

The non-recognition of Jerusalem as Israel's capital: A condition for international law to remain relevant?

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1. *Introduction*

On 6 December 2017, the United States recognised Jerusalem as the capital of Israel, in violation of its obligation to acknowledge that the eastern part of the city has been unlawfully occupied since 1967 and that such an occupation precludes Israel from claiming sovereignty on the city.¹ Therefore, even if 'the United States continues to take no position on any final status issues' and 'is not taking a position on boundaries or borders',² its decision endorses Israel's claim to exercise sovereignty over the city and thus contravenes international law. No legal justification was proposed and it was underlined that 'the foreign policy of the United States is grounded in principled realism, which begins with an honest acknowledgment of plain facts'.³ The reasoning is reminiscent of the sceptical stance which has sometimes been adopted towards non-recognition since its emergence as a legal obligation. Fear that it unduly divorces international law from the reality and the prac-

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¹ UN Doc S/RES/476 (1980) (30 June 1980) para 3; UN Doc S/RES/478 (1980) (20 August 1980) paras 2 and 4.

² Proclamation 9683 of 6 December 2017, 'Recognizing Jerusalem as the Capital of the State of Israel Relocating the United States Embassy to Israel to Jerusalem' *Federal Register* vol 82, no 236 (11 December 2017) 58331; See also, Statement by the United States before the Security Council, UN Doc S/PV.8128 (8 December 2017), 11.

³ Proclamation 9683 (n 2)) *ibid.* See also, Statement by the United States before the Security Council, UN Doc S/PV.8128 (n 2) 11 and UN Doc S/PV.8139 (18 December 2017) 4.



tice of States has been expressed by some scholars.⁴ In rather explicit terms, John Fischer Williams considered that ‘we shall do nothing – except administer a little opium to our mental and moral vigor – by saying that war and conquest while we allow them to take place, produce results which are invalid in law’.⁵ On the contrary, non-recognition has been conceived as a condition for an international legal order to exist.⁶ Hersch Lauterpacht was convinced that ‘to admit that an unlawful act, or its consequences or immediate manifestations, can become a source of legal rights for the violator of the law is to introduce into the legal system a contradiction which can only be resolved by the negation of its legal character’.⁷ The discussion surrounding non-recognition is still intense. If most authors no longer doubt that a duty of non-recognition is binding upon States under international law, some have called into question its exact nature, scope and influence, characterising it as ‘an obligation without real substance’⁸ or, to paraphrase, ‘an obligation without real impact’.⁹ This contribution aims at showing that the recognition of Jerusalem as the capital of Israel and the reaction it has prompted shed light on these questions. It confirms that non-recognition is broadly perceived by States as a general obligation which requires from them a specific course of in-action (section 2). It further shows that non-recognition fulfils functions that States deem necessary to preserve the integrity of fundamental principles of international law

⁴ C de Visscher, ‘De l’effectivité dans les rapports interétatiques’ in *Théories et réalités en droit international public* (Pedone 1970) 319; Ch Rousseau, ‘Le conflit italo-éthiopien (suite et fin)’ (1938) 45 *Revue Générale de Droit International Public* 83-123.

⁵ JF Williams, ‘Sovereignty, Seisin, and the League’ (1926) 7 *British YB Intl L* 24, 42.

⁶ M Kohen, *Possession contestée et souveraineté territoriale* (Presses Universitaires de France 1997) 157.

⁷ (author’s translation) H Lauterpacht, ‘Règles générales du droit de la paix’ (1937) 62 *Recueil des Cours de l’Académie de Droit International* 291.

⁸ Separate opinion of Judge Kooijmans, ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 44; See also, S Talmon, ‘The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious breaches of a Jus Cogens Obligation: An Obligation without Real Substance?’, in C Tomuschat, JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, (Martinus Nijhoff 2005) 127-166.

⁹ M Arcari, ‘The Relocation of the US Embassy to Jerusalem and the Obligation of Non-recognition in International Law’ (2018) 50 *QIL-Questions Intl L* 13.



such as the prohibition on the use of force or people's right to self-determination, thus implying that the obligation and its violation may have an impact (section 3). Yet, the question may be asked as to what international law fears most, its ineffectiveness in certain situations or its disregard as a reference framework. And some thoughts on this question will be shared as a conclusion.

2. *Non-recognition, an obligation without real substance?*

Non-recognition finds its roots in the practice of American States.¹⁰ It was particularly promoted by US State Secretary Henri Stimson who asserted in relation to the Japanese invasion of Manchuria and the subsequent establishment of Manchukuo, that the American Government

‘cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement (...) which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the republic of China’.¹¹

This policy was turned by the League of Nations into an obligation that States should not recognise any situation established in violation of the League of Nations Pact or the Pact of Paris.¹² As Judge Skubiszewski noted in his dissenting opinion in the *East Timor case*, ‘through the Stimson doctrine, the United States of America played a pioneering – and beneficial – role in this development’.¹³ The obligation

¹⁰ Recommendation of States during the first Pan-American conference in 1890 mentioned in M Whiteman, *Digest of International Law* (US Department of State publication 1965) 874; Art I, Supplemental Treaty, General Treaty of Peace and Amity, 20 December 1907, mentioned in C Anderson, ‘The Central American Policy of Non-recognition’ (1925) 19 AJIL 164.

¹¹ Note addressed to the Chinese and Japanese governments, 7 January 1932, reproduced in G Hackworth, *Digest of International Law* (United States Government printing office 1940) 334.

¹² Resolution adopted by the League of Nations, 11 March 1932, Official Journal League of Nations, suppl no 101, 87.

¹³ Dissenting opinion of Judge Skubiszewski, ICJ *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 262 para 125.

was later reaffirmed by the United Nations in general terms¹⁴ and applied to many specific situations, including the situation of occupied East Jerusalem. When Israel enacted a law in 1980 affirming that Jerusalem, ‘complete and united’, was its capital city,¹⁵ the Security Council condemned the decision as a violation of international law, decided ‘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 of Jerusalem’ and called upon those States that had diplomatic missions at Jerusalem ‘to withdraw such missions from the Holy City’.¹⁶ By 1982, most states had removed their embassies from Jerusalem. Costa Rica and El Salvador were the last to do so in 2006.¹⁷ The Security Council emphasised in 2016 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 called upon all States ‘to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967’.¹⁸ On 21 December 2017, a few weeks after the US decision, the General Assembly called upon all States ‘to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Council resolution 478 (1980)’.¹⁹ The terms used were identical to the terms of a draft resolution submitted to the Security Council which was not adopted owing to the negative vote of the United States, leading the General Assembly to act upon the powers

¹⁴ UN Doc A/RES/375 (IV) (6 December 1949) Annex, art 11 Draft Declaration on Rights and Duties of States; UN Doc A/RES/2625 (XXV) (24 October 1970) Annex, Principle 1, para 10; UN Doc A/RES/2734 (XXV) (16 December 1970) para 5; UN Doc A/RES/3314 (XXIX) (14 December 1974) Annex, art 5 para 3; UN Doc A/RES/2936 (XXVII) (29 November 1972) Preamble; UN Doc A/RES/42/22 (18 November 1987) Annex, para 10; See also UN Doc A/RES/34/103 (14 December 1979) para 7 and UN Doc A/RES/36/103 (9 December 1981) Annex, III, e).

¹⁵ Basic Law: Jerusalem, capital of Israel, 1980, unofficial translation available at <www.knesset.gov.il/laws/special/eng/basic10_eng.htm>.

¹⁶ UN Doc S/RES/478 (1980) (20 August 1980) paras 2 and 4.

¹⁷ ‘El Salvador to Move Embassy From Jerusalem to Tel Aviv’ *Haaretz* (25 August 2006).

¹⁸ UN Doc S/RES/2334 (2016) (23 December 2016) paras 1 and 4.

¹⁹ UN Doc A/RES/ES-10/19 (2017) (21 December 2017) para 1. The resolution was adopted by 128 against 9, with 35 abstentions.



conferred by Resolution 377 A *Uniting for Peace*.²⁰ On these occasions, States confirmed that they felt bound by such a duty not to recognise Jerusalem as Israel's capital and not to establish their diplomatic premises in the city. An overwhelming majority of them underscored that they did not recognise 'Israel's annexation of East Jerusalem', which they considered 'part of occupied territory'.²¹ Some specified that their embassies were in Tel Aviv and that they would remain there.²²

Their statements further seem to confirm that non-recognition is an obligation pertaining to general international law, an obligation that thus exists irrespective of any resolution adopted by the United Nations characterising the situation in question as unlawful and/or calling upon States not to recognise it. Many States considered that the US decision contradicted 'international law and Security Council resolutions'.²³ Others evoked 'unilateral decisions that are at odds with international law' or 'contrary to international law' without referring specifically to Security Council resolutions.²⁴ France reaffirmed its 'collective commitment to international law, including the resolutions of the Council,

²⁰ Draft resolution submitted by Egypt, UN Doc S/2017/1060 (18 December 2017); See the debates in the Security Council and the result of the vote: UN Doc S/PV.8139 (n 3) 3; Bolivia, China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russia, Senegal, Sweden, Ukraine, United Kingdom, Uruguay voting in favour, United States voting against.

²¹ Communiqué of the coordinating bureau of the non-aligned movement (NAM) on violations and provocations regarding the status of Jerusalem (5 December 2017) para 1; Resolution 8221 adopted by the extraordinary session of the Council of the League of Arab States at Ministerial Level (9 December 2017) Preamble, UN Doc A/72653-S/2017/1046 (15 December 2017) 2-3; Statements made before the Security Council by Sweden (4), Egypt (5), United Kingdom (6), France (7), Bolivia (9), UN Doc S/PV.8128 (n 2); Statements made before the Security Council by Bolivia, UN Doc S/PV.8138 (18 December 2017) 8; Statements made before the General Assembly, 10th emergency special session, by Yemen (2), Turkey (5), Pakistan (10), Indonesia (11), Maldives (12), Syria (12), Bangladesh (13), Cuba (14), Iran (14), Malaysia (15), North Korea (16), South Africa (16) UN Doc A/ES-10/PV.37 (21 December 2017).

²² Statements made before the Security Council by United Kingdom (6), Italy (10) UN Doc S/PV.8128 (n 2); Statement made before the General Assembly, 10th emergency special session, by Canada UN Doc A/ES-10/PV. 37 (n 21) at 20.

²³ Resolution 8221 adopted by the extraordinary session of the Council of the League of Arab States at Ministerial Level (n 21) para 1; Statements before the Security Council by Sweden (4), Palestine (16) UN Doc S/PV.8128 (n 2); Statements before the Security Council by Egypt, UN Doc S/PV.8139 (n 3) 2.

²⁴ Statements made before the Security Council by Egypt (5) and Bolivia (8), UN Doc S/PV.8128 (n 2).



on the essential question of the status of Jerusalem'.²⁵ This corroborates what had already emerged from other precedents and, in particular, from the proceedings in the advisory opinion by the International Court of Justice on Namibia. India for example considered that

'Every State is bound, under well-established principles of international law, irrespective of considerations owing from other sources as for example decisions of the United Nations subsequent to the termination of the Mandate, not to recognize any authority exercised by South Africa on behalf of, or concerning, Namibia, in relation to which territory South Africa has ceased to have any *locus standi* with the termination of the Mandate, and the exercise of which authority would amount to an unlawful encroachment on the legitimate rights of the United Nations as the Administrating Authority. This obligation on the part of every State is further reinforced by the decisions of the Security Council which Members of the United Nations agreed to 'accept and carry out' under Article 25 of the United Nations Charter'.²⁶

Not every State adopted such clear terminology during the proceedings,²⁷ but no State denied this analysis either. This might be considered as a tacit acceptance that non-recognition exists as an obligation which is independent from any other source of international law.

As for the nature of this obligation, States' practice combined with States' belief to be bound by such an obligation – progressively strengthened since the 1930's and reaffirmed fairly systematically since the adoption of the UN Charter – tend to establish its customary char-

²⁵ Statements made before the Security Council by France, UN Doc S/PV.8128 (n 2) 7; See also during the same debates, Russia (14) and Jordan (19).

²⁶ Written statement of India, ICJ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) available at <www.icj-cij.org/files/case-related/53/9371.pdf> 842; See also, written statement of the Secretary-General of the United Nations, available at <www.icj-cij.org/files/case-related/53/9367.pdf> para 116.

²⁷ Written statement of Hungary, ICJ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) available at <www.icj-cij.org/files/case-related/53/9369.pdf> 360, in more open terms though: 'States are naturally bound not to recognize any acts of the Government of South Africa made on behalf of or concerning Namibia after the termination of the Mandate, in accordance with the above-mentioned resolution of the Security Council'.



acter.²⁸ Non-recognition should thus be considered as a customary obligation deriving from an 'already well-established practice', to borrow the words of the International Law Commission.²⁹ Even though the obligation was formulated in the articles on the responsibility of States for internationally wrongful acts, the obligation should not only be characterised as a secondary rule.³⁰ Rather it is the logical corollary to primary rules as fundamental as the prohibition to use force and the principle that no territory may be acquired by force, as many States underlined during the debates surrounding the adoption by the General Assembly of resolution 42/22, reaffirming that 'neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation'.³¹ As to the principle *ex injuria jus non oritur*, it serves more as an explanation of the duty's *raison d'être* than a formal legal source. Non-recognition certainly constitutes one of the many expressions of the principle *ex injuria*

²⁸ Th 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, JM Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, (Martinus Nijhoff 2005) 127-166; J Crawford, *The Creation of States in International Law* (OUP 2007) 160; I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1983) 410-419; D Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' (2003) 2 Chinese J Intl L 107 (2003) 107; SE Himmer, 'The Achievement of Independence in the Baltic States and Its Justifications' (1992) 6 Emory Intl Law Rev 272.

²⁹ Report to the General Assembly of the International Law Commission on the work of its forty-eighth session, YB Intl Law Commission (1996) vol II, 72, para 2.

³⁰ Art 40(2) Responsibility of States for internationally wrongful acts, UN Doc A/RES/56/83 (2001) (12 December 2001) Annex.

³¹ See statements made in the 6th Commission of the General Assembly by Cyprus (UN Doc A/C.6/33/SR.56 (27 November 1978) para 17), Ecuador (UN Doc A/C.6/33/SR.57 (28 November 1978) para 40), Yemen (UN Doc A/C.6/33/SR.57 (28 November 1978) para 46); German Democratic Republic (UN Doc A/C.6/34/SR.19 (17 October 1979) para 11); China (UN Doc A/C.6/35/SR.27 (22 October 1980) para 17); Greece (UN Doc A/C.6/35/SR.31 (28 October 1980) para 14); Ghana, (UN Doc A/C.6/36/SR.13 (6 October 1981) para 45); Egypt (position adopted on 26 March 1982, addressed to the Secretary-General, UN Doc A/37/375 (11 August 1982) para 7 h); Belgium (UN Doc A/C.6/37/SR.39 (8 November 1982) para 58); Yugoslavia (UN Doc A/C.6/38/SR.12 (11 October 1983) paras 29, 32); Vietnam (UN Doc A/C.6/38/SR.18 (18 October 1983) para 8) and Syria (UN Doc A/C.6/42/SR.21 (13 October 1987) para 84).

jus non oritur.³² As an arbitral tribunal decided, the ‘non-recognition doctrine (...) is based in part on the principle *ex injuria jus non oritur*, according to which acts contrary to international law cannot become a source of legal rights for a wrongdoer’.³³ This does not only provide an insight as to the reason why States should not recognise a situation created in violation of imperative norms of international law. It also proves helpful in indicating what exactly constitutes the object of non-recognition: it is the legal claim (*jus*) based on the violation of international law (*ex injuria*) that is null and void and should thus not be recognised. In relation to Jerusalem, it is primarily the claim made by Israel that it enjoys sovereignty over Jerusalem and that Jerusalem is its capital that should not be recognised. But non-recognition also applies to the claim made by the United States that Israel enjoys sovereignty on Jerusalem and that Jerusalem is its capital as this claim also stem from a violation of international law. In that sense, non-recognition applies not only to the legal claims made by the perpetrator of the wrongful act but also to the claims made by third States, as long as these claims also find their root in the unlawful situation.

3. *Non-recognition, an obligation without impact?*

If non-recognition seems firmly anchored in international law, its impact has nonetheless been questioned. An evaluation of international law’s impact poses important methodological questions as to the tools which should be used to assess such an impact. If the influence of international law is measured in terms of effectiveness, then the impact of non-recognition is undeniably uncertain in relation to the numerous cases where an effective situation which came about through unlawful means remains unchallenged on the ground. This is certainly the case in self-proclaimed *de facto* States such as the ‘Turkish Republic of Northern Cyprus’, the ‘Republic of Nagorno-Karabakh’, the ‘Moldavian Republic of Transnistria’ or in territories unlawfully annexed such as Cri-

³² A Lagerwall, *Le principe ex injuria jus non oritur* (Bruylant, 2016) 141-159.

³³ Arbitral Tribunal for Dispute over inter-entity boundary in Brcko area, *Republika Srpska v The Federation of Bosnia and Herzegovina* (Award 14 February 1997) (1997) 36 ILM 422.



mea or certain Palestinian territories. In these cases, non-recognition has not prevented the unlawful situations from being consolidated, just as the prohibition of the use of force has not prevented Turkey, Armenia, Russia or Israel from invading, occupying, annexing or managing these territories. The impact of international law on the ground may therefore be fundamentally questioned in these cases.

But if international law's impact is instead measured in light of its strength as an argumentative tool that enjoys relative autonomy from politics, then its influence cannot be denied.³⁴ What States' reaction to the US decision to recognise Jerusalem shows is that they are still fundamentally attached to non-recognition and to the functions assigned to non-recognition in the international legal order. States are still convinced of the importance of fighting the *fait accompli* in order to preclude the unlawful situation from being consolidated, as non-recognition aims at, according to the International Court of Justice in its advisory opinion relating to the *Wall in Palestinian occupied territories*.³⁵ And recognition of unlawfully installed situation should be condemned because they participate in strengthening the *fait accompli*. The Non-Aligned Movement specifically rejected the US decision as an action 'that will further consolidate Israel's control and unlawful *de facto* annexation of the City'.³⁶ This concern carries a particular meaning here as the consolidation of Israel's annexation was generally viewed by States as putting the two-State solution with Jerusalem as a shared capital in jeopardy.³⁷ The Secretary-General and many States underlined that 'there is no alternative to the two-State solution and no plan B'.³⁸ More broadly, States approach non-recognition as a safeguard for international law itself, its integrity and its relevance as a framework meant to

³⁴ D Kritsiotis, 'The Power of International Law as Language' (1998) 34 *California Western L Rev* 397; M Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (CUP 2006).

³⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep, para 121.

³⁶ Communiqué of the coordinating bureau of the non-aligned movement (NAM) on violations and provocations regarding the status of Jerusalem (n 21).

³⁷ Statements made before the Security Council by United Kingdom (6), Bolivia (9) and Ethiopia (13), UN Doc S/PV.8128 (n 2).

³⁸ See also, Statements made before the Security Council by Sweden (4) and France (8), UN Doc S/PV.8128 (n 2).

maintain and restore peace in general and in this situation in particular.³⁹ To Egypt,

‘The call to safeguard the international legal terms of reference and international law is not a luxury, especially in a region that is beset by conflict and a world subjected to huge challenges. We have no need for further unjustified chaos. This is a call that takes into account what is before our very eyes – the huge danger posed by the deterioration of the international legal system’.⁴⁰

France also affirmed in relation to the situation in 1980 that ‘what was at stake was no less than what is at stake today – not only the clear Jewish link with Jerusalem, but also the legal framework and political parameters for a settlement to the conflict’.⁴¹ For Russia, ‘a just and comprehensive settlement in the Middle East is something that can be achieved only if there is a firm international legal basis’.⁴² The preoccupation with preserving international law’s relevance was sometimes coupled with the necessity to reaffirm the relevance of the United Nations and, in particular, of the Security Council. As Bolivia made very clear,

‘The Security Council bears a responsibility to take action and decisions; otherwise, the Security Council will also become an occupied territory, and this chamber will have to join the long list of settlements of the occupying Power. We will have demonstrated our irrelevance in this matter’.⁴³

³⁹ Statement made before the Security Council by France, UN Doc S/PV.8128 (n 2) 8.

⁴⁰ Statement made before the Security Council by Egypt, UN Doc S/PV.8128 (n 2) 6; See also the statement made before the Security Council by Egypt, UN Doc S/PV.8139 (n 3) 2 : ‘However, we are well aware that the only path towards addressing the issue is to resort to the one pillar underlying all international disputes – that is international law – as distinct from religious or other beliefs. Any attempt to do otherwise would have huge repercussions on the situation and reawaken the chaos that preceded human development’.

⁴¹ Statement made before the Security Council by France, UN Doc S/PV.8139 (n 3) 6.

⁴² Statement made before the Security Council by Russia, UN Doc S/PV.8139 (n 3) 9.

⁴³ Statement made before the Security Council by Bolivia, UN Doc S/PV.8128 (n 2) 9.



These concerns are frequently voiced when the United Nations are seized with situations where force has imposed on the ground a situation that is in violation of international law. For example, when Russia annexed Crimea, States were not only condemning the unlawful character of the annexation and the necessity not to recognise it, but also expressing the importance of guaranteeing the credibility of international law and the United Nations. Georgia stated that ‘concerted action [was] needed’ because ‘only through such action can we restore the stability of the United Nations system and prevent the annihilation of international law’.⁴⁴ In a similar vein, France considered that ‘to accept the annexation of Crimea would be to give up everything that we are trying to build in this Organization. It would make a mockery of the Charter of the United Nations. It would once again make the sword the supreme arbiter of disputes’.⁴⁵ According to Japan, ‘whether the international community looks at what is happening in Ukraine as a bystander or chooses to stand up and take appropriate action could have a grave impact on what the international community will look like in 10 or 20 years’.⁴⁶ As of today, Crimea is still part of Russia but only a handful of States have recognised such annexation.

Finally, it seems that non-recognition is also perceived as a factor of political stability, as an obligation the violation of which may increase tension on the ground. This was undoubtedly expressed by UN officials, as well as States with regards to the US decision. As Nickolay Mladenov, Special Coordinator for the Middle East Peace Process, explained before the Security Council, ‘since 6 December, in the wake of the decision of the United States to recognize Jerusalem as the capital of Israel, the situation has become more tense, with an increase in incidents, notably rockets fired from Gaza and clashes between Palestinians and Israeli security forces’.⁴⁷ The fear that the US decision would have serious

⁴⁴ Statement made before the General Assembly by Georgia, UN Doc A/68/PV.80 (27 March 2014) 12.

⁴⁵ Statement made before the Security Council by France, UN Doc S/PV.7138 (15 March 2014) 5.

⁴⁶ Statement made before the General Assembly by Japan, UN Doc A/68/PV.80 (27 March 2014) 10.

⁴⁷ Statement by Mladenov before the Security Council, UN Doc S/PV.8138 (n 21) 3.

repercussions was shared by most States reacting individually⁴⁸ or collectively.⁴⁹ Before the Security Council, Uruguay even referred to John Lennon, hoping that one day his dream of a world living in peace would come true.⁵⁰ This tends to show that – if not recognition – at least violations of the obligation of non-recognition can sometimes have a considerable impact on the ground.

In sum, the Jerusalem crisis illustrates once again the importance to States of reaffirming non-recognition as an important obligation of international law. And their commitment to non-recognition stands, no matter how effective the unlawful situation proves to be or how long it has lasted for. This had already been noticed in relation to other precedents where a situation installed unlawfully was successful on the ground, for example the independence of Bangladesh as a result of India's unlawful use of force in 1971 or the administration by the United States and the United Kingdom of Iraq as a result of their aggression in 2003.⁵¹ In these cases, States eventually recognised these situations but it was never their effectiveness alone that led States to adopt such decisions. Rather, States which believed that the situations had been created unlawfully generally waited until they were settled in accordance with international law, either through an agreement with the injured State (in the case of Bangladesh) or through a decision of the United Nations (in the case of Iraq), before fully endorsing them through their recognition. State statements are quite remarkable in this regard and appear to outlive Raymond Aron's assertion that 'international law can only endorse the fate of arms and the arbitration of force'.⁵²

⁴⁸ Statements made before the Security Council by Sweden (4), Egypt (5-6), France (8), Bolivia (8), Italy (10), China (12), Ethiopia (13), Kazakhstan (14), Russia (14) and Japan (15), UN Doc S/PV.8128 (n 2).

⁴⁹ Communiqué of the coordinating bureau of the non-aligned movement (NAM) on violations and provocations regarding the status of Jerusalem (n 21) para 4; Statement of the Chairperson of the African Union Commission on the American Decision to recognize Jerusalem as the Capital of the State of Israel (6 December 2017); Resolution 8221 adopted by the extraordinary session of the Council of the League of Arab States at Ministerial Level (n 21) para 1.

⁵⁰ Statement made before the Security Council by Uruguay, UN Doc S/PV.8128 (n 2) 10.

⁵¹ A Lagerwall, *Le principe ex injuria jus non oritur* (n 32).

⁵² A Aron, *Paix et guerre entre les Nations* (Plon 1962) 117.



4. *Conclusive remarks: International law as a language which should fear nothing more than silence?*

Even to those who agree that international law works principally as a language and remains vivid as long as it is spoken, the Jerusalem crisis still asks fundamental questions. It certainly does with regards the 35 States which chose to abstain during the General Assembly's emergency special session on 21 December 2017. The abstention of these States is all the more telling in that the resolution finally adopted did not really add anything to what previous resolutions had already stated. Not every State explained their position before the General Assembly.⁵³ In the light of those who did, abstentions were principally justified by the belief that a further resolution reaffirming what had already been decided would not help the peace process or that the timing was inappropriate (Australia, Argentina, Romania). Paraguay considered that such issues should be dealt with in the Security Council and El Salvador regretted that it was not given enough time for preliminary consultations. Abstentions thus did not mean that States denied the obligation of non-recognition as such. But it is still puzzling that 35 States decided against reaffirming it on this particular occasion. And so is the fact that the United States did not even try to justify its decision from an international legal point of view. This form of contempt towards international law was already noted when the United States launched their attacks on Syria in reaction to the use of chemical weapons by the Assad regime.⁵⁴ This contrasts with the practice of the United States where it has regularly sought to find legal justification to their use of force, whether in Grenada (1983) or in Iraq (1991-2003). Even if such justifications were sometimes unconvincing and particularly so with respect to the military

⁵³ Statements made before the General Assembly, 10th emergency special session, by Canada (20), Australia (19), Paraguay (19), El Salvador (19) and Romania (20), UN Doc A/ES-10/PV.37 (n 21).

⁵⁴ See recently 'Joined by Allies, President Trump Takes Action to End Syria's Chemical Weapons Attacks' White House (14 April 2018) available at <www.whitehouse.gov/articles/joined-allies-president-trump-takes-action-end-syrias-chemical-weapons-attacks/>; A Lagerwall, 'Threats of and Actual Military Strikes Against Syria 2013 and 2017' in T Ruys, O Corten, A Hofer (eds), *The Use of Force in International Law: A Case-based Approach* (OUP 2018) 828-854.

intervention against Iraq in 2003,⁵⁵ such justifications still showed that the US cared to find some legal reasoning, a care that in itself illustrated their respect for international law as an important set of terms of reference. Maybe the greatest fear for international law thus lies, more than in its ineffectiveness in some very tense cases, in actions undertaken by States with absolute no international legal discourse provided as a justification. This might be what international lawyers dread the most. Not only because it adversely affects international law as a language shared by all States no matter their political, economic or cultural differences. But also, because international law is a language that many can speak in order to welcome or to criticise decisions adopted by great powers and others. To dismiss international law as a meaningful framework thus also works to sideline, amongst others, ‘an international scientific community that desires to establish international law as the language of international relations’ to borrow the terms of Boutros Boutros Ghali.⁵⁶ If the Jerusalem crisis has provided an occasion for which some States have expressed a certain indifference and even defiance towards international law, a very large majority of them remain committed to its core principles and to non-recognition in particular. In that sense, it could be said that its relevance has been reaffirmed more than anything else.

⁵⁵ Appel de juristes de droit international concernant le recours à la force contre l’Irak (more than 300 scholars signatories) (2003) 36 *Revue Belge de Droit International* 266.

⁵⁶ Foreword, *International Law as a Language for International Relations* (Kluwer 1996) available at <www.un.org/law/books/IntlLawAsLanguageForIntlRelations.pdf>.

