1 Introduction

This book concerns the relationship between two broad elements underpinning international law: legality and effectiveness. The element of legality is embodied in the maxim *ex injuria jus non oritur*, according to which a violation of international law cannot produce legally valid outcomes. In some situations, however, effective practice does generate normative consequences, particularly through international human rights law. This phenomenon is embodied in the maxim *ex factis jus oritur*. This book studies the balance between the two elements as it is expressed in a discrete category of situations: the transition from a territorial regime that is illegal under international law to a legal territorial regime.

The term 'territorial regime' denotes an entity in which a functioning governing apparatus exercises control over a population in a territory, and makes a claim of sovereignty over that territory.[1] Territorial status is a matter not only of fact but also of law. A territorial regime is considered in this book 'illegal' when its creation involves the violation of a peremptory norm of international law, principally the prohibition on the use of force or the obligation to respect the right of peoples to self-determination. This is not to say that territorial claims do not at times involve other violations of international law, but those are less likely to result in an objective illegality of the regime. For example, the establishment of the German Democratic Republic (GDR) was regarded by the Western Allies

[1] Accordingly, the term 'illegal regime' does not refer to the governing body alone, as in expressions such as 'the Taliban regime', 'the Rabuka regime', 'the Habré regime' or 'the Khmer Rouge regime', which denote the identity of the individuals in power and not the international status of Afghanistan, Iraq, Fiji, Chad or Cambodia respectively. Regarding claims to territorial status other than sovereignty, see below.

(France, the UK and the US) as a violation of the Potsdam Declaration of 1 August 1945.[2] But this violation operated only among the parties to the declarations. There was nothing illegal about the emergence of the GDR as far as states other than the four occupying powers (the Western Allies and the USSR) were concerned.[3] In contrast, the illegality of a territorial regime which comes to exist in violation of a peremptory norm has effect *erga omnes*,[4] thereby creating an objective status. This objective character of the territorial regime also permits an analysis of the consequences of illegality as a matter of general international law rather than as the result of specific undertakings by individual states.[5]

The link between the peremptory character of certain basic rules and the criteria for the legality of a territorial regime, noted by Crawford in his treatise on the role of law in the creation of states,[6] has evolved through both doctrine and practice. Norms regulating territorial status include first and foremost the prohibition on the use of force, which provides the well-established principle that territory cannot validly be acquired by an unlawful use of force.[7] The prohibition on the use of force is generally

[2] Protocol of the Proceedings of the Berlin Conference, Declaration of 1 August 1945, 'Section II: The Principles to Govern the Treatment of Germany in the Initial Control Period', in United States Department of State, *Foreign Relations of the United States: Diplomatic Papers: The Conference of Berlin (the Potsdam Conference), 1945* (Washington, DC: US Government Printing Office, 1960), Volume II, 1478, 1481–1483.

[3] The refusal of states other than the Western Allies to recognize the GDR was a political stance, not a legal one. It was not universal, and ultimately it did not prevent the recognition of the GDR, even before the treaties of 1972 (involving the Federal Republic of Germany, the GDR and the four powers) regulated the situation. Thomas D. Grant, 'Hallstein Revisited: Unilateral Enforcement of Regimes of Nonrecognition since the Two Germanies' (2000) 36 *Stanford Journal of International Law* 221, 226.

[4] On the *erga omnes* character of peremptory norms, see Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Clarendon Press, 1997); André de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague: Kluwer Law International, 1996), particularly 53–56; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Company, 1988).

[5] John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006).

[6] Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 84.

[7] Report of the Committee on General Welfare, Recommendation of the International American Conference adopted 18 April 1890, 2 International American Conference. Reports of Committees and Discussions Thereon (Revised under the Direction of the Executive Committee by Order of the Conference Adopted 7 March 1890) 954, 1148 (second declaratory paragraph). Tripartite Conference in Moscow, Anglo-Soviet-American Communiqué, 1 November 1943 (1944) 38 *American Journal of International Law*

accepted as a peremptory norm that operates *erga omnes*.[8] While originally the test of legality was applied to territorial acquisitions by existing states, practice indicates that the *creation* of states, previously perceived as a matter of fact only, is also regulated by the prohibition on the use of force.[9] Through the years, the prohibition on unilateral territorial acquisition has expanded further, to cover territorial situations resulting from any use of force, even lawful use.[10] However, the consequences of territorial change following lawful use of force are presumably less far-reaching than those that follow unlawful use of force, which is a violation of a peremptory norm.

Another parameter for testing the legality of a territorial regime is the obligation to respect peoples' right to self-determination.[11] The right to self-determination is generally accepted as a peremptory norm which operates *erga omnes*,[12] although its precise content and limitations are controversial. The obligation to respect the right to self-determination is, in some instances, the corollary of the prohibition on the use of force: the breach of the right to self-determination is an illegal use of force when looked upon from the perspective of the victimized people rather

supplement 3, 7; Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 410–423; Robert Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), Chapter 5; Charles de Visscher, *Theory and Reality in International law* (revised edn, translated by P. E. Corbet, Princeton, NJ: Princeton University Press, 1968), 323–324; Robert Langer, *Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* (Princeton, NJ: Princeton University Press, 1947); see also Sharon D. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), particularly 234–248. For an account of the development of the prohibition on the use of force, see Brownlie, *Use of Force*, particularly Chapter 5.

[8] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *US*) *(Merits)* [1986] ICJ Rep 14, 100–101, [190]; ILC, *Draft Articles on State Responsibility*, Article 40 Commentary, paragraph 4.

[9] Crawford, *The Creation of States*, 131–148; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 188–189.

[10] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to UNGA Resolution 2625(XXV).

[11] J. E. S. Fawcett, 'Security Council Resolutions on Rhodesia' (1965–1966) 41 *British Yearbook of International Law* 103, 112; Crawford, *The Creation of States*, 107–131; David Raič, *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002), Chapter 4, particularly 128–140.

[12] ICJ, *East Timor Case*, [29]; ICJ, *Wall Advisory Opinion*, [155]–[156]; ILC, *Draft Articles on State Responsibility*, Article 40 Commentary, paragraph 5.

than from that of the victimized state.[13] The right to self-determination can also be violated irrespective of any use of force, for example when a territorial regime is established in order to deprive the population of its right to internal self-determination.

Another norm recognized as peremptory is the prohibition on racial discrimination.[14] While not inherently related to territorial status, it may be implicated when a territorial regime is established for the sole purpose of maintaining a racially discriminatory political entity. When racial discrimination is institutionalized, for example through apartheid, it can amount to a violation of the right to self-determination.

Territorial regimes may take many forms: entities purporting to be states, established states purporting to hold sovereign title over territory outside their boundaries (annexation), occupation, international administration and more. All of these regimes can be tested against legal yardsticks.[15] This book is limited to the first two categories – purported states and purported annexations – which concern claims of full sovereignty. Limiting the discussion to claims of sovereignty permits a focus on the effect of illegality in isolation from other factors which limit the international functioning of a territorial regime, such as the inherently limited international personality of non-state actors. For example, it would be irrelevant to examine the effect of illegality on the capacity of an illegal occupant or an illegal international administration to grant its nationality to residents of the occupied territory, since even a legal occupant may not grant such nationality, while an international administration has no nationality to grant.

The consequence of a violation of a peremptory norm is a legal nullity which operates *erga omnes*. To maintain this nullity, states are prohibited from recognizing the legality of a situation created in violation of a

[13] Cassese, *Self-Determination of Peoples*, 55, 90–99.
[14] ICJ, *Barcelona Traction Case*, [33]–[34]; Dugard, *Recognition and the United Nations*, 156–158.
[15] On the legal parameters for occupation see Yaël Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 *Israel Law Review* 201; Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: The Framing of the Occupied Palestinian Territory' (2005) 23 *Berkeley International Law Journal* 551; Benjamin Matthew Clarke, 'Occupation, Resistance and the Law: Was Armed Resistance to the Occupation of Iraq Justified under International Law?', PhD thesis, University of Melbourne, 2009, unpublished, Appendices 2 and 3 (on file with the author); on the legality of international administration see Enrico Milano, *Unlawful Territorial Situations in International Law* (Leiden: Martinus Nijhoff, 2006), 237–251.

peremptory norm,[16] irrespective of the effectiveness or apparent success of those responsible for the conduct in question.[17] By non-recognition, states deny the competence of the governing apparatus to act on behalf of the territory and its people, and thus prevent the acts of the illegal regime from producing valid consequences.[18] This, in turn, is intended to prevent the regime in question from reaping the fruits of its violation of law, and to induce it to restore legal order.[19] Non-recognition is thus an expression of the maxim *ex injuria jus non oritur* (illegal acts cannot create law). This nullity operates not only towards third states, but also towards the illegal regime itself (at least if it is a state and therefore bound by general international law), as well as towards the ousted, legal regime, recognized as sovereign over the territory (where such a regime exists).[20] Needless to say, the illegal regime is unlikely to accept the illegality of its actions and their consequent nullity, although it is not unprecedented that arguments concerning the regime's status arise before its own authorities.[21] The peremptory character of the violated norm also means that the illegality is not curable by consent of states.[22]

[16] ILC, *Draft Articles on State Responsibility*, Article 41; Sir Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 413; Robert Y. Jennings, 'Nullity and Effectiveness in International Law', in *Cambridge Essays in International Law (Essays in Honour of Lord McNair)* (London: Stevens, 1965), 66.

[17] Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Dordrecht: Martinus Nijhoff, 1990), 276–277; Raič, *Statehood and the Law of Self-Determination*, 109.

[18] For simplicity, when describing the non-recognized regimes (as states or annexations), their institutions (governments, courts) and acts (laws, treaties, administrative acts), the qualifying terms 'purported', 'so-called', 'aspirant' etc. will be used only where they are necessary to avoid ambiguity. Nonetheless, these qualifications should be assumed wherever appropriate.

[19] Lauterpacht, *Recognition in International Law*, 340–341.

[20] Orakhelashvili, *Peremptory Norms*, 401; ILC, *Draft Articles on State Responsibility*, Article 45 Commentary, paragraph 4.

[21] Namibia, *Binga* v. *Administrator-General, South West Africa and Others*; Rhodesia, *Madzimbamuto and Baron* v. *Lardner-Burke (GD)*; Rhodesia, *Madzimbamuto and Baron* v. *Lardner-Burke (AD)*. In *Demopoulos and Others* v. *Turkey*, [107], the ECtHR acknowledged that 'it can hardly be expected, for evident practical reasons, that the [illegal regime] authorities themselves proceed to pronounce the legal and administrative system . . . to be null and void in order to satisfy the points of principle'. The case of the Turkish Republic of Northen Cyprus (TRNC) is unique in that despite the Greek-Cypriot claim that the TRNC is illegal, despite Turkey's claim that it is not responsible for the TRNC, and despite the TRNC's claim to be independent, all three parties appear, in one form or another, before the ECtHR and accept its authority to adjudicate the disputes.

[22] Christian Tomuschat, 'International Crimes by States: An Endangered Species?', in Karel Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998), 259.

Moreover, to waive this illegality or acquiesce in it would in itself be a violation of an international obligation,[23] even if the waiving or acquiescing state is the one directly injured by the original violation.

The obligation of non-recognition was pronounced by the ICJ in the *Namibia Advisory Opinion*, although the court did not expressly tie it to the violation of a peremptory norm. Formally, the obligation of non-recognition was triggered by the obligation of states under Article 25 of the UN Charter to comply with the decisions of the Security Council. The Security Council resolution in question, Resolution 276(1970), confirmed the revocation of the South African mandate over Namibia by the UN General Assembly, following the violation of peremptory norms, as discussed in Chapter 2. It declared that the continued presence of South Africa in Namibia was illegal and consequently that South Africa's acts on behalf of or concerning Namibia were invalid.[24] In other words, substantively the obligation or non-recognition arose from the violation of a peremptory norm which affected Namibia's status. The obligation under UN Charter Article 25 can itself be analogized to a peremptory norm, given the normative superiority under UN Charter Article 103 of Security Council resolutions over other international obligations of states. Admittedly, this normative superiority is institutional rather than substantive.

The link between peremptory norms and the obligation of non-recognition is clearly stipulated in the ILC *Draft Articles on State Responsibility*, which, interestingly, regard the *Namibia Advisory Opinion* as an authority on the application of the doctrine despite the fact that the *Advisory Opinion* relies only indirectly on the peremptory character of the norms.[25] The ICJ itself subsequently twice linked the obligation of non-recognition to peremptory norms. In the *Case Concerning East Timor*, Judge Skubiszewski suggested that the obligation of non-recognition of forcible acquisition of territory might in the future develop into a peremptory

[23] E.g. Swedish recognition of the Soviet annexation of the Baltic states in 1940 – William J. H. Hough III, 'The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory' (1985) 6 *New York Law School Journal of International & Comparative Law* 303; and the Australian recognition of the Indonesian annexation of East Timor in 1979 – *Australian Practice in International Law* (1978–1980) 8; *Australian Yearbook of International Law* 253, 279; ICJ, *East Timor Case* (*Portugal* v. *Australia*), Counter-memorial of the Government of Australia (1 June 1992), [175]–[176]; ICJ, *East Timor Case* (*Portugal* v. *Australia*), Rejoinder of the Government of Australia (1 July 1993), [44]–[54].

[24] ICJ, *Namibia Advisory Opinion*, [112]–[115]; UNSC Resolution 276 (30 January 1970) paragraph 2.

[25] ILC, *Draft Articles on State Responsibility*, Article 41 Commentary, paragraph 8.

norm as a corollary of the prohibition on the use of force.[26] If this process does occur, recognition of a territorial claim despite the existence of an obligation of non-recognition will itself constitute a violation of a peremptory norm. In the *Wall Advisory Opinion*, the majority opinion again mentioned the peremptory character of certain norms in the context of the obligation of non-recognition. However, it did so chiefly as an indication of the norms' *erga omnes* character, which is where the court lay the basis for the obligation of non-recognition.[27] The linkage between non-recognition and obligations *erga omnes* was criticized by two of the judges, who instead alluded to the peremptory character of the norms as the direct trigger for the obligation of non-recognition. Judge Higgins in a separate opinion referred to the commentary of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which deal with obligations regarding peremptory norms.[28] Judge Kooijmans, also in a separate opinion, took issue with the notion that a violation of an obligation *erga omnes* by one state can lead to an obligation for another. He noted, however, the overlap between *erga omnes* obligations and peremptory norms at least where claims to sovereignty over territory are concerned.[29] This opinion, in particular, relies on and reinforces the link made in the ILC *Draft Articles on State Responsibility* between the obligation of non-recognition and the violation of peremptory norms, in the context of territorial claims.

The obligation of non-recognition should be distinguished from a policy of non-recognition that is adopted on political grounds or on domestic legal grounds,[30] even if such a policy is in some cases universal. It is not always easy to determine whether a refusal of recognition is politically or legally grounded, particularly since governments that refuse to lend legitimacy to territorial claims often attempt to strengthen their position by couching it in international legal terms. In addition, claims of illegality are sometimes grounded in domestic law. For example, secessionist entities which come to exist in violation of the law of the state from

[26] ICJ, *East Timor Case*, dissenting opinion of Judge Skubiszewski, [125].
[27] ICJ, *Wall Advisory Opinion*, [155]–[159].
[28] ICJ, *Wall Advisory Opinion*, separate opinion of Judge Higgins, [37]–[38], referring to ILC, *Draft Articles on State Responsibility*, Chapter 3 Commentary paragraph 2.
[29] ICJ, *Wall Advisory Opinion*, Separate Opinion of Judge Kooijmans, [40]–[43].
[30] The grounds for non-recognition are distinct from the motive for the adoption of a non-recognition policy. Whether the motives of a state in a specific situation are political or legal is immaterial. What is important is whether it can base its policy in international law.

which they emerge or without its consent are often referred to in common political parlance as 'illegal'.[31] But neither non-recognition based on a political stance nor domestic illegality create the objective legal status that a violation of a peremptory norm creates.[32]

The negatively formulated objective of the obligation of non-recognition, namely to prevent the consolidation of the illegal regime, assumes that non-recognition is a temporary measure. Practice, however, reveals the weakness of non-recognition in restoring legal order. Illegal regimes have at times existed for lengthy periods of time. This book examines six cases, where the illegal regimes have lasted for periods ranging from fifteen to fifty years. During the period of existence of the illegal regime, a disparity exists between law and practice. Within the territory under the illegal regime's control, the effectiveness of the illegal regime's conduct remains by and large unhindered; outside the territory, the invalidity of the regime's status, and its acts, may reign unchallenged by the need to meet factual changes on the ground, other than in exceptional cases. When the illegal regime comes to an end, the new regime (the post-transition regime) is confronted with the need to resolve the large-scale conflict between law and fact. Its policy may be informed, inter alia, by the lack of legitimacy of the previous regime, by that regime's effectiveness or by some balancing mechanism between the two.

Non-recognition is a means to an end. Once that end is achieved, i.e. the illegal regime ceases to exist, the *raison d'être* of the obligation disappears. As a matter of law, the post-transition regime should not be bound by the obligation of non-recognition, and thus it should not be prevented from giving retroactive effect to the acts of the illegal regime that non-recognition failed to prevent. Equally, however, the post-transition regime should not be held bound by the effectiveness of the illegal regime, and thus should not be obligated to give effect to acts that non-recognition

[31] This is the case of practically all secessions, since the law of the parent state usually prohibits secession. E.g. on the American Constitution see *Texas* v. *White* (1868); the attempted secession of Katanga was in violation of the Loi Fondamentale of the Congo: Dugard, *Recognition and the United Nations*, 88. The absence of a prohibition does not mean that the parent state would peacefully accept secession, of course. James Crawford, 'State Practice and International Law in Relation to Succession' (1998) 69 *British Yearbook of International Law* 85, 85.

[32] E.g. Henry Cattan, *Palestine and International Law* (London: Longman, 1973); Nathan Feinberg, *The Arab–Israel Conflict in International Law* (Jerusalem: Hebrew University, 1970), particularly 71–79.

has failed to prevent. In principle, the post-transition regime should be able to decide whether and to what extent to revert to the situation that prevailed prior to the emergence of the illegal regime.

If the post-transition regime opts to adapt law to facts by giving blanket effect to the acts of the illegal regime, it may avoid most practical and normative problems, although where the acts of the illegal regime were illegal for reasons other than the regime's status, the post-transition regime would still have to address that illegality. If, on the other hand, the post-transition regime opts to return to the legal *status quo ante*, its ability to do so may be constrained by the normative consequences of factual changes that have taken place. International law at times gives effect to such changes through the protection of third parties' reliance and through international human rights law.

The focus of this book is on the manner in which the tension between the illegality of the regime and its effectiveness informs the law and policy of post-transition regimes. To what extent can the post-transition regime reverse the factual situation to put it back in line with the law? To what extent do post-transition regimes attempt to do so? How do the interests of third parties play into the equation? Does international human rights law affect the post-transition regime's freedom of action? On the basis of doctrinal analysis and practice review, this book seeks to contribute a response to a more general question: whether, overall, transition from an illegal regime is substantively different from an ordinary transition from a legal regime, and, by implication, whether the obligation of non-recognition is an effective tool of international legal enforcement.

This book examines six instances of transition following lengthy periods of non-recognition of illegal regimes. These instances are, in chronological order: (1) the purported annexation of the Baltic states by the USSR (1940–1991); (2) the purported statehood of Rhodesia under the Ian Smith regime (1965–1980); (3) South Africa's administration in Namibia (1966–1990); (4) the purported statehood of the South African homeland states Transkei, Bophuthatswana, Venda and Ciskei (collectively referred to as the TBVC) (1976–1994); (5) the purported annexation of Timor-Leste by Indonesia (1976–1999);[33] and (6) the purported statehood of the Turkish Republic

[33] For convenience, the names Namibia and Timor-Leste are used also with respect to the periods prior to independence, during which the territories were referred to as South West Africa and East Timor (or Timor Timur) respectively.

of Northern Cyprus (TRNC) (since 1983), which persists at the time of writing.[34]

The main criterion for choosing these cases was that an obligation of non-recognition in response to a violation of international law was (or is) generally considered to exist in their respect, and that a policy of non-recognition was instituted in practice. With regard to Rhodesia, Namibia, the TBVC and the TRNC, the illegality of the regimes and the obligation of non-recognition were prominently declared in international fora, and a policy of non-recognition was instituted and implemented. The situation is different with regard to the Soviet annexation of the Baltic states and the Indonesian annexation of Timor-Leste. In both cases, the illegality of the annexation was never formally declared, nor was a policy of non-recognition instituted on a collective basis. Indonesia's intervention in Timor-Leste was a matter of concern in the UN until 1982, although apart from deploring the violation of Portuguese Timor's territorial integrity,[35] the UN has never referred directly to the illegality of the annexation. For obvious reasons, the Soviet annexation of the Baltic states was also never even put to debate in the UN. These cases are nonetheless pertinent in view of the convergence of three factors. First, the obligation of non-recognition is triggered directly by the violation of the peremptory norm; it does not depend on any formal declaration. Difficulties of analysis can arise when that obligation is not fully complied with, but with respect to both the Baltic states and Timor-Leste, this difficulty is mitigated by the second factor, namely the practice of non-recognition on the part of many states, which can be seen as confirmation that they considered the annexations illegal.[36] Third, and most importantly for present purposes, the post-transition regimes in both cases acted on the premise that their territories had previously been subject to an illegal regime.

This work does not provide an exhaustive catalogue of territorial regimes that were, or are still, denied recognition because of their illegality. Conspicuously absent from its coverage are Manchukuo, the Japanese puppet state established in China's Manchuria in 1932; Iraq's purported annexation of Kuwait in 1990; Israel's claims of sovereignty over Jerusalem since 1967 and over the Golan Heights since 1981;[37] and Western Sahara's status under Moroccan control since 1975.

[34] For the reasons for including the TRNC in this work despite the fact that no transition has yet occurred, see Chapter 2 below.

[35] UNGA Resolution 3485(XXX) (12 December 1975).

[36] See Chapter 2 below.

[37] Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84 *American Journal of International Law* 44, 67; Stephen M. Schwebel, 'What