023

Issaeva M, ‘The Case of Crimea in the Light of International Law: Its Nature and Implications Conference Review Notes’ (2015) 3 Russian Law Journal 1

‘Italy v. Abyssinia (Walwal Incident).’ (1945) 8 Annual Digest and Report of Public International Law Cases 268

Ivan E, ‘Economic Sanctions as Tools of Foreign Policy’, *Economic Sanctions* (Routledge 2018) <<http://www.taylorfrancis.com/chapters/edit/10.4324/9780429493935-3/economic-sanctions-tools-foreign-policy-ivan-eland>> accessed 14 December 2022

Iyenaga T, ‘Japan’s Annexation of Korea’ (1912) 3 The Journal of Race Development 201

Jackson M, ‘THE DEFINITION OF APARTHEID IN CUSTOMARY INTERNATIONAL LAW AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION’ (2022) 71 International & Comparative Law Quarterly 831

Jagou F, ‘10. The Dispute between Sichuan and Xikang over the Tibetan Kingdom of Trokyap (1930s-1940s)’, 10. *The Dispute between Sichuan and Xikang over the Tibetan Kingdom of Trokyap (1930s-*

1940s) (Amsterdam University Press 2019)

<<https://www.degruyter.com/document/doi/10.1515/9789048544905-015/html>> accessed 30 June 2023

Jalloh CC, 'Identification of Customary International Law, Statement of the Chairperson of the Drafting Committee' (24 November 2020) <<https://papers.ssrn.com/abstract=3737098>> accessed 2 July 2023

Jane Boulden, 'Double Standards, Distance and Disengagement: Collective Legitimization in the Post-Cold War Security Council' (2006) 37 Security Dialogue <<https://journals-sagepub-com.ezproxy.library.uvic.ca/doi/abs/10.1177/0967010606069063>> accessed 16 April 2024

Janofsky M and Times ST the NY, 'OLYMPICS; I.O.C. AMPLIFIES ITS STAND ON APARTHEID' *The New York Times* (22 June 1988) <<https://www.nytimes.com/1988/06/22/sports/olympics-ioc-amplifies-its-stand-on-apartheid.html>> accessed 4 October 2022

'Japan and the Manchuria Crisis | History Revision for GCSE, IGCSE, IB and AS/A2 History | Mr Allsop History' <<https://www.mrallsophistory.com/revision/japan-and-the-manchuria-crisis.html>> accessed 20 December 2023

JASSE RL, 'Zion Abandoned: Great Britain's Withdrawal from the Palestine Mandate, 1945-1948' (PhD, The Catholic University of America) <<https://www.proquest.com/docview/303013192/abstract/14B0D6B0A5B74C00PQ/1>> accessed 17 January 2023

Jian C, 'The Tibetan Rebellion of 1959 and China's Changing Relations with India and the Soviet Union' (2006) 8 Journal of Cold War Studies 54

Joaquín Alcaide Fernández, 'Countermeasures' (*Oxford Bibliographies*) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0072.xml>> accessed 12 November 2022

Johnson VD and Dickinson E, 'International Norms and the End of Apartheid in South Africa' (2015) 16 Safundi 355

Jones DM and Smith MLR, *Asean And East Asian International Relations: Regional Delusion* (Edward Elgar Pub 2006)

Jones L, 'South Africa: Sanctioning Apartheid' in Lee Jones (ed), *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015) <<https://doi.org/10.1093/acprof:oso/9780198749325.003.0003>> accessed 29 August 2022

—, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015)

—, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford University Press 2015)

Joseph Raz, *Authority* (New York University Press 1990)

Joyce D, *Informed Publics, Media and International Law* (Hart Publishing 2020)

Kaczorowska-Ireland A, *Public International Law* (5th edition, Routledge 2015)

Kampuchea D, 'Letter Dated 8 September 1980 from the Permanent Representative of Democratic Kampuchea to the United Nations Addressed to the Secretary-General UN Docs A/35/434 - S/14154' <<https://digitallibrary.un.org/record/15425>> accessed 16 March 2023

Karaian J, 'The Russian Ruble Keeps Rising, Hitting a Seven-Year High.' *The New York Times* (21 June 2022) <<https://www.nytimes.com/2022/06/21/business/russian-ruble-ukraine.html>> accessed 12 November 2022

Keal P, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2003)
<<https://www.cambridge.org/core/books/european-conquest-and-the-rights-of-indigenous-peoples/2F60AFED5E8D5BA4B4625605DD7EDFC7>> accessed 23 March 2023

Kelsen H, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1950)

Keyuan Z, 'Historic Rights in International Law and in China's Practice' (2001) 32 *Ocean Development & International Law* 149

Khan R, 'Was the NATO Invasion of Afghanistan Legal?' (*E-International Relations*, 6 November 2013) <<https://www.e-ir.info/2013/11/06/was-the-nato-invasion-of-afghanistan-legal/>> accessed 17 December 2022

Kholodilin KA and Aleksei Netšunajev, 'Crimea and Punishment: The Impact of Sanctions on Russian Economy and Economies of the Euro Area' (2018) 19 *Baltic Journal of Economics* 39

Kiel-Morse M, 'Research Guides: Legal Dissertation: Research and Writing Guide: Home' <<https://law.indiana.libguides.com/dissertationguide/home>> accessed 9 January 2024

Kiernan B, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (Third edition, Yale University Press 2008)

Klabbers J, 'On Epistemic Universalism and the Melancholy of International Law' (2018) 29 *European Journal of International Law* 1057

Klintworth G, *Vietnam's Intervention in Cambodia in International Law* (Australian Government Publishing Service 1989)

Kochavi AJ, 'The Struggle against Jewish Immigration to Palestine' (1998) 34 *Middle Eastern Studies* 146

Koh HH, 'Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal* 2599

Konderla J, 'International Customary Law in the Jurisprudence of the ICTY and the ICTR' (2018) 8 Wroclaw Review of Law, Administration & Economics 287

Korman S, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press 1988)

Koskeniemi M, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 European Journal of International Relations 395

—, 'The Politics of International Law' *The Politics of International Law*

KOSTENKO Y, *Ukraine's Nuclear Disarmament: A History*. (Svitlana Krasynska ed, Harvard University Press 2020)

Kratochwil FV, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989)

<<https://www.cambridge.org/core/books/rules-norms-and-decisions/5230DE82772EFC582C32906F1C09F7ED>> accessed 25 October 2022

Krogh PF (Peter F, 'Never Again?: Genocide in Cambodia' (*American Interests* (show 230), 31 May 1983) <<https://repository.library.georgetown.edu/handle/10822/552628>> accessed 16 March 2023

Kuhn AK, 'The Lytton Report on the Manchurian Crisis' (1933) 27 The American Journal of International Law 96

Kumaraswamy PR, *The A to Z of the Arab-Israeli Conflict* (Scarecrow Press 2009)

<<http://ebookcentral.proquest.com/lib/uvic/detail.action?docID=616443>> accessed 10 January 2023

Kurtulus EN, 'The Notion of a "Pre-Emptive War:" The Six Day War Revisited' (2007) 61 Middle East Journal 220

Lande GR, 'The Changing Effectiveness of General Assembly Resolutions' (1964) 58 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 162

Lapchick RE, 'The Olympic Movement and Racism: An Analysis in Historical Perspective' (1970) 17 Africa Today 14

Lapidoth R, 'Is the Balfour Declaration a Legally Binding Document?' (2017) 28 Jewish Political Studies Review 42

Larsen KW, *Tradition, Treaties, and Trade: Qing Imperialism and Chosŏn Korea, 1850–1910* (Harvard University Press 2011)

LAUGEN T, 'The World Bank and the UN in the Occupied Territories' (1998) 29 Security Dialogue 63

Lauterpacht H, *Recognition in International Law* (AMS Press Inc 1978)

—, *Recognition in International Law* (AMS Press Inc 1978)

Lawler D, 'Putin Defends Ukraine Invasion in Meeting with UN Chief' (*Axios*, 26 April 2022) <<https://www.axios.com/2022/04/26/guterres-meet-putin-russia-invasion-ukraine>> accessed 4 September 2022

—, 'Putin Defends Ukraine Invasion in Meeting with UN Chief' (*Axios*, 26 April 2022) <<https://www.axios.com/2022/04/26/guterres-meet-putin-russia-invasion-ukraine>> accessed 4 September 2022

League of Nations Assembly, 'Report on the Sino-Japanese Dispute' (1933) 27 *American Journal of International Law* 119

Lee K-G, 'Trope of a Sovereign State: Treaty-Making by Korea From 1876-1899' (2008) 11 *The Review of Korean Studies* 11

Legal Sub-Committee, 'Report to the Co-Ordination Committee' (1936) 30 *The American Journal of International Law* 52

Lentner GM, 'The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism' (2020) 20 *International Criminal Law Review* 251

Lepard BD (ed), 'The Role of United Nations General Assembly Resolutions as Evidence of *Opinio Juris*', *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010) <<https://www.cambridge.org/core/books/customary-international-law/role-of-united-nations-general-assembly-resolutions-as-evidence-of-opinio-juris/C01FA6036CC837BFF3D8F64AF0745159>> accessed 16 April 2024

Lesaffer R (ed), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press 2004) <<https://www.cambridge.org/core/books/peace-treaties-and-international-law-in-european-history/C219F9C0E8C4DD7DB46D505B44BA5BD1>> accessed 30 November 2022

Leung PS and Carty A, 'The Crisis of the Ryukyus (1877–82): Confucian World Order Challenged and Defeated by Western/Japanese Imperial International Law' in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0017>> accessed 30 March 2023

Leung PS and Xu B, 'The Sino-Japanese War and the Collapse of the Qing and Confucian World Order in the Face of Japanese Imperialism and European Acquiescence' in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0019>> accessed 30 March 2023

Levi W, 'Tibet under Chinese Communist Rule' (1954) 23 *Far Eastern Survey* 1

Lew DH, 'Manchurian Booty and International Law' (1946) 40 *The American Journal of International Law* 584

Lim DYM and Vreeland JR, 'Regional Organizations and International Politics: Japanese Influence over the Asian Development Bank and the UN Security Council' (2013) 65 *World Politics* 34

Lin H, *Modern China's Ethnic Frontiers: A Journey to the West* (Routledge 2010)

Linderfalk U, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar Publishing 2020)

<<http://www.elgaronline.com/display/9781786439505/9781786439505.xml>> accessed 21 December 2022

Lissoni A and Ally S, "'Bantustan States'" (2018) 50 *African Historical Review* 1

"'Little Green Men" or "Russian Invaders"?' *BBC News* (11 March 2014)

<<https://www.bbc.com/news/world-europe-26532154>> accessed 4 September 2022

Lorch N, *The Edge of the Sword: Israel's War of Independence, 1947-1949* (2d rev. ed., Massada Press 1968)

Lorraine Haricombe and F. W. Lancaster, *Out in the Cold: Academic Boycotts & the Isolation of South Africa* (Michigan: University of Michigan 1995)

Lorraine J. Haricombe, 'The Effect of an Academic Boycott on Academics in South Africa' *University of Illinois at Urbana-Champaign*

<<https://www.proquest.com/openview/3644227df777d3d58522f35db568447a/1?pq-origsite=gscholar&cbl=18750&diss=y>> accessed 5 October 2022

Lossan A and RBTH, 'Updated: ICAO Calls Crimean Airspace as Ukrainian, Denies Reports' (*Russia Beyond*, 8 July 2014)

<https://www.rbth.com/business/2014/07/07/icao_recognizes_crimean_airspace_as_russian_37997.html> accessed 5 September 2022

Lowell AL, 'Alternatives Before the League' (1936) 15 *Foreign Affairs*

<<https://www.foreignaffairs.com/articles/1936-10-01/alternatives-league>> accessed 24 December 2023

Luthra G, 'The Russia-Ukraine Conflict and Sanctions: An Assessment of the Economic and Political Impacts' (*ORF*) <<https://www.orfonline.org/research/the-russia-ukraine-conflict-and-sanctions/>> accessed 12 November 2022

Lưu VL, *Biên Hoà Sử Lược Toàn Biên (Quyển Thứ II)* (Biên Hùng 1973)

MacIntosh D, Cantelon H and Mcdermott L, 'The IOC and South Africa: A Lesson in Transnational Relations' (1993) 28 *International Review for the Sociology of Sport* 373

—, 'The IOC and South Africa: A Lesson in Transnational Relations' (1993) 28 *International Review for the Sociology of Sport* 373

MacLean M, 'Revisiting (and Revising?) Sports Boycotts: From Rugby against South Africa to Soccer in Israel' (2014) 31 *The International Journal of the History of Sport* 1832

—, 'Revisiting (and Revising?) Sports Boycotts: From Rugby against South Africa to Soccer in Israel' (2014) 31 *The International Journal of the History of Sport* 1832

Magazine S and Binswanger J, 'Hundreds of Crimean Treasures Return to Ukraine After Long Legal Battle' (*Smithsonian Magazine*) <<https://www.smithsonianmag.com/smart-news/hundreds-of-crimean-treasures-return-to-kyiv-after-long-legal-battle-180983328/>> accessed 14 April 2024

'Manchu Invasion of Korea' (*New World Encyclopedia*) <https://www.newworldencyclopedia.org/entry/Manchu_invasion_of_Korea#Second_Manchu_Invasion_of_Korea> accessed 23 November 2022

Manning P, *A History of Humanity: The Evolution of the Human System* (Cambridge University Press 2020) <<https://www.cambridge.org/core/books/history-of-humanity/7B275674255241D1BB2DEE626C2259C5>> accessed 12 April 2023

— (ed), 'Anthropocene Evolution', *A History of Humanity: The Evolution of the Human System* (Cambridge University Press 2020) <<https://www.cambridge.org/core/books/history-of-humanity/anthropocene-evolution/EE110BB69C498B8D2416D0D53BEE7CE5>> accessed 12 April 2023

'Mara'abe v. The Prime Minister of Israel' <<https://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel>> accessed 30 January 2023

Marcus HG, *Haile Sellassie I: The Formative Years 1892-1936* (Berkeley: University of California Press 1987)

Marshall JG, *Britain and Tibet 1765-1947: A Select Annotated Bibliography of British Relations with Tibet and the Himalayan States Including Nepal, Sikkim and Bhutan* (RoutledgeCurzon 2005)

Martel S, *Enacting the Security Community: ASEAN's Never-Ending Story* (Stanford University Press 2022)

Matthews E, Newman D and Daoudi MSD, *The Israel-Palestine Conflict: Parallel Discourses* (Taylor & Francis Group 2011) <<http://ebookcentral.proquest.com/lib/uvic/detail.action?docID=668869>> accessed 16 January 2023

McDermid C, 'Looking Back at the 1979 People's Revolutionary Tribunal' <<https://www.phnompenhpost.com/national/looking-back-1979-peoples-revolutionary-tribunal>> accessed 16 March 2023

McDougal MS and Lasswell HD, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *The American Journal of International Law* 1

- McGlynn J, 'Why Putin Keeps Talking About Kosovo' (*Foreign Policy*) <<https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/>> accessed 28 December 2022
- McKay A, '19th Century British Expansion on the Indo-Tibetan Frontier: A Forward Perspective' (2003) 28 *The Tibet Journal* 61
- McNeill J and McNeill W, *The Human Web: A Bird's-Eye View of World History* (1st edition, WW Norton & Company 2003)
- Mearsheimer JJ, 'The False Promise of International Institutions' (1994) 19 *International Security* 5
- , *The Great Delusion: Liberal Dreams and International Realities* (1st Edition, Yale University Press 2018)
- Merrett C, 'Masters and Servants: African Trade Unionism in Pietermaritzburg and the Natal Midlands before the Early 1980s' (2018) 48 *Journal of the Natal Society Foundation* 22
- Metzl J, 'The U.N. Commission on Human Rights and Cambodia, 1975-1980' (1996) 3 *Buffalo Journal of International Law* 67
- Middlebush FA, 'The Effect of the Non-Recognition of Manchukuo' (1934) 28 *American Political Science Review* 677
- Milano E, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Brill Nijhoff 2005)
- , *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Brill Nijhoff 2005)
- , 'The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with de Facto Regimes'
- Miller JDB, 'Politicians, Officials, and Prophets' (1971) 26 *International Journal* 325
- Minzarari D, 'The next War: How Russian Hybrid Aggression Could Threaten Moldova – European Council on Foreign Relations' (*ECFR*, 29 July 2022) <<https://ecfr.eu/publication/the-next-war-how-russian-hybrid-aggression-could-threaten-moldova/>> accessed 15 March 2023
- Molly Quell, 'Dutch Supreme Court Orders Museum Artifacts Borrowed from Crimea Returned to Ukraine' *AP News* (9 June 2023) <<https://apnews.com/article/crimea-ukraine-russia-museum-artifacts-54b6463f9df7512dd407fa3941b9d773>> accessed 14 April 2024
- More AL, *International Assistance to the Palestinians after Oslo: Political Guilt, Wasted Money* (1st edition, Routledge 2008)
- Morgenthau H, Thompson K and Clinton D, *Politics Among Nations* (7th edition, McGraw-Hill Education 2005)

Morris B, 1948: *A History of the First Arab-Israeli War* (Yale University Press 2009)

Morris SJ, *Why Vietnam Invaded Cambodia: Political Culture and the Causes of War* (Stanford University Press 1999)

Mosyakov D, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' in Susan E Cook (ed), Susan E Cook, *Genocide in Cambodia and Rwanda* (1st edn, Routledge 2017)
<<https://www.taylorfrancis.com/books/9781351517782/chapters/10.4324/9780203790847-3>> accessed 16 March 2023

Moyn S and Özsu U, 'The Historical Origins and Setting of the Friendly Relations Declaration' in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020)
<<https://www.cambridge.org/core/books/un-friendly-relations-declaration-at-50/historical-origins-and-setting-of-the-friendly-relations-declaration/4E061CDDA531A8FC0F3D0B2A104D90A8>> accessed 2 July 2023

Mutua M, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201

Myres S. McDougal, *Studies in World Public Order* (New Haven Studies in International Law and World Public Order 1987)

Nafez Nazzari, *The Palestinian Exodus from Galilee, 1948* (Institute for Palestine Studies 1978)
<<https://www.palestine-studies.org/en/node/1649387>> accessed 6 February 2023

Najita T, 'Inukai Tsuyoshi: Some Dilemmas in Party Development in Pre-World War II Japan' (1968) 74 The American Historical Review 492

Naor, 'Menachem Begin and "Basic Law: Jerusalem, Capital of Israel"' (2016) 21 Israel Studies 36

Narain J, 'Law and Human Mind' (1981) 23 Journal of the Indian Law Institute 1

Natasha Gill, 'The Original "No": Why the Arabs Rejected Zionism, and Why It Matters' Middle East Policy Council

'Never Again? The Legacy of Cambodia's Khmer Rouge Trials' (*United States Institute of Peace*)
<<https://www.usip.org/publications/2022/10/never-again-legacy-cambodias-khmer-rouge-trials>> accessed 16 March 2023

'"Never Going to Happen": Ukraine Blasts Trading Land for Peace'
<<https://www.aljazeera.com/news/2022/5/26/never-going-to-happen-ukraine-blasts-trading-land-for-peace>> accessed 31 December 2022

'New York Times Co. v. United States, 403 U.S. 713 (1971)' (*Justia Law*)
<<https://supreme.justia.com/cases/federal/us/403/713/>> accessed 14 March 2023

Nguyen QTT, 'Rethinking the Legality of Intervention by Invitation: Toward Neutrality' (2019) 24 *Journal of Conflict and Security Law* 201

—, 'How Vietnamese "Putinistas" Are Spreading Disinformation about Ukrainians' (*The Conversation*) <<http://theconversation.com/how-vietnamese-putinistas-are-spreading-disinformation-about-ukrainians-181131>> accessed 28 December 2022

—, 'No, Russia's Invasion Ukraine Is Not the Same as Vietnam's War in Cambodia' *The Diplomat* <<https://thediplomat.com/2022/11/no-russias-war-in-ukraine-is-not-the-same-as-vietnams-invasion-of-cambodia/>> accessed 11 December 2022

Nicholas Rescher, *Introduction to Value Theory* (UPA 1969)

Nicholson M, 'Re-Situating Utopia' (2018) 1 *Brill Research Perspectives in International Legal Theory and Practice* 1

Nijman JE, 'Grotius' "Rule of Law" and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword' (2019) 30 *European Journal of International Law* 1105

Niksic O, Nasser Eddin N and Cali M, *Area C and the Future of the Palestinian Economy* (The World Bank 2014) <<http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0193-8>> accessed 2 March 2023

Nish I, *Japan's Struggle with Internationalism: Japan, China, and the League of Nations, 1931-3* (Routledge 1993)

Nixon R, 'Apartheid on the Run: The South African Sports Boycott' [1992] *Transition* 68

"'No Maoris - No Tour" Poster, 1959' (*New Zealand History - New Zealand Government*) <<https://nzhistory.govt.nz/media/photo/no-maoris-no-tour-poster>> accessed 3 October 2022

Norman G and Trachtman JP, 'The Customary International Law Game' (2005) 99 *American Journal of International Law* 541

'North Sea Continental Shelf (Federal Republic of Germany/Netherlands)' <<https://www.icj-cij.org/case/52>> accessed 15 March 2023

Nossal KR, 'The Symbolic Purposes of Sanctions: Australian and Canadian Reactions to Afghanistan' (1991) 26 *Australian Journal of Political Science* 29

Nossal KR, *Rain Dancing: Sanctions in Canadian and Australian Foreign Policy* (University of Toronto Press 1994)

O'Connell DP, *International Law: Volume One* (Stevens and Sons 1970)

O'Connell ME, 'New International Legal Process' (1999) 93 *The American Journal of International Law* 334

O'Donnell L, 'Portugal Left a Mark on India' (*Foreign Policy*, 13 May 2023) <<https://foreignpolicy.com/2023/05/13/india-go-portugal-colonial-history/>> accessed 26 June 2023

Office of the Historian, 'Israel - Palestine Milestones: 1961–1968' <<https://history.state.gov/milestones/1961-1968/arab-israeli-war-1967>> accessed 19 January 2023

'OHCHR | Ukraine' (*OHCHR*) <<https://www.ohchr.org/en/countries/ukraine>> accessed 5 September 2022

Okafor OC, 'The Bandung Ethic and International Human Rights Praxis: Yesterday, Today and Tomorrow', *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017)

O'Mahoney J, *Denying the Spoils of War: The Politics of Invasion and Non-Recognition* (Edinburgh University Press 2018) <<https://library.oapen.org/handle/20.500.12657/53505>> accessed 12 November 2022

—, *Denying the Spoils of War: The Politics of Invasion and Non-Recognition* (Edinburgh University Press 2018) <<https://library.oapen.org/handle/20.500.12657/53505>> accessed 12 November 2022

O'malley A, 'India, Apartheid and the New World Order at the UN, 1946–1962' (2020) 31 *Journal of World History* 195

'Opinion | Governments Triumph over Athletes in Olympic Committee's Latest Hypocrisy' (*NBC News*, 16 January 2020) <<https://www.nbcnews.com/think/opinion/olympics-are-political-ioc-ban-denies-reality-athletes-their-voice-ncna1117306>> accessed 6 June 2023

Oppenheim L, *International Law: A Treatise* (Longmans, Green 1905)

Oppenheim's International Law: Volume 1 Peace (Oxford University Press 2023) <<https://opil.ouplaw.com/display/10.1093/law/9780582302457.001.0001/law-9780582302457>> accessed 12 March 2023

— (Oxford University Press) <<https://opil.ouplaw.com/display/10.1093/law/9780582302457.001.0001/law-9780582302457>> accessed 12 March 2023

Orakhelashvili A, 'Interpretation of Customary Rules' in Alexander Orakhelashvili (ed), *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) <<https://doi.org/10.1093/acprof:oso/9780199546220.003.0016>> accessed 20 October 2022

'Origin of the Title of "Dalai Lama" and Its Related Backgrounder -- China.Org.Cn' <http://www.china.org.cn/china/tibet_democratic_reform/content_17357971.htm> accessed 30 June 2023

OSCE, 'Special Monitoring Mission to Ukraine, Daily Report 43/2022' (Organization for Security and Cooperation in Europe 2022) <<https://www.osce.org/files/2022-02-24%20Daily%20Report.pdf?itok=39275>>

Osiander A, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 *International Organization* 251

Palestine, 'Written Statement Submitted by Palestine' <<https://www.icj-cij.org/public/files/case-related/131/1555.pdf>> accessed 29 January 2023

Palestine Royal Commission, 'Palestine Royal Commission Report (Peel Report)' <<https://content.ecf.org.il/files/M00300%20-%20PeelCommissionFullReport.pdf>> accessed 30 January 2023

Pao-min C, 'Brother Enemy: The War after the War. By Nayan Chanda. San Diego, New York, London: Harcourt Brace Jovanovich Publishers, 1986. Pp. Xiv, 479. Plates, Notes, Index.' (1989) 20 *Journal of Southeast Asian Studies* 159

Papastavridis E, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 *The International and Comparative Law Quarterly* 83

Patrick HT and others, 'The Economic Muddle of the 1920's' in James William Morley (ed), *The Dilemmas of Growth in Prewar Japan* (Princeton University Press 1971) <<https://www.jstor.org/stable/j.ctt13x18xv.10>> accessed 6 July 2023

Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (WW Norton & Co 1997)

Peled Y, 'The Ethics of Boycotting as Collective Anti-Normalisation' (2019) 36 *Journal of Applied Philosophy* 527

Peppard V, *Playing Politics : Soviet Sport Diplomacy to 1992 / Victor Peppard and James Riordan* (Jai Press Greenwich, London 1993) <<https://library.olympics.com/Default/doc/SYRACUSE/58607/playing-politics-soviet-sport-diplomacy-to-1992-victor-peppard-and-james-riordan>> accessed 11 November 2022

Perdue PC, 'The Tenacious Tributary System' (2015) 24 *Journal of Contemporary China* 1002

'Perpetual Peace, by Immanuel Kant—A Project Gutenberg eBook' <<https://www.gutenberg.org/files/50922/50922-h/50922-h.htm>> accessed 17 October 2022

Pert A, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2014) 30 *Chinese (Taiwan) Yearbook of International Law and Affairs* 48

—, 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2014) 30 *Chinese (Taiwan) Yearbook of International Law and Affairs* 48

Pertile M and Faccio S, 'What We Talk about When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy's Relocation to the Holy City' (2020) 33 *Leiden Journal of International Law* 621

—, ‘What We Talk about When We Talk about Jerusalem: The Duty of Non-Recognition and the Prospects for Peace after the US Embassy’s Relocation to the Holy City’ (2020) 33 *Leiden Journal of International Law* 621

Petersen N, ‘The Role of Consent and Uncertainty in the Formation of Customary International Law’ in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/reexamining-customary-international-law/role-of-consent-and-uncertainty-in-the-formation-of-customary-international-law/99F1567E322A1D40A6098C055D9B3D98>> accessed 15 March 2023

—, ‘The Role of Consent and Uncertainty in the Formation of Customary International Law’ in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) <<https://www.cambridge.org/core/books/reexamining-customary-international-law/role-of-consent-and-uncertainty-in-the-formation-of-customary-international-law/99F1567E322A1D40A6098C055D9B3D98>> accessed 15 March 2023

—, ‘The International Court of Justice and the Judicial Politics of Identifying Customary International Law’ (2017) 28 *European Journal of International Law* 357

Pflanze O, ‘Bismarck’s “Realpolitik”’ (1958) 20 *The Review of Politics* 492

Philip I Levy, ‘Sanctions on South Africa: What Did They Do?’ (1999) 89 *The American Economic Review* 415

Picheny ML, ‘A Fertile Ground: The Expansion of Holocaust Denial into the Arab World Note’ (2003) 23 *Boston College Third World Law Journal* 331

Pinker S, ‘The Moral Instinct’ *The New York Times* (13 January 2008) <<https://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>> accessed 5 July 2023

Pirie F, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books 2021)

PLO Negotiations Affairs Department, ‘Bad Fences Make Bad Neighbors’ (2022) 9 *Palestine - Israel Journal* Vol. 9 No. 3

Pöllath M, ‘“Far Away from the Atlantic...”: Goa, West New Guinea and NATO’s out-of-Area Policy at Bandung 1955’ (2013) 11 *Journal of Transatlantic Studies* 387

Popp R, ‘Stumbling Decidedly into the Six-Day War’ (2006) 60 *Middle East Journal* 281

Portugal, ‘Letter Dated 18 December 1961 from the Permanent Representative of Portugal Addressed to the President of the Security Council UN Docs S/5030’ <<https://digitallibrary.un.org/record/632035>> accessed 26 June 2023

Posner E, ‘Russia’s Military Intervention in Ukraine: International Law Implications’ (*Personal*, 1 March 2014) <<http://ericposner.com/russias-military-intervention-in-ukraine-international-law-implications/>> accessed 11 June 2022

Posner EA and Goldsmith JL, 'A Theory of Customary International Law' 66 *University of Chicago Law Review* 1113

'Postal Solidarity in Action' <<https://www.upu.int/en/Members-Centre/Postal-solidarity-in-action>> accessed 5 September 2022

Potter PB, 'The Wal Wal Arbitration' (1936) 30 *The American Journal of International Law* 27

President of Russia, 'Address by President of the Russian Federation' (*Government of Russia*) <<http://en.kremlin.ru/events/president/news/20603>> accessed 4 September 2022

Quartermain T, 'Besieged on a Frozen Mountain Top: Opposing Records from the Qing Invasion of Chosŏn, 1636–1637' (2018) 21 *Acta Koreana* 137

Quataert JH, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (University of Pennsylvania Press 2009) <<https://www.jstor.org/stable/j.ctt3fh8mc>> accessed 27 June 2023

'Question of Palestine/Majority Plan (Partition), Minority Plan (Federal State)- UN Special Committee on Palestine (UNSCOP) - Report' (*Question of Palestine*) <<https://www.un.org/unispal/document/auto-insert-179435/>> accessed 25 January 2023

'Question of Palestine/Partition Recommendation - UN Special Committee on Palestine (UNSCOP) - Report Addendum 1 (Annexes, Appendix and Maps)' (*Question of Palestine*) <<https://www.un.org/unispal/document/auto-insert-186346/>> accessed 25 January 2023

Quigley J, *The Case for Palestine: An International Law Perspective* (2005) <<https://read.dukeupress.edu/books/book/969/The-Case-for-PalestineAn-International-Law>> accessed 10 January 2023

Quinn-Judge S, 'Fraternal Aid, Self-Defence, or Self-Interest? Vietnam's Intervention in Cambodia, 1978–1989' in Brendan Simms and DJB Trim (eds), *Humanitarian Intervention: A History* (Cambridge University Press 2011) <<https://www.cambridge.org/core/books/humanitarian-intervention/fraternal-aid-selfdefence-or-selfinterest-vietnams-intervention-in-cambodia-19781989/B446149DE6FD06BC07BC227A4C37A2A6>> accessed 16 March 2023

R. Baxter R, *Treaties and Custom (Volume 129)* (Brill 1970)

Randall MH, 'The History of the Covenants: Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780198825890.003.0002>> accessed 11 September 2022

Rao PR, *Portuguese Rule In Goa 1510-1961* (Asia Publishing House 1963) <<http://archive.org/details/in.ernet.dli.2015.127111>> accessed 7 January 2024

Raz J, 'The Justification of Authority' in Joseph Raz (ed), *The Morality of Freedom* (Oxford University Press 1988) <<https://doi.org/10.1093/0198248075.003.0003>> accessed 20 October 2022

Rebecca M. Nelson, 'Russia's War on Ukraine: The Economic Impact of Sanctions (IF12092)' (*Congressional Research Service*, 3 May 2022) <<https://crsreports.congress.gov/product/details?prodcode=IF12092>> accessed 12 November 2022

'Records of the General Conference, 18th Session, Paris, 17 October to 23 November 1974, v. 1: Resolutions - UNESCO Digital Library' <<https://unesdoc.unesco.org/ark:/48223/pf0000114040.page=144>> accessed 7 March 2023

'Records of the General Conference, Fifteenth Session, Paris, 1968, v. 1: Resolutions - UNESCO Digital Library' <<https://unesdoc.unesco.org/ark:/48223/pf0000114047>> accessed 7 March 2023

Reich B and Powers S, 'The United States and Israel: The Nature of a Special Relationship', *The Middle East and the United States* (5th edn, Routledge 2016)

Reisman WM, 'The Legal Effect of Vetoed Resolutions' (1980) 74 *The American Journal of International Law* 904

'Report of the Council of the League of Nations Under Article 15, Paragraph 4, of the Covenant' (1936) 30 *American Journal of International Law* 1

'Report of the League of Nations Council Committee' (1936) 30 *The American Journal of International Law* 37

'Res 1360 "Question of South West Africa" UN Docs A/RES/1360(XIV)' <<https://digitallibrary.un.org/record/206562>> accessed 26 September 2022

Reus-Smit C (ed), *The Politics of International Law* (Cambridge University Press 2004) <<https://www.cambridge.org/core/books/politics-of-international-law/AB3FD697E22B70B0860481147D95C441>> accessed 18 December 2022

Richardson HE, *Tibet and Its History* (Oxford University Press 1962) <<http://archive.org/details/in.gov.ignca.11408>> accessed 17 April 2024

Ringmar E, 'China and East Asia', *History of International Relations : A Non-European Perspective* (Open Book Publishers 2020) <<http://books.openedition.org/obp/9081>> accessed 15 November 2022

Roberts AE, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757

Romanyuk V, 'Fake: UN Recognizes Russian Telephone Code for Crimea' (*StopFake*, 19 March 2018) <<https://www.stopfake.org/en/fake-un-recognizes-russian-telephone-code-for-crimea/>> accessed 5 September 2022

Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995)

—, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995)

Rose C, *An Introduction to Public International Law* (New edition, Cambridge University Press 2022)

Ross R (ed), 'Apartheid', *A Concise History of South Africa* (2nd edn, Cambridge University Press 2008) <<https://www.cambridge.org/core/books/concise-history-of-south-africa/apartheid/9BCBD4754D3F2F4BB4BB3BA236CDB224>> accessed 13 September 2022

— (ed), 'Unification', *A Concise History of South Africa* (2nd edn, Cambridge University Press 2008) <<https://www.cambridge.org/core/books/concise-history-of-south-africa/unification/4D26C4A0C8B13517B15B78D203DCC41D>> accessed 12 September 2022

Rousseau C, *Le conflit italo-éthiopien devant le droit international* (A Pedone 1938)

'Russia | Fact Sheets on the European Union | European Parliament' (31 October 2023) <<https://www.europarl.europa.eu/factsheets/en/sheet/177/russia>> accessed 14 April 2024

'Russian Federation Announces "Special Military Operation" in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict | UN Press' <<https://press.un.org/en/2022/sc14803.doc.htm>> accessed 27 September 2023

Ryan Crimmino, 'Putin in Crimea: Have Sanctions Run Their Course?' (2018) 39 *Harvard International Review*

'S/1999/328 : UN Documents : Security Council Report' <<https://www.securitycouncilreport.org/un-documents/document/kos-s-1999-328.php>> accessed 16 May 2023

Saddiki S, '1. Israel and the Fencing Policy', *World of Walls : The Structure, Roles and Effectiveness of Separation Barriers* (Open Book Publishers 2018) <<http://books.openedition.org/obp/4560>> accessed 20 January 2023

Sakran S, *The Legal Consequences of Limited Statehood: Palestine in Multilateral Frameworks* (Routledge 2019)

Salazar O, 'Goa and the Indian Union' <<https://www.foreignaffairs.com/articles/india/1956-04-01/goa-and-indian-union>> accessed 30 August 2022

Saltzman A, 'DEVELOPING THE PRINCIPLE OF NON-RECOGNITION' 43 *Ohio Northern University Law Review*

Sánchez CS i, *Curso de derecho internacional publico americano : sistematica i exegesis* (Editora Montalvo 1943)

'Sanctions | United Nations Security Council' <<https://www.un.org/securitycouncil/sanctions/information>> accessed 28 May 2023

Sayegh F, 'Zionist Colonialism in Palestine (1965)' (2012) 2 *Settler Colonial Studies* 206

Scharf MP, 'Grotian Moments: The Concept' (2021) 42 *Grotiana* 193

—, ‘Grotian Moments: The Concept’ (2021) 42 *Grotiana* 193

—, ‘Power Shift: The Return of the Uniting for Peace Resolution’ (1 March 2023)
<<https://papers.ssrn.com/abstract=4197306>> accessed 2 July 2023

Schmidtke O and Yekelchik S, *Europe’s Last Frontier?: Belarus, Moldova, and Ukraine between Russia and the European Union* (1st ed., Palgrave Macmillan 2008)

Schorkowitz D and others (eds), *Managing Frontiers in Qing China: The Lifanyuan and Libu Revisited* (Brill 2016) <<https://brill.com/display/title/32688>> accessed 13 December 2022

Schwebel SM, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’, *Proceedings of the ASIL Annual Meeting* (ASIL 1979) <<http://www.jstor.org/stable/25658015>> accessed 11 June 2022

Searle JR, *Construction of Social Reality* (Allen Lane 1995)
<<http://www.librarything.com/work/124891/reviews/127034236>>

—, ‘Free Will, Rationality, and Institutional Facts’ in John Searle (ed), *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010)
<<https://doi.org/10.1093/acprof:osobl/9780195396171.003.0006>> accessed 20 June 2023

Secretary-General UA, ‘Letter Dated 62/01/10 from the Acting Secretary-General Addressed to the President of the Security Council’ <<https://digitallibrary.un.org/record/626146>> accessed 21 September 2022

Security Council, ‘988th Meeting Record, Docs S/PV.988’
<<https://digitallibrary.un.org/record/631428>> accessed 26 June 2023

‘Security Council, 69th Year, 7124th Meeting Record’ <<https://digitallibrary.un.org/record/766546>> accessed 4 September 2022

‘Security Council, 69th Year, 7125th Meeting Record’ (3 March 2014)
<<https://digitallibrary.un.org/record/766547>> accessed 4 September 2022

‘Security Council, 69th Year, 7138th Meeting’ <<https://digitallibrary.un.org/record/767358>> accessed 5 September 2022

‘Security Council, 70th Year, 7576th Meeting’ <<https://digitallibrary.un.org/record/814361>> accessed 5 September 2022

‘Security Council, 74th Year, 8575th Meeting’ <<https://digitallibrary.un.org/record/3812821>> accessed 5 September 2022

‘Security Council, 77th Year, 9052nd Meeting’ <<https://digitallibrary.un.org/record/3976593>> accessed 5 September 2022

‘Security Council, 77th Year, 8979th Meeting’ <<https://digitallibrary.un.org/record/3963720>> accessed 5 September 2022

‘Security Council, 77th Year, 9002nd Meeting’ <<https://digitallibrary.un.org/record/3966844>> accessed 5 September 2022

‘Security Council, 77th Year, 9033rd Meeting’ <<https://digitallibrary.un.org/record/3973727>> accessed 5 September 2022

‘Security Council, 77th Year, 9069th Meeting’ <<https://digitallibrary.un.org/record/3978663>> accessed 5 September 2022

‘Security Council, 77th Year, 9096th Meeting’ <<https://digitallibrary.un.org/record/3981813>> accessed 5 September 2022

‘Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wiolds Veto | UN Press’ <<https://press.un.org/en/2022/sc14808.doc.htm>> accessed 5 September 2022

Selbmann F, ‘The 1979 Trial of the People’s Revolutionary Tribunal and Implications for ECCC’ in Simon M Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (TMC Asser Press 2016) <https://doi.org/10.1007/978-94-6265-105-0_4> accessed 16 March 2023

‘Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia | ASIL’ <<https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan>> accessed 6 January 2023

Sellassie HI, *My Life and Ethiopia’s Progress: The Autobiography of Emperor Haile Sellassie I* (Frontline Books 1999)

Seo M, ‘Changing Perceptions of the Qing Dynasty in the Late Joseon Dynasty and Chinese Style Architecture That Emerged in Joseon in the 18th Century’ (2022) 21 *Journal of Asian Architecture and Building Engineering* 849

Serhii P, *The Gates of Europe: A History of Ukraine* (Basic Books 2015)

Seskuria N, ‘Russia’s “Hybrid Aggression” against Georgia: The Use of Local and External Tools’ <<https://www.csis.org/analysis/russias-hybrid-aggression-against-georgia-use-local-and-external-tools>> accessed 15 March 2023

Shamir M and Sagiv-Schifter T, ‘Conflict, Identity, and Tolerance: Israel in the Al-Aqsa Intifada’ (2006) 27 *Political Psychology* 569

Shayne P. Quick, ‘“Black Knight Checks White King” the Conflict between Avery Brundage and the African Nations Over South African Membership in the IOC’ (1990) 21 *Sport History Review* <<https://journals.humankinetics.com/view/journals/shr/21/2/article-p20.xml>> accessed 4 October 2022

- Short P, *Pol Pot: The History of a Nightmare*. Philip Short (John Murray Publishers 2006)
- Shub L, 'Israel and the United Nations' (1950) 51 *The American Jewish Year Book* 379
- Singh P, 'India Before and After the Right of Passage Case' (8 November 2013) <<https://papers.ssrn.com/abstract=2351892>> accessed 26 June 2023
- Singhal DP, 'Goa—End of an Epoch' (1962) 34 *The Australian Quarterly* 77
- Sinha NC, 'The Simla Convention 1914: A Chinese Puzzle'
- Sinha SP, 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *The International and Comparative Law Quarterly* 121
- 'Slavery Convention' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention>> accessed 5 July 2023
- Sluga G, *The Invention of International Order: Remaking Europe after Napoleon* (Princeton University Press 2021) <<https://www.degruyter.com/document/doi/10.1515/9780691226798/html>> accessed 6 December 2022
- Sonnenfeld J and others, 'Business Retreats and Sanctions Are Crippling the Russian Economy' (19 July 2022) <<https://papers.ssrn.com/abstract=4167193>> accessed 21 February 2023
- Soroczynski R, 'Acquisition of Title to Territory in the Aftermath of the Use of Force in the United Nations Era: The Case of the State of Israel' (2017) 30 *Revue québécoise de droit international* 65
- Southall RJ, 'Independence for the Transkei: Mystification and Diversion in the Model Bantustan', *Southern Africa Since the Portuguese Coup* (Routledge 1980)
- 'Southern Africa: Keeping Friends among the International Donors' [1992] *Inter Press Service*
- Southgate L, 'ASEAN and the Dynamics of Resistance to Sovereignty Violation: The Case of the Third Indochina War (1978–1991)' (2015) 2 *Journal of Asian Security and International Affairs* 200
- , *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (1st edn, Bristol University Press 2019) <<https://www.jstor.org/stable/j.ctvg5bt4s>> accessed 30 June 2023
- Sparks T and Somos M, 'Grotian Moments: An Introduction' (2021) 42 *Grotiana* 179
- , 'Grotian Moments: An Introduction' (2021) 42 *Grotiana* 179
- Spears IS, 'The Ethiopian Crisis and the Emergence of Ethiopia in a Changing State System', *Collision of Empires* (Routledge 2013)
- Spencer JH, 'The Italian-Ethiopian Dispute and the League of Nations' (1937) 31 *The American Journal of International Law* 614

Sperling E, 'Opinion | Don't Know Much About Tibetan History' *The New York Times* (13 April 2008) <<https://www.nytimes.com/2008/04/13/opinion/13sperling.html>> accessed 30 June 2023

Spiro P, 'Ukraine, International Law, and the Perfect Compliance Fallacy' (*Opinio Juris*, 2 March 2014) <<http://opiniojuris.org/2014/03/02ukraine-international-law-perfect-compliance-fallacy/>> accessed 11 June 2022

—, 'Ukraine, International Law, and the Perfect Compliance Fallacy' (*Opinio Juris*, 2 March 2014) <<http://opiniojuris.org/2014/03/02ukraine-international-law-perfect-compliance-fallacy/>> accessed 11 June 2022

'S.S. "Lotus", France v Turkey, Judgment, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7th September 1927, League of Nations (Historical) [LoN]; Permanent Court of International Justice (Historical) [PCIJ]' (*Oxford Public International Law*) <<https://opil.ouplaw.com/display/10.1093/law/icgj/248pcij27.case.1/law-icgj-248pcij27>> accessed 5 July 2023

Staff CIE, 'Prime Minister Levi Eshkol Statement to the Knesset at Conclusion of June War' (*CIE*, 7 June 2019) <<https://israeled.org/resources/documents/prime-minister-levi-eshkol-statement-knesset-conclusion-june-war/>> accessed 26 January 2023

Stapleton T, 'Haile Selassie, Appeal to the League of Nations', *Africa: War and Conflict in the Twentieth Century* (Routledge 2018)

Stasavage D, 'The Ongoing Democratic Experiment', *The Decline and Rise of Democracy*, vol 96 (Princeton University Press 2020) <<https://www.jstor.org/stable/j.ctvss3zz6.16>> accessed 16 April 2023

'Statement by the Director General of the International Bureau of the UPU on the Conflict in Ukraine' <<https://www.upu.int/en/News/2022/3/Statement-by-the-Director-General-of-the-International-Bureau-of-the-UPU-on-the-conflict-in-Ukraine>> accessed 5 September 2022

Stein AA, 'Coordination and Collaboration: Regimes in an Anarchic World' (1982) 36 *International Organization* 299

—, 'Coordination and Collaboration: Regimes in an Anarchic World' (1982) 36 *International Organization* 299

Stern WB, 'The Treaty Background of the Italo-Ethiopian Dispute' (1936) 30 *The American Journal of International Law* 189

Stetka B, 'Steven Pinker: This Is History's Most Peaceful Time--New Study: "Not So Fast"' (*Scientific American*) <<https://www.scientificamerican.com/article/steven-pinker-this-is-historys-most-peaceful-time-new-study-not-so-fast/>> accessed 18 April 2023

Strang GB (ed), *Collision of Empires: Italy's Invasion of Ethiopia and Its International Impact* (Routledge 2016)

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, 'Report of the Sub-Commission under Commission on Human Rights Resolution 8 (XXIII) UN Docs E/CN.4/Sub.2/414/Add.2' <<https://digitallibrary.un.org/record/629036>> accessed 16 March 2023

Summary of EU Legislation, 'EU Restrictive Measures in View of Russia's Invasion of Ukraine | EUR-Lex' <<https://eur-lex.europa.eu/EN/legal-content/summary/eu-restrictive-measures-in-view-of-russia-s-invasion-of-ukraine.html>> accessed 14 April 2024

Sun H, *Qing Dai Zhong Yue Zong Fan Guan Xi Yan Jiu* (Di 1 ban, Heilongjiang jiao yu chu ban she 2006) <<https://catalog.lib.uchicago.edu/vufind/Record/5892865>> accessed 29 November 2022

'Supreme Court of Israel: Beit Sourik Village Council v. the Government of Israel' (2004) 43 International Legal Materials 1099

Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (Cameron May 2005)

Suttner R, 'Has South Africa Been Illegally Excluded from the United Nations General Assembly?' (1984) 17 The Comparative and International Law Journal of Southern Africa 279

Talmon S, '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?', *The Fundamental Rules of the International Legal Order* (Brill 2006) <<https://doi.org/10.1163/ej.9789004149816.i-472.33>>

—, '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?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill | Nijhoff 2006) <https://brill.com/view/book/edcoll/9789047417828/Bej.9789004149816.i-472_007.xml> accessed 9 May 2023

—, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417

Tana L, 'An Alternative Vietnam? The Nguyen Kingdom in the Seventeenth and Eighteenth Centuries' (1998) 29 Journal of Southeast Asian Studies 111

Tao T, 'Chinese Intellectuals' Discourse of International Law in the Late Nineteenth and Early Twentieth Centuries' in Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780199670055.003.0016>> accessed 30 March 2023

Taylor KW (ed), 'The Nguyen Dynasty', *A History of the Vietnamese* (Cambridge University Press 2013) <<https://www.cambridge.org/core/books/history-of-the-vietnamese/nguyen-dynasty/13C3DDEAF77081354795EB92475981A4>> accessed 16 March 2023

Taylor T, 'Politics and the Seoul Olympics' (1988) 1 The Pacific Review 190

Terblanche O, 'Die Nederlandse Akademiese Boikot Teen Suid-Afrika: 'n Ontleding: The Dutch Academic Boycott against South Africa: An Analysis.' (2016) 56 *Tydskrif vir Geesteswetenskappe* 1113

Tesón FR, *A Philosophy of International Law* (Routledge 2019)

The Committee on the Exercise of the Inalienable Rights, of the Palestinian People and United Nations, 'The Status of Jerusalem' <<https://www.un.org/unispal/wp-content/uploads/2016/07/The-Status-of-Jerusalem-English-199708.pdf>> accessed 26 January 2023

The Council of European Union, 'EU Adopts Its Latest Package of Sanctions against Russia over the Illegal Annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson Regions' (6 October 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/10/06/eu-adopts-its-latest-package-of-sanctions-against-russia-over-the-illegal-annexation-of-ukraine-s-donetsk-luhansk-zaporizhzhia-and-kherson-regions/>> accessed 14 April 2024

—, 'Council Adopts Decision Not to Accept Russian Documents Issued in Ukraine and Georgia' (European Union 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/08/council-adopts-decision-not-to-accept-russian-documents-issued-in-ukraine-and-georgia/>> accessed 14 April 2024

The Council of the League of Nations, 'Report on Dispute between Ethiopia and Italy' (1936) 30 *The American Journal of International Law* 1

'The Draft Treaty of Mutual Assistance' (1924) 3 *Journal of the British Institute of International Affairs* 45

The Government of Israel, 'Written Statement of the Government of Israel on Jurisdiction and Propriety' <<https://www.icj-cij.org/public/files/case-related/131/1579.pdf>> accessed 29 January 2023

'The Khmer Rouge Trials: The Good, the Bad, and the Ugly' <<https://thediplomat.com/2018/11/the-khmer-rouge-trials-the-good-the-bad-and-the-ugly/>> accessed 16 March 2023

'The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice - Document - Gale OneFile: LegalTrac' <<https://go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=LT&u=uvictoria&id=GALE|A176477656&v=2.1&it=r>> accessed 29 January 2023

The National Archives, 'Southern Rhodesia's Unilateral Declaration of Independence (UDI)' (*The United Kingdom National Archives*, 11 November 2015) <<https://blog.nationalarchives.gov.uk/southern-rhodesias-unilateral-declaration-independence-udi/>> accessed 14 September 2022

The Power of Legitimacy among Nations (Oxford University Press 1990)

'The Price of War: Macroeconomic Effects of the 2022 Sanctions on Russia' (CEPR)
<<https://cepr.org/voxeu/columns/price-war-macroeconomic-effects-2022-sanctions-russia>>
accessed 12 November 2022

The State Council Information Office C, 'Protection and Development of Tibetan Culture*' (2009) 8
Chinese Journal of International Law 233

The Use of Force in International Law: A Case-Based Approach (Oxford University Press)
<<https://opil.ouplaw.com/display/10.1093/law/9780198784357.001.0001/law-9780198784357>>
accessed 16 March 2023

Thejahloukho, 'The Sikkim–Tibet Convention of 1890 and the Younghusband Mission of 1904' (2021)
57 China Report 451

Thi My Hanh N, 'Controversial Border and Territory Issues between the Mac Dynasty (Dai Viet) and
Ming Dynasty (China)' (2022) 9 Humanities and Social Sciences Communications 1

Tikhvinskii SL and Perelomov LS, *China and Her Neighbours, from Ancient Times to the Middle Ages:
A Collection of Essays* (Progress Publishers 1981)

Tobias PV, 'Thoughts on Academic Boycotts' (1988) 26 Minerva 575

Tomka P, 'Custom and the International Court of Justice'
<<https://heinonline.org/HOL/P?h=hein.journals/lpict12&i=204>> accessed 4 July 2024

Toulmin S, *Cosmopolis: The Hidden Agenda of Modernity* (1st edition, University of Chicago Press
1992)

Traces of Racial Exception : Racializing Israeli Settler Colonialism (Bloomsbury Academic 2017)
<<http://www.bloomsburycollections.com/book/traces-of-racial-exception-racializing-israeli-settler-colonialism>> accessed 17 January 2023

Tran Ngoc V, 'Lưỡng Đầu Chế Thời Lê - Trình và Những Hệ Quả Lịch Sử Của Nó (Kỳ 1)' (2008) 209 Tạp
chí Triết học <<http://philosophy.vass.gov.vn/triet-hoc-vietnam/Luong-dau-che-thoi-Le--Trinh-va-nhung-he-qua-lich-su-cua-no-Ky-1-58.0.html>> accessed 24 November 2022

Trần TV, 'Thể chế chính quyền Nhà nước thời Lê - Trình sản phẩm đặc biệt của lịch sử Việt Nam thế
kỷ XVII-XVIII' <http://repository.vnu.edu.vn/handle/VNU_123/70611> accessed 24 November 2022

'TREATY BETWEEN THE GOVERNMENT OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF
PORTUGAL ON RECOGNITION OF INDIA'S SOVEREIGNTY OVER GOA, DAMAN, DIU, DADRA AND
NAGAR HAVELI AND RELATED MATTERS [1974] INTSer 53'
<<http://www.commonlii.org/in/other/treaties/INTSer/1974/53.html>> accessed 27 June 2023

'Treaty on the Non-Proliferation of Nuclear Weapons - Main Page'
<<https://legal.un.org/avl/ha/tnpt/tnpt.html>> accessed 5 July 2023

Trooboff P and de Chazournes LB, 'Economic Countermeasures in an Interdependent World' (1995) 89 *Proceedings of the Annual Meeting (American Society of International Law)* 337

Tsagourias N, *International Humanitarian Law: Cases, Materials and Commentary* (2nd ed. edition, Cambridge University Press 2023)

Tunes HKS to TNY, 'Cambodia and Vietnam—Ancient Enemies' *The New York Times* (7 January 1978) <<https://www.nytimes.com/1978/01/07/archives/cambodia-and-vietnamancient-enemies-border-drawn-by-france-cambodia.html>> accessed 16 March 2023

Turley WS and Race J, 'The Third Indochina War' [1980] *Foreign Policy* 92

Udokang O, 'The Role of the New States in International Law' (1971) 15 *Archiv des Völkerrechts* 145

'Ukraine: Briefing on "Incitement to Violence Leading to Atrocity Crimes" : What's In Blue : Security Council Report' <<https://www.securitycouncilreport.org/whatsinblue/2022/06/ukraine-briefing-on-incitement-to-violence-leading-to-atrocity-crimes.php>> accessed 5 September 2022

'UN General Assembly Resolution 2253-ES-V (July 1967)' <<https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-2253-es-v-july-1967>> accessed 28 February 2023

UN Library, 'Voting Record of Resolution 3336 on Permanent Sovereignty over National Resources in the Occupied Arab Territories' <<https://digitallibrary.un.org/record/651053>> accessed 1 March 2023

'UN Security Council Action on Crimea Referendum Blocked' (*UN News*, 15 March 2014) <<https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>> accessed 4 September 2022

UN Subcommission on Prevention of Discrimination and Protection of Minorities, 'Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under Decision 9 (XXXIV) of the Commission on Human Rights.' <<https://digitallibrary.un.org/record/6653>> accessed 16 March 2023

UNESCO, 'Decisions Adopted by the Executive Board at Its 196th Session, 196 EX/Decisions' <<https://unesdoc.unesco.org/ark:/48223/pf0000232890?posInSet=2&queryId=44109e78-4e29-4486-b9b3-f9e51509a0eb>> accessed 5 September 2022

—, 'Damaged Cultural Sites in Ukraine Verified by UNESCO' <<https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>> accessed 31 May 2023

UNGA, 'Res 44 "Treatment of Indians in the Union of South Africa" UN Docs A/RES/44(I)' <<https://digitallibrary.un.org/record/209760>> accessed 14 September 2022

—, 'Res 44 "Treatment of Indians in the Union of South Africa" UN Docs A/RES/44(I)' <<https://digitallibrary.un.org/record/209760>> accessed 14 September 2022

—, ‘Res 395(V) “Treatment of People of Indian Origin in the Union of South Africa” UN Doc A/RES/395(V)’ <<https://digitallibrary.un.org/record/209555>> accessed 16 September 2022

—, ‘Res 602 on “Ways and Means for Making the Evidence of Customary International Law More Readily Available” UN Docs A/RES/602(VI)’ <<https://digitallibrary.un.org/record/211235>> accessed 2 July 2023

—, ‘Res 615(VII) “The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa” UN Docs A/RES/615(VII)[B]’ <<https://digitallibrary.un.org/record/666110>> accessed 16 September 2022

—, ‘Res 637 (VII) on “The Right of Peoples and Nations to Self-Determination” UN Docs A/RES/637(VII)[A]’ <<https://digitallibrary.un.org/record/666117>> accessed 26 June 2023

—, ‘Res 686 on Ways and Means for Making the Evidence of Customary International Law More Readily Available UN Docs A/RES/686(VII)’ <<https://digitallibrary.un.org/record/211257>> accessed 16 April 2024

—, ‘Res 721 (VIII) “The Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa” UN Docs A/RES/721(VIII)’ <<https://digitallibrary.un.org/record/211615>> accessed 16 September 2022

—, ‘Res 1514 on “Declaration on the Granting of Independence to Colonial Countries and Peoples” UN Docs A/RES/1514(XV)’ <<https://digitallibrary.un.org/record/206145>> accessed 26 June 2023

—, ‘Res 1542 on “Transmission of Information under Article 73e of the Charter” UN Docs A/RES/1542(XV)’ <<https://digitallibrary.un.org/record/205905>> accessed 26 June 2023

—, ‘Resolution 1568 on “Question of South West Africa” UN Docs A/RES/1568(XV)’ <<https://digitallibrary.un.org/record/206009>> accessed 19 March 2024

—, ‘Res 1598 “Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa” UN Docs A/RES/1598 (XV)’ <<https://digitallibrary.un.org/record/206151>> accessed 18 September 2022

—, ‘Res 1699(XVI) on “Non-Compliance of the Government of Portugal with Chapter XI of the Charter of the United Nations and with General Assembly Resolution 1542 (XV)” UN Docs A/RES/1699(XVI)’ <<https://digitallibrary.un.org/record/204797>> accessed 26 June 2023

—, ‘Res 1747(XVI) “The Question of Southern Rhodesia” UN Docs A/RES/1747(XVI)’ <<https://digitallibrary.un.org/record/205657>> accessed 26 September 2022

—, ‘Res 1761 “The Policies of Apartheid of the Government of the Republic of South Africa” UN Docs A/RES/1761(XVII)’ <<https://digitallibrary.un.org/record/204274>> accessed 28 September 2022

—, ‘Res 2022(XX) “Question of Southern Rhodesia” Un Docs A/RES/2022(XX)’ <<https://digitallibrary.un.org/record/203554>> accessed 26 September 2022

—, ‘Res 2145 on “Question of South West Africa” UN Docs A/RES/2145(XXI)’
<<https://digitallibrary.un.org/record/203150>> accessed 28 June 2023

—, ‘Res 2253. 2254, 2255, 2256 on “Measures Taken by Israel to Change the Status of Jerusalem” UN Docs A/RES/2253(ES-V) | A/RES/2254(ES-V) | A/RES/2255(ES-V)’
<<https://digitallibrary.un.org/record/203080>> accessed 14 February 2023

—, ‘Res 2253. 2254, 2255, 2256 on “Measures Taken by Israel to Change the Status of Jerusalem” UN Docs A/RES/2253(ES-V) | A/RES/2254(ES-V) | A/RES/2255(ES-V)’
<<https://digitallibrary.un.org/record/203080>> accessed 14 February 2023

—, ‘Res 2324 - 2325 on the “Question of South West Africa” UN Docs A/RES/2324(XXII)’
<<https://digitallibrary.un.org/record/202874>> accessed 27 December 2023

—, ‘Res 2396 on ‘the Policies of Apartheid of the Government of South Africa UN Docs A/RES/2396(XXIII)’ <<https://digitallibrary.un.org/record/202567>> accessed 11 February 2024

—, ‘Res 2546 on “Respect for the Implementation of Human Rights in Occupied Territories” UN Docs A/RES/2546(XXIV)’ <<https://digitallibrary.un.org/record/202418>> accessed 28 February 2023

—, ‘Res 2636 (XXV) “Credentials of Representatives to the 25th Session of the General Assembly” UN Docs A/RES/2636(XXV)[B]’ <<https://digitallibrary.un.org/record/645482>> accessed 3 October 2022

—, ‘Res 3151 (XXVIII) “Dissemination of Information on Apartheid” UN Docs A/RES/3151(XXVIII)’ <<https://digitallibrary.un.org/record/642336>> accessed 3 October 2022

—, ‘Res 3206 “Credentials of Representatives to the 29th Session of the General Assembly” UN Docs A/RES/3206(XXIX)’ <<https://digitallibrary.un.org/record/189828>> accessed 3 October 2022

—, ‘Res 3240 on Adopting the “Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories” UN Docs A/RES/3240(XXIX)[C]’ <<https://digitallibrary.un.org/record/640852>> accessed 28 February 2023

—, ‘Res 3336 on “Permanent Sovereignty over National Resources in the Occupied Arab Territories” UN Docs A/RES/3336(XXIX)’ <<https://digitallibrary.un.org/record/190163>> accessed 28 February 2023

—, ‘Res 3336 on “Permanent Sovereignty over National Resources in the Occupied Arab Territories” UN Docs A/RES/3336(XXIX)’ <<https://digitallibrary.un.org/record/190163>> accessed 28 February 2023

—, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ <<https://digitallibrary.un.org/record/637263>> accessed 15 September 2022

—, ‘Res 31/6[A] “The so-Called Independent Transkei and Other Bantustans” UN Doc A/RES/31/6[A]’ <<https://digitallibrary.un.org/record/637263>> accessed 15 September 2022

- , ‘General Assembly Official Records, 34th Session :: 65th Plenary Meeting, UN Docs A/34/PV.65’ <<https://digitallibrary.un.org/record/754024>> accessed 16 March 2023
- , ‘Res 34/22 on “the Situation in Kampuchea” UN Docs A/RES/34/22’ <<https://digitallibrary.un.org/record/10605>> accessed 16 March 2023
- , ‘Res 35/206[E] “Cultural, Academic and Other Boycotts of South Africa” UN Docs A/RES/35/206[E]’ <<https://digitallibrary.un.org/record/614065>> accessed 3 October 2022
- , ‘Res 37/6 on “The Situation in Kampuchea” UN Docs A/RES/37/6’ <<https://digitallibrary.un.org/record/38254>> accessed 16 March 2023
- , ‘Res 40/7 on “The Situation in Kampuchea”, UN Docs A/RES/40/7’ <<https://digitallibrary.un.org/record/102860>> accessed 21 March 2023
- , ‘Res 45/83 on the “Questions of Palestine” UN Docs A/RES/46/82’ (1990) <<https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-45-83-december-1990>> accessed 1 March 2023
- , ‘Res 44/22 on “the Situation in Kampuchea”, UN Docs A/RES/44/22’ <<https://digitallibrary.un.org/record/82223>> accessed 21 March 2023
- , ‘Res 49/62 on “Question of Palestine” UN Docs A/RES/49/62’ <<https://digitallibrary.un.org/record/169934?ln=en>> accessed 1 March 2023
- , ‘Res 73/203 on Identification of Customary International Law UN Docs A/RES/73/203’ <<https://digitallibrary.un.org/record/1660631>> accessed 3 December 2023
- , ‘Draft Resolution on “Aggression against Ukraine” UN Docs A/ES-11/L.1’ <<https://digitallibrary.un.org/record/3958976>> accessed 14 April 2024
- , ‘Res ES-11/1 on “Aggression against Ukraine” UN Docs A/RES/ES-11/1’ <<https://digitallibrary.un.org/record/3965290>> accessed 15 March 2023
- , ‘Res ES-11/1 on “Aggression against Ukraine” UN Docs A/RES/ES-11/1’ <<https://digitallibrary.un.org/record/3965290>> accessed 15 March 2023
- , ‘Res 76/262 on “Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council” UN Docs A/RES/76/262’ <<https://digitallibrary.un.org/record/3971417>> accessed 2 July 2023
- , ‘Res ES-11/4 on “Territorial Integrity of Ukraine : Defending the Principles of the Charter of the United Nations” UN Docs A/RES/ES-11/4’ <<https://digitallibrary.un.org/record/3990673>> accessed 8 November 2022
- , ‘Res 77/284 on “Cooperation between the United Nations and the Council of Europe” UN Docs A/RES/77/284’ <<https://digitallibrary.un.org/record/4010475>> accessed 13 May 2023

—, ‘Res 2625 on “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations” UN Docs A/RES/2625(XV)’ <<https://www.refworld.org/docid/3dda1f104.html>> accessed 18 April 2023

—, ‘Res ES-10/14 on “ILLEGAL ISRAELI ACTIONS IN OCCUPIED EAST JERUSALEM AND THE REST OF THE OCCUPIED PALESTINIAN TERRITORY” UN Docs A/ES-10/14’ <https://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_ES-10/14>

—, ‘Resolution 181 on “Palestine Plan of Partition with Economic Union” UN Docs A/RES/181(II)’ <<https://www.un.org/unispal/document/auto-insert-185393/>> accessed 26 December 2023

UNGA E), ‘Res 273 “Admission of Israel to Membership in the United Nations” UNGA Docs A/RES/273(III)’ <<https://digitallibrary.un.org/record/210373>> accessed 6 February 2023

UNGA UGA (29th, ‘Res 3324 on “Situation in South Africa” UN Docs A/RES/3324(XXIX)’ <<https://digitallibrary.un.org/record/640879>> accessed 11 February 2024

UNGA UGA (58th, ‘Res 58/98 on Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan UN Docs A/RES/58/98’ <<https://digitallibrary.un.org/record/508158>> accessed 16 February 2023

UNSC, ‘Security Council, 15th Year : 856th Meeting. UN Docs S/PV.856’ <<https://digitallibrary.un.org/record/629489>> accessed 18 September 2022

—, ‘Res 4300, “The Situation in the Union of South Africa Arising out of the Large-Scale Killings of Unarmed and Peaceful Demonstrators in Sharpeville” Un Docs S/4300’ <<https://digitallibrary.un.org/record/619261>> accessed 12 November 2022

—, “987th Meeting Record” UN Docs S/PV.987’ <<https://digitallibrary.un.org/record/631425>> accessed 26 June 2023

—, ‘Res 5386 on the Situation of South Africa’ <<https://digitallibrary.un.org/record/615029>> accessed 21 September 2022

—, ‘Resolution 217 (1965) “on the Proclamation of Independence by the Minority Régime in Southern Rhodesia” UN Docs S/RES/217(1965)’ <<https://digitallibrary.un.org/record/90484>> accessed 26 September 2022

—, ‘Res 242 Concerns Achievement of a Peaceful and Accepted Settlement in the Middle East UN Docs S/RES/242(1967)’ <<https://digitallibrary.un.org/record/90717>> accessed 9 February 2023

—, ‘Res 242 Concerns Achievement of a Peaceful and Accepted Settlement in the Middle East UN Docs S/RES/242(1967)’ <<https://digitallibrary.un.org/record/90717>> accessed 9 February 2023

—, ‘Res 250, 251, 252 on the Israeli Military Parade in Jerusalem’ <<https://digitallibrary.un.org/record/90752>> accessed 9 February 2023

- , ‘Res 250, 251, 252 on the Israeli Military Parade in Jerusalem’
<<https://digitallibrary.un.org/record/90752>> accessed 9 February 2023
- , ‘Res 264 on “on South African Administration of Namibia” UN Docs S/RES/264(1969)’
<<https://digitallibrary.un.org/record/90763>> accessed 28 June 2023
- , ‘Res 276 “on Establishment of an Ad Hoc Subcommittee of the Council to Study Ways to Implement Council Resolutions Regarding Namibia” UN Docs S/RES/276(1970)’
<<https://digitallibrary.un.org/record/90776>> accessed 28 June 2023
- , ‘Resolution 245 “On South West Africans Detained by South Africa” UN Docs S/RES/246(1968)’
<<https://digitallibrary.un.org/record/90745>> accessed 26 September 2022
- , ‘Res 279, 280 on Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/279(1970)’
<<https://digitallibrary.un.org/record/90781>> accessed 9 February 2023
- , ‘Res 285 on the Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/285(1970)’
<<https://digitallibrary.un.org/record/90783>> accessed 9 February 2023
- , ‘Res 285 on the Withdrawal of Israeli Armed Forces from Lebanon UN Docs S/RES/285(1970)’
<<https://digitallibrary.un.org/record/90783>> accessed 9 February 2023
- , ‘Res 407 on “assistance to Lesotho” UN Docs S/RES/407(1977)’
<<https://digitallibrary.un.org/record/66635>> accessed 26 September 2022
- , ‘Record of Meeting Held on 11 Jan. 1979. UN Docs S/PV.2108’
<<https://digitallibrary.un.org/record/1664>> accessed 16 March 2023
- , ‘Draft Resolution on Situation in Kampuchea UN Docs S/13027’
<<https://digitallibrary.un.org/record/1575>> accessed 15 April 2024
- , ‘Resolution 446 on Establishment of a Commission to Examine the Situation Relating to Settlements in the Arab Territories Occupied by Israel UN Docs S/RES/446(1979)’
<<https://digitallibrary.un.org/record/1696>> accessed 14 February 2023
- , ‘Report of the Security Council Commission Established under Resolution 446 UN Docs S/13679’ <<https://digitallibrary.un.org/record/10448>> accessed 14 February 2023
- , ‘Resolution 465 on Israeli Settlement Policies in the Occupied Territories UN Docs S/RES/465(1980)’ <<https://digitallibrary.un.org/record/11767>> accessed 15 February 2023
- , ‘Res 468 on the Deportation of Palestinian Leaders from Territories Occupied by Israel UN Docs S/RES/468’ <<https://digitallibrary.un.org/record/13068>> accessed 17 April 2024
- , ‘Res 478 on the Status of Jerusalem UN Docs S/RES/478(1980)’
<<https://digitallibrary.un.org/record/25618>> accessed 16 February 2023

- , ‘Res 478 on the Status of Jerusalem UN Docs S/RES/478(1980)’
<<https://digitallibrary.un.org/record/25618>> accessed 16 February 2023
- , ‘Res 497 on the Annexation of the Golan Heights UN Docs S/RES/497(1981)’
<<https://digitallibrary.un.org/record/26751>> accessed 16 February 2023
- , ‘Resolution 497 (1981) /: Adopted by the Security Council at Its 2319th Meeting, on 17 December 1981.’ <<https://digitallibrary.un.org/record/26751>> accessed 9 February 2023
- , ‘Res 620 on “on Chemical Weapons Use in the Conflict between Iraq and the Islamic Republic of Iran” UN Docs S/RES/620(1988)’ <<https://digitallibrary.un.org/record/44865>> accessed 2 July 2023
- , ‘Res 819 on “Demanding That Srebrenica and the Surrounding Areas, Bosnia and Herzegovina, Be Treated as a Safe Area”’ <<https://digitallibrary.un.org/record/164939>> accessed 16 May 2023
- , ‘Res 827 on “establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” UN Docs S/RES/827(1993)’
<<https://digitallibrary.un.org/record/166567>> accessed 28 September 2023
- , ‘Res 880 on “the Transitional Period in Cambodia Following the Withdrawal of the UN Transitional Authority in Cambodia” UN Docs S/RES/880’
<<https://digitallibrary.un.org/record/176426>> accessed 21 March 2023
- , ‘Res 955 on “on Establishment of an International Tribunal for Rwanda and Adoption of the Statute of the Tribunal” UN Docs S/RES/955(1994)’ <<https://digitallibrary.un.org/record/198038>>
accessed 28 September 2023
- , ‘Res 1846 on “acts of Piracy and Armed Robbery against Vessels in Territorial Waters and the High Seas off the Coast of Somalia” UN Docs S/RES/1846(2008)’
<<https://digitallibrary.un.org/record/642811>> accessed 2 July 2023
- , ‘Res 2334 on ‘Cessation of Israeli Settlement Activities in the Occupied Palestinian Territory, Including East Jerusalem” UN Docs S/RES/2334 (2016)’ <<https://digitallibrary.un.org/record/853446>>
accessed 27 December 2023
- , ‘Draft Resolution on Aggression by the Russian Federation against Ukraine in Violation of the Charter of the United Nations, UN Docs S/2022/155’
<<https://digitallibrary.un.org/record/3958806?ln=en&v=pdf>> accessed 15 April 2024
- , ‘8968th Meeting Minute Concerning the Letter Dated 13 April 2014 from the Permanent Representative of the Russian Federation to the United Nations, UN Docs S/PV.8968’
<<https://digitallibrary.un.org/record/3958813>> accessed 15 April 2024
- , ‘8974th Meeting Minute Concerning the Letter Dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations, UN Docs S/PV.8974’
<<https://digitallibrary.un.org/record/3959147>> accessed 15 April 2024

UNSC Commission, 'Report of the Security Council Commission Established under Resolution 446 (1979). Volume II. UN Docs S/13450/Add.1' <https://digitallibrary.un.org/record/3606?ln=zh_CN> accessed 14 February 2023

UNSC USC (50th, 'Res 1004 on "Demanding Withdrawal of the Bosnian Serb Forces from the Safe Area of Srebrenica, Bosnia and Herzegovina"' <<https://digitallibrary.un.org/record/198686>> accessed 16 May 2023

Vandenbosch A, *South Africa and the World: The Foreign Policy of Apartheid* (University Press of Kentucky 1970) <<http://www.jstor.org/stable/j.ctt130jc4z>> accessed 14 September 2022

Venkatasubbiah H, 'INDIA AND THE "APARTHEID" QUESTION' (1977) 33 *India Quarterly* 62

Vidmar J, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 *St Antony's International Review* 37

Villiger M, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1st edition, Springer 1997)

Viswanath R, *The Right of Passage Case of the International Court of Justice* (Springer 2021) <<https://cadmus.eui.eu/handle/1814/70896>> accessed 7 January 2024

von Bogdandy A, Goldmann M and Venzke I, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115

'VORSTER APPEALS FOR ACCORD NOW; Believes Settlement Possible but Criticizes Britain' *The New York Times* (7 December 1966) <<https://www.nytimes.com/1966/12/07/archives/vorster-appeals-for-accord-now-believes-settlement-possible-but.html>> accessed 15 September 2022

Vuving A, 'The References of Vietnamese States and the Mechanisms of World Formation' (1 April 2001) <<https://papers.ssrn.com/abstract=1782997>> accessed 5 April 2023

Waldock H, 'The International Court of Justice as Seen from Bar and Bench' (1984) 54 *British Yearbook of International Law* 1

Wallach Y, 'The Racial Logic of Palestine's Partition' [2022] *Ethnic and Racial Studies* 1

Waltz KN, *Theory of International Politics* (1st edition, Waveland Press 2010)

Wan M, 'Japan and the Asian Development Bank' (1995) 68 *Pacific Affairs* 509

—, 'The AIIB versus the World Bank and the ADB' in Ming Wan (ed), *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order* (Palgrave Macmillan US 2016) <https://doi.org/10.1057/9781137593870_4> accessed 19 April 2023

—, *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order* (Palgrave Macmillan US 2016)

<<http://link.springer.com/10.1057/9781137593870>> accessed 19 April 2023

Wang C-C, *Japan's Continental Adventure* (Routledge 2010)

Wang X, 'The Qing Court's Tibet Connection: Lcang Skya Rol Pa'i Rdo Rje and the Qianlong Emperor' (2000) 60 *Harvard Journal of Asiatic Studies* 125

Wang X, 'Tibet and Modern China', *Oxford Research Encyclopedia of Asian History* (2020)

<<https://oxfordre.com/asianhistory/display/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-158>> accessed 17 April 2024

Wang Y, 'Explaining the Tribute System: Power, Confucianism, and War in Medieval East Asia' (2013) 13 *Journal of East Asian Studies* 207

Wani K, *Neutrality in International Law: From the Sixteenth Century to 1945* (1st edition, Routledge 2017)

Ward L, 'Locke on the Moral Basis of International Relations' (2006) 50 *American Journal of Political Science* 691

'Was Tibet Always Part of China?' (*ThoughtCo*) <<https://www.thoughtco.com/tibet-and-china-history-195217>> accessed 17 April 2024

'Was UNTAC's Mission in Cambodia a Success or a Failure? - Khmer Times' (21 October 2021) <<https://www.khmertimeskh.com/50956684/was-untacs-mission-in-cambodia-a-success-or-a-failure/>> accessed 18 April 2023

Waswo A, *Japan in Crisis: Essays on Taisho Democracy* (Bernard S Silberman and others eds, First Edition, U of M Center For Japanese Studies 1999)

Weatherall T, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) <<https://www.cambridge.org/core/books/jus-cogens/32B376EFC842153C03D1BAAA655548E0>> accessed 21 December 2022

WEISS TG, 'The United Nations: Before, during and after 1945' (2015) 91 *International Affairs* 1221

Wesley M, 'The Cambodian Waltz: The Khmer Rouge and United Nations Intervention' (1995) 7 *Terrorism and Political Violence* 60

'West Bank and Gaza | Data' <<https://data.worldbank.org/country/PS>> accessed 2 March 2023

Westad OA and Quinn-Judge S (eds), *The Third Indochina War: Conflict between China, Vietnam and Cambodia, 1972-79* (1st edition, Routledge 2006)

'WH Committee: 1st Extraordinary Session, Paris 1981'

<<https://whc.unesco.org/archive/repxt81.htm>> accessed 7 March 2023

Wheeler NJ, 'Vietnam's Intervention in Cambodia: The Triumph of Realism Over Common Humanity?' in Nicholas J Wheeler (ed), *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press 2002) <<https://doi.org/10.1093/0199253102.003.0004>> accessed 16 March 2023

Wildeman J, 'EU Development Aid in the Occupied Palestinian Territory, between Aid Effectiveness and World Bank Guidance' (2018) 4 *Global Affairs* 115

Williams RT, 'Dangerous Precedent: America's Illegal War in Afghanistan' (2012) 33 *University of Pennsylvania Journal of International Law* <<https://papers.ssrn.com/abstract=1923956>> accessed 17 December 2022

Willoughby WW, *The Sino-Japanese Controversy and the League of Nations* (Johns Hopkins Press 1935)

Wills M, 'Tibet and China 65 Years Later' (*JSTOR Daily*, 23 May 2016) <<https://daily.jstor.org/tibet-and-china-65-years-later/>> accessed 8 January 2024

Wolfke K, *Custom in Present International Law: Second Revised Edition* (Brill Nijhoff 1993) <<https://brill.com/view/title/9284>> accessed 18 October 2022

—, *Custom in Present International Law: Second Revised Edition* (Brill Nijhoff 1993) <<https://brill.com/view/title/9284>> accessed 18 October 2022

Wood M and Sthoeger E, *The UN Security Council and International Law* (Cambridge University Press 2022) <<https://www.cambridge.org/core/books/un-security-council-and-international-law/BE04DD1A1853420882F54ECF3EB7920B>> accessed 28 September 2023

Woodside AB, *Vietnam and the Chinese Model: A Comparative Study of Vietnamese and Chinese Government in the First Half of the Nineteenth Century* (Harvard University Asia Center 2020) <<https://brill.com/display/title/57912>> accessed 16 March 2023

World Bank, 'Developing the Occupied Territories: An Investment in Peace - Vol III - Private Sector Development]' <<https://www.un.org/unispal/document/auto-insert-202183/>> accessed 2 March 2023

Wright DC, 'The Sung-Kitan War of A.d. 1004-1005 and the Treaty of Shan-Yüan' (1998) 32 *Journal of Asian History* 3

Wright Q, 'The Manchurian Crisis' (1932) 26 *The American Political Science Review* 45

—, 'The Manchurian Crisis' (1932) 26 *The American Political Science Review* 45

—, 'The Test of Aggression in the Italo-Ethiopian War' (1936) 30 *The American Journal of International Law* 45

—, 'The Goa Incident' (1962) 56 *American Journal of International Law* 617

Wuschka S, 'Procedural Aspects of the Obligation of Non-Recognition Before International Investment Tribunals' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer International Publishing 2019) <https://link.springer.com/10.1007/978-3-030-10746-8_7> accessed 7 May 2023

Xu P, 'The Mandala as a Cosmic Model Used to Systematically Structure the Tibetan Buddhist Landscape' (2010) 27 *Journal of Architectural and Planning Research* 181

Yao J, 'The Power of Geographical Imaginaries in the European International Order: Colonialism, the 1884–85 Berlin Conference, and Model International Organizations' (2022) 76 *International Organization* 901

Year: 1970), 'Resolution 283 (1970) "Requesting All States to Refrain from Any Relations with South Africa Implying Recognition of South African Authority over Namibia" UN Docs S/RES/283(1970)' <<https://digitallibrary.un.org/record/90777>> accessed 3 October 2022

YOST DS, 'The Budapest Memorandum and Russia's Intervention in Ukraine' (2015) 91 *International Affairs* (Royal Institute of International Affairs 1944-) 505

Zhang Y, 'System, Empire and State in Chinese International Relations' (2001) 27 *Review of International Studies* 43

Zimmern A, 'The League's Handling of the Italo-Abyssinian Dispute' (1935) 14 *International Affairs* (Royal Institute of International Affairs 1931-1939) 751

Zysset A and Vidal-Marti N, "'Constitutionalism and Covid-19: Broadening the Lens" with Jus Cogens' (2022) 4 *Jus Cogens* 203

Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol 2014 (OJ L)

Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas 2022 (OJ L)