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DEVELOPING THE PRINCIPLE OF NON-RECOGNITION

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Developing the Principle of Non-recognition

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In an attempt to ensure enforcement of law, international bodies have developed a practice of collective non-recognition in response to serious violations of international law. This Article seeks to bring some clarity to the practice of non-recognition. Through analysis of International Court of Justice cases and State practice, the Article demonstrates a legally binding, but not acknowledged shift in the law that governs non-recognition. Then, moving beyond strict legal analysis, the Article expresses policy concerns with the current legal status of the obligation and proposes how States should legally respond.

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I. INTRODUCTION

Laws can grant privileges or create obligations, and, in either case, the law sets the limit of permissible action.[1] Since men are not angels but social beings, a successful legal system must address how members are to behave when they confront violators.[2] In the international legal system, where there is no single functioning legal enforcer, States' need for guidance is all the greater.[3] With over one hundred and fifty members in the international community, of which many of which have sizable militaries and economic power, there looms the danger that a local dispute could become internationalized if the law deputizes all States.[4] However, labeling all States that are aware of violations as innocent bystanders, who are not permitted to intervene, is no less troublesome.[5] While such an approach may restrain conflict from spreading, it does so at the cost of handicapping enforcement and thereby institutionalizing injustice.[6]

Confronted with this reality and trying to ensure enforcement of the law without multiplying conflicts, international bodies developed a practice of collective non-recognition in response to serious violations of international law.[7] For example, in response to Japan's illegal invasion of Manchuria and establishment of the puppet State of Manchukuo in 1931, the Assembly of the League of Nations declared that it was "incumbent upon the Members of

1. *See, e.g.*, Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 1, 2 (2011) ("Private law presents itself in normative language. Judicial decisions in private law cases are replete with references to 'duties,' 'obligations,' 'rights,' 'wrongs' and so on. This language presumes that private law tells citizens how they ought to behave. It is striking, therefore, that contemporary legal theorists often explain and evaluate private law with little, if any, reference to normativity.").

2. *See, e.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1801-02 (2009) (alteration in original) ("[L]egal systems solve the problem of 'uncertainty' by providing institutions and procedures for resolving what counts as law, 'either by reference to an authoritative text or to an official whose declarations on this point are authoritative.' Hart famously described how mature legal systems accomplish this task through 'secondary rules' of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated.").

3. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 427 (2000) ("Violations weaken the international legal system and are self-defeating, at least over time.").

4. *See* Goldsmith & Levinson, *supra* note 2, at 1793.

5. *See infra* Part IV.A.

6. *See infra* Part IV.A.

7. JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 24 (1987).

the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[8] Similarly, after the minority white government of Southern Rhodesia unilaterally declared independence from the United Kingdom, the Security Council called for all States not to recognize, render assistance to, or entertain diplomatic or other relations with Rhodesia.[9] During the last fifty years, the Security Council called upon all States to not recognize Iraq's declaration of an eternal merger with Kuwait,[10] and scholars have debated the principle of non-recognition in relation to current events in Ukraine as well as Georgia.[11]

This Article seeks to bring some clarity to the principle of non-recognition. First, through analysis of International Court of Justice ("ICJ" or "Court") cases and State actions, the Article traces the development of the principle of non-recognition.[12] Second, with this development delineated, the Article demonstrates a legally binding, but not acknowledged, shift in law.[13] This shift is from a principle that applied to all States only after an authoritative determination was made to a principle that applies when certain objective requirements are met.[14] Given the long history of the principle and its ongoing functionality, it is likely the shift in

8. *Id.* at 30. Some have questioned the Manchuria Incident as an example of states practicing the obligation of non-recognition. *See, e.g.*, H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (AMS Press 1978) (1947) [hereinafter LAUTERPACHT, RECOGNITION].

9. S.C. Res. 216, ¶¶ 1-2 (Nov. 12, 1965). The use of the term "illegitimate authority" in the prohibition may seem tied to the illegitimacy of the Rhodesian government and not the illegitimacy of the State; however, it has been convincingly argued that this interpretation is incorrect. DUGARD, *supra* note 7, at 93-94.

10. S.C. Res. 662, ¶ 2 (Aug. 9, 1990).

11. *See, e.g.*, Anna Dolidze, *Ukraine Insta-Symposium: Potential Non-recognition of Crimea*, OPINIO JURIS (Mar. 17, 2014, 11:29 PM), http://opiniojuris.org/2014/03/17/ukraine-insta-symposium-potential-non-recognition-crimea/.

12. *See infra* Parts II.B and III.B.

13. *See infra* Part II.

14. *See, e.g.*, James Crawford, Trades Union Cong., *Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories* 1, 16, ¶¶ 40-41 (Jan. 24, 2012), http://www.tuc.org.uk/sites/default/files/tucfiles/ (arguing that the *erga omnes* obligations identified in the *Wall Case* do not compel states to behave in a particular way) [hereinafter Crawford]; Alison Pert, *The "Duty" of Non-recognition in Contemporary International Law: Issues and Uncertainties*, 2014 CHINA (TAIWAN) Y.B. INT'L L. & AFF. 1, 13 (2014) (focusing primarily on the ILC serves to demonstrate that the obligation depends upon an authoritative determination). *See also* Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 99, 121-22 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2005) (alteration in original) ("The first difficulty [of the principle of non-recognition] is knowing when the obligation will arise."). Then, without reference to the *Wall Advisory Case* or any other binding source, Talmon correctly concluded that the obligation does not legally depend upon an authoritative determination. *Id.*

law will be extended to other contexts.[15] Thus, this Article moves beyond strict legal analysis to expose policy concerns with the current legal status of the obligation.[16] Finally, the Article proposes that the international community should legally respond to the current status by adopting a moderate approach to non-recognition.[17] This moderate approach would allow States to justify their own actions if the requirements of the non-recognition obligation are met, but it does not require a State to act until an authoritative determination is made.[18]

This Article is not the first effort to bring order to the principle of non-recognition. In an attempt to provide a codified rule for States, the International Law Commission's (ILC) 2001 Report on The Responsibility of States for Internationally Wrongful Acts ("Report") declares, "[n]o State shall recognize as lawful a situation created by a serious breach. . .nor render aid or assistance in maintaining that situation."[19] However, despite the ILC's monumental effort to codify third-party States' obligations, the requirements which stem from the obligation remain unclear, as do the circumstances in which the obligation arises.[20]

First, an obligation may be negative or positive.[21] A negative obligation requires States not to perform certain acts, while a positive obligation

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15. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. Rep. 136, 200-01, ¶¶161-62 (July 9) [hereinafter *Wall Case*]. The "shift in law" discussed below takes place in the highly controversial ICJ advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Wall Case*"), yet it does not follow that others will extend the case to other contexts. *See id.* First, the opinion provides no legal justification for restricting the ICJ's decision solely to Israel. *See id.* Second, as discussed below, many scholars prior to the *Wall Case* advanced its conception of the principle of non-recognition. *See id.* Thus, the ICJ's shift in the law has academic support. *See id.* More importantly, there is no shortage of entities seeking recognition or arguing against recognition, which stands to benefit from a proper understanding of the case. As Sir Arthur Watts writes, "Palestine is in many respects *sui generis*, there are passages in the ICJ's treatment of the status of Palestine and the Palestinians, either expressly or by implication, which will resonate with other entities." Sir Arthur Watts, *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, THE MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶ 45 (2007), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e150. With the prospect of benefiting from the *Wall Advisory Case*, these entities will marshal the case to their respective advantage. *See Wall Case*, 2004 I.C.J. Rep. at 200-01, ¶¶161-62. Thus, if the shift brought about in the *Wall Case* does not have lasting significance in international law, the reason will be political—not legal. *See id.* In any event, even if others do not apply the holding of the *Wall Case* in other cases, it is important to delineate the political possibilities from the legal logic behind the cases. *See id.*

16. *See infra* Part III.A.

17. *See infra* Parts IV.A-B.

18. *See infra* Part IV.A.

19. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 53-54 (2001) [hereinafter Report] (alteration in original).

20. *See id.*

21. *See, e.g.*, JEAN-FRANÇOIS AKANDJI-KOMBE, COUNCIL OF EUROPE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2007) [hereinafter POSITIVE OBLIGATIONS].

instructs States on what ought to be done.[22] With regard to the requirements following from the principle of non-recognition, the ILC states that the principle imposes a "duty of abstention" and consists of a requirement of non-recognition as well as its "logical extension" not to render aid or assistance in maintaining the situation.[23] The ILC clearly holds that the obligation of non-recognition imposes a negative obligation.[24] However, this description does little to clarify the content of the negative obligation.[25] The ILC only provides limited explanation of what non-recognition entails and no boundaries are drawn on what counts as "assisting to maintain an illegal situation."[26] Nor does the ILC explain its non-elaboration on the content of the obligation.[27] In fact, the lack of clarity provided by the Report in part led States to issue divergent comments on the codification of a principle of non-recognition.[28]

Second, the concept of negative and positive obligations addresses the content of an obligation, but is silent on when such an obligation arises.[29] Under a declarative approach, no obligation exists absent an authoritative body recognizing that the obligation applies.[30] At the other end of the spectrum, a constitutive approach to the obligation of non-recognition holds that the obligation is "self-standing"—applying to all States once certain objective requirements are met.[31] In between these two extremes, the moderate approach allows a State to justify its own actions if the requirements of the obligation are met, but it does not require a State to act until an authoritative determination is made.[32]

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22. *See, e.g.*, *id.*
23. Report, *supra* note 19, at 53-54, 287, 291.
24. *Id.* at 289.
25. *Id.*
26. *Id.* at 287, 289, 459.
27. *See id.*
28. *State Responsibility Comments and Observations Received from Governments*, 2 Y.B. Int'l L. Comm'n 64, 70, U.N. Doc. A/CN.4/515, 64, 70 (concluding that the obligation of non-recognition added nothing of substance to the Report and therefore suggested deleting it). In contrast, the United States felt more limitations needed to be placed on the obligation and lamented that the obligation of non-recognition, along with the other parts of Articles 41 and 42, were inappropriate given the existence of the Security Council and the International Criminal Court. *See id.* at 69. France and the United States were not alone in expressing concern regarding the content of the obligation. To clarify the section of the Report, Spain complained that the ILC should "streamline the content of the obligation not to recognize as lawful the situation created by the breach[.]" *See id.* at 64, 70. Reading the same document, the United Kingdom came to a different conclusion, complaining that the obligation of non-recognition in the Report in relation to other rules presented was an "inflexible rule" which wrongly mandated "the application of the same approach in every conceivable case . . . ." *See id.* at 67.
29. *See, e.g.*, POSITIVE OBLIGATIONS, *supra* note 21, at 11.
30. Most obligations do not require an authoritative determination; however, a third party obligation to intervene deviates from bilateralism, differentiating it from most obligations. *See* Int'l L. Ass'n, *Sofia Conference: Recognition and Non-Recognition in International Law* (2012).
31. *Id.*
32. *Id.*

The Report stipulates that, "[n]o State shall recognize as lawful a situation created by a serious breach."[33] The Report does not inform States who determines when a violation counts as a serious breach.[34] The Report's commentary discussion of countermeasures and invocations of responsibility by non-injured States also fails to inform on this issue.[35] The Report's commentary does provide examples of non-recognition, all of which involve a determination by the Security Council or the ICJ.[36] However, it would be a mistake to derive rules by inference from a list of examples. Thus, States are left wondering whether an obligation not to recognize arises once a relevant violation is identified or whether it requires a determination of illegality by an impartial authoritative body.[37] Furthermore, even assuming the requirements of non-recognition are not automatic, the ILC Report still does not inform States when the obligation may be invoked by a State to justify its own actions.[38]

Subsequently, scholars have tried to clarify the content of the obligation, but have come short to differing degrees. Alison Pert submits that, in any given situation, the details of what the obligation practically entails can be determined only with a specific resolution.[39] Martin Dawidowicz found that tribunals and political organs of the United Nations have been reluctant to provide general rules of content.[40] Similarly, Eugene Kontorovich argued that the ICJ, in discussing the principle of non-recognition, relies heavily on case-sensitive Security Council resolutions.[41] However, the Article demonstrates that past ICJ decisions go beyond concrete cases to provide three negative requirements that follow from an obligation of non-recognition, and consciously choose to provide only minimum requirements because of the nature of the obligation.[42] While a few scholars have correctly identified some of the content of the negative obligation as argued in Part II, they incorrectly object to the inclusion of other requirements discussed in this Article.[43]

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33. Report, *supra* note 19, at 53-54 (alteration in original).
34. *See id.* at 53.
35. *See id.* at 286-87.
36. *Id.* at 288-89.
37. *See id.* at 286-87.
38. *See* Report, *supra* note 19, at 286-87.
39. Pert, *supra* note 14, at 22.
40. Martin Dawidowicz, *The Obligation of Non-recognition of an Unlawful Situation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 677, 686 (James Crawford et al. eds., 2010) [hereinafter Dawidowicz].
41. Eugene Kontorovich, *Economic Dealings with Occupied Territories,* 53 COLUM. J. TRANSNAT'L. L. 584, 589-90 (2015).
42. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, 55-58, ¶¶ 121-33 (June 21) [hereinafter *Namibia Case*].
43. *See, e.g.*, Talmon, *supra* note 14, at 105-06; *see also infra* Part II.

With regard to when the obligation arises, many scholars have identified when the obligation applies, but have failed to acknowledge that their conclusion amounts to a conceptual revolution made legally defensible by recent events.[44] As early as Hersch Lauterpacht, scholars have argued that deductive reasoning mandates that all States comply with the principle of non-recognition—even absent an authoritative determination.[45]. Through step-by-step analysis, this Article shows that not logical reasoning, but ethical wishes ground this defense of a self-executing principle.[46] Other scholars[47] seem to rely in part on Judge Skubiszewski who, in the *East Timor*[48] case, posited that the principle "is self-executory."[49] While these scholars correctly recognize that the ICJ implicitly adopts this view, they miss the fact that this implicit self-executing understanding did not occur until the highly controversial ICJ advisory opinion *Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory* ("*Wall Case*").[50]

To bring clarity to the principle, this Article divides the modern development of the principle of non-recognition into two time periods—pre and post-*Wall Case*. Part II analyzes ICJ cases, States' votes in the United Nations, and scholarly arguments pre-*Wall Case* to develop a clear understanding of the past application of the principle.[51] Part III introduces the ICJ's recent decision in the *Wall Case* and highlights its radical holding that the obligation of non-recognition applies to all States even absent an authoritative determination.[52] Finally, Part IV moves beyond strict legal analysis to suggest how the international community should respond to the change in the principle.[53]

II. PRE-WALL

A. Instituting an Obligation

With regard to who may institute a requirement of non-recognition prior to the *Wall Case*, Court decisions and State opinion made clear that a binding determination by a competent organ of the United Nations created

44. *See, e.g.*, Crawford, *supra* note 14, at 16.

45. H. LAUTERPACHT, *The Problem of Non-Recognition: The Principle of Non-recognition in International Law*, *in* INSTITUTE OF PACIFIC RELATIONS, LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT 129-30, 139-40 (1941) [hereinafter LAUTERPACHT, *Problem*].

46. *See infra* Part II.A.3.

47. *See, e.g.*, Dawidowicz, *supra* note 40, at 683.

48. Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90 (June 30).

49. *East Timor*, 1995 I.C.J. at 262-63, ¶ 125 (June 30) (dissenting opinion by Skubiszewski, J.).

50. *See* 2004 I.C.J. at 136, 138, 199, ¶¶ 155, 157.

51. *See infra* Part II.

52. *See infra* Part III.

53. *See infra* Part IV.

an obligation of non-recognition.[54] State opinion further clarified that States believed they could justify their own actions based on the principle of non-recognition, and the principle of non-recognition only applied when a serious breach of international law occurred.[55] While scholars advanced deductive arguments for accepting a constitutive principle of non-recognition, these deductive arguments received little attention from either the States or the ICJ and ultimately failed to establish a self-executing alternative to the declarative norm.[56]

1. The Security Council and the ICJ

There is strong support for the conclusion that prior to the *Wall Case* "[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal"[57] may create an obligation of non-recognition.[58] In particular, decisions of the ICJ recognized Security Council authority to do so and implied that the Court may likewise impose the obligation under appropriate circumstances.[59]

In the *Namibia Case*,[60] referring to Security Council 276 (1970) and other resolutions, the Court declared that "[a] binding determination made by a competent organ of the United Nations . . . cannot remain without consequence."[61] As a result, the ICJ then turned "to the legal consequences arising for States from the continued presence of South Africa in Namibia . . . ."[62] The ICJ held States "are under [an] obligation to recognize the illegality of South Africa's presence in Namibia . . . ."[63]

54. *See, e.g.*, *Namibia Case*, 1971 I.C.J. at 54, ¶ 117.
55. *Id.*
56. *See, e.g.*, Talmon, *supra* note 14, at 121-22.
57. *Namibia Case*, 1971 I.C.J. at 54, ¶ 117 (alteration in original).
58. *Id.*
59. *See, e.g.*, *id.*
60. *Id.*
61. *Id.* (alteration in original).
62. *Namibia Case*, 1971 I.C.J. at 54, ¶ 117. To explain how Resolution 276 (1970) and other resolutions, which were not decisions taken under Chapter VII of the UN Charter, could create a binding determination that South Africa's actions were illegal, the Court turned to Articles 24 and 25 of the Charter. *Id.* at 51-54, ¶¶ 109-16 (noting that Article 24(2)'s reference to specific powers of the Security Council under certain chapters of the Charter did not preclude the existence of a general power to discharge the responsibility of maintaining peace and security conferred in Article 24(1)). Therefore, since the determination that South Africa's actions were illegal in relation to the maintenance of peace and security, Article 24(1) provided the legal basis for the Resolution. *Id.* at 51-52, ¶¶ 109-10. Having identified the legal basis for the Security Council's actions, the Court reasoned it would be "an untenable interpretation to maintain that [States] would be free to act in disregard of [the finding] . . . ." *Id.* at 52, ¶ 112 (alteration in original). This led the Court to conclude that the Security Council's determination gained binding status under Article 25. *Id.* at 52-53, ¶¶ 112-14. The Court concluded that "[a] binding determination made by a competent organ of the United Nations . . . cannot remain without consequence" and turn to "the legal consequences arising for States from the continued presence of South Africa in Namibia." *Id.* at 54, ¶ 117 (alteration in original).
63. *Id.* at 133.

Similarly, in the *Case Concerning East Timor*, the Court's decision suggests that the Security Council may declare an obligation of non-recognition and that the Court may review a Security Council resolution to determine if the resolution instituted an obligation of non-recognition.[64] After Indonesia took *de facto* control of East Timor, Australia entered into a contract with Indonesia regarding East Timor on December 11, 1989.[65] On February 22, 1991, Portugal sued Australia for failing to observe: (1) the obligation to respect Portugal as the administering power; and (2) the right of the people of East Timor to self-determination.[66] The Court began its decision by noting that all parties agreed that the ICJ could not entertain the case if a ruling required the Court to determine the rights and obligations of a third party that had not granted jurisdiction to the Court.[67] Since the legality of Australia's action required a ruling on the legality of Indonesia's actions, a matter beyond the Court's jurisdiction in Indonesia's absence, the Court largely avoided the principle of non-recognition.[68] However, from the Court's decision it appears the ICJ assumes that the United Nations could have issued a resolution prohibiting recognition.[69]

Furthermore, if only a jurisdictional issue prevented the ICJ from finding an obligation, in principle the ICJ could find an obligation.[70] The Court made it clear in the *Case Concerning East Timor* that it could not rule on the lawfulness of a third State's conduct in the absence of that State's

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64. *See East Timor*, 1995 I.C.J. at 273, ¶ 156.

65. *Id.* at 98, ¶ 18.

66. *Id.* at 92, ¶ 1.

67. *Id.* at 101, ¶ 26.

68. *Id.* at 104-05, ¶ 34. One notable exception is Judge Skubiszewski's dissenting opinion. He wrote, "the obligation not to recognize a situation created by the unlawful use of force does not arise only as a result of a decision by the Security Council ordering non-recognition. The rule is self-executory." *Id.* at 263, ¶ 125 (dissenting opinion by Skubiszewski, J.).

69. *See East Timor*, 1995 I.C.J. at 103-04, ¶¶ 31-32. It is a mistake to conclude from this case that the ICJ must pass judgment on the obligation for there to be a binding obligation of non-recognition. It is also a mistake to conclude that non-recognition imposable against third party States in judicial proceedings cannot emanate from the U.N. political organs alone. *But see* Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273, 309 (2000). As for the first erroneous conclusion, although the ICJ did review the resolutions to determine whether it created an obligation of non-recognition, this was because the resolutions were evidence in a judicial proceeding, not because the resolutions could not have had a binding effect prior to a Court reviewing them. *See East Timor*, 1995 I.C.J. at 103-04, ¶¶ 31-32. Similar reasoning explains why the second conclusion is also incorrect. *See id.* When the ICJ reviewed the resolutions, it was examining if, as Portugal claimed, the Security Council passed resolutions that were imposable against third party States. *See id.* The Court determined that the resolutions did not clearly mandate an obligation of non-recognition. *See id.* This finding, and not concerns that mere literal interpretation of the resolution would violate the third party principal, prevented the Court from concluding there was no obligation of non-recognition. *Id.* at 119 (separate opinion by Shahabudden, J.) (arguing that interpreting the resolutions as required to determine an obligation of non-recognition would violate the third party principle).

70. *See East Timor*, 1995 I.C.J. at 104-05, ¶ 34.

consent.[71] Therefore, without the relevant act already being determined as illegal by the Security Council or the violating State participating in the case, the Court cannot find an obligation of non-recognition.[72] However, if the jurisdictional issues were removed, the ICJ could, on its own, hold that the obligation of non-recognition existed.[73]

2. States' Views of the Obligation of Non-recognition[74]

The ICJ cases hold that a binding determination made by a competent organ may lead to an obligation of non-recognition; however, the Court is silent on whether the Security Council's resolution is necessary for non-recognition to be obligatory.[75] Nevertheless, States believe they can justify their own actions based on the principle of non-recognition. [76]

i. States' Votes in the U.N.

On November 11, 1965, the white minority government of Rhodesia unilaterally declared independence from the United Kingdom.[77] The Security Council condemned the unilateral declaration, calling upon States

71. *Id.* at 101, ¶ 26 ("The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction.").

72. *Id.*

73. *See id.* at 104-05, ¶ 34.

74. Most scholars and the ICJ understand the ICJ Statute description of custom as "evidence of a general practice accepted as law" to posit two necessary elements for custom: (1) general practice; and (2) *opinio juris*. *See* North Sea Continental Shelf (Ger. v. Den.), Judgment, 1969 I.C.J. Rep. 3, 44, ¶ 77 (Feb. 20); Int'l L. Ass'n, *London Conference*, *Committee on Formation of Customary (General) International Law*, 6-7, ¶¶ 9-10 (2000). With two elements required for the formation of customary international law, the ICJ in subsequent cases developed and applied two approaches to such law. Under the traditional approach, State practice in the form of physical actions provides the primary consideration in determining customary international law. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757-58 (2001). The role of *opinio juris*, the belief that that there is a legal obligation, only distinguishes between legal obligations and practices not occurring pursuant to legal obligations. *See id.* In contrast, the modern approach, *opinio juris* in the forms of statements and declarations, is primary. *See id.* Since the modern approach relies on statements rather than actions in determining custom, traditional evidence of State practice plays a secondary role, if a role at all. *See id.*; *see also* Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L. J. 87, 97-99 (1991). The Article does not take sides in the debate between traditional and modern approaches to customary law, but instead allows the reader to decide which view is preferable. *See generally id.*

75. Individual judges argue over whether the principle is self-executing, but the Court does not discuss whether the obligation can be self-executing. *Compare East Timor*, 1995 I.C.J. at 262-23, ¶ 125 (dissenting opinion by Skubiszewski, J.), *with Namibia Case*, 1971 I.C.J. at 168 (separate opinion by Dillard, J.).

76. *See generally East Timor*, 1995 I.C.J. 90 (the examination of State views is not supposed to represent an authoritative study on State practice of non-recognition).

77. G.A. Res. 20/2022 (XX), Question of Southern Rhodesia, at 54 (Nov. 5, 1965).

not to recognize Rhodesia or provide assistance to the illegal regime.[78] Subsequently, the General Assembly passed a resolution that condemned:

> activities of those foreign financial and other interests which, by supporting and assisting the illegal racist minority regime in Southern Rhodesia, are preventing the African people of Zimbabwe from attaining freedom and independence . . . and calls upon Governments of the States concerned to take all necessary measures to bring to an end such activities . . . .[79]

Rhodesia is not an isolated case of the General Assembly encouraging States not to recognize an illegal act prior to a binding determination of an obligation of non-recognition.[80]

Like the Security Council, the General Assembly has adopted non-binding resolutions calling on States not to recognize the creation of illegal States. For example, in 1974, Turkey invaded Cyprus and a Turkish Federated State of Cyprus was established in the part of the island controlled by Turkey.[81] In 1983, the Assembly of the Turkish Federated State of Cyprus declared the establishment of a new State, the Turkish Republic of Northern Cyprus.[82] Responding to this new situation, the Security Council adopted a non-binding resolution that called upon "all States not to recognize any Cyproit State other than the Republic of Cyprus"[83] and another non-binding resolution that condemned Turkey's exchange of ambassadors with the new State and again called on all States not to recognize the purported State.[84]

ii. Analyzing How States Vote

States' voting practices strongly suggest that States believe they can justify their own actions based on the principle of non-recognition prior to a binding determination.[85] The resolutions examined above encourage States not to recognize particular acts even prior to a binding resolution.[86] This means that if States could fulfill the requirements of non-recognition prior

78. S.C. Res. 216, ¶¶ 1-2 (Nov. 12, 1965).
79. G.A. Res. 21/2151 (XXI), Question of Southern Rhodesia, ¶ 5 (Nov. 17, 1966) (alteration in original).
80. *See, e.g.*, G.A. Res. 30/3411 (XXX), Policies of Apartheid of the Government of South Africa, ¶¶ 8-13 (Dec. 10, 1975).
81. *See, e.g.*, G.A. Res. 541, at 15 (Nov. 18, 1983).
82. *Id.*
83. S.C. Res. 541, ¶ 7 (Nov. 18, 1983).
84. S.C. Res. 550, ¶ 3 (May 11, 1984).
85. *See* Talmon, *supra* note 14, at 121.
86. *See, e.g.*, S.C. Res. 550, *supra* note 82, ¶ 3; G.A. Res. 541, *supra* note 81, ¶ 7.

to a binding determination, they should do so.[87] It would make little sense for the members of the General Assembly or the Security Council to encourage such behavior without believing it to be legal.[88] Thus, States appear at a minimum to adopt the moderate approach; this approach allows individual States to justify their own actions based upon the principal, but maintains, absent an authoritative legal and factual determination, the invocation that does not impact third parties.[89]

Some may wish to infer more from States' voting practices and conclude States view non-recognition as a constitutive obligation.[90] Under this reasoning, States called on each other and condemned individual States that recognized illegal acts.[91] They did so prior to an authoritative determination of non-recognition while armed only with votes that resulted in non-binding resolutions calling for non-recognition.[92] States, so the reasoning goes, not only believe that they can justify their own actions, as well as call on others not to recognize, but they also believe that they can bind others not to recognize as well.[93]

This conclusion goes too far. In voting for these resolutions, States express their belief that they may invoke the principle of non-recognition to justify their own actions, while also indicating that they believe they can signal their desire that other States not recognize the illegal act.[94] However, to conclude from States calling on other States to behave a certain way that States believe they can bind other States to behave that way is a stretch.[95] The act of calling on States may be expressing a normative call without also expressing a legal claim that States, absent an authoritative determination, have an obligation not to recognize.[96] With voting practice consistent with the moderate approach and without strong reason to take the further constitutive step, voting practice supports a moderate principle.[97]

This reasoning is bolstered by the European Court of Justice's determination that Security Council Resolution 541 (1983), which called on States not to recognize the Turkish Republic of Cyprus but was not passed

87. *See* Talmon, *supra* note 14, at 121.
88. *See id.* at 121-22.
89. *See id.*
90. *See, e.g.*, *id.* at 121-22 ("Many, if not most, of the calls for non-recognition have been made in non-binding resolutions of the General Assembly and in statements of the President of the Security Council, which could neither authoritatively determine the existence of a serious breach nor create an obligation not to recognize a situation as lawful[,]" but Talmon concludes this is not a prerequisite for the obligation of non-recognition to arise.) (alteration in original).
91. *See id.* at 122-23.
92. *See* Talmon, *supra* note 14, at 122-23.
93. *See id.*
94. *See id*.
95. *See id*.
96. *See id.* at 122.
97. *See* Talmon, *supra* note 14, at 122.

under Article VII, is nonbinding in nature.[98] Thus, the nonbinding resolutions do not demonstrate that States view the obligation of non-recognition as applying independently of an authoritative determination.[99]

3. An Obligation Absent an Authoritative Determination: Failed Philosophical Defenses

With analysis of ICJ decisions providing no clear support for a constitutive theory of the principle of non-recognition and States' votes only definitively revealing, States may rely on the principle absent an authoritative declaration.[100] Deductive reasoning is the last resort of proponents of a constitutive approach, and deductive arguments have received little attention from States or the ICJ in recent years. Thus, this section only analyzes and demonstrates the ultimate failure of one of the early and more famous advocates of deductive arguments, as well as what appears to be the current dominant logical reason for why, absent an authoritative determination, an obligation exists for all States not to recognize certain illegal acts.

With his unique style of progressive interpretation, Hersch Lauterpacht, former member of the United Nations' International Law Commission and ICJ judge,[101] offers a deductive defense of a constitutive obligation of non-recognition.[102] First, Lauterpacht introduces the fundamental principle of international law that an illegal act cannot lead to a legal right for the wrongdoer (*ex injuria jus non oritur*).[103] Defending this premise, Lauterpacht does not deny the contrary principle that law arises from fact (*ex factis jus oritur*).[104] Nevertheless, Lauterpacht points out that just as the laws of grammar are not wholly dependent on our compliance with them,

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98. Case 204/86, Greek Republic v. Council, 1988 E.C.R. 5337, 5353, ¶ 13. In this case, Greece first argued that the Security Council resolution called "upon all States not to recognize any Cypriot State other than the Republic of Cyprus." *Id.* at 5339, ¶ 3. It then reasoned that since the Turkish Government recognized the Turkish Republic of North Cyprus, the European Community "cannot grant it the special aid without ignoring that breach and thereby itself violating an obligation imposed on it under a measure which is binding on it by virtue of the principle of substitution." *Id.* at 5352, ¶ 13. While there appear to be many problems with Greece's argument, the ECJ rejected Greece's argument because the resolution was not binding. *Id.* at 5353, ¶ 13 ("It is manifest from the wording of the operative part and from the debates and the declarations of vote prior to the adoption of Resolution No[.] 541 that the resolution does not constitute a 'decision' and is therefore not a binding measure, but a measure in the nature of a mere recommendation.").

99. *See, e.g.*, *id.* at 5353, ¶ 13.

100. *See* Talmon, *supra* note 14, at 122-23.

101. This style of interpretation of international law is guided by the proposition that "international law should be functionally oriented towards both the establishment of peace between nations and the protection of fundamental human rights." Patrick Capps, *Lauterpacht's Method*, 82 BRIT. Y.B. INT'L L. 248, 249 (2012).

102. *See* LAUTERPACHT, *Problem*, *supra* note 45, at 133.

103. *Id.* at 133, 139.

104. *Id.* at 142-43.

the validity of the laws of recognition are not dependent upon compliance in any individual case.[105] Second, Lauterpacht posits that without an international court endowed with obligatory jurisdiction to decide questions of recognition, States must act as judges.[106] From these two arguments, Lauterpacht seems to logically derive his self-standing obligation of non-recognition.[107]

However, Lauterpacht fails to provide a successful deductive argument for a self-standing obligation of non-recognition.[108] There are multiple ways to interpret the concept *ex injuria jus non oritur*; thus, it alone cannot justify the obligation of non-recognition. For example, applying the concept to non-recognition, it may only posit that illegal actions cannot be the source of a demand for recognition, but that States still remain free to confer recognition if they wish.[109] Thus, under this interpretation of the principle *ex injuria jus non oritur*, non-recognition would be consistent with the moderate and declarative approaches.[110]

Lauterpacht's second claim tries and fails to answer this challenge. Building on the proposition that States must act as judges in the absence of courts, it might be reasoned that since the international legal system does not yet have such judges, States must fully adopt the behavior of impartial judges when recognizing entities.[111] As impartial judges, States cannot, as proposed above, acknowledge a legal principle that prevents them from being required to recognize an entity but nevertheless recognize the entity for political reasons.[112]

Lauterpacht's second claim is grounded not in logical reasons, but in ethical wishes. In the absence of courts, Lauterpacht correctly observes that States must be allowed to issue judgments on the recognition of statehood, because to deny them this power would "result in an absurdity consisting in the duty of States to refrain from questioning the legality of actions of other States in any circumstances . . . ."[113] However, this reasoning only explains

105. *Id.* at 143.

106. *Id.* at 133.

107. *See* LAUTERPACHT, *Problem*, *supra* note 45, at 133. Lauterpacht was widely criticized for his broader theory of recognition and specifically for his arguments about non-recognition. For example, Josef L. Kunz, one of Lauterpacht's harshest critics, wrote that in his primary endeavors "it must be said in the interest of scientific truth, [Lauterpacht] has failed completely." Josef L. Kunz, *Critical Remarks on Lauterpacht's 'Recognition in International Law'*, 44 AM. J. INT'L L. 713, 714, 717-18 (1950) (alteration in original) (arguing that Lauterpacht failed because he did not support his theory with accurate examples of State practice). This Note's critique shows that Lauterpacht's argument fails logically as well.

108. *See* LAUTERPACHT, *Problem*, *supra* note 45, at 133.

109. *See id.* at 140.

110. *See* Talmon, *supra* note 14, at 122-23.

111. *See* LAUTERPACHT, *Problem*, *supra* note 45, at 133.

112. *See id.* at 133-34.

113. LAUTERPACHT, RECOGNITION, *supra* note 8, at 413.

why States must be able to not recognize prospective States; it says nothing about a State being obligated not to enter into an agreement with an entity that may have performed an illegal act.[114]

In contrast to Lauterpacht, today many scholars and the ILC associate the principle of non-recognition with a peremptory norm. For example, with regard to the obligation of non-recognition, the ILC states, "[t]his chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law."[115] Many who associate the principle with a peremptory norm simply assume that this implies that the binding nature of the principle does not depend upon an authoritative determination.[116] For example, after identifying non-recognition as grounded in peremptory norms, Dawidowicz writes, "[t]herefore, individual States are obligated . . . not to recognize certain unlawful situations; they do not require the approval of UN organs to justify their actions since this obligation is self-executory."[117] However, like Lauterpacht's argument, this line of reasoning fails.[118]

First, identifying the obligation of non-recognition with peremptory norms by the ILC and others is a mistake.[119] The ILC cites to the *Namibia Case* as authority, but the *Namibia Case* does not tie the obligation of non-recognition to a peremptory norm.[120] In the *Case Concerning East Timor*, Judge Skubiszewski narrowly predicted that the obligation of non-recognition of forcible acquisition of territory might develop into a peremptory norm.[121] However, in the *Wall Case*—the most recent ICJ case addressing the obligation of non-recognition—the majority, when discussing the obligation of non-recognition, focused not on peremptory

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114. *See id.*

115. Report, *supra* note 19, at 112 (alteration in original).

116. *See, e.g.*, Dawidowicz, *supra* note 40, at 683. In fact, a version of this assumption substituting peremptory with the concept of *erga omnes* seems to motivate the Court in the *Wall Case* discussed below. *See Wall Case*, 2004 I.C.J. at 196, ¶ 155. However, like the *peremptory* argument, the Court's reasoning in the *Wall Case* is flawed: an *erga omnes* obligation solely means it is an obligation owed to the community as a whole; however, the *Wall Case* states nothing about whether the obligation applies independently from an authoritative determination or if any State may invoke the obligation to justify its own behavior. *See* Crawford, *supra* note 14, at 16, ¶ 41 (agreeing with *erga omnes* obligations in part and noting, "Law does not compel those concerned to seek a remedy, even if they are entitled to do so.").

117. Dawidowicz, *supra* note 40, at 683 (alteration in original).

118. *See* Kunz, *supra* note 107, at 718.

119. *See* Report, *supra* note 19, at 115.

120. *See id.*

121. *See East Timor*, 1995 I.C.J. at 262-63, ¶ 125 ("The rule may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is a corollary, i.e., the principle of the non-use of force. In that hypothesis non-recognition would acquire the rank of a peremptory norm of that law . . . .").

norms, but on *erga omnes* obligations—obligations whose performance all States seem to have a legal interest in.[122]

Second, even if the obligation of non-recognition has a peremptory character, this does not shed light on whether the principle creates an obligation absent a binding determination.[123] A peremptory norm is an obligation owed by States to the community of States as a whole and from which no derogation is permitted.[124] It is not a norm that, by definition, is self-realizing.[125] In other words, even if the principle of non-recognition comes about after such a violation—and a State cannot choose to ignore the principle of non-recognition—the peremptory status of the obligation says nothing about who declares that the obligation applies to a specific situation.[126]

4. Marshalling the Principle; A Limitation

Votes in the United Nations and ICJ cases suggest a limitation on what may be cited as a reason for instituting an obligation of non-recognition and how States may explain a choice of non-recognition.[127] In justifying its findings, the ICJ focused on illegal territorial acquisitions and systematic racial discrimination.[128] The United Nations, in its resolutions, focused on similar principles.[129] This suggests that maximally the principle may be instituted when a serious breach of an *erga omnes* norm occurs.[130] More conservatively, this practice can be interpreted as allowing the institution of an obligation of non-recognition only if one of the peremptory norms referred to by the Security Council or the ICJ are violated.[131] An important implication of such recognition is that under the ICJ rulings and State practice, not all violations of international law may lead to an obligation of

122. *Wall Case*, 2004 I.C.J. at 199, ¶¶ 154-56.

123. *See* Report, *supra* note 19, at 112.

124. *See id.* at 56.

125. *See id.*

126. *See id.* This error in logical reasoning might explain why many academics have not acknowledged, as discussed below, the *Wall Case*'s radical declaration that the principle is binding absent an authoritative declaration. *See Wall Case*, 2004 I.C.J. at 196, ¶ 146. For these academics, the *Wall Case*'s declaration merely expressed an implication of the principle that the ICJ did not yet recognize (or at least formally acknowledge). *See id.*

127. Report, *supra* note 19, at 114 ("The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ.").

128. *See, e.g.*, Dawidowicz, *supra* note 40, at 685-86; *Wall Case*, 2004 I.C.J. at 171-72, ¶¶ 87-88; Report, *supra* note 19, at 127.

129. *See* Report, *supra* note 19, at 85.

130. *See id.* at 112 (ILC stipulates that an obligation may be instituted when a serious breach of a peremptory norm occurs).

131. *See* Report, *supra* note 19, at 56; *see also Wall Case*, 2004 I.C.J. at 171-72, ¶¶ 87-88.

non-recognition.[132] This might explain, in part, why despite the fact that Colonel Mu'ammar al-Qadhafi's nationalization of Nelson Hunts' oil operations was framed by international legal scholars as a violation of international law and should have been met with non-recognition,[133] no such action was taken.[134]

*5. An Example: Pre-*Wall Case*—The Obligation Arising*

The previously discussed ICJ cases and State voting in the United Nations provide two answers to the question of when an obligation of non-recognition arises. First, the analysis demonstrates that the obligation of non-recognition applies after an authoritative determination and may be instituted only when a particular type of breach of international law occurs.[135] Second, States' votes in the United Nations suggest many States believe they may determine at their own risk that the requirements of the principle of non-recognition should be fulfilled.[136]

These rules provide considerable guidance to States. Imagine a State called Aggressor illegally invades a State called Innocence and begins to build settlements in the occupied territory. Some of the most powerful States condemn Aggressor's action, but because of gridlock, no competent organ of the United Nations issues a determination condemning the act. Given the analysis above, it is clear what a third State, called Observer, must do to determine if it has an obligation of non-recognition.

At the outset, Observer must determine if there is a binding determination made by a competent organ of the United Nations that creates an obligation of non-recognition. As presupposed, no competent organ of the United Nations issues a determination condemning the act. Therefore, Observer could easily conclude there is no binding obligation. Prior to the *Wall Case*, this would have ended Observer's analysis of whether there was a binding obligation of non-recognition.

B. Content of the Obligation of Non-recognition

Prior to the *Wall Case*, international law acknowledged three minimum negative requirements and a limiting condition following from the

132. *See* Dawidowicz, *supra* note 40, at 686.

133. F.S.R., *Nationalization and International Law: Testimony of Elihu Lauterpacht, Q.C.*, 17 INT'L L. 97, 109 (1983).

134. Instead, Hunt was left "publishing notices in newspapers throughout the world claiming that the Libyan nationalization violated international law and threatening to sue anyone who bought [his] oil from Libya." Hunt v. Coastal States Gas Producing Co., 583 S.W.2d 322, 323 (Tex. 1979) (alteration in original).

135. *See* Dawidowicz, *supra* note 40, at 684.

136. *See id.* at 683.

obligation of non-recognition.[137] The Pre-*Wall* cases set only a minimum, because the nature of the obligation prevents codification of an extensive general list of requirements that follow from the obligation.[138] Still, by establishing three negative requirements, it could no longer be claimed that the obligation of non-recognition is satisfied by a mere formal declaration.[139]

1. Three Negative Requirements

A minimum of three negative requirements following from the obligation demonstrate that the obligation of non-recognition is not only a formality.[140] In 1966, the General Assembly of the United Nations adopted Resolution 2145 (XXI), in which it terminated South Africa's mandate over Namibia.[141] The General Assembly, however, lacked the necessary powers to ensure the withdrawal of South Africa and therefore requested the assistance of the Security Council.[142] The Security Council responded with Resolution 276 (1970) and other resolutions declaring South Africa's failure to withdraw illegal.[143]

On July 29, 1970, the ICJ was asked: "what are the legal consequences for States of the continued presence of South Africa in Namibia,

137. *See Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23.

138. *See id.*

139. *See id.*

140. *See id.* The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations stipulates that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal." G.A. Res. 25/2625 (XXV), annex, Declaration on Principles of International Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, at 123 (Oct. 24, 1970) (alteration in original). In drafting the Declaration and debating its meaning, many States opposed this wording, arguing that the phrase "as legal" allowed for unqualified non-recognition. Talmon, *supra* note 14, at 109 (citing U.N. GAOR, 23rd Sess., 81st-96th mtgs. at 43, Doc. A/AC.125/SR.81-96 (Oct. 21, 1968) (providing Mexico's concerns with including the modifying phrase). The States that opposed including the phrase "as legal" feared that such language would allow States to simply deny *de jure* recognition to the entity in question while continuing to deal with it. *See* Talmon, *supra* note 14, at 109, 111-12. States like Australia and England strongly supported such interpretation and made no secret of their belief that it was not functionally feasible to require a broad understanding of the obligation of non-recognition. U.N. GAOR, 21st Sess., 26th mtg., U.N. Doc. A/AC.125/SR.26, at 12-13 (July 25, 1966); U.N. GAOR, 21st Sess., 25th mtg. at 16-17, U.N. Doc. A/AC.125/SR.25 (July 25, 1966); *see* Talmon, *supra* note 14, at 108 & n.40, 111-12. Though the Court did not abandon the "as legal" qualification or comment on *de jure* recognition, the Court's decisions, with their support of three requirements, provide an inclusive understanding of what would qualify "as legal recognition." *See Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23. In doing so, the Court rejects the proposal that the obligation of non-recognition may be satisfied solely by a formal declaration and resolves the disagreement surrounding the Declaration on Principles of International Law by effectively siding with those States that opposed Australia and England. *See Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23; U.N. GAOR, 21st Sess., 25th mtg. at 16-17, U.N. Doc. A/AC.125/SR.25 (July 25, 1966).

141. *See* G.A. Res. 2145 (XXI), at 2 (Oct. 27, 1966).

142. *See* Talmon, *supra* note 14, at 113.

143. *See id.*; *see also* S.C. Res. 276, ¶ 2 (Jan. 30, 1970).

notwithstanding Security Council [R]esolution 276 (1970)?"[144] The Court began its answer by noting that "[t]he precise determination of the acts permitted or allowed . . . ." is a matter for the Security Council.[145] Still, the Court pressed on, revealing its intent to provide generally applicable requirements by stating that it would:

> confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of [R]esolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal.[146]

The Court then noted three requirements that follow from an obligation of non-recognition.[147] First, the Court called on States to abstain from entering, invoking, or applying treaties where the government of South

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144. *Namibia Case*, 1971 I.C.J. at 58, ¶ 133.

145. *Id.* at 55, ¶ 120 (alteration in original).

146. *Id.* at 55, ¶ 121.

147. *See Namibia Case,* 1971 I.C.J. at 55, ¶¶ 121-23. The clarity provided by the *Namibia* Court's list of requirements should not be overstated. In subparagraph 2 of the operative clause, the Court held that U.N. member States:

> are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.

Namibia Case, 1971 I.C.J. at 58, ¶ 133. The ICJ added, "[I]t is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia." *See id.* (alteration in original). One can read subparagraph (2) of the operative clause as deviating from the Court's list of three obligations. *See id.* However, this broad language should be read in the context of the extensive discussion of the decision as providing three minimal requirements, and also as leaving the door open to further Security Council action. The Court did not specify if these requirements were the only implications, which allowed the Judges to provide conflicting accounts of the extent of a third party's obligations in their separate opinions. *See id.* at 55, ¶¶ 121-23. For example, in his separate opinion, Judge Ammoun proceeds to "supplement the Opinion" with more restrictions. *Id.* at 97, ¶ 16 (separate opinion by Ammoun, J.). Judge Ammoun explains that the Court erred to think a more detailed list would lead to confusion, and thus derives the principle of neutrality from the Security Council resolution. *Namibia Case*, 1971 I.C.J. at 97, ¶ 16 (separate opinion by Ammoun, J.). He further derives obligations from the principle of non-recognition, such as, "States should debar themselves and should forbid their nationals, subjects and foreign residents, under penalties, from having any part in South African companies or undertakings registered or established in Namibian territory." *Id.* (separate opinion by Ammoun, J.). In contrast, given the possible disconnect between subparagraph (2) of the operative clause and the reasoning that led up to it, as well as Judge Ammoun's even more radical interpretation of the obligation of non-recognition, Judge de Castro and Judge Dillard only conditionally supported the Court's opinion. *See Namibia Case*, 1971 I.C.J. at 165-67 (separate opinion by Dillard, J.); *Namibia Case*, 1971 I.C.J. at 217 (separate opinion by de Castro, J.).

Africa purports to act on behalf of Namibia.[148] Second, the Court required States to refrain from diplomatic relations that imply recognition of South Africa's authority over Namibia.[149] Third, the Court directed States to abstain from entering into economic or other forms of relations that might entrench South Africa's control over Namibia.[150] Thus, for the Court, three requirements of the principle of non-recognition derive from the United Nations' Charter and general international law.[151]

Stefan Talmon objected to the inclusion of the requirement of not providing aid as part of the obligation of non-recognition.[152] Talmon conceded that not providing aid to maintaining an illegal act "may be seen as a logical extension of the duty of non-recognition," but warned that, because not all aid suggests recognition, the "obligation not to recognize as lawful a certain situation must be distinguished from the obligation not to render aid or assistance in maintaining that situation."[153] Talmon claimed both the Court and the ILC share his view.[154] While Talmon is correct that the ILC shares his reasoning, he is wrong to conclude the Court agrees with his conclusion.[155] Specifically addressing conduct that entrenches an illegal act, the Court in the *Namibia Case* wrote:

> The restraints which are implicit in the non-recognition of South Africa's presence in Namibia . . . impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.[156]

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148. *Namibia Case*, 1971 I.C.J. at 55, ¶ 122

149. *Id.* at 55, ¶ 123.

150. *Id.* at 55-56, ¶ 124.

151. *See id.* at 55, ¶ 120. *But see* Kontorovich, *supra* note 41, at 589 (citing S.C. Res. 276, *supra* note 143, at ¶ 5) (arguing that in *Namibia* the ICJ derived the content of the duty of non-recognition "as much from the principle of non-recognition as from the express language of U.N. Security Council Resolution 276."). However, Kontorovich identifies the resolution as "unusually broad" because the resolution stated that the "very 'presence' of South Africa" was "'illegal and invalid'" and therefore declared all acts performed by South Africa in Namibia to be illegal and invalid. *See* Kontorovich, *supra* note 41, at 589-90. Yet, the Court's distinguishing between some acts that could not be recognized from other recognizable acts, such as registration of births, deaths, and marriages, undermines this claim. S.C. Res. 276, *supra* note 143, at ¶ 2; *see Namibia Case*, 1971 I.C.J. at 56, ¶ 125.

152. Talmon, *supra* note 14, at 105-06.

153. *Id.*

154. *Id.*

155. *See* Report, *supra* note 19, at 115 ("In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40.").

156. *Namibia Case*, 1971 I.C.J. at 55, ¶ 124.

Thus, for the Court, the requirement prohibiting aid is derived from the obligation of non-recognition and extends to all acts that entrench the authority of the illegal act.[157]

2. Meaningful Requirements Without Rigidity

What will be interpreted as an act of recognition depends on the situation. In one situation, diplomatic relations may reflect recognition and, in another situation, the same diplomatic relations may reflect the need to save one's citizens.[158] Similarly, what assists in maintaining the situation depends on the situation.[159]

Acknowledging this need for flexible, meaningful requirements in the *Namibia Case*, the Court noted:

> [t]he precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations . . . .[160]

Thus, though the lack of a fixed list of obligations often reflects confusion, in this case it results from a conscious decision.[161]

That the absence of a detailed list of requirements reflects a conscious choice is further supported by Judge Dillard, who explains:

> [a] detailed specification of the particular acts which may or may not be compatible with South Africa's illegal presence in Namibia cannot be determined in advance since they depend on numerous factors including not only the interests of contracting parties who acted in good faith but the immediate and future welfare of the inhabitants of Namibia.[162]

Not only do the requirements that follow from an obligation of non-recognition depend on what would be interpreted as an act of recognition, they also depend upon what constitutes support of the illegal act.[163] This determination turns upon ascertaining the types of actions parties entered into and the needs of the violated entity.[164] For Judge Dillard, building a

157. *See* Talmon, *supra* note 14, at 105-06.
158. *See* Report, *supra* note 19, at 114.
159. *See id.*
160. *Namibia Case*, 1971 I.C.J. at 55, ¶ 120 (alteration in original).
161. *See id.* at 58, ¶ 133.
162. *See id.* at 167 (separate opinion by Dillard, J.) (alteration in original).
163. *See id.*
164. *See id.*

road in occupied territories may constitute support in one situation, but the need to end a humanitarian crisis in another.[165] The *Namibia Case* thus provides a meaningful yet flexible response to illegal State action.[166]

3. Humanitarian Exception/Reminder

After discussing the three minimum negative requirements, the Court includes a clarifying provision noting, "[i]n general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation."[167] Since the clarification is linked to the three general requirements, the Court implied that it should be applied beyond the *Namibia Case*.[168] Furthermore, none of the ICJ's other non-recognition cases challenge this proposition.[169] Thus, there is no reason to believe the clarification does not extend to all cases of non-recognition.[170]

While academic hermeneutics have complicated the meaning of this clarifying rule,[171] a literal reading of the rule provides clear legal, if factually-dependent, guidance. The rule reads:

> In general, the non-recognition of South Africa's administration of the Territory should not result in 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 on behalf of or concerning Namibia 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.[172]

The first sentence of the excerpt explains that the clarifying rule frees States from the three requirements in individual cases if applying the requirements would result in depriving those they are meant to protect from the advantages of recognition. In the second sentence, the Court provides specific examples meant to clarify, but not modify, the rule.

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165. *See Namibia Case*, 1971 I.C.J. at 167 (separate opinion by Dillard, J.).
166. *See generally id.*
167. *Id.* at 56, ¶ 125 (alteration in original).
168. *See id.*
169. *See id.*
170. *See Namibia Case*, 1971 I.C.J. at 56, ¶ 125 (alteration in original).
171. *See, e.g.*, Yaël Ronen, *Status of Settlers Implanted by Illegal Territorial Regimes*, 79 BRIT. Y.B. INT'L L. 194, 233-34 (2008) (locating the origin of these hermeneutical interpretations in the opinion of the ICJ judges).
172. *Namibia Case*, 1971 I.C.J. at 56, ¶ 125.

Given the humanitarian exception, it may be tempting to conclude that the above discussion simply clarifies the content of a legal fiction. Whether a third State is paving a road, building a factory, or even buying goods from the occupied area, the third party may argue the humanitarian exception protects its actions. The State will explain that the road, factory, or bought goods benefit the inhabitants of the occupied territory. The third party will continue to insist it does not recognize the illegal act, because it only cooperates with the occupier for "humanitarian reasons."

This argument overreaches. First, some commentators have read the phrase, "[i]n general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation"[173] not as "an exception to the duty of non-recognition, but rather as a reminder . . . that the obligation should . . . be interpreted . . . in its context and in the light of its object and purpose, as a countermeasure against the international crime."[174] Viewed this way, the phrase simply states the obvious; the principle of non-recognition, like any other principle, should not be applied blindly.[175]

Second, even when reading the phrase as an exception, this argument assumes that the international community cannot identify and apply pressure when the exception is manipulated in bad faith.[176] Moreover, this argument also assumes that international and regional courts will be unable to evaluate a State's reliance on the exception.[177]

These assumptions were challenged by *Minister of Agric., Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others* (hereinafter *Anastasiou*),[178] which addressed whether European Union member States could accept citrus fruits and potatoes produced in the unilaterally-created Turkish Republic of Northern Cyprus under the 1972 Association Agreement between the European Communities and the Republic of Cyprus.[179] The 1972 Association Agreement provided preferences for the goods shown to originate in Cyprus.[180] The Origin Protocol of 1977 clarified that the evidence required to prove the goods originating from Cyprus was a certificate of origin from Cypriot officials.[181] In *Anastasiou*,

173. *Id.* (alteration in original).

174. Willem Riphagen (Special Rapporteur), *Third Rep. on the Content Forms and Degrees of State Responsibility (Part Two of the Draft Articles)*, ¶ 8, U.N. Doc. A/CN.4/354/Add.2 (May 5, 1982).

175. *See id.*

176. *See Namibia Case*, 1971 I.C.J. at 56, ¶¶ 125, 128.

177. *See id.* at 56, ¶ 125.

178. Case C-432/92, Minister of Agric., Fisheries and Food *ex parte* S.P. Anastasiou (Pissouri) Ltd. and Others, Judgment, 1994 E.C.R. I-3116 (July 5) [hereinafter *Anastasiou Judgment*].

179. Case C-432/92, Minister of Agric., Fisheries and Food *ex parte* S.P. Anastasiou (Pissouri) Ltd. and Others, Opinion, 1994 E.C.R. I-3091 (Apr. 20) [hereinafter *Anastasiou Opinion*].

180. *Anastasiou Judgment*, 1994 E.C.R. at I-3120.

181. *Id.*

it was argued that under the Origin Protocol of 1977, "to accept, in connection with the importation of products originating in Cyprus, certificates issued by the Turkish community" breakaway republic results in a clear breach of the Original Protocol because "[t]hose certificates are not issued by authorities who, under the Association Agreement, are competent to issue certificates."[182] The United Kingdom and other interested parties did not dispute that certificates from the Turkish Republic of Northern Cyprus were not valid under the Association Agreement.[183] Instead, they argued that the "ICJ laid down an 'interpretative guideline' [Namibia exception] which implies that a policy of non-recognition should not lead to the denial to the population of Cyprus of advantages granted by treaty."[184] The European Court of Justice rejected this argument, stating it "reads too much into the ICJ's emphasis on the need to take account of the affected population's interests and underestimates the importance of the real differences between the two situations."[185] Thus, the international community has been able to temper misuse of the humanitarian exception.[186]

4. Applying the Pre-Wall Content

Returning to the hypothetical example of Aggressor's illegal invasion of Innocence, the balanced efficacy of the pre-*Wall* approach becomes clear.[187] If an obligation of non-recognition is instituted, three minimum requirements follow from Observer's obligation not to recognize the illegal situation.[188] First, Observer is limited in the types of agreements it may enter into with Aggressor.[189] Second, Observer is required to abstain from sending diplomatic or special missions to the territory under Aggressor's de facto control.[190] Observer must also clarify that general diplomatic or consular relations with Aggressor do not imply any recognition of Aggressor's illegal act.[191] Third, Observer is prohibited from entering into economic and other forms of relationships concerning the violation that may entrench the violation.[192]

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182. *Anastasiou Opinion*, 1994 E.C.R. at I-3103 (alteration in original).
183. *Id.*
184. *Id.* at I-3104 (alteration in original) (citation omitted).
185. *Id.* at I-3108.
186. *See id.* at I-3109.
187. *See Namibia Case*, 1971 I.C.J. at 54, ¶ 117 (citation omitted).
188. *See id.* at 55-56, ¶¶ 120-24.
189. *See id.* at 55, ¶ 122.
190. *See id.* at 55, ¶ 123.
191. *See id.*
192. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶ 124. As discussed in Part II, Section B, this requirement is not available to Talmon, because he incorrectly labels it as an independent obligation. *See supra* Part II.B; *see also* Talmon, *supra* note 14, at 105-06.

Qualifying these three requirements is the rule that Observer's non-recognition should not deprive the inhabitants of Innocence from receiving international cooperation.[193] Therefore, despite the fact that Observer has an obligation not to recognize the illegal situation, Observer may be able to recognize particular acts performed by Aggressor in the occupied territory.[194] For example, Observer could legitimately conclude it may help fund an Aggressor-run organization that primarily provides health services to Innocence's occupied population. If Observer, based on a factual determination, concludes that funding the organization does not entrench Aggressor's violation, no requirement flowing directly from the principle prevents funding.[195] Furthermore, even if Observer concludes that funding would violate the third requirement, the clarifying provision might allow funding depending on the facts—such as whether a choice not to fund the organization would negatively impact Innocence's occupied population.[196]

In contrast, the purchase of produce by Observer from Aggressor's settlements may be prohibited.[197] It is arguable that Aggressor's sale of produce is aimed at entrenching its occupation, and Aggressor's produce directly competes with produce that Innocence's occupied population sells.[198] Furthermore, it may be argued that no proceeds from the sale of settlement produce will reach Innocence's occupied population.[199] In such a case, not only would Observer's purchase of the produce violate the third requirement, but the purchase would also not be protected under the clarifying rule.[200] Whether or not Observer concludes that the three limiting requirements apply, these hypotheticals demonstrate how Observer's decision will be highly fact dependent.[201]

Despite how fact dependent Observer's decision is, Observer's government, under almost all circumstances, has no obligation to pass laws preventing private sector entities or its citizens from aiding in the unlawful invasion or settlement program.[202] First, such laws are not derived from the three requirements that follow from the principle of non-recognition.[203] Second, despite Judge Ammoun's claims to the contrary, the principle of non-recognition governs inter-governmental relations—not private entities

193. *See Namibia Case*, 1971 I.C.J. at 56, ¶ 125.
194. *See id.*
195. *See id.* at 57, ¶ 129.
196. *See id.* at 56, ¶ 125.
197. *See id.* at 55-56, ¶ 124.
198. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶ 124.
199. *See id.*
200. *See id.* at 55-56, ¶¶ 124-25.
201. *See id.* at 50, ¶ 104.
202. *See* Crawford, *supra* note 14, at 16, ¶ 39 ("[A] State cannot be responsible for acts conducted by entities outside its control and outside of its jurisdiction." (alteration in original)).
203. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122-24.

or citizens' interactions with States.[204] As Judge Dillard observed in a separate opinion, the Court, in discussing the principle, confines itself to intergovernmental relations to the exclusion of private dealings.[205]

It is also clear what the third State, Observer, may do even if an obligation is not instituted. Absent an authoritative, legal, and factual determination, Observer may decide whether to invoke the principle of non-recognition unilaterally in its relations with Aggressor.[206] However, in invoking the principle, Observer only justifies its own actions. Since Observer's determination is in lieu of a binding determination, the moderate approach, unlike the *Wall Case*, views Observer's determination as only affecting Observer's relationship to Aggressor, but not requiring any other State to follow Observer's response.[207]

III. THE *WALL CASE*: AN OBLIGATION ON ALL STATES INDEPENDENT OF AN AUTHORITATIVE DETERMINATION

Application of the non-recognition principle moved into a new expansive approach after the *Wall Case*. With the rise of terrorist attacks in 2000, Israel began to build a security wall in the West Bank.[208] In response, the General Assembly sought an advisory opinion asking:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth

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204. *Namibia Case*, 1971 I.C.J. at 94-95 (separate opinion by Ammoun, J.).

205. *Namibia Case*, 1971 I.C.J. at 150 (separate opinion by Dillard, J.) ("[The principle] does not concern itself with private dealings or the activities directly performed by specialized agencies.").

206. *See Namibia Case*, 1971 I.C.J. at 41, ¶ 78. Regional bodies have received considerable attention recently. *See, e.g.*, S.C. Res. 1631, ¶¶ 1-2 (Oct. 17, 2005). This expressed the Security Council's determination to take steps to initiate further cooperation between the United Nations and regional organizations in maintaining international peace and security. *Id.* at ¶ 1. The Security Council also took note of the League of Arab States' call for the imposition of a no-fly zone on Libyan military aviation before declaring a no-fly zone. *See* S.C. Res. 1973 ¶¶ 6-7 (Mar. 17, 2011). Thus, just as order first calls on States to turn to the Security Council before unilaterally invoking the principle of non-recognition, order encourages States to see if regional bodies can address the problem before acting on their own. *See id.* at ¶ 4. However, regional bodies suffer many of the same limitations of the Security Council or the ICJ. *See id.* at ¶ 15. Therefore, the availability of regional bodies does not preclude the call for unilateral action. *See id.* at ¶ 21. *See generally* Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States,* 42 BRIT. Y.B. INT'L L. 175 (1967) (discussing just how limited the powers of regional bodies might be under the UN Charter).

207. *Compare* Talmon, *supra* note 14, at 121, *with Wall Case*, 2004 I.C.J. at 148, 196-97, ¶¶ 26, 146.

208. Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice*, 40 VAND. J. TRANSNAT'L L.1425, 1429 (2007).

Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[209]

A. An Erga Omnes Obligation; A Third Party Self-Standing Obligation

In the *Wall Case*, the Court broke with its tradition and declared that an obligation of non-recognition can apply to all States independent of an authoritative determination.[210] First, the Court noted existing prohibitions on territorial acquisitions by threat or use of force as well as a right of self-determination enshrined in the Charter and customary international law.[211] Second, the Court stated that, despite Israel's arguments to the contrary, the Hague Regulations had become part of customary law, and the Fourth Geneva Convention as well as the human rights conventions, to which Israel is a party, all apply within the occupied territories.[212] Furthermore, the Court next ascertained that the construction of the wall violated these international laws—many of which are obligations *erga omnes*.[213] Referencing Israel's *erga omnes* violations, but without identifying an authoritative body from whose actions an obligation follows, the Court concluded that "[g]iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation."[214]

Judge Higgins' separate opinion reinforced the conclusion that the Court relied on the concept of *erga omnes* obligations rather than Security Council or ICJ authority to find an obligation of non-recognition.[215] Responding to the Court's reasoning, Judge Higgins protested that, "[t]he obligation upon United Nations Members of non-recognition and non-

209. *Wall Case*, 2004 I.C.J. at 141, ¶ 1.

210. *See Wall Case*, 2004 I.C.J. at 196, ¶ 146. Prior to the *Wall Case* and the *Namibia Case*, Israel faced considerable condemnation for its actions from other States. *See id.* at 146, ¶ 20. Furthermore, prior to the ICJ decision, the Security Council critically assessed South Africa's actions against Namibia and Israel's illegal action in the occupied territory. *See* S.C. Res. 276, *supra note* 143, at ¶¶ 1-2 (declaring the continued presence of South Africa in Namibia illegal); *see also* S.C. Res. 242, ¶ 1 (Nov. 22, 1967) (affirming the importance of withdrawal of Israel from land occupied during the Six Day War). The distinction drawn between the *Namibia Case* and the *Wall Case* in this article does not depend upon a factual difference existing between these two cases. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122-24; *see also Wall Case*, 2004 I.C.J. at 196, ¶¶ 145-46. The central difference between these two cases is their method of analysis. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122-24; *see also Wall Case*, 2004 I.C.J. at 196, ¶¶ 145-46. Thus, even if situations that the ICJ considered in both cases were more similar than different, this article's thesis—that the ICJ broke with its tradition—remains correct. *See supra* Part I.

211. *Wall Case*, 2004 I.C.J. at 171-72, ¶¶ 87-88.

212. *Id.* at 167, 177, ¶¶ 78, 101-02.

213. *Id.* at 199, ¶ 155.

214. *Id.* at 200, ¶ 159 (alteration in original).

215. *Id.* at 216, ¶ 37 (separate opinion by Higgins, J.) (alteration in original).

assistance does not rest on the notion of *erga omnes*."[216] For Judge Higgins, an obligation of non-recognition arises following "a finding of an unlawful situation by the Security Council" or "the principal judicial organ of the United Nations," the ICJ.[217] Thus, Judge Higgins' opinion, critical of the majority, underscored the majority's reliance on *erga omnes* obligations as opposed to an authoritative determination.[218]

Without explicitly stating so, the *Wall Case* altered the nature of the obligation of non-recognition.[219] In the *Namibia Case*, the ICJ focused on a Security Council resolution and considered what actions "should be considered inconsistent with the declaration of illegality and invalidity made in paragraph 2 of [R]esolution 276 (1970)."[220] In contrast, in the *Wall Case*, the ICJ focused on the nature of Israel's violations.[221] For the *Wall* Court, there was an alternative—establishing an obligation of non-recognition that creates an obligation absent an authoritative determination.[222] This amendment to the principle of non-recognition presents far more than a new legal alternative.[223]

Comparing how States prior to the *Wall Case* and post-*Wall Case* determined when the principle of non-recognition applies confirms the practical implications of the post-*Wall* principle of non-recognition. First, when Aggressor illegally invades Innocence, pre-*Wall Case*, to determine if an obligation of non-recognition applies, Observer must determine if there is a binding determination creating an obligation.[224] If some of the most powerful States condemn Aggressor's action, but, because of gridlock, no competent organ of the United Nations issues a binding determination condemning the act, Observer's investigation is complete. No obligation exists.[225] However, now post-*Wall* the obligation does not depend on an authoritative determination, and so Observer's investigation is not complete because an obligation may exist despite the absence of an authoritative

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216. *Wall Case*, 2004 I.C.J. at 217, ¶ 38 (separate opinion by Higgins, J.). Judge Higgins' comparison of this case to the *Namibia Case* is troubling, given that advisory opinions are non-binding. *See id.* at 157, ¶ 47 (separate opinion by Higgins, J.). Nevertheless, it highlights that Judge Higgins believes the Court is advocating for an obligation of non-recognition that does not depend upon an authoritative determination. *See id.* at 216, ¶ 38 (separate opinion by Higgins, J.).

217. *Id.* at 216-17, ¶ 38 (separate opinion by Higgins, J.).

218. *See id.* at 217, ¶ 39 (separate opinion by Higgins, J.).

219. *See id.* at 216-17, ¶ 38 (separate opinion by Higgins, J.).

220. *Namibia Case*, 1971 I.C.J. at 55, ¶ 121.

221. *See id.* at 141, ¶ 1.

222. *See Wall Case*, 2004 I.C.J. at 216-17, ¶ 38. It is interesting that Judge Higgins, who argued that the ICJ should have followed the reasoning of the *Namibia Case*, turns to the Court's authority (instead of the Security Council's authority) in concluding that an obligation exists. *See Wall Case*, 2004 I.C.J. at 216, ¶ 38 (separate opinion by Higgins, J.).

223. *See Wall Case*, 2004 I.C.J. at 197, ¶¶ 149-50.

224. *See Namibia Case*, 1971 I.C.J. at 54, ¶ 117 (citation omitted).

225. *See id.*

determination.[226] Thus, prior to the *Wall Case*, ascertaining whether an obligation of non-recognition existed was cut-and-dry.[227] A State knew it had an obligation when an authoritative body declared the principle applied.[228]

In contrast, in the *Wall Case* the Court determined that the obligation of non-recognition was mandatory absent an authoritative decision.[229] The new self-standing nature of the principle implies that each State determines whether the principle of non-recognition applies.[230] Absent an authoritative determination of a breach, it is difficult for a State to accurately assess whether a violation of international law, let alone a serious violation of international law, has occurred.[231] Some States will conclude that the principle applies, while other States will conclude that the principle does not apply. Given the self-standing nature of the obligation, States that find an obligation may see those States who are not executing the three requirements of non-recognition as violating international law.[232] In contrast, States that find the principle does not apply may view any State action as voluntary and any attempt to pressure States into applying the principle as unfriendly action.[233] Disorder may ensue.[234]

Furthermore, under the *Wall Case*'s holding, confusion will reign even among States that agree the principle of non-recognition applies.[235] The three requirements of non-recognition represent the basic requirements that follow from the principle.[236] However, as the Court made clear in the

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226. *See Wall Case*, 2004 I.C.J. at 197, ¶¶ 149-50.

227. *See Namibia Case*, 1971 I.C.J. at 54, ¶ 117 (citation omitted).

228. *See id.*

229. *See Wall Case*, 2004 I.C.J. at 197, ¶¶ 149-50.

230. *See, e.g.*, *id.* at 200, ¶ 159.

231. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 121-24.

232. *See id.*

233. *See, e.g.*, Int'l Law Comm'n, Comments and Observations Received from Governments, U.N. GAOR, 53d Sess., U.N. Doc. A/CN.4/515, at 91 (2001) (presenting Mexico's concern that third party countermeasures "would have disruptive effects and would give rise to a series of complex relationships.").

234. *See* Akehurst, *supra* note 206, at 175. Despite the *Wall Case's* holding, massive disorder has not ensued because non-recognition is costly, and not because others are honoring the principle. *See* Kattan, *supra* note 208, at 1512. For a State to stop trading with a violator means a loss of money. *See id.* at 1512. Similarly, cutting diplomatic relations expends political capital and may also lead to a loss of international business. *See* Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT'L L. & POL. 1, 38 (2011). In fact, some scholars have argued that States have generally ignored the ICJ's decision in the *Wall Case* because of the cost of compliance. *See, e.g.*, Kattan, *supra* note 208, at 1498. Nevertheless, the *Wall Case*, as a matter of law, requires intervention that could lead to significant disorder. *See generally Wall Case*, 2004 I.C.J. 136. Furthermore, as currently expounded upon, the obligation fails to provide the necessary guidance to make clear when a State abuses the principle due to personal interests. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122-24.

235. *See Wall Case*, 2004 I.C.J. at 196-97, ¶¶ 145-46.

236. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122-24.

Namibia Case, the Security Council remains free to find further obligations that follow from the principle.[237] With States replacing the Security Council, multiple independent entities may determine if a specific case warrants lawful requirements beyond the three basic ones.[238] As with the determination that the principle applies, this determination may also not depend upon an authoritative determination, creating multiple conflicting claims on States.[239] The same problems reoccur in determining when the principle no longer applies.[240]

Finally, the pre-*Wall* cases obligated third party intervention, but only in the rare situation where an authoritative body determined the principle applied.[241] Looking back at the hypothetical, when Aggressor or Innocence alone invoked the principle of non-recognition in response to their conflict, third party States' responsibilities would remain unaffected. Aggressor's relations with State Innocence and State Innocence's relations with State Aggressor might be disrupted, but the rest of the international business community would continue as normal. Only when the Security Council or the ICJ declared the principle applicable to all States would the obligation internationalize the dispute.[242] Conversely, the *Wall Case* universalized conflict by holding that the obligation of non-recognition applies absent an authoritative determination.[243] When Aggressor or Innocence alone invokes the principle of non-recognition in response to their conflict, third party States may legally be obligated to enter the conflict.[244] Now, in addition to Aggressor and Innocence's relationship being disrupted, the rest of the international business community's relations with these countries are also threatened.

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237. *See id.* at 55, ¶ 120.

238. *See* Akehurst, *supra* note 206, at 175 ("Some States feared that the United Nations would be weakened if enforcement action could be taken under regional arrangements, without the authorization of the Security Council.").

239. *See, e.g.*, *id.* at 187-88.

240. *See id.* One of the problems with the principle of non-recognition leading to so much disagreement and potential conflict is that many will view the principle with suspicion, even when it is used for all the right reasons. *See* Brilmayer & Tesfalidet, *supra* note 234, at 11. Since proponents of increasing the number and depth of third party obligations concede that "[t]he degree to which international law is respected affects the security and stability of all States," the ICJ should hesitate before creating a self-standing third party obligation. *See id.* As China's delegate to the United Nations observed that, rather than leading to a stronger international order, allowing individual States to invoke the principle of non-recognition will "adversely affect the stability of the international legal order." Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/C.6/56/SR.11, at ¶ 58 (2001).

241. *See generally Namibia Case*, 1971 I.C.J. 16.

242. *See id.* at 53, ¶ 115.

243. *See Wall Case*, 2004 I.C.J. at 197, ¶¶ 149-50.

244. *See id.* at 196-97, ¶ 146.

B. Content of Obligation

Unlike the Court's break from precedent in determining the self-standing nature of the obligation, the Court did not clearly alter the content of the obligation.[245] In stark contrast to the Court's question in the *Namibia Case*, the question presented to the Court in the *Wall Case* did not specifically single out the consequence for States.[246] Thus, unlike the *Namibia* Court, the *Wall* Court chose not to expound on the content of the obligation of non-recognition for States.[247] Instead, the Court succinctly observed that all States "are under an obligation not to recognize the illegal situation resulting from the construction of the wall . . . and not to render aid or assistance in maintaining the situation created by such construction."[248]

In declaring a dual requirement not to recognize the illegal situation and not to render aid or assistance, the Court captures the *Namibia Case*'s three minimum requirements.[249] The *Wall Case*'s first requirement captures the *Namibia Case*'s first two requirements—limitations on the types of formal agreements States may enter into with the violating State, and abstaining from sending diplomatic or special missions to the occupied territory.[250] Similarly, the *Wall Case*'s prohibition not to render aid or assistance in maintaining an illegal situation mirrors the *Namibia Case*'s prohibition against entering into economic and other forms of relationships concerning the violation that may entrench the violation.[251] Thus, in declaring an obligation of non-recognition, the Court provides a dual requirement consistent with the *Namibia Case*.[252]

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245. *See id.*
246. *See Namibia Case*, 1971 I.C.J. at 17, ¶ 1; *see also Wall Case*, 2004 I.C.J. at 141, ¶ 1.
247. *See Namibia Case*, 1971 I.C.J. at 17, ¶ 1; *see also Wall Case*, 2004 I.C.J. at 141, ¶ 1.
248. *Wall Case*, 2004 I.C.J. at 196, ¶ 146. The Court goes on to say:

> [States] are also under an obligation . . . to see to it that any impediment . . . to the exercise by the Palestinian people of its right to self-determination is brought to an end . . . to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Id. at 200, ¶ 159 (alteration in original). However, for the Court, these requirements seem to be additional and unrelated to the obligation of non-recognition. *See id.*

249. *Id.*; *Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23.
250. *See Wall Case*, 2004 I.C.J. at 200, ¶ 159; *see also Namibia Case*, 1971 I.C.J. at 55, ¶¶ 123-24.
251. *Wall Case*, 2004 I.C.J. at 200, ¶ 159; *Namibia Case*, 1971 I.C.J. at 55-56, ¶ 124.
252. *See Wall Case*, 2004 I.C.J. at 200, ¶ 159. However, with no further elaboration on what the obligation of non-recognition means, Judge Koojimans, who did not vote for the obligation, admits that in this case he has "great difficulty . . . in understanding what the duty not to recognize an illegal fact involves." *Wall Case*, 2004 I.C.J. at 232, ¶ 44 (separate opinion by Koojimans, J.). Similarly, Talmon, in passing, concedes that the obligation of non-recognition may have meaningful content when prohibiting recognition of a new State or the acquisition or occupation of territory, but he also "[has] great difficultly, however, in understanding what the duty not to recognize an illegal fact [the construction of the wall] involves." Talmon, *supra* note 14, at 104 (alteration in original). The answer to this question is the extent to which Israel purports to act on behalf of, claims political control over, or

IV. A PROPOSAL TO ENSURE A MORE EFFECTIVE PRINCIPAL

This section proposes four positions that the international community should take to enhance the principle of non-recognition. Part A urges the adoption of the moderate understanding of the principle of non-recognition. Parts B and C discuss the content of the principle.[253] Part B argues that whether or not a moderate approach is adopted, a conservative interpretation of the three requirements laid out in the *Namibia Case* should be followed.[254] Similarly, Part C defends maintaining the *Namibia* exception despite Part B's call to ensure order through clearly defined rules.[255] Finally, Part D discusses when the principle is applicable.[256]

A. Rejecting an Independent Obligation or an Institutionalized Approach and Adopting the Moderate Approach

During the early efforts to formulate the ILC's report on the responsibility of States, multiple rapporteurs, partially due to concern for order, proposed institutionalizing third party responsibilities.[257] However, the rapporteurs' suggestions did not come to fruition.[258] As Bruno Simma explains, institutionalization is not a satisfactory approach because it "builds upon institutions and procedures which are clearly unable to serve as effective reins on autodetermination."[259] The *Wall Case* moved in the opposite direction, holding that when a State violates an *erga omnes* obligation to which the principle of non-recognition applies, the principle is obligatory even absent an authoritative determination.[260] As discussed in Part III, Section A, this move creates its own problems.[261]

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involves itself economically with the territory illegally affected by the wall, thereby defining the bite of the obligation. *See Namibia Case*, 1971 I.C.J. at 55-56, ¶¶ 122, 124.

253. *See infra* Parts IV.A-C.

254. *See infra* Part IV.B.

255. *See infra* Parts IV.B-C.

256. *See infra* Part IV.D.

257. *See* R. Ago, *Obligations Erga Omnes and the International Community*, *in* INTERNATIONAL CRIMES OF STATE 237, 238 (Joseph H. H. Weiler et al. eds., 1989). The Court's grounding of the legality of the principle of non-recognition in the *Namibia Case* on the Security Council's actions, despite the action not being justified under Article VII, suggests that the Court was sympathetic to this approach. *See Namibia Case*, 1971 I.C.J. at 52, ¶ 112. Judge Higgins' opinion in the *Wall Case* reveals that this sympathy remains relevant today. *See Wall Case*, 2004 I.C.J. at 207, ¶ 2 (separate opinion by Higgins, J.).

258. *See, e.g*, Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 821, 836-37 (Yoram Dinstein & Mala Tabory eds., 1989).

259. *Id.* at 837. In 1985, Special Rapporteur Riphagen, Simma's main target, only had to consider the possibility of States unilaterally applying the principle; however, one may extend his reasoning to a self-executing principle. *See id.* at 836-37.

260. *Wall Case*, 2004 I.C.J. at 171-72, ¶ 88.

261. *See supra* Part III.A.

The moderate approach, as its name suggests, falls in between these two legal positions. By allowing individual States to decide if the principle applies, the moderate approach, like the *Wall Case*, strongly rejects institutionalizing non-recognition.[262] However, unlike the *Wall Case*, the moderate approach does not require every serious violation to be internationalized.[263] Instead, the moderate approach holds two central positions.

First, absent an authoritative legal and factual determination, States may decide whether to invoke the principle.[264] Compared with the attempts to institutionalize third party intervention, this approach frees third parties to act.[265] For example, when Aggressor violates the rights of Innocence, justice demands Innocence be able to right the wrong, and the moderate approach allows Observer to aid Innocence. However, recognizing the disorder that might result from requiring every relevant conflict to be internationalized, the moderate approach allows Observer and all other states to intervene, but does not require those states to do so.[266]

Second, the moderate approach maintains that since individual States invoke the principle, the invocation does not have an impact on third parties. In other words, after considering a conflict between Aggressor and Innocence, Observer may determine the principle applies to Aggressor's actions. However, since Observer's determination is in lieu of a binding determination, Observer's determination only affects Observer's relationship to Aggressor.

This aspect of the moderate approach prevents the principle of non-recognition from over reaching. As noted above, many scholars relying on the idea of *ex injuria jus non oritur*, or some other version of the idea, argue that when Aggressor violates the rights of Innocence, Observer has an

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262. *See Wall Case*, 2004 I.C.J. at 178-80, ¶¶ 108-09, 112.

263. *See id.* at 200, ¶ 159.

264. *See Namibia Case*, 1971 I.C.J. at 41, ¶ 78. Regional bodies have received considerable attention recently. S.C. Res. 1631, *supra* note 206, at ¶ 2. This expressed the Security Council's determination to take steps to initiate further cooperation between the United Nations and regional organizations in maintaining international peace and security. *Id.* at ¶ 1. The Security Council took note of the League of Arab States' call for the imposition of a no-fly zone on Libyan military aviation before declaring a no fly zone. S.C. Res. 1973, *supra* note 206, at ¶ 4. Thus, just as order first calls on States to turn to the Security Council before unilaterally invoking the principle of non-recognition, order encourages States to see if regional bodies can address the problem before acting on their own. *See id.* at ¶ 15. However, regional bodies suffer many of the limitations of the Security Council or the ICJ. *See id.* at ¶ 21. Therefore, the availability of regional bodies does not preclude the call for unilateral action. *See id.* at ¶ 8. For a discussion of just how limited the powers of regional bodies might be under the United Nations Charter, *see generally* Akehurst, *supra* note 206.

265. *See, e.g.*, S.C. Res. 1973, *supra* note 206, at ¶ 4.

266. Considering intervention to be permitted or even praiseworthy, but not mandatory, should not appear strange. Many actions in our daily lives are permitted or encouraged, but are not mandatory.

obligation to respond.[267] Though championing third party obligations, scholars hesitate to take the next logical step and conclude that when Observer fails to respond, Observer 2, another third party state, should also have an obligation to respond to Observer's violation.[268] However, once the third party principle of non-recognition obligations acquires firm grounding in the international community, this seems to be the next logical step.[269] The moderate approach anticipates and prevents this move by explaining that States may unilaterally invoke the principle, but the invocation has no effect on other States' obligations.

Since the moderate approach does not require third-party intervention, it may be argued that the approach does not institute an effective enforcement mechanism. The power of this critique cannot be denied; however, several facts soften its effect. First, the moderate approach does not create a legal stumbling block to third party enforcement. In fact, by allowing third party intervention, the approach legally facilitates such intervention. What prevents intervention is a lack of will. Second, and related, declaring an obligation by itself can maximally create a legal obligation to intervene. A State's predilection not to intervene (and therefore, failure to intervene) would remain the same.

Third, recognizing that States may apply the principal in a biased manner, the moderate approach limits the effect of an individual State's invocation. "[A] copycat or mimetic dynamic in modern international law has taken shape whenever an enhancement of state power has become available . . . ."[270] Therefore, while it may be assumed that even if those States that initially advocated for an obligation of non-recognition—absent an authoritative determination—had altruistic intentions, inevitably less altruistic States will use such a principle for self-interested reasons. In fact, a third State willing to invest resources in a disagreement between two States, both of which accuse the other of violating international law, is likely to be a State that has an interest in the disagreement. With the inevitability that some States will use the opportunity to require all other States to abide by the principle for purposes contrary to the reason behind broadening the principle, limiting States' ability to invoke the principle becomes consistent with the principle's goals. Thus, the moderate approach provides a system that protects order without stripping States of the enforcement mechanism granted to them in the *Wall Case*.[271]

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267. *See supra* Part II.A.3.
268. *See supra* Part II.A.3.
269. *See supra* Part II.A.3.
270. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 525 (2006) (alteration in original).
271. *See Wall Case*, 2004 I.C.J. at 195, ¶ 141.

B. The Namibia Case's Three Basic Requirements

The *Namibia Case* arms the moderate approach with three minimum negative requirements that follow from an obligation of non-recognition.[272] Despite Judge Ammoun's arguments for additional requirements, the Court's three requirements build a logical floor that may be added to by the Security Council, or other authoritative bodies, rather than random states.[273]

1. The Benefits of the Namibia Case's Requirements

The *Namibia Case*'s requirements are appropriate because the object of non-recognition is to prevent the validation of an illegal act, and all three of the *Namibia Advisory Opinion*'s requirements prevent validating illegal acts.[274] Furthermore, whether the moderate approach or the *Wall Case* approach is endorsed, States will in either case be permitted to intervene in the conflicts of other States.[275] In intervening, States must determine how the principle applies. Without clear guidance, it is likely that conflicting judgments and enforcement orders will arise. By providing three defined requirements, the *Namibia Case* addresses this need.[276] If State A commits a serious violation against State B, and States C and D decide to respond, States C and D need not argue over how to respond. The *Namibia Case* requirements provide guidance.[277] In addition, while it must be conceded that the instructions cannot prevent purposeful misinterpretation, they do expose such deviation, making it more difficult for opportunists to misapply the principle.[278]

2. A Balanced Approach

The power to add to the three basic requirements of the obligation of non-recognition should only be granted to authoritative bodies. From a practical perspective, this interpretation should be preferred. This interpretation limits States' enforcement power, but it still leaves a strong enforcement mechanism. The interpretation creates a balance that respects both the needs and risks of serious intervention. Alternatively, State power to determine if the obligation of non-recognition applies can extend to a

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272. *See Namibia Case*, 1971 I.C.J. at 56, ¶ 125.

273. *See Namibia Case*, 1971 I.C.J. at 97, ¶ 16 (separate opinion by Ammoun, J.).

274. *See* LAUTERPACHT, RECOGNITION, *supra* note 8, at 133; *see also Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23.

275. *See Wall Case*, 2004 I.C.J. at 196-97, ¶ 146.

276. *See Namibia Case*, 1971 I.C.J. at 55, ¶¶ 121-23.

277. *See id.*

278. *See id.* For similar reasons, States or the ICJ should clearly adopt Judges Dillard and de Castros' conservative understanding of the three requirements. *See generally Namibia Case*, 1971 I.C.J. 138 (separate opinion by Dillard, J.); *Namibia Case*, 1971 I.C.J. 158 (separate opinion by de Castro, J.).

determination of whether additional requirements are necessary. Such an interpretation would greatly expand third party powers to intervene, expanding the risk of conflict without sufficient checks.

Legally, even after the *Wall Case*, the limitation can be justified if one interprets the *Wall Case*'s finding that States can determine if the principle is applicable to all States as not changing the fact that, "[t]he precise determination of the acts permitted or allowed . . . lies within the competence of the appropriate political organs of the United Nations . . ."[279] Thus, case law and practical considerations both support allowing only proper authoritative bodies to add to the three requirements.[280]

C. Maintaining the Clarifying Rule

In light of the moderate approach's grant of power to States, the *Namibia Case* clarifying rule—which can free States from specific requirements in the interest of not harming the aggrieved population—should remain in effect.[281] The clarifying rule legally prevents States from ignoring that the principle of non-recognition may adversely impact those directly harmed by the violation of international law.[282] With individual third parties enforcing the law, this reminder becomes all the more important.[283] Furthermore, while the clarifying rule may be abused, removing the rule would not prevent States from acting as if the rule persists.[284] In protecting those who are directly impacted by the violation, the rule embodies an especially moral flavor.[285] Absent the legal rule, States can and will simply invoke the moral high ground to justify their actions.[286] The primary difference absent the rule will be that the law will no longer direct States' real or pretended moral inclinations in a way that avoids punishing the already suffering population.[287] The clarifying rule thus has a close relationship with the three *Namibia Case* requirements as applied in the moderate approach.[288]

279. *Id.* at 55, ¶ 120 (alteration in original).
280. *See id.*
281. *See Namibia Case*, 1971 I.C.J. at 56, ¶ 125.
282. *See id.*
283. *See id.*
284. *See id.*
285. *See id.*
286. *See Namibia Case*, 1971 I.C.J. at 56, ¶ 125.
287. *See id.*
288. *See id.*

D. When the Principle Should Apply

If States are to determine when to invoke the principle of non-recognition, the Court's actions provide insufficient guidance as to when the principle of non-recognition applies.[289] Maximally, the principle of non-recognition may be applied when a serious breach of an *erga omnes* obligation occurs, but States may argue that the principle can only be invoked by a State in a situation where the Security Council or the ICJ has already adopted the principle for the type of violation in question.[290] While these two possibilities provide considerable guidance to States, they still require States to choose between the two interpretations.[291]

If the international community decides that the principle may apply when a serious breach of an *erga omnes* obligation occurs, a further problem arises. Since proclaiming the concept of *erga omnes* obligations in *Barcelona Traction*,[292] the Court has adopted an enigmatic approach to explain how to identify an *erga omnes* obligation.[293] For example, in the *Wall Case*, the Court discussed the *erga omnes* obligations of self-determination and "certain . . . international humanitarian law."[294] In explaining how it determined these obligations were *erga omnes*, the Court cited the *Case Concerning East Timor*[295] and the advisory opinion *Legality of the Threat or Use of Nuclear Weapons*.[296] However, these precedents barely provide any more guidance as to why one obligation is *erga omnes* while another is not.[297] Academic sources provide more elaboration but little consensus. This lack of guidance has led a noted scholar, expressing the frustration of many, to write that he "was not certain as to how various norms entered into the magic *erga omnes* circle."[298]

Ambiguity is the enemy of a well-functioning system, and without clear rules on when the principle will apply, States will inevitably disagree about

289. *See, e.g.*, *id.* at 97-98, ¶ 16 (separate opinion by Ammoun, J.).

290. *See Wall Case*, 2004 I.C.J. at 199, ¶ 157.

291. *See id.*; *see also Namibia Case*, 1971 I.C.J. at 97-98, ¶ 16 (separate opinion by Ammoun, J.).

292. Barcelona Traction, Light, and Power Co., (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

293. *See* IAN D SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 123 (2001).

294. *Wall Case*, 2004 I.C.J. at 199, ¶ 155.

295. *See id.* at 199, ¶ 156 (citing *East Timor*, 1995 I.C.J. at 102, ¶ 29).

296. *See Wall Case*, 2004 I.C.J. at 199, ¶¶ 156-57 (citing Legality of the Threat or Use of Nuclear Weapons (United Nations), Case, 1996 I.C.J. 226, 273, ¶ 23 (July 8)).

297. *See East Timor*, 1995 I.C.J. 90 at 102, ¶ 29; *see also Nuclear Weapons Case*, 1996 I.C.J. 226 at 273-74, ¶ 23.

298. Symposium, *The Future of International Law Enforcement: New Scenarios—New Law?*, 115 KIEL INST. OF INT'L L. 9, 170 (1992).

invoking the principle.[299] Less than altruistic States will try to misuse the ambiguity to their advantage. Once the definition of an *erga omnes* violation becomes more concrete, it may be appropriate to apply the principle whenever a serious breach of an *erga omnes* obligation occurs. However, given the failure of the *erga omnes* concept to provide States with needed guidance at this time, and given the potential consequences of this failure, the principle should only be invoked by a State in a situation where the Security Council or the ICJ has already adopted the principle.

V. CONCLUSION

The above analysis demonstrates that the principle of non-recognition has developed to guide States regarding the content and applicability of the principle.[300] However, new developments potentially threaten the stability of the international community.[301] This Article suggests steps that protect world order while allowing States to apply the principle of non-recognition for the enhanced advancement of international justice.

299. Though ambiguity is often the cost of action in this case, as demonstrated above, it need not be. *See East Timor*, 1995 I.C.J. at 102, ¶ 29; *see also Nuclear Weapons Case*, 1996 I.C.J. at 273-74, ¶ 23.

300. *See supra* Part III.

301. *See supra* Part IV.