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Thomas D. Grant

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ABSTRACT

This Article seeks to assess how the U.N. system has enforced regimes of non-recognition under international law. Claims by certain communities to constitute states and claims by some states to hold title to certain pieces of territory have met with opposition from various quarters. At times, the United Nations has attempted to organize international non-recognition of such claims. The claim by the state of Indonesia to hold title to East Timor presents a vivid and important example of an attempt to set up a regime of non-recognition by the United Nations. The Article examines how the United Nations addressed the Indonesian claim and inquires whether this amounted to a self-enforcing regime of non-recognition.

The Article examines in detail U.N. practice in other regions of the world, including Katanga, Rhodesia, the South

* B.A., Harvard, 1991; J.D., Yale, 1994; Fulbright Scholar, Cambridge University, 1995-98. During the academic year 1999-2000, the author was a Visiting Fellow at the Max Planck Institute for International Law in Heidelberg, Germany. Mr. Grant thanks the Alexander von Humboldt Foundation for awarding him a Bundeskanzier Scholarship to support his work in Heidelberg. Mr. Grant is a member of the bars of Massachusetts, New York, and Washington, D.C.

African "Homelands," Namibia, Israel, Cyprus, and Kuwait, in which the United Nations legislated rules of non-recognition. In light of these examples, the Article concludes with a discussion of the East Timor *case, in which the International Court of Justice (ICJ) decided that U.N. resolutions had not in fact created an international rule of recognition or non-recognition regarding the status of East Timor. Nonetheless, the Article speculates that the ICJ may have left open the possibility of adjudication of claims of illegal recognition, thus creating a future mechanism of regulating controversial claims concerning territory and statehood.*

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I. INTRODUCTION

The inhabitants of East Timor on August 30, 1999 took part in a referendum on the future status of their country.[1] From this point, East Timor was on a course toward independence.[2] Political decisions in Portugal—the former colonial power and the

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1. *See People of East Timor Reject Proposed Special Autonomy, Express Wish to Begin Transition to Independence, Secretary-General Informs Security Council*, U.N. Press Release No. SG/SM/7119, SC/6722, Sept. 3, 1999, at 1.

2. *See Report of the Secretary-General on the Situation in East Timor*, U.N. Doc. S/1999/1024 (1999) (presenting "a framework and concept of operations for the United Nations Transitional Administration for East Timor" (UNAMET) pending final establishment of an independent East Timor). This report was submitted pursuant to S.C. Res. 1264, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999).

state designated in U.N. General Assembly Resolution 1542 (XV) of December 15, 1960 as "Administering Power"[3]—political decisions in the territory itself, and, perhaps most of all, political decisions in Indonesia—the country that had actually controlled East Timor since 1975—were central determinants of that course.[4] At the same time, the legal status of East Timor should not be ignored as a factor in the movement of the territory from de facto province of Indonesia to independent state *in statu nascindi.* In particular, East Timor's status as a non-self-governing territory (NSGT) under Chapter XI of the U.N. Charter allowed self-determination to act within East Timor with a certain practical effect not guaranteed as of right in all parts of the world.[5]

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3. The status was recognized in subsequent resolutions. *See infra* note 94.

4. A milestone in the political process was the conclusion on May 5, 1999 of a set of agreements in New York between Indonesia and Portugal. *See Question of East Timor: Report of the Secretary-General to the Security Council,* U.N. Doc. A/53/951-S/1999/513 (1999). These agreements had the purpose of resolving the East Timor issue and (1) proposed a "Constitutional Framework for a Special Autonomy for East Timor" providing for a "Special Autonomous Region of East Timor" (SARET) within the Republic of Indonesia, *id.* at 9, and (2) provided for a "popular consultation" to determine whether to accept the Constitutional Framework providing for the SARET, *id.* at 5. It was understood that rejection of the Constitutional Framework would entail independent statehood for East Timor. The political environment that made the process possible took form after the fall of the government of General Suharto in 1998.

5. On the special legal character of non-self-governing territories, see James R. Crawford, *State Practice and International Law in Relation to Secession,* 69 BRIT. Y.B. INT'L L. 85, 87-92 (1998) (based on James R. Crawford, *State Practice and International Law in Relation to Unilateral Secession,* factum before the Supreme Court of Canada, Feb. 19, 1997 (visited Feb. 13, 2000) <http://canada.justice.gc.ca>); Hurst Hannum, *Rethinking Self-Determination,* 34 VA. J. INT'L L. 1, 13-14 (1993) (noting that U.N. Charter article 73(e) and G.A. Res. 1541 identify inhabitants of NSGTs as "at least one of the categories of peoples entitled to self-determination"). *See also* Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice,* 17 HASTINGS INT'L & COMP. L. REV. 323, 335-36 (1994); Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo,* GA. J. INT'L & COMP. L. (forthcoming 2000).

Chapter XI of the U.N. Charter, in Articles 73 and 74, states

> Article 73
> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
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> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

Yet Indonesia, the state most proximate to East Timor and the state that ruled East Timor for nearly a quarter century, long had claimed that no process of self-determination was required in the territory, apart from that already coordinated by the Indonesian government and its forces of occupation. Self-determination of the East Timorese, Indonesia claimed, was achieved through incorporation of their territory into Indonesia.[6] Indonesia persisted in this claim, even though the advent of Indonesian rule in East Timor was condemned as an illegal use of

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b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
c. to further international peace and security;
d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74
Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

U.N. CHARTER arts. 73-74. These obligations were amplified by *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, para. 5, U.N. Doc. A/4684 (1961), which stated

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. For more detailed developments of the Indonesian position from Indonesia's Foreign Minister, see Ali Alatas, *East Timor: De-Bunking the Myths Around a Process of Decolonization*, INDON. NEWS, March 20, 1992, at 1, 4, *cited in* Simpson, *supra* note 5, at 339 n.74; *The Attempt to Rewrite the History of East Timor Continues* (visited Dec. 4, 1999) <http://www3.itu.ch/MISSIONS/Indonesia/Attempt.htm> (quoting *Situation in East Timor: Report of the Secretary-General*, U.N. Doc. E/CN.4/1996/56 (1996)).

force[7] and the continuation of that rule was criticized as a violation of the rights of the inhabitants of the territory.[8]

It was left to the international community to preserve the status of East Timor as an NSGT. In particular, this meant assuring that measures were avoided that might have lent legal support to the Indonesian claim. Critical in the preservation of the status of East Timor as NSGT was a collective decision, taken at the U.N. level, to deny de jure status to the occupation, annexation, and administration by Indonesia of East Timor. The U.N. General Assembly and Security Counsel strongly implied early in the crisis over East Timor that the claims of Indonesia were predicated on breaches of international law.[9] This view appeared to develop into a decision to establish a regime of non-recognition against Indonesia's claims. The General Assembly, in Resolution 31/53 of December 1, 1976, "[rejected] the claim that East Timor has been integrated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence." The Assembly repeated this formulation in 1989.[10] U.N. General Assembly Resolution 33/39 of December 13, 1978 "reaffirm[ed] the inalienable right of the people of East Timor to self-determination and independence, and the legitimacy of their struggle to achieve that right."[11] The Security Council, in Resolution 389 of April 22, 1976, "call[ed] upon all States to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination."[12] Thus, a regime of non-recognition was adopted by the most broadly constituted organization in international society, and, with varying levels of resolve, this regime was

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7. See G.A. Res. 3485, U.N. GAOR, 30th Sess., Supp. No. 34, paras. 4-5, U.N Doc. A/10034 (1976) ("strongly deplor[ing] the military intervention of the armed forces of Indonesia in Portuguese Timor" and "[c]all[ing] upon the Government of Indonesia to desist from further violations of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the Territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence"); S.C. Res. 384, U.N. SCOR, 30th Sess., 1869th mtg. (1976) (using language similar to that in G.A. Res. 3485, *supra*).

8. *See Situation of Human Rights in East Timor*, U.N. Commission on Human Rights, Res. 1997/63, U.N. Doc. E/CN.4/RES/1997/63 (1997). *See also* G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. 48, para. 4, U.N. Doc. A/35/48 (1981) (expressing "deepest concern at the continued suffering of the people of East Timor as a result of the situation still prevailing in the Territory"); G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. 51, at 228, U.N. Doc. A/37/51 (1983) (expressing concern "at the humanitarian situation prevailing in the Territory").

9. *See* Simpson, *supra* note 5, at 339-40.

10. G.A. Res. 32/34, U.N. GAOR, 32nd Sess., Supp. No. 45, para. 3, U.N. Doc. A/32/45 (1978).

11. G.A. Res. 33/39, U.N. GAOR, 33rd Sess., Supp. No. 45, para. 1, U.N. Doc. A/33/45 91979).

12. S.C. Res. 389, U.N. SCOR, 31st Sess., 1914th mtg. para. 1 (1997).

maintained throughout the period during which Indonesia ruled East Timor.[13]

The object of this Article is to assess how—and indeed whether—the U.N. system has enforced regimes of non-recognition.[14] This is a matter of broad interest. There are some 200 communities in the world today that claim to constitute independent states.[15] For the most part, the claims of such communities meet little or no opposition from states or from international organizations. A very small but important minority of putative states, however, face persistent opposition to their claims to statehood from some segment of international society.[16] Western Sahara, Anjouan, Chechnya, Kurdistan, and the Turkish Republic of Northern Cyprus (TRNC) each represent a claim, largely unrecognized in the world at large, of a community forming a state. The non-recognition of such claims has been set forth at different levels and by different participants in the

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13. As discussed below, U.N. organs have constituted rules of non-recognition with varying degrees of precision. John Dugard, whose treatment of U.N. non-recognition regimes was the best and most comprehensive at the time of its publication in 1987, found a rule of non-recognition in connection with the secessionist province of Katanga, though the language used there was far from explicit in its requirement of non-recognition. *See* JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 86 (1987) (analyzing ICJ holdings and writings of publicists). The language in connection with the annexation of East Timor by Indonesia is more explicit than that in connection with Katanga and, thus, may be said, *a fortiori*, to have set forth a rule of non-recognition. This, however, has been one matter of controversy at the heart of the contest over East Timor.

14. Writings on the holding in *Case Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 90 (June 30), did not address in detail its implications for recognition as a general field of international legal activity. *See, e.g.*, Peter H.F. Bekker, *East Timor*, 90 AM. J. INT'L L. 94, 96 (1996) (noting that the ICJ held that the U.N. resolutions on East Timor alone did not establish a rule of non-recognition).

15. The United Nations, as of the accession of Kiribati, Nauru, and Tonga at the start of the fifty-fourth session of the General Assembly, counted 188 member states. In addition to these, there are a handful of entities generally recognized as states but not members of the United Nations, in particular the Vatican, Switzerland, and Tuvalu. East Timor and Palestine, as of November 1999, might well have been states *in statu nascindi*. Kiribati, Nauru, and Tonga were admitted to the United Nations under G.A. Res. 9541 of September 14, 1999. *See* G.A. Res. 9541 (54/1, 54/2 & 54/3), 54th Sess., Agenda Item 19, U.N. Doc. A/54/PV.1 (1999).

16. By "putative states" I refer to communities that have put forth claims to statehood of varying robustness, all of which in recent times have established at least a measure of effective control over at least a part of the territory they claim as the state territory. This is to distinguish putative states from aspirations to statehood as yet unrealized in any de facto sense. The many ethnic, religious, or cultural minorities that have sought statehood are amply documented. *See, e.g.*, PEOPLES AND MINORITIES IN INTERNATIONAL LAW (Catherine Brölmann et al. eds., 1993); JAMES MINAHAN, NATIONS WITHOUT STATES: A HISTORICAL DICTIONARY OF CONTEMPORARY NATIONAL MOVEMENTS (1996). However, not all of them would fall within my definition of putative state. For present purposes, for example, I do not count as putative states the political formations resulting from the aspirations of the Catalans or the Quebec French.

decisionmaking process. In some cases, such as Western Sahara, only a small segment of the international community—perhaps only one state—participates in non-recognition of the claim to statehood.[17] In other cases, such as the TRNC, non-recognition is much more broadly supported.[18] The case of collective non-recognition of East Timor, then, is more than a matter of isolated interest. Its contemporary relevance arguably is magnified by the rapid pace of events in that territory; more importantly, it usefully informs an important category of international legal conduct. It must be anticipated that when claims to a status are contested, actors taking one side in the contest will express their position as recognition of the claim while actors on the opposite side will express their position as non-recognition. Many contests in international law—whether over claims to statehood, claims to

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17. Western Sahara was a colony of Spain until 1975, when Spain quit the territory. The colonial history is presented in *Western Sahara*, 1975 I.C.J. 12 (Oct. 16). Upon Spain's departure, Morocco and Mauritania, the states neighboring Western Sahara to the north and south, occupied the territory against the advice of the U.N. Security Council. *See* S.C. Res. 380, U.N. SCOR, 30th Sess., 1854th mtg. paras. 2-3 (1976). The inhabitants of Western Sahara formed a government-in-exile and organized themselves as a Sahrawi Arab Democratic Republic (SADR). As many as seventy-five states came to recognize the SADR as the state with title to the territory of the former Spanish colony. *See Foreign Policy Brief on Morocco and Western Sahara*, AFR. NEWS SERV., Feb. 12, 1999, *available in* 1999 WL 12921026. Morocco, however, occupied it in its entirety after Mauritania withdrew from the territory, claiming Western Sahara to be part of Morocco and declining to recognize the SADR. Though after a time some other states joined in this non-recognition, the regime of non-recognition was impelled essentially as a concomitant of Moroccan state policy and by unilateral diplomatic exercise. *See Sahara Weekly News Update: Western Sahara Referendum Support Association*, AFR. NEWS SERV., Sept. 8, 1997, *available in* 1997 WL 14061047 (noting Liberian retraction of SADR recognition); *Togo Withdraws Recognition of Sahrawi Arab Democratic Republic*, AFR. NEWS SERVICE, June 17, 1997, *available in* 1997 WL 11876812; *Sahara Weekly News Update: Western Sahara Referendum Support Association*, AFR. NEWS SERV., May 12, 1997, *available in* 1997 WL 10553379 (noting Chad's retraction of its recognition of SADR); *Baker Awaited in Morocco on Western Sahara Peace Mission*, AGENCE FR.-PRESSE, Apr. 22, 1997, *available in* 1997 WL 2100901 (noting withdrawal of SADR recognition by Benin, Burkina Faso, Congo, Peru, and Sao Tomé e Principe).

18. The United Nations there, like in East Timor, established a rule of non-recognition. The establishment of the rule at the level of the U.N. stands in contrast to the non-recognition of the SADR, a non-recognition essentially authored by one state. *See* Case of Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 19-20 (Mar. 23, 1995) (noting consensus of illegality of TRNC); S.C. Res. 541, U.N. SCOR, 38th Sess., 2500th mtg. para. 7 (1984) ("[c]all[ing] upon all States not to recognize any Cypriot State other than the Republic of Cyprus"); S.C. Res. 550, U.N. SCOR, 39th Sess., 2539th mtg. para. 3 (1985); Resolution of Nov. 24, 1983, Committee of Ministers of the European Parliamentary Assembly, Eur. Parl. Ass., 35th Sess., para. 1, Doc. No. 5165 (1984). *Case of Loizidou v. Turkey (Merits)*, 1996-VI Eur. Ct. H.R. 2216, 2224-25 (1996), quotes a European Communities statement of Nov. 16, 1983 and a Commonwealth Heads of Government press communiqué of Nov. 29, 1983, both of which iterate non-recognition of the TRNC.

territory, or claims to some other status or thing—therefore often may equate to competing regimes of recognition and non-recognition. How international society regulates widely agreed regimes of recognition or non-recognition in turn can be determinative of the outcome of such contests under law.

This Article first reviews earlier U.N. practice regarding non-recognition. Katanga and Rhodesia presented the first claims to statehood in the U.N. era that were rejected at the U.N. level for reasons of international law. The South African "Homelands" and Namibia involved claims by the apartheid-era government of South Africa about the legal status of certain territories in southern Africa that were not all recognized as parts of South Africa but were all under the de facto control of that state. The United Nations addressed these situations, too, by legislating rules of non-recognition. Response to annexation of Kuwait by Iraq is a further example of the establishment of a regime of non-recognition at U.N. level. These and a handful of related precedents form the core of U.N. practice on non-recognition of claims to territory and claims to statehood. With that core of practice in mind, this Article examines how the International Court of Justice (ICJ), recruited by one state to help enforce a collective decision to deny recognition to the Indonesian claim over East Timor, addressed the proposition, implicit in the pleadings of that state, that breach of a regime of non-recognition is actionable under international law.

II. THE U.N. SYSTEM AND NON-RECOGNITION

U.N.-sponsored rules of non-recognition up to 1987 were examined by John Dugard in *Recognition and the United Nations.*[19] This section briefly reviews these early rules and then discusses the rule of non-recognition legislated in response to the invasion of Kuwait by Iraq in 1990.

A. *Katanga and Rhodesia*

Two problems of political geography and law contributed to conflicts in Africa in the decades following the eclipse of European colonialism. The alignment of boundaries set in the late

19. *See* DUGARD, *supra* note 13, at 81-122. The treatment of non-recognition in this generally acclaimed work was particularly well-received. *See* M.J. Peterson, *Recognition and the United Nations*, 82 AM. J. INT'L L. 391 (1988) (book review); Douglas B. Ross, *Recognition and the United Nations*, 58 BRIT. Y.B. INT'L L. 374 (1987) (book review); *Recognition and the United Nations*, 33 ANNUAIRE FRANÇAIS DE DROIT INT'L 1056 (1987) (book review).

nineteenth and early twentieth centuries by colonial powers was one problem. The boundaries were in many instances set without regard to the political, ethnic, linguistic, or religious affinities of the indigenous population; yet, in deference to the principle *uti possidetis juris*,[20] virtually every boundary set by the European colonial powers was preserved as the boundary of an independent state after decolonization.[21] Thus, in many instances, groups of people were included in states of which they wanted no part or excluded from states to which they aspired to belong.

A second problem, contributing to several conflicts, was the presence in parts of Africa of communities of European settlers and their descendants. Some of these communities were tenacious. Unlike European administrators in other parts of Africa who could be recalled to the metropole upon the granting of independence to the territories they administered—and who mostly, when recalled, in fact went—members of the settler communities perceived themselves to be in Africa as holders of title to territory in their own right. Questions of recognition arose in several situations in which one or the other of the problems was particularly acute.

The problem of African boundaries has been associated with a number of ethnic and religious conflicts on the continent. The Muslim-Christian divide across the Sahel has played out in several countries as civil conflict, and, in Sudan, it has been a cause of a long-running civil war.[22] Ethnic differences in Nigeria were at the heart of the secession of Biafra from the federation

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20. For a critical view of the principle, see Tomás Bartos, *Uti Possidetis. Quo Vadis?*, 18 AUSTL. Y.B. INT'L L. 37 (1997).

21. States in Africa on a number of occasions would plead *uti possidetis juris* in disputes over border alignments. For example, in pleadings before the ICJ against Nigeria, Cameroon noted the breadth of the application of the principle in Africa and alleged that Nigeria had attempted illegally to alter the border between the two states. *See* Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1998 I.C.J. 275 (June 11). Cameroon stated "that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization." *Id.* para. 16. The Charter of the Organization of African Unity and AHG/Res. 16(1) on respect for boundaries inherited from colonization, as adopted in Cairo on July 21, 1964, supported application of the principle. *See Application Instituting Proceedings*, para. 18 (last modified Nov. 24, 1998) <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>; *Application Additional to the Application Instituting Proceedings Brought by the Republic of Cameroon*, para. 16 (last modified Nov. 24, 1998) <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>.

22. In response to evidence of religious persecution by the government of Sudan, the United States put in place economic sanctions in 1997. *See* Secretary of State Madeleine K. Albright, *Remarks on New Economic Sanctions Against Sudan* (visited Dec. 5, 1999) <http://secretary.state.gov/www/statements/971104.html>.

and a civil war in the late 1960s and early 1970s.[23] One attempt to revise colonial boundaries through secession resulted in a rule of non-recognition. Belgium conceded independence to the Congo on June 30, 1960. Less than two weeks later, Moise Tshombe, a regional leader, declared the southeastern province of Katanga an independent state.[24] Possessing a large portion of the mineral wealth of the Congo, Katanga sought close relations with European and American mining concerns and with the former colonial power. This gave rise to charges that the Katangan government was complicit in a veiled return of colonial rule to the region.

In any event, the United Nations took the view that Katangan secession violated the territorial integrity of the Congo, which had been admitted to the United Nations a week after independence.[25] Affirmation of the territorial integrity of the Congo and rejection of the claim by Katanga to constitute an independent state were contained in Security Council and General Assembly resolutions.[26] Dugard, who characterizes U.N. response to Katanga as "the first example of non-recognition of an aspirant State by the United Nations," points to U.N. Security Council Resolution 169 of November 24, 1961 as the locus of a rule of non-recognition.[27] The resolution condemned "the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external resources and manned by foreign mercenaries" and stated that "all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* and Security Council decisions" and "specifically *demand[ed]* that such activities which are now taking place in Katanga shall cease forthwith."[28] The United Nations issued no explicit statement requiring non-recognition of the putative state in Katanga, but Dugard nonetheless takes the view that the Security Council established a rule of non-recognition toward the secessionist province. U.N. Security Council Resolution 169, according to Dugard, was tantamount to such a rule. Moreover, the rule was backed up by armed force and, ultimately, enforced

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23. *See* JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR: 1967-1970 (1977).

24. *See* THOMAS KANZA, THE RISE AND FALL OF PATRICE LUMUMBA: CONFLICT IN THE CONGO 196-203 (1994).

25. As recommended by S.C. Res. 142, U.N. SCOR, 15th Sess., 872nd mtg. at 12, U.N. Doc. S/4377 (1965).

26. *See* S.C. Res. 145, U.N. SCOR, 15th Sess., 879th mtg. at 6, U.N. Doc. S/4405 (1965); S.C. Res. 169, U.N. SCOR, 16th Sess., 982nd mtg. at 3-5, U.N. Doc. S/5002 (1965); G.A. Res. 1474, U.N. GAOR, 4th Emergency Special Session, Supp. No. 1, para. 5(a), U.N. Doc. A/4510 (1960).

27. DUGARD, *supra* note 13, at 86.

28. S.C. Res. 169 (U.N. Doc. S/5002), *supra* note 26, paras. 1, 8 (emphasis in original), *quoted in* DUGARD, *supra* note 13, at 88.

successfully. Katanga ended its attempted secession in January 1963.[29] Though Belgium kept close relations with the secessionist entity for a time, no state recognized it. Accordingly, no chance arose to test how the U.N. system might enforce a rule of non-recognition against third states intent on recognizing the situation toward which the rule was directed.

The first explicit U.N.-mandated non-recognition was promulgated in connection with a case arising from the second problem of post-colonial Africa identified above. Settler communities complicated the process of decolonization in several parts of Africa. In Algeria, the gulf between the settler and the French administrator was broad, as the settler community—numbering over a million—fought to thwart the decision by the government of France to decolonize. In southern Africa, settler communities were yet more confirmed in the view that they inhabited Africa independent of contemporary policies in the country from which they or their forebears emigrated. This characteristically took the form of claims that title to African territory lay with the settler communities. Some five million Europeans in South Africa indeed were said by their political leaders to be the *original* settlers of the region—a tendentious history fashioned to invalidate African claims to a share in title to South Africa and to political equality with whites.[30] In Rhodesia, a territory in which British immigrants settled from the late nineteenth century, the colonial administration excluded Africans from governmental processes, and, when Great Britain required reform, the British settler community—numbering around 150,000 in a population of 4.25 million—supported secession of the territory from the British empire. The government of the territory on November 11, 1965, issued a Unilateral Declaration

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29. For a discussion of U.N. intervention in the Congo during the period of the attempted establishment of an independent Katanga, see 3 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING, 1946-1967: DOCUMENTS & COMMENTARY (1980); D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 153-254 (1964). Higgins and Bowett characterize the intervention as an illegal interference in the internal affairs of the Congo. Dugard characterizes it as an endorsement of the principle set forth in G.A. Res. 1514 that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." G.A. Res. 1514, *supra* note 5, para. 6. Dugard cites the statement of a delegate from Liberia as evidence of the link he posits between U.N. non-recognition of Katanga and the then-emerging U.N. practice on decolonization. *See* DUGARD, *supra* note 13, at 89 (citing *Security Council Insists on Ending of Secessionist Activities in Congo*, 8 U.N. REV. 6, 7 (1961)).

30. On the political utility of certain representations of the past, see HARVEY J. KAYE, THE POWERS OF THE PAST: REFLECTIONS ON THE CRISIS AND THE PROMISE OF HISTORY (1991); KAREN DAWISHA & BRUCE PARROTT, RUSSIA AND THE NEW STATES OF EURASIA: THE POLITICS OF UPHEAVAL 1-56 (1994).

of Independence (UDI).[31] This presented the international community with a question of recognition. The act of secession violated the long-standing rule, active in the Katanga case, that violations of the territorial integrity of a state are delicts and also violated the emerging rule that a claim to statehood may fail if it is predicated on illegal acts—including, probably, systematic denial of political rights on the basis of race.[32] The United Nations from 1965 to 1980 maintained a rule of non-recognition toward the putative state of Rhodesia. Shortly before the UDI, the General Assembly called on "all States . . . not to recognize any government in Southern Rhodesia which is not representative of the majority of the people."[33] U.N. Security Council Resolution 216, "call[ed] upon all States not to recognize this illegal racist minority régime in Southern Rhodesia."[34] U.N. Security Council Resolution 217, determining that the situation in Rhodesia threatened international peace and security, called upon "all States not to recognize this illegal authority and not to entertain any diplomatic or other relations with it."[35] The non-recognition rule was made comprehensive by the imposition of economic

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31. *See* VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 181 (1990); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968); MICHAEL CHARLTON, THE LAST COLONY IN AFRICA: DIPLOMACY AND THE INDEPENDENCE OF RHODESIA (1990); Christopher Ashley Ford, Defensor Fidei: Explaining South African Foreign Policy Behavior: The Case of Ian Smith's Rhodesia (1989) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Library).

32. Thus, could an entity such as Rhodesia satisfy the "traditional" criteria for statehood set forth in the Montevideo Convention of 1933 yet be denied recognition as a state? Writers widely agreed that Rhodesia satisfied the Montevideo criteria. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 103 (1979); D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 91 (3d ed. 1983); C.B. MARSHALL, CRISIS OVER RHODESIA: A SKEPTICAL VIEW 68-69 (1967), *cited in* DUGARD, *supra* note 13, at 91 n.51; CHRIS N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 87-89 (1974); D.J. Devine, *The Status of Rhodesia in International Law*, 1973 ACTA JURIDICA 1, 78-89; Isaak I. Dore, *Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems*, 13 VAND. J. TRANSNAT'L L. 25, 33-38 (1980); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 110 (1968). For an argument that the Montevideo Convention no longer accurately reflects international practice regarding the creation and recognition of new states, see Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999).

33. G.A. Res. 2022, U.N. GAOR, 20th Sess., Supp. No. 14, para. 9, U.N. Doc. A/6014 (1966).

34. S.C. Res. 216, U.N. SCOR, 20th Sess., 1258th mtg. para. 2 (1967). The term "Southern Rhodesia" denoted the territory under the effective control of the illegal Smith government. "Northern Rhodesia" had gained independence as Zambia in 1964 and had been admitted to the United Nations on December 1, 1964. *See* Devine, *supra* note 32, at 12.

35. S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg. para. 6 (1967).

sanctions[36] and by a later resolution containing a more detailed non-recognition directive. U.N. Security Council Resolution 277 of March 18, 1970 read in pertinent part:

> [The Security Council reaffirming] that the present situation in Southern Rhodesia constitutes a threat to international peace and security,
>
> Acting under Chapter VII of the Charter,[37]
>
> 1. Condemns the illegal proclamation of republican status of the Territory by the illegal régime in Southern Rhodesia;[38]
> 2. Decides that Member States shall refrain from recognizing this illegal régime or from rendering any assistance to it;
> 3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal régime in Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice, by the competent organs of their State;[39] . . . .
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> . . . .

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36. *See* S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg. para. 2 (1968); S.C. Res. 253, U.N. SCOR, 23rd Sess., 1428th mtg. para. 3, U.N. Doc. S/INF/23/Rev.1 (1970).

37. S.C. Res. 277, U.N. SCOR, 25th Sess., 1535th mtg. at 5-6 (1971).

38. The government of Ian Smith in Rhodesia had claimed that the state it governed still recognized the Queen as the head of the Commonwealth, despite the UDI. This position changed in 1970 when the Smith government declared Rhodesia a republic. International practice toward Rhodesia varied and was, in instances, ambivalent on the distinction between recognition of the government of Ian Smith and recognition of the putative state of Rhodesia. U.N. instruments regarding Rhodesia, such as U.N. Security Council Resolution 277, referred to the situation as one involving non-recognition of an "illegal régime." S.C. Res. 277, *supra* note 37, para. 2. But writers, including Dugard and Devine, who represented divergent political views agreed that statehood was the matter really at stake. *See* DUGARD, *supra* note 13, at 93-94. According to Dugard, the United Nations referred to the "régime" and "government" in Rhodesia, rather than the "state" of Rhodesia, in order to preserve the legal status of Rhodesia as a British colony under the U.N. Charter Chapter XI system of non-self-governing territories (NSGTs). *See id.* at 94. The special status of NSGTs has been noted elsewhere. *See, e.g.*, Grant, *supra* note 5. To have acknowledged explicitly that statehood was at issue might have complicated the claim that Rhodesia was an NSGT. Dugard further points out that U.N. Security Resolution 277, in calling for the suspension of Rhodesian membership in the specialized agencies of the United Nations and denial of Rhodesian membership in other multilateral organizations, showed that the controversy concerned recognition of the *state*, not the *government*, of Rhodesia. *See* DUGARD, *supra* note 13, at 94. States are international legal persons; governments are their representatives or agents. Membership in multilateral organizations is held by states, not by their governments.

39. There was some concern after *Madzimbamuto* v. *Lardner-Burke, N.O.*, 1968 (2) SALR 284 (A), and *R.* v. *Ndhlovu*, 1968 (4) SALR 515 (A), in which the Rhodesia judiciary affirmed the legality of the UDI, that courts in Britain and the Commonwealth might regard those precedents as persuasive.

> 9. Decides, in accordance with Article 41[40] of the Charter and in furthering the objective of ending the rebellion, that Member States shall:
>
> (a) Immediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal régime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory; . . . .
>
> . . . .
>
> 12. *Calls upon* Member States to take appropriate action to suspend any membership or associate membership that the illegal régime of Southern Rhodesia has in the specialized agencies of the United Nations;
>
> 13. *Urges* Member States of any international or regional organizations to suspend the membership of the illegal régime of Southern Rhodesia from their respective organizations and to refuse any request for membership from that régime.[41]

Practice of individual states, especially the United Kingdom, affirmed non-recognition.[42]

The rule of non-recognition of Rhodesia was respected by all—or nearly all—states. No state expressly recognized Rhodesia or the government of Ian Smith. South Africa and Portugal, which until 1975 administered neighboring Mozambique, maintained diplomatic relations with Rhodesia, in violation of paragraph 9(a) of Resolution 277, though even these relations were not at the ambassadorial level and in time were terminated.[43] Non-recognition of Rhodesia did not produce a clear test of third-state obligation. Two ambiguous cases did arise—South Africa and Portugal in their relations with the putative state—but neither South Africa nor Portugal were sanctioned by the United Nations expressly for their dealings with

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40. U.N. CHARTER art. 41 states:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

41. S.C. Res. 277, *supra* note 37.

42. Dugard cites a certificate presented to the court by the United Kingdom in *Madzimbamuto v. Lardner-Burke, N.O.*, 1968 (2) SALR 284 (A). *See* DUGARD, *supra* note 13, at 95 ("Her Majesty's Government in the United Kingdom does not recognise Southern Rhodesia or Rhodesia as a State either *de facto* or *de jure.*").

43. For a comprehensive examination of relations between Rhodesia and other states, see HARRY R. STRACK, SANCTIONS: THE CASE OF RHODESIA 66-84 (1978). On whether South African relations with Rhodesia might have amounted to implicit recognition, see John Dugard, *Rhodesia: Does South Africa Recognize It as an Independent State?* 94 S. AFR. L.J. 127 (1977). Christopher Ford examines at length the shift in South African policy toward severing ties with and joining the embargo against Rhodesia. *See* Ford, *supra* note 31.

Rhodesia. The rule of non-recognition of Rhodesia was made robust by a system of sanctions in which nearly every state participated. Unclear is whether and how the rule would have been enforced if a third state had endeavored unambiguously to breach it.

B. *South African "Homelands"*

With the apparent goal of denying South African citizenship to all black inhabitants of the country, the government of South Africa during the period of apartheid organized four "Homelands" and six "self-governing territories" on the territory of South Africa, and compelled black South Africans to take citizenship in the new entities. The "Homelands" were the Transkei, the Ciskei, Bophuthatswana, and Venda. The self-governing territories were KwaZulu, KaNgwane, Gazankulu, Lebowa, KwaNdebele, and Qwaqwa.[44] Multiple U.N. resolutions stated a rule of non-recognition regarding the "Homelands," the establishment of each "Homeland" occasioning further U.N. clarifications.[45] U.N. General Assembly Resolution 31/6A (1976) termed the putative Transkei state "invalid" and called upon all states to "deny any form of recognition to the so-called independent Transkei."[46] The establishment of the putative state of Bophuthatswana in 1977 led the General Assembly to call on states to deny recognition to any putative "Homeland" states.[47] Establishment of Venda in

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44. During the transition to majority rule, writers acknowledged that the arrangement would require resolution under the new constitution since these entities were part of the apartheid constitutive order. *See, e.g.*, Lakshman Marasinghe, *Constitutional Reform in South Africa*, 42 INT'L & COMP. L.Q. 827 (1993). Concerning the effects of the homelands on citizenship, see John Dugard, *South Africa's 'Independent' Home-lands: An Exercise in Denationalization*, 10 DENV. J. INT'L L. & POL'Y 11, 21-35 (1980); John Dugard, *The Denationalization of Black South Africans in Pursuance of Apartheid: A Question for the International Court of Justice?* 33 REV. INT'L COMMISSION JURISTS 49 (1984).

45. This practice is discussed in DUGARD, *supra* note 13, at 100-02.

46. G.A. Res. 31/6 A, U.N. GAOR, 31st Sess., Supp. No. 39, paras. 2-3, U.N. Doc. A/31/39 (1977).

47. *See* G.A. Res. 32/105 N, U.N. GAOR, 32nd Sess., Supp. No. 45, para. 5, U.N. Doc. A/32/45 (1978). With U.N. General Assembly Res. 3411 D of Nov. 28, 1975, the General Assembly had already condemned establishment of the Bantustans and called upon all states to deny them recognition. *See* G.A. Res. 3411 D, U.N. GAOR, 30th Sess., Supp. No. 34, para. 3, U.N. Doc. A/10034 (1976). Subsequently, Resolution 31/6 A of Oct. 26, 1976 (entitled "Policies of Apartheid of the Government of South Africa—The So-Called 'Independent' Transkei and Other Bantustans") called upon all states to deny the Transkei "any form of recognition" and endorsed the non-recognition rule set forth in G.A. Res. 3411 D. The Security Council also commended Lesotho for declining to recognize the Transkei and appealed to states to assist Lesotho to protect it from the material consequences of South African countermeasures. *See* S.C. Res. 402, U.N. SCOR, 31st Sess., 1982nd mtg. paras. 2, 5, U.N. Doc. S/INF/32 (1977). *See also* G.A.

1979 led the President of the Security Council to state on behalf of the Council:

> The Security Council condemns the proclamation of the so-called "independence" of Venda and declares it totally invalid. This action by the South African régime, following similar proclamations of Transkei and Bophuthatswana, denounced by the international community, is designed to divide and dispossess the African people and establish client states under its domination in order to perpetuate *apartheid.* It further aggravates the situation in the region and hinders international efforts for just and lasting solutions.
>
> The Security Council calls upon all Governments to deny any form of recognition to the so-called "independent" bantustans; to refrain from any dealings with them; to reject travel documents issued by them; and urges Member Governments to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called "independent" bantustans.[48]

Notwithstanding these statements and related resolutions, it remained open to question whether a rule of non-recognition, binding on states, had been established. Dugard noted that none of the resolutions were issued pursuant to Chapter VII of the Charter, under which the Security Council, after determining that a threat to the peace, breach of the peace, or act of aggression has transpired, may issue resolutions binding on the member states.[49] He added that "[t]his does not necessarily mean that States are not under any legal obligation to withhold recognition of the homeland-States."[50] The comprehensive system of sanctions against South Africa and the condemnation of apartheid contained in multiple U.N. resolutions combined, Dugard wrote, to make the non-recognition statements mandatory.[51] In any event, no state besides South Africa accepted the claim that the "Homelands" constituted independent states. Thus, rather as happened with Rhodesia, no clear case presented itself to test whether the United Nations would enforce non-recognition—except in the case of recognition of the "Homelands" by South Africa itself.

Res. 2775 E, U.N. GAOR, 26th Sess., Supp. No. 29, para. 1, U.N. Doc. A/8429 (1972) (condemning South Africa's establishment of the Bantu homelands).

48. S.C. Res., 2168th mtg., U.N. Doc. S/13549, Sept. 21, 1979, *quoted in* DUGARD, *supra* note 13, at 101. *See also* G.A. Res. 34/93 G, U.N. GAOR, 34th Sess., Supp. No. 46, para. 2, U.N. Doc. A/34/46 (1980) (denouncing putative independence of Venda). A similar statement was issued in connection with the Ciskei. *See Statement of the President of the Security Council, on Behalf of the Council, Concerning the Proclamation of the "Independent" State of Ciskei,* U.N. Doc. S/14794, Dec. 15, 1981.

49. *See* DUGARD, *supra* note 13, at 102.

50. *Id.*

51. *See id.* at 102.

Though South Africa was subject to a comprehensive regime of sanctions, it would be misleading to say that this was chiefly to enforce non-recognition of the "Homelands." The United Nations addressed the "Homelands" as part of a larger set of human rights violations in South Africa. This is not to ignore that the derogation of territorial integrity that would have been worked by the putative new states was a point of objection by some governments[52]—and, at least in connection with Namibia, by the United Nations itself.[53] At the end of the day, however, South Africa was sanctioned for apartheid, of which the "Homelands" were one instrumentality. There was indeed a U.N.-legislated rule of non-recognition regarding the "Homelands," and the United Nations did in fact institute sanctions against South Africa.[54] The "Homelands" precedent, however, does not convincingly show that the United Nations imposes sanctions against a state for violating a rule of non-recognition.[55]

C. *Namibia*

A German colony before World War I, the territory then called South West Africa had been seized by South Africa in 1915. By terms of the mandate system established under Article 22 of the League of Nations Covenant, South West Africa was placed under South African administration. The territory was one of only two Mandates to survive the dissolution of the League of Nations

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52. *See, e.g., Recognition,* 7 AUSTL. Y.B. INT'L L. 430 (1981) (Senator representing the Minister for Foreign Affairs of Australia stating the Australian view that the "Bantustan" policy would lead to "the fragmentation of the South African state").

53. In Security Council Resolution 264 of March 20, 1969, the Security Council observed in paragraph four that "the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the Charter of the United Nations." S.C. Res. 264, U.N. SCOR, 24th Sess., 1465th mtg. para. 4 (1970).

54. *See* SANCTIONS AGAINST APARTHEID (Mark Orkin ed., 1990); UNITED NATIONS, SANCTIONS AGAINST SOUTH AFRICA: THE PEACEFUL ALTERNATIVE TO VIOLENT CHANGE, U.N. Sales No. E.88.I.5 (1988).

55. It does furnish, however, the only case of the United Nations rewarding a state for *adhering* to a rule of non-recognition. Lesotho, a state member of the United Nations landlocked within South Africa, had a border with the putative state of the Transkei. Lesotho complained to the Security Council that South Africa was endeavoring to coerce Lesotho into recognizing the Transkei. Security Council Resolution 402 of December 22, 1976 "commended" Lesotho for withholding recognition and called on states to render economic assistance to Lesotho to make up for losses incurred by South African retaliation. S.C. Res. 402, *supra* note 47. Dugard discusses the Transkei in DUGARD, *supra* note 13, at 81-82, 98-108, and in JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 91-92, 94-96, 110-11 (1978).

without being transferred to the U.N. Trusteeship system.[56] South Africa requested permission to annex the territory, but the General Assembly refused in 1946.[57] South Africa claimed authority to continue the supervisory functions of the Mandate and was initially supported in this endeavor by the International Court of Justice in the *Status Opinion*.[58] After it became apparent, however, that South Africa was not promoting development of the mandated territory toward self-governance as the Mandate obliged, the General Assembly declared on October 27, 1966 the Mandate for South West Africa revoked.[59] The Security Council called upon South Africa to end its administration of the territory, which, now lacking the Mandate, lacked basis in international law.[60] South Africa nonetheless continued to administer the territory. The U.N. Security Council in Resolution 276 of January 30, 1970 gave notification that "all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid."[61] This was expressed as a policy of non-recognition in U.N. Security Council Resolution 283 of July 29, 1970. That South Africa occupied Namibia illegally was confirmed by the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*.[62] The Court held that U.N. member states must

> recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and . . . 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.[63]

The Court, General Assembly, and Security Council urged that no state take measures tending to recognize or support the South African presence in Namibia. The scope of the rule of non-recognition toward South African presence in Namibia may have

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56. The other was Palestine. *See* DUGARD, *supra* note 13, at 60, 117.
57. *See* G.A. Res. 65, 1st Sess., U.N. Doc. A/64/Add.1 (1947).
58. *See* International Status of South-West Africa, 1950 I.C.J. 128 (July 11).
59. *See* G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, para. 4, U.N. Doc. A/6316 (1967).
60. *See* S.C. Res. 264, *supra* note 53, para. 2; S.C. Res. 269, U.N. SCOR, 24th Sess., 1497th mtg. para. 5 (1970).
61. S.C. Res. 276, U.N. SCOR, 25th Sess., 1529th mtg. para. 2 (1971).
62. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [hereinafter Legal Consequences], 1971 I.C.J. 16 (June 21).
63. *Id.* at 58.

been limited somewhat by the provision that measures against South Africa should be fashioned so as to avoid detriment to the inhabitants of Namibia.[64] The operation of the rule was certainly left in doubt, as the U.N. organs left unclear how, if at all, the rule of non-recognition would be policed. Whether a U.N. non-recognition regime might be enforced by a member state harmed by illegal recognition was never tested in connection with Namibia.

D. *Israel and Cyprus*

In connection with rules of non-recognition, Dugard discussed a number of further cases, up to 1987, including claims of territorial acquisition by Israel to East Jerusalem[65] and the Golan Heights[66] and claims of statehood of the Turkish Republic of Northern Cyprus.[67]

East Jerusalem is a territory of ambiguous legal status. Part of the British Palestine Mandate, it was taken by Jordan in 1948 during hostilities surrounding the establishment of the state of Israel. It was, in turn, taken by Israel in the 1967 Arab-Israeli War. U.N. Security Council Resolution 478 of August 20, 1980 stated that it does not "recognize . . . actions by Israel that . . . seek to alter the character and status of Jerusalem" and called upon states to withdraw any diplomatic missions from Jerusalem. Meanwhile, the Golan Heights were legally part of Syria and controlled by Syria until occupied by Israel during the 1967 war. The General Assembly called Israel's occupation "illegal and invalid" and called on states not to recognize it.[68] Some states

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64. *See* Legal Consequences, 1971 I.C.J. at 56:

> 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.

Id. at 56. An advocate of the East Timorese position in international law notes these limitations and takes the view that they are consistent with non-recognition. *See* Roger S. Clark, *Timor Gap: The Legality of the Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia*, 4 PACE Y.B. INT'L L. 69, 89 & n.79 (1992).

65. *See* DUGARD, *supra* note 13, at 111-15.

66. *See id.* at 115.

67. *See id.* at 108-11.

68. G.A. Res. 37/123A, U.N. GAOR, 37th Sess., Supp. No. 51, para. 5, U.N. Doc. A/37/51 (1983).

defied Security Council Resolution 478, keeping embassies in the Holy City. No state has recognized de jure Israel's presence on the Golan Heights. At the level of a regional organization, the rule of non-recognition was enforced by the threat of expulsion—a threat that went beyond recognition of the incorporation of the occupied territories into Israel and indeed extended to recognition of Israel itself[69]—but no attempt to enforce the rule of non-recognition as regards East Jerusalem seems to have been made at U.N. level. No occasion for enforcement has been afforded in regard to the Golan Heights, as no state has recognized Israeli title to that territory.

Turkish Northern Cyprus, created following hostilities on Cyprus and an invasion by forces of Turkey in July 1974, was first fashioned as the Turkish Federated State of Cyprus (1975), then, on November 15, 1983, as the Turkish Republic of Northern Cyprus (TRNC). Turkey recognized the TRNC. U.N. Security Council Resolution 541 of November 18, 1983 labeled the TRNC "legally invalid" and called upon states "not to recognize any Cypriot State other than the Republic of Cyprus."[70] Recognition of the TRNC by Turkey was emphasized when Turkey and the TRNC exchanged ambassadors in 1984. The Security Council, arguably in enforcement of Resolution 541, condemned the exchange.[71] Security Council reaction to the establishment of diplomatic relations between Turkey and the TRNC thus affords one of the few examples before *East Timor* to suggest how a system might be developed to enforce rules of non-recognition against states in breach.

E. *Kuwait*

Iraq invaded Kuwait on August 2, 1990.[72] This undertaking did not have the endorsement of any multilateral organization, nor did it take place in response to a threat to Iraq having the immediacy requisite under the rule of self-defense classically set

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69. Seventeen members of the League of Arab States broke diplomatic relations with Egypt and the membership of Egypt in the organization was suspended as a sanction for Egypt's recognition of Israel. Egypt did not recognize Israeli title to the occupied territories. *See Saudi Embassy Restored in Egypt*, CHI. TRIB., Nov. 18, 1987, at C18; *What's News—World-wide*, WALL ST. J., Nov. 17, 1987, at 1 (noting that Bahrain and Saudi Arabia restored diplomatic relations with Egypt after an eight-year suspension).

70. S.C. Res. 541, *supra* note 18, para. 7.

71. *See* S.C. Res. 550, *supra* note 18, para. 2; DUGARD, *supra* note 13, at 109-10.

72. *See* S.C. Res. 660, U.N. GAOR, 46th Sess., Supp. No. 2, at 30, U.N. Doc. A/46/2 (1993).

forth in the *Caroline* case.[73] Shortly after the invasion, which rapidly defeated Kuwaiti resistance and led to occupation of the territory of Kuwait, Iraq organized a referendum in Kuwait. This was not monitored by any external observers. Many persons who were not citizens of Kuwait voted in it, while many persons who were Kuwaiti citizens were excluded from voting in it.[74] The purport of the referendum was that Kuwait should be annexed to Iraq as the latter's nineteenth province in a "comprehensive and eternal merger."[75] This was accomplished on August 7, 1990.[76]

The Security Council condemned the Iraqi invasion and its results.[77] In a number of resolutions, the Security Council called on states to deny recognition of the results of the Iraqi invasion. Before Iraq declared the annexation of Kuwait, U.N. Security Council Resolution 661 of August 6, 1990 called upon all states

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73. Under the *Caroline* rule, a state may resort to force when there can be shown a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938) (quoting the source of the *Caroline* rule, a letter from U.S. Secretary of State Daniel Webster to the British Minister in Washington on Apr. 24, 1841).

74. The U.N. Security Council condemned "the attempts by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait." S.C. Res. 677, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 84. For a general discussion of when self-defense may be invoked as justification for a use of force, see J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE, 397-432 (Sir Humphrey Waldock ed., 6th ed. 1963).

75. S.C. Res. 662, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 38; *see also Provisional Verbatim Record of the Twenty-Third Meeting*, U.N. GAOR, 45th Sess., 23rd mtg. at 56-70, U.N. Doc. A/45/PV.23 (1990), *reprinted in* THE KUWAIT CRISIS: BASIC DOCUMENTS 191-93 (E. Lauterpacht et al. eds., 1991). For a reiteration of the historico-legal argument advanced by Iraq in defense of annexation, see *Letter from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General, 21 May 1992*, U.N. Doc. S/24044 (1992), *reprinted in* IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 439-48 (Marc Weller ed., 1993).

76. *See Identical Letters from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, 22 Mar. 1991*, U.N. Doc. S/22396 (1991) (noting the rescinding of the decision of the Iraqi National Council of August 7, 1990 to annex Kuwait), *reprinted in* IRAQ AND KUWAIT, *supra* note 75, at 396.

77. *See* S.C. Res. 660, *supra* note 72 (characterizing invasion as breach of international law); S.C. Res. 661, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 34 (establishing embargo against Iraq and Kuwait); S.C. Res. 662, *supra* note 75, para. 3 (condemning annexation of Kuwait); S.C. Res. 665, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 53 (establishing naval blockade of Iraq and Kuwait); S.C. Res. 667, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 67 (condemning mistreatment of diplomatic personnel by Iraq in Kuwait); S.C. Res. 677, *supra* note 74, para. 1 (condemning "attempts by Iraq to alter the demographic composition of the population of Kuwait"); S.C. Res. 678, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 85 (authorizing Member States of the United Nations, starting January 15, 1991, to use "all necessary means" to restore control of the territory of Kuwait to the government of Kuwait, if Iraq had not complied with the provisions of S.C. Res. 660 requiring it to withdraw from Kuwait by that date).

"[n]ot to recognize any régime set up by the occupying Power [in Kuwait]."[78] Moreover, the resolution required states to recognize only the "legitimate Government of Kuwait and its agencies" as regarded control of financial and other assets.[79]

The purported annexation of the territory precipitated a definitive statement of non-recognition, contained in U.N. Security Council Resolution 662 of August 9, 1990. "*Gravely alarmed* by the declaration of Iraq of a 'comprehensive and eternal merger' with Kuwait," the Security Council "[c]all[ed] upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation."[80] This language, especially when viewed in light of the boycott set forth in Resolution 661, encompassing both Iraq and Kuwait, was arguably the most far-reaching and decisive statement of non-recognition in the history of the Security Council. While the rule of non-recognition toward South African presence in Namibia was also comprehensive, it did contain the reservation that its implementation should not act to the detriment of the Namibian people. Though protection of the welfare of the people of Kuwait was an explicit objective in U.N. action, no limitation on the rule of non-recognition was expressed in this connection. That the embargo established under U.N. Security Council Resolution 661 of August 6, 1990 applied equally over the territories of Iraq and Kuwait again underlines the scope in this case of the U.N.-sponsored rule of non-recognition. Further Security Council resolutions reprised the non-recognition rule—Resolution 664 of August 18, 1990 in particular—terming the annexation of Kuwait "null and void."[81] Regional multilateral organizations, especially the League of Arab States and the Gulf Co-Operation Council, confirmed the U.N. non-recognition rule with their own statements of non-recognition.[82]

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78. S.C. Res. 661, *supra* note 77, para. 9(b).
79. *Id.* para. 9(a).
80. S.C. Res. 662, *supra* note 75 (emphasis added).
81. S.C. Res. 661, *reprinted in* U.N. Doc. A/46/2, *supra* note 72, at 45.
82. *See Resolution 3036 Adopted at the Extraordinary Session of the Council of the League of Arab States, Cairo, 2 Aug. 1990*, para. 1, U.N. Doc. S/21434, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 293 ("condemn[ing] the Iraqi aggression against the State of Kuwait, . . . reject[ing] any effects it might entail and . . . withhold[ing] recognition of its consequences"); *Resolution 195 Adopted at the Extraordinary Arab Summit of 10 Aug. 1990*, para. 3, U.N. Doc. S/21500, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 294 (deciding "not to recognise the Iraqi decision to annex Kuwait or any consequences arising from the invasion of Iraqi troops of Kuwaiti territory."); *The Iraqi Aggression Against the State of Kuwait*, Council of the League of Arab States Res./5037/ES (Aug. 31, 1990), para. 4, U.N. Doc. S/21693, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 296

Previous U.N.-sponsored rules of non-recognition, with the limited exception of Katanga, had been enforced, if at all, only by sanctions against the object of non-recognition. By contrast, the rule regarding Kuwait was accompanied by robust enforcement mechanisms going well beyond sanctions. To wit, the member states of the United Nations enforced, through air, land, and sea blockade, the embargo against trade to and from Iraq and the illegally occupied territory. Thus, any commerce that might have lent support to the Iraqi claim to title to Kuwait was prevented. Moreover, after January 15, 1991 an alliance of member states, in accordance with the deadline set in U.N. Security Council

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(calling on "all States and all international and regional organizations to refrain from any action or dealings which might be interpreted as an implicit recognition of [Iraqi tampering with the demographic composition or administrative structure of Kuwait]"); *Statement of the Ministerial Council of the Gulf Co-Operation Council at its Meeting Held in Cairo, Egypt, 3 Aug. 1990*, U.N. Doc. S/21430, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 302 ("The Council rejects this act of aggression and any effects to which it may give rise and will not recognize its consequences."); *Final Communiqué Issued by the Twelfth Extraordinary Ministerial Council Meeting of the Gulf Co-Operation Council Held at Jeddah, Saudi Arabia, 7 Aug. 1990*, U.N. Doc. S/21468, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 303 ("The Council affirms its rejection of this aggression and of any effects to which it may give rise and its non-recognition of its consequences."); *Final Communiqué Issued by the Thirty-Sixth Session of the Ministerial Council of the Gulf Co-Operation Council Held in Jeddah, Saudi Arabia, 6 Sept. 1990*, U.N. Doc. S/21719, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 303 ("reaffirm[ing] that it is essential to ensure . . . non-recognition of Iraq's decision to annex Kuwait and of any other consequences following on the invasion by Iraqi forces of Kuwaiti territory"); *Communiqué Issued in Cairo by the Nineteenth Interministerial Conference of the Organization of the Islamic Conference Concerning the Iraq-Kuwait Crisis, 6 Aug. 1990*, U.N. Doc. S/21448 ("condemn[ing] the Iraqi aggression against Kuwait . . . [and] reject[ing] and declar[ing] null and void the consequences stemming therefrom"), *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 306; *Statement on the Crisis in the Persian Gulf Adopted by the Meeting of Ministers of Foreign Affairs and Heads of Delegation of Non-Aligned Countries at the Forty-Fifth Session of the General Assembly, New York, 4 Oct. 1990*, U.N. Doc. A/45/585, S/21849, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 306 ("emphasiz[ing] that these acts are unacceptable, null and void"); *Decision Adopted by the Permanent Council of the Organization of American States, 22 Aug. 1990*, U.N. Doc. S/21665, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 307 (repudiating the annexation of Kuwait); *Declaration on the Iraq-Kuwait Conflict Issued at the Nordic Foreign Ministers' Meeting, 12 Sept. 1990*, U.N. Doc. S/21751, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 308 (noting that the Nordic countries had implemented "stringent boycott provisions" and "reject[ing] all attempts on the part of the Iraqi authorities to exercise governmental authority in Kuwait"); *Statement by the Twelve Member States of the European Community Issued Within the Framework of European Political Cooperation, Statement Following the Rome Meeting, 4 Aug. 1990*, U.N. Doc. A/45/383, S/21444, *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 308 ("[The Twelve] will refrain from any act which may be considered as implicit recognition of authorities imposed in Kuwait by the invaders"); *Declaration Following the Extraordinary EPC Ministerial Meeting, Brussels, 10 Aug. 1990*, U.N. Doc. A/45/409, S/21502), *reprinted in* THE KUWAIT CRISIS, *supra* note 75, at 309 ("[The Twelve] reject the announced annexation of Kuwait which is contrary to international law and therefore null and void.").

Resolution 678, began a military action, Operation Desert Storm, with the aim and result of expelling Iraqi forces from Kuwait and restoring the Government of Kuwait to its state territory. A rule of non-recognition was thus announced and enforced, preventing the crystallization under law of Iraqi claims to the territory of Kuwait and ending the de facto expression of those claims. Breaches of the rule of non-recognition, which may have taken place, were not opposed through formal proceedings but, rather, circumscribed in their effect by the thoroughness of the blockade against Iraq and the swiftness of the reversal of the results of the Iraqi invasion.[83]

III. EAST TIMOR

Case Concerning East Timor (Port. v. Austl.) called on the ICJ to address the legal effect of certain U.N. resolutions.[84] Portugal claimed these resolutions to oblige non-recognition of Indonesia's annexation of East Timor and acknowledgment of Portugal as administering power for that territory.[85] *East Timor* was

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83. Opponents of international action against Iraq included Jordan and the Palestine Liberation Organization (PLO). Neither however recognized the annexation of Kuwait or endorsed the aggressive acts leading to annexation. Mauritania, Cuba, Yemen, Libya, and the Sudan were others among the small number of states critical of the regime against Iraq. None of the states active in the establishment and enforcement of the regime brought actions against any of these critics. For a representative division of opinion, see Res. 3036, *supra* note 82. The resolution condemned the Iraqi invasion of Kuwait. Iraq, Mauritania, Yemen, and the Sudan voted against it; the PLO and Jordan approved it but with reservations; Libya abstained. *See id.*

84. *See* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30).

85. The objects of recognition may be divided into four categories:

1. New states;
2. Extra-constitutional changes of government;
3. Changes of territorial possession; and
4. Claims of belligerent status by insurgent movements within a recognized state.

See Edwin L. Fountain, Note, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473, 476 n.10 (1989). *East Timor* concerned the third category. The case, like the cases of Namibia and the Middle Eastern territories noted earlier in this Article, did not concern recognition of a claim to statehood, strictly speaking, though underlying it was an unrealized claim to statehood by the East Timorese. Recognition may well mean different things for different categories of objects. Whatever the object of recognition, however, recognition involves acknowledging a new situation containing an international dimension, and it makes some aspect of the situation opposable against the recognizing state. East Timor and ICJ treatment of the Portuguese claim regarding it are instructive about enforcement of non-recognition regimes.

therefore—potentially, at any rate—a test case for the competence of the U.N. as an organ of collective recognition.

A. *Historical Background*

East Timor was a vestigial appendage of a Portuguese empire that, built upon trade routes of the late fifteenth and sixteenth centuries, had once spanned the globe. Even after the loss of Brazil in 1822, Portugal had retained extensive but moribund colonies in Africa (Angola, Mozambique, and Guinea-Bissau), enclaves on the coasts of the Indian subcontinent (Diu, Daman, Goa, and Coçanada), and the East Asian possessions of Macau and East Timor. While Macau reverted to Chinese control in 1999, Portugal lost all of its other possessions by the mid-1970s. Political upheaval gripped Portugal in the early 1970s, and, among other repercussions, this accelerated retreat from colonial dominion.[86] Guinea-Bissau gained independence in September 1974; Angola and Mozambique followed the next year.[87] Timorese independence, however, was not to be perfected. Indonesia, a resource-rich state occupying an immense archipelago, had inherited control of the western half of the island of Timor from the Netherlands.[88] Despite the marginal economic value of East Timor in proportion to its extant possessions, Indonesia overran the territory in winter 1975–1976 and quickly set about to eradicate indigenous opposition. In the face of the invasion and a Timorese uprising at least partly orchestrated by Indonesia, Portuguese authorities evacuated the territory capital, Dili, and fled to the small nearby island of Atauro. They left Atauro shortly thereafter, thus ending all trace of Portuguese effective governmental power in that part of the world.

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86. General Salazar, long time military dictator of Portugal, suffered a debilitating stroke in September 1968. The prime minister, Caetano, formed a government and became head of state upon Salazar's death in July 1970. Caetano in April 1974 was ousted in a socialist coup known as the "Carnation Revolution." The new government enacted the Law of 27 July 1974 acknowledging that all non-self-governing territories under Portuguese administration had a right to self-determination, including a right to independence. A summary of this history appears in *Case Concerning East Timor*, 1995 I.C.J. at 115 (Oda, J., separate opinion).

87. Guinea-Bissaua gained independence on September 10, 1974, Mozambica on June 25, 1975, and Angola on November 11, 1975. *See The World Factbook 1999* (visited Feb. 13, 2000) <http://www.odci.gov/cia/publications/factbook>.

88. Indonesia gained independence in 1949, after thwarting two desultory police actions by the Netherlands. *See* WILFRED T. NEILL, TWENTIETH CENTURY INDONESIA 323-32 (1973); *see also* R.D. Lumb, *The Delimitation of Maritime Boundaries in the Timor Sea*, 7 AUSTL. Y.B. INT'L L. 72 (1981) (summarizing political history of Timor).

East Timor immediately became a subject of U.N. concern. U.N. Security Council Resolution 384 of December 22, 1975 and the first of eight U.N. General Assembly Resolutions called for Indonesian withdrawal from the territory.[89] The resolutions also called for "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination."[90] U.N. General Assembly Resolution 3485 (XXX) of December 12, 1975 referred to Portugal as the "administering Power" for East Timor.[91] The Security Council followed up its first resolution with a second, Resolution 389 of April 22, 1976, condemning unanimously the Indonesian invasion.[92] Resolutions in the ensuing years rejected the incorporation of East Timor into Indonesia and continued to express that the organization would not recognize a political situation in East Timor achieved by force of arms. U.N. General Assembly Resolution 37/30 of November 23, 1982 was the last.[93] Nonetheless, the question of East Timor remained alive before the United Nations in a number of forms. The General Assembly agenda still included it, as did the list of non-self-governing territories within the meaning of Chapter XI of the U.N. Charter.[94] The Special Committee on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples was still seized of the East Timor question. And the Secretary-General continued to consult with concerned parties on the matter.[95]

Portugal itself would maintain a degree of pressure against Indonesia for its allegedly unlawful annexation of East Timor, but, though the international community widely accepted the

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89. *See* S.C. Res. 384, U.N. SCOR, 30th Sess., 1869th mtg. (1976). The first General Assembly Resolution was G.A. Res. 3485, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1976). It was followed by G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, U.N. Doc. A/31/39 (1977); G.A. Res. 32/34, U.N. GAOR, 32nd Sess., Supp. No. 45, U.N. Doc. A/32/45 (1978); G.A. Res. 33/39, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/33/45 (1979); G.A. Res. 34/40 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980); G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/48 (1981); G.A. Res. 36/50, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1982); and G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1983). For a discussion of relevant U.N. practice, see Roger S. Clark, *The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression, in* INTERNATIONAL LAW AND THE QUESTION OF EAST TIMOR 65 (Catholic Inst. for Int'l Relations & Int'l Platform of Jurists for East Timor eds., 1995).

90. S.C. Res. 384, *supra* note 89, para. 1.

91. G.A. Res. 3485, *supra* note 89.

92. *See* S.C. Res. 389, *supra* note 12.

93. *See* G.A. Res. 37/30, *supra* note 89.

94. East Timor had been declared a non-self-governing territory. *See* G.A. Res. 1542, U.N. GAOR, 15th Sess., Supp. No. 16, para. 1, U.N. Doc. A/4684 (1961).

95. *See* Case Concerning East Timor, 1995 I.C.J. at 97.

Portuguese contention that Indonesia holds East Timor illegally,[96] few concrete measures were taken to sanction the delinquency. Australia did, arguably, quite the opposite. Though Australia had voted in favor of General Assembly Resolution 3485 of December 12, 1975, it abstained from the vote on Resolution 31/53 of December 1, 1976 and Resolution 32/34 of November 28, 1977. With General Assembly Resolution 33/39 of December 13, 1978, Australia shifted further from its earlier participation in the censure of Indonesian conduct. Australia voted against Resolution 33/39, and in connection with its vote, the Australian Department of Foreign Affairs stated, "The text of the Resolution did not reflect a realistic appreciation of the situation in East Timor and no practical purpose was served by the Resolution."[97] Australia announced on February 14, 1979 that it recognized de jure the incorporation of East Timor into Indonesia.[98]

The government of Australia concluded a maritime delimitation treaty with Indonesia on December 11, 1989. Entitled *Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia,* the instrument set up a three-part division of the maritime zone between the East Timorese and Australian coasts. To manage a complex system of tax and resource allocation envisaged under the Treaty, the Treaty also provided for a standing ministerial conference to comprise representatives of the governments of Australia and Indonesia.[99] Previous Australia-Indonesia continental shelf agreements, concluded in 1971 and 1972, had delimited the waters to the east and west of East Timor, but no agreement had been reached between Australia and Portugal or Australia and Indonesia defining rights over the waters and shelf

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96. For a report on the international consensus that the presence of Indonesia in East Timor is illegal, see *In East Timor, A Quiet Rite,* INT'L HERALD TRIB., July 18, 1996, at 4. Further suggesting continued international interest in the issue, a number of states reportedly recognized East Timor as an independent state in 1975 and have given no indication that they "retract" their recognition. The recognizing states were Angola, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe, Albania, Benin, Cambodia, the People's Republic of China, Congo (Brazzaville), Guinea (Conakry), North Korea, Laos, Vietnam, and Tanzania. *See* Clark, *supra* note 89, at 71 n.29.

97. AUSTRALIAN DEP'T OF FOREIGN AFFAIRS, ANNUAL REPORT 1978, at 30 (1979), *quoted in* Christine M. Chinkin, *East Timor Moves to the World Court,* 4 EUR. J. INT'L L. 206, 207 n.5 (1993).

98. *See* Chinkin, *supra* note 97, at 207; Clark, *supra* note 64, at 89 n.80 (citing statement by Sen. Gareth Evans, Austl. Hansard, Senate, Oct. 18, 1988).

99. *See* Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, 29 I.L.M. 469 (1990). For a detailed discussion of the terms of the delineation of Australian and Indonesian zones under the Treaty, see William T. Onorato & Mark J. Valencia, *International Cooperation for Petroleum Development: The Timor Gap Treaty,* 5 ICSID REV. FOREIGN INV. L.J. 1 (1990).

between East Timor and Australia. The sea and its underlying strata between the opposing Australian and East Timorese coasts, an area that had become known as the Timor Gap, thus was not subject to any delimitation. The 1989 treaty, however, delimited it. Portugal viewed the 1989 treaty as a form of recognition of Indonesia's claim to East Timor. As such, Portugal further viewed the treaty as a delict by Australia against Portugal. Portugal filed application on February 22, 1991 to institute proceedings against Australia before the ICJ.[100]

B. The *East Timor* Case

1. The Majority Opinion

The Court held fourteen to two in favor of Australia. The majority opinion focused on whether, in reaching the merits of the dispute, the ICJ would have to rule on rights and obligations of a third state not party to the proceedings.[101] This approach had been anticipated by writers studying the case before the Court issued its disposition.[102] Australia argued from the basic principle set forth in *Monetary Gold Removed from Rome in 1943* that third-party consent is required for the ICJ to exercise jurisdiction over a matter that will decide the rights and obligations of the third party.[103] Indonesian conduct was the true target of Portugal's suit, according to Australia.[104] It

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100. For initial motions in the case, see *Case Concerning East Timor* (Port. v. Austl.), 1993 I.C.J. 32 (May 19); *Case Concerning East Timor* (Port. v. Austl.), 1992 I.C.J. 228 (June 19); *Case Concerning East Timor* (Port. v. Austl.), 1991 I.C.J. 9 (May 3).

101. Case Concerning East Timor, 1995 I.C.J. at 90.

102. *See, e.g.*, Chinkin, *supra* note 97, at 218-22 (examining in detail precedent on the Australian theory); Clark, *supra* note 64, at 75 n.19 ("Presumably, in spite of [Portugal's] effort to draft the pleadings in such a way as to emphasize Australia's breaches of international law rather than those of Indonesia, Australia will argue some variations on the theme that Indonesia is an indispensable party in the proceedings which should therefore not proceed."); Simpson, *supra* note 5, at 344 (calling indispensable third parties a "notoriously complex question"). Simpson cites Iain Scobbie as another writer predicting possible jurisdictional problems in connection with the indispensable third-party. *See* Iain Scobbie, The Presence of an Absent Third: Procedural Aspects of the East Timor Case (Nov. 1992) (paper delivered at the Catholic Inst. for Int'l Relations and the Int'l Platform of Jurists for East Timor Conference), *noted in* Simpson, *supra* note 5, at 344 n.93.

103. *See* Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K. & U.S.), 1954 I.C.J. 19, 32 (June 15); *Case Concerning East Timor*, 1995 I.C.J. at 100.

104. *See Case Concerning East Timor*, 1995 I.C.J. at 100-01 (stating that Australia contends it is being sued in place of Indonesia); Chinkin, *supra* note 97, at 219.

followed, then, that any holding on the merits would determine rights and obligations of Indonesia. The Court indicated that the central question for review was the locus of the power to conclude a continental shelf treaty concerning the Timor Gap: did that power lie with Portugal or with Indonesia?[105] Judgment, then, could not avoid deciding the rights and obligations of the non-consenting third party.

Portugal attempted to rebut this argument, which Australia had presented initially and which the Court, in basic form, adopted.[106] The Court, Portugal argued, did not need to approach the issue of Indonesian rights de novo because these rights had already been settled by the General Assembly and the Security Council "acting within their proper spheres of competence."[107] Portugal maintained that the ten U.N. resolutions—two Security Council, eight General Assembly—were legal articles of which judicial notice could be taken.[108] The Court disagreed, stating that

> [t]he argument of Portugal . . . rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolution went so far.[109]

The majority opinion went on to note the purport of the U.N. resolutions in question and acknowledged the status of East Timor as a non-self-governing territory.[110] The Court concluded that the resolutions were not self-proving documents and thus on their own did not establish a rule of non-recognition of Indonesian and recognition of Portuguese rights in East Timor:

> The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor.[111]

The Court noted as evidence that several states had concluded treaties with Indonesia since the annexation of East Timor, and

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105. *See Case Concerning East Timor*, 1995 I.C.J. at 101-02.

106. The attempt by Portugal to defeat the indispensable third-party argument seemed to have precedent in its favor; the ICJ had rejected arguments similar to the Australian argument in all but one instance in which parties had presented them. *See* Chinkin, *supra* note 97, at 218-20.

107. *Case Concerning East Timor*, 1995 I.C.J. at 103.

108. *See id.* at 103-04.

109. *Id.* at 103.

110. *See id.*

111. *Id.* at 104.

these contained no reservations regarding the disputed territory.[112] The Court held that it lacked jurisdiction over the matter.[113]

The dispute required the Court to reach Indonesian interests—those interests not having been conclusively decided by the U.N. resolutions—and this the Court could not do absent Indonesian consent to ICJ jurisdiction.[114] There was, according to the Court, no international rule of recognition or non-recognition regarding the status of East Timor, and, if the *ratio*

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112. *See id.*

113. *See id.* at 105.

114. *See id.*at 104-05. Considering that the core operative fact in *East Timor* was an alleged delict by Indonesia, it is noteworthy that Portugal did not bring suit against Indonesia. Portugal may well have decided that Indonesia was very unlikely to consent to jurisdiction (Indonesia was not one of the states recognizing compulsory jurisdiction of the ICJ by means of declaration under Article 36(2) of the ICJ Statue). *See id.* By contrast, Australia was probably assumed to be amenable because Australia recognized compulsory jurisdiction. *See* Chinkin, *supra* note 97, at 219. Moreover, Australia had demonstrated its amenability to ICJ process in *Case Concerning Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1993 I.C.J. 322 (Sept. 13). In addition to Australia's greater willingness to participate in an ICJ action, Portugal may have had another reason for considering it a more advantageous target: the nature of Australia's political system. If Portugal were unable to persuade the Court of the existence of a general international norm obliging collective non-recognition of statuses achieved by illegal use of force or a specific U.N. rule requiring non-recognition of the annexation of East Timor, it is possible that Australia and its opinion-forming polity would nonetheless be sensitive to the mere charge of a violation. Public disapprobation has a more powerful effect on the power processes of a liberal democratic state than an authoritarian state. Accordingly, challenging Australia before the ICJ might have triggered political reactions beneficial to Portugal's cause. Though a favorable internal dynamic might not have been entirely lacking in Indonesia, the role of civil society in shaping international legal policy in Indonesia is probably less pronounced than in Australia. An ICJ action against Indonesia, even in the unlikely event Indonesia had consented, would have eventuated little internal pressure to change policy toward East Timor. An ICJ action against Australia, even in the event of dismissal before a hearing on the merits, probably furthered Portugal's cause in the political processes of the respondent. The active role that Australia has played in international intervention in East Timor since September 1999 suggests that sympathies among the policy-influencing public in Australia indeed are aligned with the East Timorese and that the public may have been sensitive to pressure in the form of ICJ proceedings. Australia committed some 4500 troops to the multinational force for East Timor (INTERFET) authorized in S.C. Res. 1264 of Sept. 15, 1999, *see supra* note 2, to restore order and protect UNAMET (the U.N. organization overseeing the popular consultation of Aug. 30, 1999 and authorized by S.C. Res. 1246 of June 11, 1999, *see* S.C. Res. 1246, 4013th mtg. para. 1, U.N. Doc. S/RES/1246 (1999)). Australia further has pledged similar forces to the police and military component of the United Nations Transitional Administration in East Timor (UNTAET) authorized under S.C. Res. 1272 of Oct. 25, 1999. *See* S.C. Res. 1272, 4057th mtg. para 1, U.N. Doc. S/RES/1272 (1999). For some thoughts on whether an impleaded but non-appearing state can be a "party" to ICJ proceedings, see HUGH W.A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 46-63 (1985).

were given general application, U.N. resolutions—at least resolutions not more explicit on the subject of recognition than those regarding East Timor—could not give rise to such a rule over any territory.[115]

Three separate opinions concurred with the judgment of the Court, and two judges dissented. The separate concurring opinions of Judges Oda, Shahabuddeen, and Vereshchetin will be examined, followed by an analysis of the dissents.

2. Concurrence

Judge Shahabuddeen agreed with the majority on the character of U.N. practice in the matter of non-recognition. The U.N. resolutions on East Timor, Shahabuddeen wrote, do not by themselves have the meaning Portugal attributed to them. To treat them as a binding rule of non-recognition, the Court would have had to have interpreted them as such.[116]

Judge Vereshchetin identified another aspect of the Portuguese case as flawed: its failure to take into account the rights of the East Timorese. To Judge Vereshchetin, this was fatal to jurisdiction.[117] The people of East Timor, he wrote, were the party most effected by the root question on review, and thus the Court could not have jurisdiction in their absence from the proceedings.[118] Judge Vereshchetin's separate opinion neither necessarily confirmed nor rejected Portugal's argument that U.N. resolutions generated a general obligation not to recognize the alleged incorporation of East Timor into Indonesia.

Judge Oda, in the most interesting of the three separate opinions, seems to have accepted that a general rule of non-recognition was established by U.N. practice. East Timor, Judge Oda wrote, was taken in an illegal use of force, and the United Nations acted within its competence when it condemned this.[119] In joining the Court in its holding of lack of jurisdiction, Judge Oda did *not*, then, concur with the proposition that a rule of non-recognition could be given effect only after a judicial decision as to the rights and obligations of non-party Indonesia. Judge Oda rejected jurisdiction because he rejected Portuguese standing.[120] To Judge Oda, the important factor was that the U.N. resolutions

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115. *See Case Concerning East Timor*, 1995 I.C.J. at 104.
116. *See id.* at 123 (Shahabuddeen, J., separate opinion).
117. *See id.* at 135 (Vereshchetin, J., separate opinion).
118. *See id.*
119. *See id.* at 116 (Oda, J., separate opinion).
120. *See id.* at 118. Chinkin also had speculated, before the ICJ issued its decision, that a standing defect in connection with Portugal might have barred adjudication of the merits. *See* Chinkin, *supra* note 97, at 210-17.

were negative of Indonesian claims of right over East Timor, not affirmative of Portuguese claims:

> Indonesia's claim that East Timor should be integrated into its territory was rejected *solely* in order to uphold the rights of the people of East Timor but *not* to protect the rights and duties of the State of Portugal in relation to East Timor or the status of Portugal as the administering Power.[121]

One senses in Judge Oda's Separate Opinion an apprehension of perverse consequences were Portugal granted standing. Portugal had marked itself for over a decade as one of Europe's most unreconstructed colonial powers. It administered overseas territories in defiance of U.N. resolutions and administered them badly. Moreover, on the eve of Timorese independence, it evacuated the territory in a "cut-and-run" fashion almost befitting comic opera. To have construed from U.N. practice any right of Portugal to East Timor would have run against U.N. purposes, as expressed in over forty years of practice regarding non-self-governing territories.

3. Dissents

The dissenting opinions, filed by Judges Weeramantry and Skubiszewski, both proposed that recognition of the territorial changes effectuated since 1975 by Indonesia on the island of Timor is a delict. But the two opinions differed in their reasoning. Judge Weeramantry posited that an international rule regarding recognition and non-recognition of Portuguese and Indonesian claims over East Timor could have been deduced from U.N. practice regarding East Timor since 1975.[122] In this, Judge Weeramantry concluded that the law has moved toward requiring that collective process govern recognition, and that once a rule of non-recognition is established by the political organs of the U.N. regarding a particular situation, the rule is binding *erga omnes*.[123] Skubiszewski, by contrast, took the view that the duty of non-recognition flowed, not from a collective decision as to the status of East Timor specifically, but from a general international rule of non-recognition of changes effectuated by threat or use of force.[124] While Judge Weeramantry took the view that a specific rule of non-recognition had been legislated as regarded the

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121. *See Case Concerning East Timor*, 1995 I.C.J. at 116 (Oda, J., separate opinion). Judge Oda, like Judge Shahabuddeen, expressed concern about the indigenous people.

122. *Id.* at 202 (Weeramantry, J., dissenting).

123. *See id.* at 172.

124. *See id.* at 262-63 (Skubiszewski, J., dissenting).

putative incorporation of East Timor into Indonesia,[125] Judge Skubiszewski held that a general rule exists applying to all such situations.[126]

Judge Weeramantry wrote that the ICJ erred when it proposed to take on work properly performed already by the United Nations—that is, the work of deciding a collective international response to the purported incorporation of East Timor into Indonesia. "The Court cannot be reduced to inaction," Judge Weeramantry wrote, "by throwing upon it a burden duly discharged by the appropriate United Nations organs, acting within their proper authority."[127] No interpretative judicial lens was necessary, as the U.N. resolutions were already international law:

> [The] resolutions of the General Assembly which expressly reject the claim that East Timor has been integrated into Indonesia . . . declare that the people of East Timor must be enabled to determine their own future within the framework of the United Nations and expressly recognize Portugal as the administering Power are resolutions which are productive of legal effects.[128]

The resolutions, in Judge Weeramantry's view, are a form of collective recognition, and the ICJ could have taken notice of this without further analysis.[129] Australia, the dissenting opinion continued, extended de jure recognition to the annexation of East Timor, in possible violation of East Timorese sovereignty and East Timorese self-determination.[130] Judge Weeramantry proposes the United Nations as an organ of collective recognition and, by extension, proposes that the ICJ enforce decisions made in that capacity.[131]

Judge Skubiszewski expressed more concern over East Timorese rights, yet in the course of his dissenting opinion, he left less certain than Judge Weeramantry the role of the United Nations as an organ of collective recognition and of the ICJ as enforcer thereof. Judge Skubiszewski noted as progenitors of a modern rule of non-recognition Hersch Lauterpacht and, with the eponymous doctrine on Manchukuo, Henry Stimson.[132] The rule, he declared, "now constitutes part of general international law" and is even on its way to becoming *jus cogens*.[133] Territorial

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125. *See id.* (Weeramantry, J., dissenting).
126. *See id.* (Skubiszewski, J., dissenting).
127. *Id.* at 155 (Weeramantry, J., dissenting).
128. *Id.* at 186 (citations omitted).
129. *See id.*
130. *See id.* at 204.
131. *See id.*
132. *See id.* at 262-63 (Skubiszewski, J., dissenting).
133. *Id.*

change enacted by force is not to be recognized, and this, Judge Skubiszewski posited, is a "self-executory" rule:

> [T]he rule of non-recognition operates in a self-executory way. To be operative it does not need to be repeated by the United Nations or other international organizations. Consequently, the absence of such direction on the part of the international organization in a particular instance does not relieve any State from the duty of non-recognition. Nor does the absence of "collective sanctions" have that effect.[134]

Judge Skubiszewski's dissenting opinion implied that the institutional framework of the U.N. system is not needed on a case-by-case basis in establishing rules of non-recognition binding on all. The prohibition against the threat or use of force gives rise automatically to a rule of non-recognition regarding any situation violating the prohibition. The rule of non-recognition is freestanding and requires no institutional action beyond, perhaps, a finding of fact that an illegal use or threat of force has taken place; however, it is unclear whether Judge Skubiszewski takes the view that even this finding need be reached through a collective institutional process. Judge Skubiszewski indicated that U.N. resolutions calling for non-recognition may *amplify* the responsibility of states to withhold recognition of the annexation of East Timor,[135] but he expressly declared that these are not necessary for that responsibility to attach.[136] Indeed, terming recognition "still a 'free act,'" Judge Skubiszewski reaffirmed the discretionary nature of recognition. The Judge went on to propose, as if tempering his assessment that recognition remains a matter for the individual state to decide, that "the discretionary nature of the act has been changed by the rule on the prohibition of the threat or use of force."[137] Precisely how the enduring freedom of states on matters of recognition has been effected by the change in "the discretionary nature of the act" Judge Skubiszewski did not explain.

4. Analyzing the Opinions

The separate writings in *East Timor* may be distinguished by how much institutional process each argues is necessary to make non-recognition mandatory. The majority opinion requires not only an initiative from the political organs of the United Nations,

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134. *Id.* at 264.

135. *See id.* at 262-63 (noting U.N. resolutions on the status of East Timor, in addition to a general rule requiring non-recognition of changes achieved by force).

136. *See supra* note 134 and accompanying text.

137. *Id.* at 264.

but also ICJ interpretation.[138] Judge Weeramantry views U.N. resolutions as sufficient. According to Judge Skubiszewski, general international law on its own indicates when non-recognition is mandatory, and he would require accordingly no formal or collective announcement of non-recognition in specific cases of changes of territorial control by force.

This division of opinion had been prefigured in the writing of publicists before the ICJ issued its disposition in *East Timor.* Christine Chinkin (Professor of Law, University of Southampton) doubted whether the U.N. General Assembly and Security Council resolutions on East Timor had established a rule of non-recognition. Professor Chinkin stated that "the United Nations has not passed . . . resolutions . . . that there is a positive duty not to recognize Indonesia's presence in East Timor"[139] and that "the Security Council has not specifically called for non-recognition of the Indonesian annexation of East Timor."[140] Professor Chinkin's restrictive view on the language requisite to establish a rule of non-recognition, however, is itself open to doubt. In comparison with the language used in the resolutions concerning Kuwait, the South African "Homelands,"[141] and Rhodesia,[142] the language used in the East Timor resolutions indeed was unspecific regarding obligations of non-recognition. Meanwhile, the language in the resolutions concerning Katanga[143] was arguably *less* specific than the language in the East Timor resolutions, yet has been interpreted as having required non-recognition.[144] Professor Maria Clara Maffei (University of Parma), prefiguring Judge Weeramantry, suggested that there in fact did exist as concerned East Timor a rule of non-recognition legislated at the U.N. level. In particular, Maffei adduced as supplementary evidence, reinforcing the U.N. resolutions, the fact that the United Nations declined to send observers to East Timor following invitations by Indonesia to do so.[145] "The absence of United Nations observers," Maffei wrote, "can be interpreted as a sign of the will not to recognize the

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138. Because of the third-party problem, no judicial interpretation was possible one way or the other in the case at bar.

139. Chinkin, *supra* note 97, at 213.

140. *Id.* at 215.

141. *See, e.g.,* G.A. Res. 3411 D, *supra* note 47; S.C. Res. 402, *supra* note 47; G.A. Res. 2775 E, *supra* note 47; *supra* text accompanying note 47.

142. *See* G.A. Res. 2022, *supra* note 33 and accompanying text; S.C. Res. 216, *supra* note 34 and accompanying text; S.C. Res. 217, *supra* note 35 and accompanying text.

143. *See* S.C. Res. 145, *supra* note 26; S.C. Res. 169, *supra* note 28; G.A. Res. 1474, *supra* note 26; *supra* text accompanying note 26.

144. *See* DUGARD, *supra* note 13, at 86-90.

145. *See* Maria Clara Maffei, *The Case of East Timor Before the International Court of Justice—Some Tentative Comments,* 4 EUR. J. INT'L L. 223, 227 (1993).

presence of Indonesia in East Timor and not to legitimize the process of decolonization and the exercise of the right to self-determination outside the machinery of the United Nations."[146] Professor Roger S. Clark (Distinguished Professor of Law, Rutgers University) approximated the view of Judge Skubiszewski by developing the argument that a general rule of non-recognition of territorial acquisitions done by force exists and, thus, that Australian conduct was illegal. According to Professor Clark, the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (Friendly Relations Declaration)[147] and the 1974 *Definition of Aggression* (Definition of Aggression Resolution),[148] especially when viewed in light of active Australian participation in the drafting and approval of the resolutions, established a rule, binding at least on Australia, not to recognize changes in the disposition of territory effectuated by force.[149] The Friendly Relations Declaration stated, "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."[150] The Definition of Aggression Resolution stated, "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."[151] Clark further adduced as support for a general rule of non-recognition the duration and breadth of practice consonant with it. League of Nations practice already contained something like it, and regional multilateral treaties in Latin America did as well.[152] Under the view put forth by Professor Clark and Judge Skubiszewski, specific announcements of a rule of non-recognition, such as were issued in connection with Rhodesia, the "Homelands," and Namibia, could be dispensed with since a general obligation now existed under international law to withhold recognition from changes in the disposition of territory effectuated by force.

Notably, the ICJ rejected an Australian argument that there was in *East Timor* no justiciable issue presented for review. Australia had argued that it was being sued as a proxy for

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146. *Id.*

147. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971).

148. *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1975).

149. *See* Clark, *supra* note 64, at 76-92.

150. G.A. Res. 2625, *supra* note 147, annex. para. 1.

151. G.A. Res. 3314, *supra* note 148, annex art. 5 para. 3. The theory, shared by Clark and Judge Skubiszewski, was also sketched out by Simpson, *supra* note 5, at 345-46.

152. *See* Clark, *supra* note 64, at 86-87.

Indonesia for Indonesian actions. Thus, the parties at bar were not parties in altercation.[153] The Court, however, stated that a dispute did exist. The questions presented were (1) whether Australia had failed to recognize Portugal as the administering Power for East Timor, East Timor as a non-self-governing territory, and the right of the East Timorese to self-determination; and (2), in so doing, whether Australia had committed a delict.[154]

In dismissing Australia's argument that Portugal had presented no dispute, the ICJ left open the possibility that states could bring actions in the future for delictual recognition. If the Court had ruled that no dispute was presented in Portugal's pleadings, then the only action open to a party alleging injury from illegal changes in territorial status would be an action against the malfeasant which executed the changes. This would remove any chance of sanction against the third state, such as Australia, contemplating recognition, express or implied, of the illegal situation. Under the majority opinion in *East Timor*, the ICJ could entertain in principle a suit against a third state accused of breaking a collective rule of non-recognition. The problem in *East Timor* was that there was, in the view of the Court, no such rule freestanding, and the posture of the parties did not permit the finding of such a rule from extant practice of U.N. political organs. According to the ICJ, non-recognition opposable against third states in judicial proceedings cannot emanate from the U.N. political organs alone. The Court only acknowledged U.N. resolutions on East Timor as *evidence* of a rule of non-recognition. To treat those resolutions themselves as a rule of non-recognition regarding incorporation of East Timor into Indonesia, the Court apprehended that it would have had to consider the resolutions, if not on their merits de novo, then at least with an eye to determining their international legal status. The Court did not view the resolutions as final as regarded Indonesian rights. Judicial examination of the resolutions, then, was the stumbling block. According to the Court, an examination of the resolutions was necessary if any rule of non-recognition were to be established, but any conclusions from such examination would have decided Indonesian rights. Without Indonesian consent to ICJ jurisdiction, no matter requiring decision as to Indonesian rights could be entertained. It was the absence of a pre-existing rule of non-recognition—not the lack of a justiciable dispute—that barred the Court from holding on the merits. If, however, a rule of non-recognition had already existed,

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153. *See* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 100-01 (June 30); Chinkin, *supra* note 97, at 218.

154. *See Case Concerning East Timor*, 1995 I.C.J. at 100-01.

then the case could have gone to the merits. The reservation implicit in the majority reasoning is that third states *could* be taken to task for acts of recognition done in the face of collective non-recognition.

This is an important reservation. Recognition might well be strengthened as a methodology of response to uncertain claims if its extension in violation of the law opens the door to negative sanction. In the case at bar, as the Court saw it, collective non-recognition simply was not a settled issue nor could it have been settled without deciding non-party rights. If, however, the view espoused by Judge Weeramantry had been adopted by the Court, then Indonesia's legal rights would already have been decided by the political organs of the United Nations. Accordingly, Portugal's claim against Australia could have been heard on the merits, and the ICJ would have had to determine whether Australia had committed an illegal act of recognition.

The aperture that the Court seems to have left open—for adjudication of a claim of illegal recognition—may well furnish in the future a mechanism for regulating controversial claims concerning territory and statehood. The telling case would be one in which a rule of non-recognition has been set forth in unambiguous terms by the political organs of the United Nations, thus giving the party instituting proceedings a clearer basis for action than was available to Portugal and possibly clearing the air of the problem of the unimpleaded third party.