

The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes

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1 Introduction

The main dilemma facing the international community when dealing with *de facto* administrations - such as those established in certain areas under the nominal sovereignty of current European States, for instance, Transdniestria in Moldova, Abkhazia in Georgia and the Turkish Republic of Northern Cyprus in Cyprus – is the difficulty in matching a genuine effort to lead those territories to ‘normalcy’ with the diplomatic reluctance to enter ‘into business’ with authorities established under an extended exception, whose legitimacy under international law is most of the times in serious doubt. In the 20th century, diplomats, judges and international lawyers have developed the so-called ‘principle of non-recognition’ making the isolation of such authorities and territories not only desirable in terms of policy, but also obligatory in terms of legal relations States and international organisations may entertain with such administrations. While the rules related to the application in practice of such principle have constituted at times an element of rigidity in the attempt to lead these territories back to the international community, they remain an important sanctioning tool in the face of continued resistance by local rulers to change for the benefit of the local populations. The present contribution seeks to explore some of the complexities of the doctrine of non-recognition, both in terms of legal articulation, and in terms of policy implications.

2 The Namibia Doctrine of Non-Recognition

As far as the legal articulation of the doctrine is concerned, we may identify three different versions propounded by international lawyers, diplomats and judges since the Stimson doctrine up until the ILC Codification on State Responsibility and the *Legality of the Wall* advisory opinion.

The first version of the doctrine relies on the mere concept of ‘illegality’ (the *Namibia* formula) and it has been re-affirmed by the current President of the International Court of Justice (ICJ), Rosalyn Higgins, in her Separate Opinion in the *Legality of the Wall* advisory opinion. This version, the broadest one in terms of legal obligations for States, builds on the famous Stimson doctrine developed by the then US Secretary of State in the 1930s at the peak of the Manchurian crisis in the Far East, in which the US government declared its refusal to recognize any *de facto* situation or treaty impairing the treaty rights of China and the United States and the former’s territorial integrity or political independence.¹ But the most significant articulation of this doctrine is provided by the ICJ in its 1971 *Namibia* advisory opinion.² In examining the consequences for third States of the declaration of illegality of South Africa’s presence in Namibia, the Court relied on norms of general

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¹ Cit. in R. Langer, *Seizure of Territory* (1945) 58. On the Stimson doctrine see also Meng, ‘Stimson Doctrine’ in V. R. Bernhardt (ed.), *EPIL* (1982), Vol. IV 690; and Turns, ‘The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law’, 2 *Chinese Journal of International Law* (2003) 105.

² *Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276* (1970), ICJ Reports (1971) 6.

international law in order to precisely identify the obligations incumbent upon non-member States of the UN – as such not bound under Chapter VII by obligations imposed by the Security Council. According to the Court ‘the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia [were] opposable to *all* States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law [...]’.³ In the opinion, the Court also identified those relations which were incompatible with the determination of illegality made by UN political organs, such as entering into treaty relations, invoking and applying already existing treaty relations, exchanging diplomatic or consular missions and entering into economic relations, in other words any acts or dealing that could ‘imply a recognition’ that the situation was legal.⁴ The Court also introduced an element of flexibility in the doctrine of non-recognition, by stating that ‘the non-recognition of South Africa’s administration of the Territory should not result in the depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.’⁵ We shall call this qualification made by the Court as the ‘*Namibia exception*’.

A recent endorsement of the *Namibia* approach may be found in President Higgins’ Separate Opinion in *Legality of the Wall*. In responding to the majority opinion’s approach of finding the basis of the non-recognition obligations in the *erga omnes* nature of norms breached by Israel, the British judge held:

That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of “*erga omnes*”. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails “decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 115). The obligation upon United Nations Members not to recognize South Africa’s illegal presence in Namibia, and not to lend support or assistance, relied in no way whatever on “*erga omnes*”. Rather, the Court emphasized 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.” (*Ibid.*, para. 117.) [...] Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court’s position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.⁶

The *Namibia* advisory opinion is also recalled in the European Court of Human Rights (ECHR) case law on the Turkish Republic of Northern Cyprus: but rather than on a general theory of invalidity and non-recognition, such case law is mostly based on an assessment of compatibility of the acts of *de facto* administrations with provisions of the European

³ *Ibid.*, 56.

⁴ *Ibid.*, 55.

⁵ *Ibid.*, 56.

⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004), ICJ Reports (2004) 136, Separate Opinion of Judge Higgins, at 216.

Convention on Human Rights.⁷ The *Ilascu* judgement concerning Transdniestria confirms such approach.⁸ Moreover, the ECHR case law has upheld the *Namibia* exception.

3 The *Erga Omnes* Doctrine of Non-Recognition

In the 2004 advisory opinion the ICJ held that, in view of the *erga omnes* character of the obligations breached by Israel - such as those related to the self-determination of the Palestinian people and their protection under international humanitarian law - through the construction of the wall in the West Bank and in and around East Jerusalem, States are under an obligation not to recognize the illegal situation.⁹ According to the Court, it is thus the nature of the obligations breached that makes non-recognition by other States obligatory in terms of international law. The duty of non-recognition is conceived as a communitarian counter-measure to repair the consequences of a breach of a norm so fundamental for the international community. This approach should not be confused with the term '*erga omnes*' used by the same Court in *Namibia*, as in that case the term only indicated the effect of the illegality determined by the UN political organs with regard to the violation of certain rights belonging to the people of Namibia – namely opposable *erga omnes* -, not the peremptory or *erga omnes* nature of the obligation breached.

4 The ILC Doctrine of Non-Recognition

A third version of the doctrine of non-recognition may be found in the ILC Articles on State Responsibility, namely art. 40 and art. 41.¹⁰ Replacing the previous idea of setting up a special regime for international crimes, the ILC in its last version decided to introduce the notion of 'serious violations of peremptory norms of international law' in order to spell out an aggravated regime of State responsibility. Among the consequences of the responsibility arising out of grave breaches of peremptory norms, for example the prohibition of aggression or the obligation to respect the rights of self-determination of peoples, art. 41(2) provides for the obligation for States not to 'recognize as lawful a situation created by a serious violation' of a peremptory norm, together with the additional obligation not to render aid or assistance in maintaining that situation.¹¹ To that extent, the duty of non-recognition arises not only from the nature of the obligation breached – it must be an infringement of an obligation arising out of a norm of *ius cogens* – but such violation must be of a serious nature, i.e. to use the ILC articles wording a 'gross and systematic failure to fulfil the obligation'.¹² Similarly to the *erga omnes* doctrine the ILC approach sees the duty of non-recognition as a community counter-measure to react to the breach of a norm of fundamental nature and bring to an end the illegal situation. As a matter of fact the duty of non-recognition is part of a wider array of community measures aimed at restoring the *status quo ante*: art. 41(1) provides for a positive duty of all States to co-operate to bring to an end through lawful means any art. 40 situation; the second part of art. 41(2) provides for a further duty to abstain from rendering any form of aid or assistance in maintaining the unlawful situation.¹³

⁷ *Loizidou v. Turkey (Merits)*, Judgement of 18 December 1996, ECHR (1996) Series A, No. 4, 2219, at 2231 *et seq.*; *Case of Cyprus v. Turkey (Merits)*, Judgement of 10 May 2001, ECHR (2001) Series A, No. 4, 5, at 30-31.

⁸ *Case of Ilascu and Others v. Moldova and Russia*, Application n. 48787/59, Judgement of 8 July 2004, paras. 460-461, in <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ilascu&sessionid=4358038&skin=hudoc-en>>.

⁹ *Legality of the Wall*, *supra* note 6, 200.

¹⁰ Articles 40 and 41, 2001 ILC Articles on State Responsibility, in Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

¹¹ *Ibid.*, 249-253.

¹² *Ibid.*

¹³ On the relation between the three different obligations see *Legality of the Wall*, *supra* note 6, Separate Opinions of Judge Higgins and Judge Kooijmans.

5 Common Features and Shared Principles

Having spelled out the three different versions of the law of non-recognition, we may now look at their common features and at the agreed principles underlying them.

The first common feature, as explained by Warbrick and Christakis, is that the law of non-recognition belongs to the law of state responsibility, i.e. it relates to secondary obligations arising out an internationally wrongful act. It should not be confused with the recognition of States and governments, an act which belongs to the policy discretion of States and international organisations.¹⁴ It is important to bear in mind this conceptual distinction, even if, in practice, recognition in the classic sense and obligations of non-recognition may be strictly intertwined in terms of policy decisions.

The second one, as shown by Talmon in one of the most thorough and in-depth doctrinal contributions on the present subject, is that the duty of non-recognition was conceived as barring the *legality* of the situations produced by the internationally wrongful act, but was not aimed at preventing any relation or *de facto* implied recognition.¹⁵ After all the wording of all major documents enshrining the principle refers to the recognition of *legality*, including art. 41(2) of the ILC Articles on State Responsibility which states that 'no State shall recognize as *lawful* a situation produced by a serious violation of a peremptory norm. This would appear to prevent formal admissions or recognition of legality only, concerning, for instance, a forcible annexation or the creation of a new State following an act of aggression. Yet, as already pointed out, the ICJ in *Namibia* has spelled out a doctrine of 'implied recognition', which prevents States from entering into formal arrangements and treaties concerning the occupied territory with the illegal occupant, or exchanging diplomatic or consular missions with the occupied territory.¹⁶ The same approach is followed by the ILC in its commentary where it states that the obligation 'not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.'¹⁷ The 'illegality' of the situation is thus conceived in a broad manner: no State can accrue international rights or obligations from the illegal *status quo*, nor can it benefit from the application to the territory in question of existing treaties with the wrongdoer. That remains subject to what we called the *Namibia* exception, which is shared by the ILC in its commentary.¹⁸

The third common feature is that none of the doctrines above explained provides for an exclusive competence of the Security Council in the determination of the violation of international law. Any attempt within the ILC and the Sixth Commission to render the activation of a collective response of non-recognition subject to the procedures set out in the UN Charter in the field of international peace and security (i.e. a determination under Chapter VII) failed. As rightly pointed out by Talmon '[t]he ILC considers non-recognition to be the "minimum response" to a serious breach of *jus cogens* that is called for on the part of all States, independently of more extensive measures which may be taken by States through international organizations. The obligation of non-recognition thus arises for each

¹⁴ Warbrick, 'States and Recognition in International Law', in M. Evans (ed.), *International Law* (2003), 205, at 241-242; Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales', in C. Tomuschat and J. Thouvenin (eds.), *The Fundamental Rules of the International of the International Legal Order: Jus Cogens and Obligations Erga Omnes Obligations* (2006) 127.

¹⁵ 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 Tomuschat and Thouvenin (eds.), *supra* note 14, 99, at 121-122. See also from the same author, S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (2006).

¹⁶ *Namibia*, *supra* note 2.

¹⁷ ILC Commentary, *supra* note 10, at 250.

¹⁸ *Ibid.*, at 251-252.

State as and when it forms the view that a serious breach of a *jus cogens* obligation has been committed, and each State will bear responsibility for its decision.¹⁹ Judge Higgins in her Separate Opinion rightly refers to the importance of authoritative findings of a UN organ, but she rightly omits any reference to the central or exclusive role of the Security Council. An authoritative determination may be made not only through a Ch. VII resolution, but also through a judicial statement, a General Assembly resolution, a Presidential statement; in the face of absence of such determination every State may make its own determination. As a matter of fact, that is simply the result of the main features of the function of law-determination in international law, a function which is exercised by different actors in different manners. The focus here is not so much on the binding character of the determination, but more on its authoritativeness.

6 Of the Differences Among the Three Doctrines: Some Theoretical and Practical Implications

A tentative response to the identification of these three doctrines of non-recognition may be that those different bases for the obligation not to recognize should not be overemphasised as the obligation of non-recognition always arises in practice from grave violations of fundamental norms, such as territorial aggressions or annexations, as in the cases of Iraq and Northern Cyprus, or grave denials of the right of self-determination of peoples, as in the case of the South African occupation of Namibia. To that extent the ILC approach seems to be more in line with state practice.

Yet one cannot fail to notice the discrepancies between the classic doctrine of non-recognition as explained in the *Namibia* advisory opinion and more recent expressions of this doctrine to be found in the *Legality of the Wall* advisory opinion and the ILC codification. These latter seem to emphasize the community interest and reaction underlying the collective response to a violation of a fundamental norm of the international community. While these aspects are not absent in the *Namibia* advisory opinion, the ICJ approached the obligation of non-recognition from the perspective of international legality: any illegal act should be deprived of its consequences and effects and a general non-recognition is the means through which such consequences and effects are voided. That regardless of the *erga omnes* or *jus cogens* nature of norm breached (in truth, two notions that in 1971 had just been developed).

In terms of policy implications for States the difference is not devoid of practical consequences. While a forcible annexation or aggression relates to the category of serious violations of fundamental norms of the international community, we may take the example of secessions from the parent State, where the new entity has managed to establish control and authority over part of the territory. This is indeed very topical, as the current cases of Transdniestria, Abkhazia and Kosovo, with all their peculiarities, represent such instances. In all these cases parts of the territory of sovereign States, Moldova, Georgia and Serbia respectively, members of the United Nations and the Council of Europe, seek to secede and create their own independent and sovereign State. Assuming that a unilateral secession is illegal in most circumstances, as it is contrary to the principle of territorial integrity of States (not an undisputed assumption itself), a principle enshrined in the UN Charter, we can hardly characterize it as a violation of a peremptory norm or *erga omnes* obligation. In none of the cases mentioned, there seems to be an act of aggression or a denial of self-determination involved or a policy of genocide. According to ILC arts. 40 and 41 there would seem to be no obligation of non-recognition arising out of the act of secession: that means that other States could enter into diplomatic relations with the new State, conclude treaties, apply already existing treaties concerning the exploitation of natural resources in that region. Yet State practice seems to show hardly any instance of

¹⁹ Talmon, *supra* note 15, at 122.

express or implied recognition of those situations. Is such practice only the result of a policy convenience not to enter into international disputes with the parent State or is it also the result of a widespread *opinio juris* that States are duty bound not to recognize such situations as they are the result of an illegal act? Is such practice supporting a broader doctrine of non-recognition as compared to the ILC articles, which supports the *Namibia* approach?

Another fitting example of the practical implications that different approaches may lead to can be seen in the issuing of an international arrest warrant which is found to be in violation of the rules on state immunity protecting state officials (the *Arrest Warrant* ruling is the inspiration for such example).²⁰ Such violation can hardly be considered as a serious violation of a peremptory norm, nor a violation of an *erga omnes* obligation. Are third States under an obligation not to enforce the international arrest warrant, while awaiting the return to the *status quo ante*, i.e. the withdrawal of the arrest warrant? The answer must be necessarily in the affirmative. To think that a third State after the *Arrest Warrant* may have lawfully enforced the international arrest warrant issued by Belgium against Yerodia seems to make a mockery of the idea of international legality, let alone of the authority of the ICJ as the main UN judicial body. This is after all the purpose of the doctrine of non-recognition as originally conceived by US Secretary of State Stimson: that an illegal act or the situation produced by such act may not be 'normalised' through the subsequent active recognition of third States.

In other words, when considering the basis of the obligation of non-recognition, we should refer to rights *erga omnes* belonging to States, regardless of the interest of the international community in upholding them, rather than to *erga omnes* obligations which refer to norms protecting fundamental, non-derogable values of the international community. These latter are only relevant to the invocability of state responsibility by third States in accordance with art. 48 of the ILC Articles on State Responsibility.²¹ The principles of territorial integrity and state immunity are two clear examples of such rights *erga omnes*: they translate into a number of rights and prerogatives of each State, which should be respected by all other States. An act of recognition by a third State of a situation or act deriving from a violation of such rights is by itself and *prima facie* a violation of the very same rights. Of course, those States entitled to the protection ensured by these principles and rights may decide to waive them under certain circumstances, hence providing room for subsequent lawful recognition by third parties; however, that should not be confused with a general power of third States to recognize the illegal *status quo*.

That leads to the main normative proposition of the present paper: the *Namibia* approach remains the most accurate exposition of the doctrine of non-recognition; the ICJ *erga omnes* doctrine and the ILC approach restrict excessively the scope of application of the doctrine of non-recognition. States and international organisations are under an obligation not to recognize the *erga omnes* effects and consequences of illegal actions, regardless of the gravity of those violations and the peremptory nature of the norms breached. Such gravity and fundamental nature of the norms breached may only reinforce the need to comply with the obligation of non-recognition. The gravity of the violation and the peremptory nature of the norms breached is also the necessary pre-condition for a positive duty incumbent upon States to cooperate to bring to an end the unlawful situation. To that extent, the community dimension explored by the ILC in its arts. 40 and 41 is to be welcomed. But it should not detract from the true and simple legal basis of the doctrine of non-recognition.

²⁰ *Case Concerning the Arrest Warrant of 11 August 2000* (Democratic Republic of the Congo v. Belgium), ICJ Reports (2002) 3.

²¹ Art. 48, ILC Articles on State Responsibility, *supra* note 10, at 276.

7 EC Practice with *De Facto* Regimes: the Problem of Implied Recognition

Moving to the practical aspects of the actual application (or non-application) of the law of non-recognition, one can take as a problematic point that of the implied recognition of *de facto* regimes. This problem has especially emerged with regard to the economic relations entertained by the European Community (EC) with *de facto* regimes, such as occupied territories or secessionist entities.

A fitting example is represented by the recent Fisheries Partnership Agreement (FPA) concluded by the EC with Morocco.²² The agreement, which was signed in Brussels in July 2006 and entered into force with the ratification of the Moroccan parliament in March 2007, may appear one of the many fisheries agreements concluded by the EC with third countries in order to grant access to fisheries in the Eastern Atlantic. In exchange for a number of quotas of licenses for EC countries and for access to a maximum tonnage of pelagic fish, the EC shall pay to Morocco a contribution of EUR 144.4 million plus the fees to be paid by shipowners – around EUR 13.6 millions.²³

Yet a number of questions and protests were raised by the civil society, by many MEPs in the European Parliament and by some countries in the Council concerning the possible violation of international law that the agreement would entail, insofar as it would allow the fishing of EC vessels in waters off the coast of Western Sahara, hence recognizing the authority of Morocco over that territory and infringing upon the sovereignty over natural resources enjoyed by the people of Western Sahara.²⁴ Following those protests, two controversial legal opinions on the compatibility of the agreement with international law were rendered by the Legal Service of the Parliament and the Legal Service of the Council, respectively.²⁵ The legal opinions held that the principle of self-determination and of sovereignty over natural resources does apply to Western Sahara and that it would be up to Morocco to comply with its international legal obligations *vis-à-vis* the people of Western Sahara.²⁶ The agreement as such would neither include nor exclude from its geographical scope of application the waters off the coast of Western Sahara.²⁷ Eventually, the agreement was approved by the Council with the only opposition of Sweden and the abstention of Finland. The Netherlands and Ireland voted in favour but issued separate declarations.²⁸

I have argued elsewhere that the legal opinion falls short of identifying all possible dimensions of the impact the agreement may have on the right of sovereignty over natural resources enjoyed by the people of Western Sahara.²⁹ The conclusion reached is that, if the agreement is applied to include the waters south of the Moroccan border with Western Sahara, it will infringe upon the permanent sovereignty of the people of Western Sahara. For the sake of brevity, the present contribution will not dwell on that debate and on the reasoning leading to that conclusion. I shall instead focus on the application of the

²² Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (FPA), in Council Regulation (EC) No 764/2006 of 22 May 2006, in *Official Journal of the European Union*, L 141 (2006), p. 1.

²³ *Ibid.*, Protocol, Art. 2.

²⁴ European Parliament legislative resolution on the proposal for a Council regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, P6_TA-PROV(2006)0201, 16 May 2006; Council of the European Union, Press Release, 2730th Meeting, 22 May 2006, 18.

²⁵ See Legal Opinion of the Legal Service of the Parliament, Doc. SJ-0085/06, 20 February 2006, available from March to July 2006 at <<http://www.fishelsewhere.org/legal.htm>>; Legal Opinion of the Legal Service of the Council, Doc. 6664/06, 22 February 2006 (only available paras. 1-5)

²⁶ Legal Opinion of the Legal Service of the Parliament, *supra* note 25, paras. 38-44.

²⁷ *Ibid.*, para. 45.

²⁸ Council of the European Union, Press Release, 2730th Meeting, 22 May 2006, 18.

²⁹ See Milano, 'The New Fisheries Partnership Agreement Between the European Community and the Kingdom of Morocco: Fishing too South?' XXII *Anuario Español de Derecho Internacional* (2006) 413.

principle of non-recognition to the present case, i.e. whether the agreement may represent a violation of the obligation of non-recognition of Morocco's authority over Western Sahara.

The first question to be addressed relates to the applicability of the duty of non-recognition to Morocco's *de facto* administration of Western Sahara. As already shown, the ILC commentary to arts. 40 and 41 states that this obligation 'applies to "situations"...such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.'³⁰ In the *Namibia* advisory opinion the Court pointed out that third States are not allowed to enter into treaty relations in all cases in which the wrongdoing State purports to act on behalf of or concerning the occupied or annexed territory.³¹ These descriptions fit the situation of Western Sahara and the extension of the FPA by the EC to Western Sahara, despite the lack of a binding determination by the UN Security Council. As argued above, while the lack of a binding determination under Chapter VII and the imposition of a duty not to recognize the situation by the Security Council makes the implementation of a multilateral policy of non-recognition difficult to realize in practice, the obligation of non-recognition under general international law arises independently of the action by the Security Council.³²

Another fundamental legal question to be tackled is whether the EC, as an international organization, is bound by the obligation of non-recognition in its international legal arrangements with *de facto* regimes. An answer may be found in the proposition that international organizations are bound to respect the obligation of non-recognition of situations resulting from a serious violation of peremptory norms under general international law to the same extent that States are bound in accordance with arts. 40 and 41 of the ILC Articles on State Responsibility.³³ This is confirmed by the draft arts. 43 and 44 of the ILC work on responsibility of international organizations which propose a solution analogous to that found in the ILC Articles on State Responsibility and spells out an obligation of non-recognition incumbent upon international organizations.³⁴ With specific regard to the EC, the European Court of Justice (ECJ), while reluctant to assert powers of judicial review of Community acts against rules of general international law, has held in a number of judgements, the most important being *Poulsen* and *Racke*, that the EC is bound to respect customary international law and that customary international law may represent a limitation in the exercise of powers by its organs.³⁵

Moreover, it is arguable that Member States of the EC have not freed themselves of their obligation of non-recognition, when acting within international organizations. The question of the subsidiary responsibility of Member States for the actions of international organizations of which they are members is another controversial legal question which is currently being dealt with by the ILC, under the leadership of Professor Giorgio Gaja. In general and in accordance with the draft provision already proposed by the Special

³⁰ ILC Articles on State Responsibility, Commentary, *supra* note 10, at 250.

³¹ *Namibia*, *supra* note 2, at 55.

³² Talmon, *supra* note 15, at 121-122; J. Crawford, *The Creation of States in International Law* (2006, 2nd ed.), at 162-173.

³³ See ILC Articles on State Responsibility, Arts. 40 and 41, *supra* note 10.

³⁴ ILC, Responsibility of International Organizations, Fifth Report, Special Rapporteur Mr Giorgio Gaja, A/CN.4/583, draft articles 43 and 44. In truth, article 43 provides for the situation where an international organization commits a serious breach of a peremptory norm. Yet the commentary refers to two instances of obligations of non-recognition arising for international organizations with regard to acts of aggression by States (at 19).

³⁵ See Wouters, Eeckhout, 'Giving Effect to Customary International Law Through European Community Law', Institute for International Law, University of Leuven, Working Paper no. 25, June 2002, at 7-11.

Rapporteur in his fourth report, we may assert that Member States should not be held responsible for the acts of the EC when the organization acts within its area of exclusive competence.³⁶ However, one should make the useful distinction between the subsidiary responsibility of the States for the action of the organization – for which the Member States can bear responsibility only under the specific exceptions identified by the Special Rapporteur – and the separate responsibility for breach of obligations incumbent upon them also when acting within inter-governmental bodies. In this latter perspective, the action of Member States must not be assessed on the basis of the institutional outcome (i.e. the approval and signature by the Council and the FPA as such), but in terms of their individual conduct at the time of voting. Thus, no violation can be envisaged with regard to Sweden, since it expressed its opposition to the FPA; the same applies to Finland, which abstained in the vote and does not accrue any fishing right under the terms of agreement. As for the other States, the Netherlands could hardly oppose with success its disclaimer that ‘the FPA may not be considered as acceptance of territorial claims not supported by international law’, since it voted in favour of the agreement and its fishing fleet benefits from it. Regardless of the non-recognition of Morocco’s territorial claim, the entering into an agreement extending to the waters of Western Sahara remains an act of implied recognition of Morocco’s authority over the Non Self-Governing Territory.³⁷

In practice, in the lack of a binding determination by the Security Council and in the lack of a judicial determination by the ICJ, any third party will have to make its own assessment of the situation in Western Sahara. The universal lack of recognition of the annexation of Western Sahara by Morocco indicates a clear stance taken by the international community on the legality of Morocco’s formal claim. While some States like the US have followed through in avoiding any form of implied recognition too, other actors like the EC, Russia and Japan have taken a more unclear stance and found a *modus vivendi* that would not sacrifice their fishing interests in the area.³⁸

More generally, the EC practice with regard to its relations with occupied territories or unrecognized entities seems to be based on economic and political convenience, rather than abidance by its obligations of non-recognition under general international law. In particular, the EC practice shows hardly any hesitation in applying existing treaties to *de facto* regimes whose legality is not recognized under international law. Some examples are indicative of such attitude. With regard to the West Bank and Gaza, the EC refusal to grant preferential treatment to goods imported from Israel under the 1995 Association Treaty between Israel and the EC was arguably based on the willingness of the Community to recognize the Palestinian Authority (PA) as the legitimate trading partner for the West Bank and Gaza - hence its conclusion with Palestinian Authority of a trade

³⁶ See draft Art. 29 of the ILC project on responsibility of international organizations and commentary by Special Rapporteur, Mr Giorgio Gaja, in the second addendum to his Fourth Report, A/CN.4/564/Add.2.

³⁷ Generally, all States voting in favour and accruing fishing rights could plausibly argue that they had voted for the FPA in the good faith expectation that it would not extend to Western Sahara; however, this latter defence should be also rejected due to the clear unwillingness on the part of any of the relevant EC institutions to exclude Western Sahara from the geographical scope of the FPA, hence the awareness on the part of all Member States in the Council that the FPA may end up including Western Sahara, as it was the case with previous EC-Morocco agreements.

³⁸ See the Letter of the United States Trade Representative, Robert B. Zoellick, of 20 July 2004, to Congressman Joseph R. Pitts (available at <<http://www.house.gov/pitts/temporary/040719l-ustr-moroccoFTA.pdf>>), in which the Trade Representative set out the Administration’s position concerning the geographical scope of the Free Trade Agreement between the US and Morocco: ‘The United States and many other countries do not recognize Moroccan sovereignty over Western Sahara and have consistently urged the parties to work with the United Nations to resolve the conflict by peaceful means. The FTA will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara.’ On the other hand, there is evidence that both Japan and Russia have in recent years entered into fishing agreements with Morocco, extending in their practice to the waters of Western Sahara.

agreement in 1997 - rather than an *opinio juris sive necessitatis* that Israel's authority should receive no *de facto* recognition on the occupied territories.³⁹ In fact, before the conclusion of the trade agreement with the PA, the West Bank and Gaza were treated by the EC as *de facto* part of Israel under the terms and practice of previous trade agreements between the EC and Israel. With regard to the Turkish Republic of Northern Cyprus (TRNC) and to the scope of the 1972 Association Agreement between the Republic of Cyprus and the EC, until 1994 the practice of the Commission had been to extend the application to certificates of origin issued by the TRNC's authorities. Despite the Commission's opposition, the ECJ ruled in the case *Anastasiou I* that non-recognition of the TRNC's authorities would imply an obligation on the EC authorities and the authorities of Member States not to recognize such certificates.⁴⁰ While Member States' and the Commission's practice had eventually to fall in line with the ruling of the ECJ with regard to the TRNC, the Commission has continued to accept certificates of origin from unrecognized entities such as the Republic of China (Taiwan).⁴¹

In sum, subject to the FPA actually extending in practice to the waters of Western Sahara (and there are already some indications of that occurring) and as a consequence of the practice tending to sacrifice legal prudence in favour of political and economic convenience, the EC actions may be found in violation of its obligations of non-recognition. The same may be held for the support given to the FPA by Member States within the Council. A denial of wrongfulness based on the *Namibia* exception - i.e. that non-recognition 'should not result in depriving the people...of any advantages derived from international co-operation' - should rest on the evidence the FPA actually brings a benefit to the people of Western Sahara: there is little to suggest that that will happen given the demographic composition of the coastal population of Western Sahara and the burden of proof rests on the EC.

8 Conclusion

Whereas the doctrine of non-recognition represents a classic principle of the international law of the 20th century, its precise legal basis still represents a contentious issue to the clarification of which recent case law and codification have only partly contributed. Moreover, important international actors such as the EC have failed to fully explore its practical implications in terms of implied recognition in economic relations with *de facto* regimes. There are indications that the proliferation of secessionist entities - especially within the European legal framework - may resuscitate the need to precisely identify the scope and applicability of non-recognition obligations incumbent upon States and international organizations.

For instance, the prospect of Kosovo declaring soon independence from Serbia shows exactly that: namely, that the question of recognizing or not recognizing Kosovo will not be simply a question of political discretion exercised by third States, but may also involve secondary obligations incumbent upon them under the law of responsibility. In other words, those States deciding to recognize Kosovo will have to take into account that recognition may be considered a violation of an obligation owed to Serbia itself, if Serbia continues to oppose that secession and does not waive its right to territorial integrity. As for those States deciding not to recognize Kosovo as a State, they will have to extend that policy of non-recognition also to relations implying an admission of legality of Kosovo's new status. Finally, regardless of their recognition *vel non* of Kosovo as a new independent State, third States claiming that the secession of Kosovo *is not illegal* will feel

³⁹ See Hauswaldt, 'Problems under the EC-Israel Association Agreement: the Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement' 14 *EJIL* (2003) 591.

⁴⁰ Case C-432/92 *Anastasiou I* [1994] ECR I-3087.

⁴¹ Talmon, 'The Cyprus Question before the European Court of Justice' 12 *EJIL* (2001) 727, at 747-748.

entitled to enter into legal and diplomatic relations with the newly independent entity: at the same time, they should be aware that that may result into a political and legal dispute with Serbia concerning its alleged right to territorial integrity.

In conclusion, recognition policies by third States are more and more intertwined with applicable obligations of non-recognition which may limit the traditionally discretionary nature of the process of entering into relations with a new or consolidated state of affairs. Considerations of *Realpolitik* and pursuance of national interests may ultimately decide the kind of policy choices and decisions States are likely to adopt; yet States should be aware that their policy choices do not exist in a legal vacuum and that the decision to act contrary to international law or to the rights of the allegedly injured State may come at a cost.