AEL 2022/07
Academy of European Law
European Society of International Law Paper

WORKING PAPER

Non-Recognition as the Pioneer Solidarity Tool for the Preservation of the International Legal Order

Agnese Vitale

European University Institute

Academy of European Law

European Society of International Law

Research Forum, Catania, April 2021

Non-Recognition as the Pioneer Solidarity Tool for the Preservation of the International Legal Order

Agnese Vitale

ESIL Paper Series editors:

Adriana Di Stefano (University of Catania)
Evelyne Schmid (University of Lausanne)
Catharine Titi (University Paris II Panthéon-Assas)

ISSN 1831-4066

© Agnese Vitale, 2022

This work is licensed under a Creative Commons Attribution 4.0 (CC-BY 4.0) International license.

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

Published in April 2022 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in Cadmus, the EUI Research Repository:

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.
Papers presented at ESIL events in 2011-2019 can be downloaded from SSRN. As of 2022, the papers are available in the EUI CADMUS Research Repository.

More information about the Academy of European Law

European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

More information about ESIL

ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

More information about the ESIL Paper Series

2021 ESIL Research Forum, Catania, 15-16 April 2021

The ESIL Research Forum is a scholarly conference that promotes engagement with research in progress by early-career researchers, who have the opportunity to present their works and receive comments from members of the ESIL Board and invited experts during the Forum. The 2021 ESIL Research Forum was hosted by the University of Catania on 15-16 April 2021 and addressed the topic "Solidarity: The Quest for Founding Utopias of International Law"

More information about the 2021 ESIL Research Forum

EUI ACADEMY OF EUROPEAN LAW

esil sedi EUROPEAN SOCIETY OF INTERNATIONAL LAW

Abstract

This work aims to present a new legal-historical conceptualization of the period 1919-1945, stressing that under the 'new law' of the Covenant of the League of Nations and of the Treaty for the Renunciation of War, States acted in the interests of the community of nations and not anymore solely in their own national interests. Not only States prohibited to a large extent recourse to armed force in international relations, but they established an obligation not to recognize as lawful the results of illegal claims to sovereignty. The doctrine of non-recognition proved to be significant in consolidating a new international order and in vindicating the force of law against the force of arms in the path leading to the creation of the United Nations.

Keywords

League of Nations; non-recognition; sanction; solidarity; international order; collective security.

Author information

Ph.D Candidate in International Law, University of Florence, Department of Legal Sciences; agnese.vitale@unifi.it

Table of Contents

1. Introduction

This work aims to present a new legal-historical conceptualization of the period 1919-1945. Many scholars have largely highlighted the flaws of the League and its blatant failure since it could not prevent the outbreak of World War II in 1939. However, insufficient attention has been given to the fact that the creation and activities of the League did alter pre-existing rules of public international law. The Covenant of the League of Nations, 1919, and the Treaty for the Renunciation of War, 1928 (also 'Pact of Paris' or 'Briand-Kellogg Pact') constituted the first attempt in the field of international relations to establish a relatively universal system of collective security. As a matter of fact, it was only after the two treaties came into force that the problem of collective security began to attract the attention of scholars and politicians and that the term became commonly used in the legal literature.[1] Not only States prohibited to a large extent recourse to armed force in international relations, but they established an obligation not to recognize as lawful the results of illegal claims to sovereignty. From then on, and still today, the obligation of all States to oppose aggression and the illegal threat or use of force and not to recognize as lawful the results of such violations presuppose the central place of solidarity in international law.[2]

To demonstrate that a paradigm shift occurred in this period – by which the international rule of law, and in particular peace and security, were considered common goods of an international community inspired by a solidarity sentiment – it is first necessary to analyse more in depth how collective security worked in the League of Nations era. Then a revisitation of the doctrine of non-recognition in the period concerned is proposed, showing how the doctrine was applied consistently even after the Manchukuo crisis throughout WWII years. Finally, it is explained why the instrument of non-recognition was and is still a solidarity tool in the hands of the international community even at its most critical crossroads.

---

[1] Hans Kelsen, *Collective Security under International Law* [United States Government Printing Office, Washington, 1957] 39. See also Konstantin D. Magliveras, 'The Withdrawal From the League of Nations Revisited' [1991] 10(1) *Dickinson Journal of International Law* 70-71.

[2] See Themistoklis Tzimas, 'Solidarity as a Principle of International Law: Its Application in Consensual Intervention' [2018] 6(2) *Groningen Journal of International Law* 335-36; Abdul G. Karoma, 'Solidarity: Evidence of an Emerging International Legal Principle' in *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (ed by H. P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P-T. Stoll and S. Vöneky) [Martinus Nijhoff Publishers, Leiden/Boston, Vol. 1, 2012] 104. According to Georg Schwarzenberger, collective security is a 'machinery for joint action in order to prevent or counter any attack against an established international order' (Georg Schwarzenberger, *Power Politics. A Study of International Society* [Stevens & Sons Limited, London, 1951] 494). The objective of collective security is thus to frustrate any attempt by States to change the *status quo* with overwhelming force (Joseph C. Ebegbulem, 'The Failure of Collective Security in the Post World Wars I and II International System' [2011] 2(2) *Transcience* 23).

2. Collective Security, Rule of Law and Solidarity in the Era of the League of Nations

By its very nature, law is an organization of force. The collective security system, as created in the era of the League of Nations, aimed at regulating such force in an unprecedented communitarian way. The idea of a universal organization for collective security is directed against the policy of alliances in general and the so-called balance of power in particular.[3] Indeed, previous experiments like the Concert of Europe – created in 1815 with the Congress of Vienna – are diametrically opposed in their intent to the novel idea of the League of Nations. Under the 'new law' of the Covenant of the League of Nations, 1919, and of the Treaty for the Renunciation of War, 1928 (also 'Pact of Paris' or 'Briand-Kellogg Pact') – through procedures of a legislative character – States indeed acted in the interests of the community of nations and not anymore (solely) in their own national interests.[4] In this way, they accepted that the law be placed above their particular national interests, not because of a self-limitation, but because of a 'solidarity' sentiment towards the protection of fundamental values of the community.[5] There was a paradigm shift and international law became an important world-ordering instrument.[6] The international rule of law, and in particular peace and security were now considered common goods of the international community.

In the Preamble to the League's Covenant, the High Contracting parties agreed to achieve international peace and security by 'the acceptance of obligations not to resort to war'. Art. 11(1) of the Covenant stated that any war or threat of war would be a matter of concern to the whole League.[7]

[3] 'It must be noted that a treaty of alliance, in the specific sense of the term, provides for mutual assistance only in case of external aggression, whereas universal collective security organizations are directed only [..] against an illegal use of force within the organization', see Kelsen (n 1) 39.

[4] Quincy Wright, 'The legal foundation of the Stimson Doctrine' [December 1935] 8(4) *Pacific Affairs* 444-46.

[5] See for example, Geoffrey Butler, 'Sovereignty and the League of Nations' [1920-1921] 1 *British Yearbook of International Law* 42-44; James W. Garner, 'Limitations on National Sovereignty in International Relations' [1925] 19(1) *The American Political Science Review* 1-24.

[6] Not by chance, in 1919, Woodrow Wilson wrote: '[w]hat we seek is the *reign of law* based upon the consent of the governed and sustained by the organized opinion of mankind', Woodrow Wilson quoted in William W. Bishop, 'The International Rule of Law' [1961] 59(4) *Michigan Law Review* 555 (emphasis added). In this sense, it is remarkable that the change brought by the establishment of the collective security system materialized not only in the creation of rules related to the organization of force, but more generally to the affirmation of an international rule of law, which indeed has been described with two trends: the aversion to lawlessness and the aversion to the law being changed by a unilateral act of the stronger (see Robert E. Goodin, 'Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers' [2005] 9 (1/2) *Journal of Ethics* 227-228).

[7] The Covenant of the League of Nations (Including Amendments adopted to December 1924), available on Avalon Project website <https://avalon.law.yale.edu/> accessed 5 December 2019.

Although the Covenant represented the first treaty trying to limit the freedom of States to resort to war, it was only with the Pact of Paris[8] that such prohibition became unconditional.[9] On the basis of the Covenant, in fact, if the Council of the League failed to agree unanimously on a solution to a dispute, the individual States concerned could eventually resort to war. War was also permissible in disputes declared by a party to be a matter of domestic jurisdiction. On the other hand, notwithstanding the admitted loopholes in Art. 15 of the Covenant, the Pact of Paris was subject to a wider exception of self-defence compared to the Covenant. Furthermore, the League's Covenant with its arrangements for conciliation, discussion and compromise, was probably stronger than the Pact of Paris regarding peaceful settlement of disputes.[10] As a matter of fact, the general tenor of the Covenant went against an arbitrary use of force by States.[11]

However, the responsibility to adopt economic and military sanctions as provided for in the Covenant ultimately rested with the individual decision of Member States. Thus, the concept of solidarity lying beneath the creation of the League of Nations did not reflect in the drafting of the rules providing for a collective reaction to serious violations of the Covenant.[12] Indeed, as it is well known, economic sanctions were ineffective and military sanctions were never applied. Nonetheless, solidarity was put into practice by Members of the League through a consistent implementation of the doctrine of non-recognition of illegal seizures of territory that, precisely in this period, acquired a strong collective dimension.

In conclusion, the Covenant of the League and the Pact of Paris worked synergistically. The Pact of Paris undoubtedly set the highest terms of reference for a complete ban on aggressive war on a theoretical level and it proved to be fundamental in changing the mindset of world leaders in subsequent decades. In this light, the Pact of Paris was recently described as the watershed between the old and the new world order in which we are living.[13] On its part, the

---

[8] Kellogg-Briand Pact 1928, available on Avalon Project website at the following address < https://avalon.law.yale.edu/20th_century/kbpact.asp> accessed 5 December 2019. Art. I of the Pact of Paris read as follows: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.'

Both the Pact of Paris and the Covenant of the League of Nations contained the term 'war' rather than the wider and non-technical term 'armed force'; though the Kellogg Pact went far to repair this defect by means of the references in the Preamble and in its second article to 'pacific means' and a 'peaceful and orderly process'. This proves that the two instruments did not ban the use of force *tout court* in international law, rather they were limited to the notion of aggressive war (see Arnold D. McNair, 'Stimson Doctrine of Non-Recognition' [1933] 65 BYIL 68).

[9] Enrico Milano, Unlawful Territorial Situations In International Law. Reconciling Effectiveness, Legality and Legitimacy [Martinus Nijhoff Publishers, Leiden/Boston, 2006] 103.

[10] Robert H. Ferrell (ed.), *The American Secretaries of State and Their Diplomacy* [Volume XI, New York, Cooper Square Publishers, 1963] 165. This is true also in relation to the doctrine of non-recognition. It has been noted, indeed, that the Stimson Note would be only a unilateral declaration if not endorsed by the Assembly of the League of Nations with its all set of functionings.

[11] "[..] It would be misleading to give too much emphasis to the subordination of the Covenant restrictions to Article 15, paragraph 7, and the customary law. It is significant that States which resorted to war and other types of force in the lifetime of the League did not attempt to justify their action by reference to a full-blooded right to resort to war inherent in general international law. States either made no legal apology at all, denied the existence of war in the formal sense, or talked in terms of necessity and self-defence. The Covenant in view of its general purpose and its particular provisions created a presumption against the legality of war as a means of self-help; and as time went by various instruments, and legal developments such as the Stimson Doctrine, were to reinforce that presumption; Ian Brownlie, *International Law and the Use of Force by States* [Clarendon Press, Oxford, 1963] 56-57.

[12] According to Art. 16(1), member States should severe immediately all trade or financial relations and prohibit all intercourse between their nationals and the nationals of the covenant-breaking State. Art. 16(2) provided instead military sanctions that were to be recommended to member States by the Council of the League.

[13] "The Peace Pact quite plainly did not create world peace. Yet it was among the transformative events of human history, one that has, ultimately, made our world far more peaceful. It did not end war between states, but it

League of Nations should be revalued too as the first forum where the concrete realization of such new international order was set in motion. Therefore, it seems correct to uncover the seeds of the new international order inside the League rather than only detecting the persistent elements of the old one.

3. The Doctrine of Non-Recognition Revisited

Until recently, the principle of non-recognition was a matter of policy only.[14] A fundamental step towards transforming the policy of non-recognition into an obligation was taken by the US administration through the enunciation of the Stimson Doctrine and then by the Assembly of the League of Nations through important resolutions, in connection with the invasion of Manchuria in 1931.
Scholars have often engaged in legal/historical conceptualizations of this period assuming that the doctrine of non-recognition of unlawful territorial acquisitions was just a 'pathetic paper sword',[15] a convenient substitute for active participation in the maintenance of the law of

marked the beginning of the end – and, with it, the replacement of one international order with another [..] Outlawing war only seems ridiculous to us because ours is a world in which war has already been outlawed. It is difficult to imagine war serving any legitimate function other than a defensive one. Today, war is regarded as a departure from civilized politics. But this has not always been so. Before 1928, every state accepted the opposite position. War wasn't a departure from civilized politics; it was civilized politics. Indeed, states could not imagine doing without it", Oona A. Hathaway and Scott J. Shapiro, *The Internationalists, And Their Plan to Outlaw War* [Allen Lane, Great Britain, 2017] xiii.

[14] Since ancient times, the State's external relations with other political bodies were differentiated depending on whether the political body in question had been recognized as meeting or not meeting certain criteria; see on this point, Remigiusz Bierzaneck, 'La non-reconnaissance et le droit international contemporain', [1962] 8 AFDDI, 119; Wolfgang Preiser, 'History of International Law, Ancient Times to 1648', [2008] MPEPIL 2-3. Later, in mediaeval times, ecclesiastical consecration developed as a right of approbation. Even if it was not constitutive of the legal subjectivity, it remained a fundamental element of occidental royal rule throughout the Middle Ages, especially for those kings and princes whose legitimacy seemed doubtful. And 'as the claims of the Church grew, so a doctrine of *impedimenta* developed, which defined the obstacles to the suitability of a ruler'; see Wilhelm Georg Grewe, *The Epochs of International Law* [Walter de Gruyter, Berlin-New York 2000] 75. From approximately 1494 to 1648, Spain was able to exercise its influence on the formation of the legal subjectivity of new entities, limiting the law of nations' purview both geographically and ideologically. In other words, Spain did not recognize the extension of the 'international legal community to non-Christian, non-European States' denying them legal subjectivity; see *Ibidem*, 186.

In 1648, the Treaty of Westphalia formalized and consolidated international law as a system of rules which governed the relations among sovereign States. Practically, however, the international society became dominated by a small group of European monarchial States. It was with the independence of the United States, proclaimed in 1776, that the European *de facto* government of monarchial powers began to feel threatened. If they could do little to stop the rise of the United States, they applied for the very first time a collective policy of non-recognition to the results of the French revolution in 1789, known as "theory of monarchial illegitimacy". The European theory was successfully contrasted by the stance of the United States which asserted the predominance of the principle of effectiveness over the theory of 'monarchial illegitimacy' established itself in the first half of the XIX century. With the joint efforts of the US President Monroe and the British Secretary of State Canning, Spanish colonies in Latin America – claiming independence between 1808 and 1829 - were granted recognition despite European revendication; see Kimon A. Doukas, 'The Non-Recognition Law of the United States' [May 1937] 35(7) Mich. L. Rev. 1076; John Bassett Moore, *A hundred years of American diplomacy* [Saratoga Springs, August 30, 1900] 6; American State Papers, Foreign Relations (Vol. I) 708 <https://memory.loc.gov/cgi-bin/ampage> accessed 05 September 2019; David Raič, *Statehood and the Law of Self-Determination* [Kluwer Law International, The Hague, 2002] 113-14.

From the second half of the XIX century, the instrument of non-recognition assumed three different declinations: non recognition of revolutionary governments, non-recognition in the law of treaties, and finally non recognition of territorial acquisitions. It was the latter one that then developed into the obligation of non-recognition in the '30s.

[15] Schwarzenberger (n 2) 503.

nations.[16] In the common view of scholars, the Manchurian case was a sporadic episode, and the doctrine of non-recognition was soon to be abandoned in the wake of other conflicts. The following analysis is an attempt to challenge this basic assumption.

Despite the critical voices arguing that after Manchukuo the doctrine of non-recognition became dead letter, an innovative interpretation of subsequent practice shows that it was instead steadily evolving. Moreover, while it cannot be denied that the doctrine also served the purpose to postpone a more active contribution to enforcing international law,[17] it should be realised that it accomplished other functions for the sake of international order.

The events that brought Japan to invade and occupy *de facto* the Chinese region of Manchuria are well-known.[18] Likewise, it is known that this represents the foundational case for the doctrine (or obligation) of non-recognition of unlawful seizures of territory. Soon after the occupation, Japan was indeed the object of a diplomatic note by the US government (later known as Stimson Note)[19] as well as of two resolutions of the League's Assembly.[20] These

---

[16] Frederick A. Middlebush, 'Non-recognition as a Sanction of International Law' [April 27-29, 1933] 27 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 54; Editors, 'Non-recognition: A Reconsideration' [Autumn 1954] 22(1) *The University of Chicago Law Review* 274.

[17] This was probably the US administration's position with regard to the doctrine. Not by chance, the US Secretary of State talked about the Stimson Doctrine as a 'formula which make the Kellogg Pact more effective without incurring the danger that this country would have to fight to preserve the peace', see Middlebush, *Non-recognition as a Sanction of International Law* (n 16) 47 citing Address by Acting Secretary Castle on 'Recent Developments in the Kellogg Pact'. This is also the reason why many scholars have attached to the US move towards the application of the doctrine of non-recognition, the mere intention to preserve the influence and the interests of Occidental powers in the Far East; see Joe Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine. Le relations Publiques Internationales* [Editions A. Pedone, Paris, 1975] 281.

[18] The northernmost region of China, called Dongbei but known to the West as Manchuria, however, has been in the Japanese sphere of influence since the end of the XIX century. However, Japan succeeded in securing it only after the victory in the Sino-Japanese War of 1895 and the Russo-Japanese War of 1904 (aimed at excluding another State interested in the control of the region). Japan was thus able to patrol the strategically important South Manchurian Railway and the territory around it, although formally the entire area remained under the sovereignty of China. Japan's army started to invade Manchuria in September 18, 1931, after the well-known 'Mukden incident' – an explosion occurred on the South Manchurian Railway near Mukden. Since the October of the same year, then, Japan supported local movements that were fighting to establish a new State in Manchuria. In the meanwhile, the control on the rest of the region was to be secured by 5 January 1932. The newly-formed local provincial authorities, under the oversight of the "Self-Government Guiding Board", reunited in Mukden on 16-17 February 1932 published a "Declaration of Independence" on 18 February; see David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' [2003] 2 *Chinese Journal of International Law* 107-110.

[19] On January 7, 1932, The Secretary of State H. Stimson issued an identical diplomatic note both to the Japanese and Chinese Ambassadors in Washington in order to inform their respective governments, inter alia, that the American Government could not 'admit the legality of any situation de facto' nor 'recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928', Quincy Wright, 'The Stimson Note of January 7, 1932' [April 1932] 26(2) AJIL 342.

[20] As for the League of Nations, China had already appealed the Council in the wake of Mukden incident on 21 September 1931 (League of Nations Official Journal, December 1931, 2453). According to the Chinese government a situation had arisen that required the Council to act under Article 11 of the Covenant, according to which the Secretary-General could summon a meeting of the Council 'so that the peace of nations may be safeguarded'. On 10 December 1931 the Council passed a Resolution by which it instituted a Commission of Enquiry (later known as the Lytton Commission) with a mandate to investigate on-the-spot the situation in Manchuria and to report back to the Council' (League of Nations Official Journal, 1932, 364). On 29 January 1932 China finally submitted a formal appeal to the Council under Article 10 and 15 of the Covenant 'requiring the Council to take steps to settle any dispute likely to lead to a 'rupture' between two members of the League' (Turns (n 18) 122).

On 11 March 1932, the League Special Assembly issued a Resolution asserting the applicability of the Covenant's provisions on non-aggression and the peaceful settlement of international disputes to the situation in the far East. Most importantly, the declaration recalled the obligation on Member States not to recognize any situation, treaty or agreement brought about by means contrary to the Covenant of the League or the Pact of Paris (''it is incumbent

documents declared that according to the Pact of Paris and the Covenant of the League it was not possible to recognize *any situation, treaty or agreement* brought about by means contrary to these instruments.
The Stimson Declaration relied on the Pact of Paris while the Resolutions of the League relied on Art. 10 of the Covenant.[21] Neither instrument expressly provided for the obligation of non-recognition. However, the latter might be considered implicit in both treaties since their original ratification.[22] The doctrine of non-recognition was only revived by the action of the Stimson Note and the League's Assembly Resolutions.[23]

---

upon the Members of the League of Nations not to recognize any situation, treaty or agreement, which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris'; League of Nations Official Journal, 1932, Special Supplement 101, 87-88). The resolution also established the Committee of Nineteen to oversee the implementation of the League resolutions and to facilitate the settlement of the dispute.

Lastly, on 24 February 1933 the draft report of the Committee was adopted by a great majority of States in the Assembly. The report, adopted under Art. 15(10) of the Covenant, recognized that China and Japan had legitimate grievances against each other in Manchuria prior to September 18, 1931, and both States were blamed for the Manchurian crisis. Ultimately, however, China was exempted from any international responsibility, while Japan was held to be in breach of Art. 10 for not respecting the territorial integrity and political independence of a League Member as well as in breach of Art. 12 for not submitting the dispute to arbitration, judicial settlement or to enquiry by the Council (League of Nations Official Journal, 1933, Special Supplement 112, 73. See also Magliveras (n 1) 61. Finally, the report called upon member States not to recognize either *de jure* or *de facto* the regime established in Manchuria and adopted recommendations as to give effect to the policy of non-recognition.

[21] Art. 10 of the Covenant of the League of Nations: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.

[22] Quincy Wright, 'The legal foundation of the Stimson Doctrine' (n 4) 439; League of Nations Official Journal, Special Supplement 64, 1928, 75; Quincy Wright, 'The Meaning of the Pact of Paris' [January 1933] 27 AJIL citing Salmon O. Levinson, Christian Century, 1929; John Dugard, *Recognition and the United Nations* [Grotius Publication Limited, Cambridge, 1987] 28; Lauterpacht, *Recognition in International Law* [Cambridge University Press, UK, 1948] 417 ('it appears from the wording of the pronouncement and the Resolution of the Assembly that non-recognition was considered to be a legal obligation binding upon the members of the League by virtue of the Covenant. In fact, refusal to recognize a conquest accomplished in violation of the Covenant would seem to have constituted the very minimum of the obligation to respect and preserve the territorial integrity and political independence of other members of the League'). For a different opinion see D. P. O'Connell, *International Law* [Vol. 1, Stevens & Sons Limited, London, 1965] 497-98.

This consideration ultimately permits to avoid the legal question raised by some scholars about the binding nature of Assembly Resolutions (see, for instance, Alison Pert, 'The Duty of Non-recognition in Contemporary International Law: Issues and Uncertainties' [2013] 30 *Chinese (Taiwan) Yearbook of International Law and Affairs* 5; James L. Brierly, 'The meaning and Effect of the Resolution of the League Assembly of March 11, 1932' [1935] 16 BYIL 159; H. A. Smith, 'The Binding Force of the League Resolutions' [1935] BYIL 157). So, it is not necessary to embark in the controversy as to whether the Assembly resolutions were binding or not, since, as already stated, they were declaratory of existing obligations flowing from the text of the Covenant; see Lauterpacht, *Recognition in International Law* (n 22) 417 footnote 4.

[23] 'This action will go far toward developing into terms of international law the *principles of order and justice which underlies those treaties*, and the Government of the United States has been glad to cooperate earnestly in this effort" (emphasis added), Wright, *The Stimson Note of January 7, 1932* (n 19) 344 citing the Statement of Secretary of State Stimson in reference to Assembly Resolution, March 11, 1932. See also L. Oppenheim, *International Law, a treatise* [ed. H. Lauterpacht, Vol. 1, fifth edition, Longmans, Green and Co., London, 1937] 141: 'So far as members of the League are concerned, the obligation [of non-recognition] implied in that Resolution must be regarded as *declaratory* of the obligations of Article 10 of the Covenant'.

In fact, in the Resolution of the Council of the League of February 16, 1932 (League of Nations Official Journal, 1932, 383), i.e. the communication of the President of the Council to the Japanese representative, the obligation of non-recognition is said to follow from the terms of Article 10 (see Oppenheim (n 23) 141, note 2-3).

After the Stimson declaration, a wide set of legal restatements of the principle of non-recognition occurred in inter-American relations. Some examples include 1) the 1925 statement of the American Institute of International Law; 2) the Declaration issued by American Republics reunited in Washington in 1932, and addressed to Bolivia and Paraguay as regard the Chaco Dispute; 3) the 1933 Montevideo Convention on the Rights and Duties of States,

It is also interesting to observe that the Stimson Note as well as the Assembly's Resolutions seemed to embrace a wider conception of 'use of force' in international relations (compared to the text of the Pact and the Covenant).[24] On this basis, the obligation of non-recognition could apply also to crisis not properly labelled as 'resort to war', as indeed it was for the Manchurian affair.[25] Thus, the instrument of non-recognition clearly developed at a 'faster rate' with respect to the prohibition on the use of force, only established as a rule in 1945 with the drafting of the UN Charter.[26]

The Manchurian crisis was characterized by a truly collective response by the international community through the first application of the obligation of non-recognition. From the beginning, both State officials and scholars attached a strong communitarian value to the obligation *de quo* since its application was decided through consultation among Member States and collectively enforced by a decision of the League's organs. Not only the Resolutions of the Assembly were adopted by unanimity but every member State – as well as some non-member States – implemented the measures suggested by the Committee of Twenty-Two to give practical effect to the obligation of non-recognition of the Japanese occupation.[27]

---

whose Art. 11 contained an express obligation of non-recognition; and 4) the 1933 Saavedra Lamas Pact, signed at Rio de Janeiro, where the parties agreed not to recognise the validity of such territorial acquisitions.

Later, in 1935, the principle of non-recognition was proclaimed in declarations concerning fundamental principles of international law by the International Juridical Association and the Académie Diplomatique Internationale. The International Law Association followed in 1936: '[n]e seront reconnus ni les acquisitions territoriales ni les avantages spéciaux obtenus par la force, que celle-ci consiste soit dans l'usage des armes, soit dans des représentations diplomatiques comminatoires, soit dans tout autre moyen de coercition effective'.

[24] McNair (n 8) 68.

[25] H. Lauterpacht, '"Resort to war" and the Interpretation of the Covenant during the Manchurian Dispute' [January 1934] 28(1) AJIL 45-46.

[26] Brownlie admits that the evidence of a 'customary rule that the use of force as an instrument of national policy otherwise than under a necessity of self-defence was illegal' is to be found in the practice of States between 1920 and 1945. Particularly he refers to 'numerous statements in diplomatic correspondence and the instruments relating to non-recognition' which constitute evidence of a general practice accepted as law (Brownlie (n 11) 110). So, the author implicitly admits that it has been the principle of non-recognition of the fruits of aggression which has been instrumental, preparatory for the establishment of a complete ban on the use of force in 1945.

In fact, this has been so since the first link between non-recognition and the notion of use of force during the Latin-American conferences in the second half of the XIX century. Latin-American countries, indeed, advanced the principle of non-recognition of unlawful seizures of territory, in a historical moment in which the use of force (not even aggressive war) had been outlawed in international law (see *Tratado de Confederación entre las Repúblicas de Bolivia, Chile, Ecuador, Nueva Granada y Perú. Congreso Americano de Lima*, 8 de Febrero de 1848, in G. A. de la Reza, *Documentos Sobre El Congreso Anfictiónico de Panamá*, Fundación Biblioteca Ayacucho y Banco Central de Venezuela, 2010, p. 274; Tratado Continental Concluido entre Las Repúblicas de Chile, Ecuador y Perú. Congreso Continental de Santiago de Chile, 15 de Septiembre de 1856, in *ibid.*, 287; Reports, Recommendations and Resolutions adopted by the Conference, in Carnegie Endowment for International Peace, *The International Conferences of American States 1889-1928* [Oxford University Press, New York, 1931] 44-45).

[27] With a view to giving greater clarity and meaning to the non-recognition obligation as applied to the Manchurian situation, the Assembly Resolution of February 24, 1933 appointed an Advisory Committee, the so-called Committee of Twenty-Two. On 14th June, 1933, with a letter from the Secretary-General, the members of the League and those non-members States to which the Assembly's report was sent, were informed of the measures adopted by the Committee resulting from the non-recognition of Manchukuo (League of Nations Official Journal, Special Supplement 113, 10). It was assumed by the Committee that, unless informed to the contrary, the governments of those states represented in the Advisory Committee, would apply the measures recommended (League of Nations Official Journal, January 1934, 17). As regards the States not represented in the Committee as well as several States not members of the League, they communicated to the Secretary General their intention to follow the concerted policy of non-recognition.

The problems which the Committee investigated were the following: 1) the question of the participation of the government of Manchukuo in international conventions; 2) whether Manchukuo would be admitted to the universal postal service; 3) the question of non-recognition of the currency of Manchukuo; 4) problems that could be raised by the acceptance by foreigners of concessions or appointments in Manchukuo; 5) the question of passports; 6)

Shortly after the Assembly of the League formulated its policy of collective non-recognition in respect of Manchukuo, the international community was confronted with two territorial disputes in Latin America which provided the opportunity for a reaffirmation of the principle: the Chaco and the Leticia cases.[28]

As for the 1933 Peru-Colombia conflict over the region surrounding the city of Leticia, in the territory of the Amazon rainforest, scholars generally agree that it was successfully managed by the League of Nations, and we may add, also by virtue of the doctrine of non-recognition. The Council, indeed, clearly stated that Peru had invaded the territory of Colombia and it recalled the Assembly Resolution of March 11, 1932, about the non-recognition of unlawful territorial acquisitions.[29] Eventually Peru returned to Colombia the contended region and it was induced to make reparations – even if only in the form of satisfaction.[30]

More controversial was the Bolivia-Paraguay border dispute, which was brought to the attention of the League on September 10, 1931.[31] The first critical point is that member States did not unanimously agree on the identification of the aggressor between the two State parties.[32] It has emerged, however, that non-recognition cannot avoid the necessity of ultimately determining the aggressor.[33]

In addition, the League even on the verge to declare that Paraguay was the aggressor[34] did not directly tackle the question of non-recognition of the Paraguayan seizure of territory and no report was submitted to the vote of the Assembly. Instead, for the first time the League tested a 'decentralization' of the obligation of non-recognition.[35] In the end, the matter was the

---

the position of consuls; and finally 7) the application to Manchukuo of the import and export certificates system applicable to trade in opium, under provisions of the Geneva Opium Convention of 1925 and the Limitation Convention of 1931 (see League of Nations Official Journal, Special Supplement, no. 113, 11. See also Frederick A. Middlebush, 'International Affairs: The Effects of the Non-Recognition of Manchukuo' [August 1934] 28(4) *The American Political Science Review* 677-683).

[28] Dugard (n 22) 35.

[29] League of Nations Official Journal 14, April 1933, Annex, 599-609, Report of the Council, provided for in Article 15, paragraph 4, of the Covenant, submitted by the Committee of the Council.

[30] At the meeting of the Council held on May 25th, 1933, both parties signed the document containing the procedure for putting into effect the recommendations proposed by the Council on March 18th, 1933 (League of Nations Official Journal 14, July 1933, 944). The document provided for the following procedure: the Council should appoint a Commission which, in the name of the Government of Colombia, would administer the territory of Leticia for a period not exceeding one year, during which negotiations should be carried out. Moreover, the Peruvian forces in that territory shall withdraw immediately upon the Commission's arrival. Finally, the abovementioned Commission would have the right to decide all questions relating to the performance of its mandate, including the calling upon of military forces of its own selection (see *Ibid*. 945). It was the first time that the League of Nations appointed a Commission to temporarily administer a contended territory, inaugurating a practice that would be pursued by its successor – the United Nations – through peace-keeping operations and territorial administrations (see Pierre-Etienne Bourneuf, '"We Have Been Making History": The League of Nations and the Leticia Dispute' (1932–1934)' [2016] *The International History Review* 2). In June 1934, Peru and Colombia signed a peace treaty and the territory of Leticia returned to Colombia. Moreover, Peru was asked to apologize for the invasion and to sign again the 1922 boundary agreement.

[31] League of Nations Official Journal, January 1932, 151.

[32] League of Nations Official Journal, Special Supplement 132, 48.

[33] Middlebush, Non-recognition as a Sanction of International Law (n 16) 53.

[34] Indeed, the League of Nations for a long period of time awaited to take a stand in the matter. Progressively, however, the League took an active attitude by informing member States that the arms embargo – already set up for both countries – should not be any more applied to Bolivia and inviting them to adopt further measures in order to render the existing ones more effective; see League of Nations Official Journal, Special Supplement 133, 49, *Report, dated January 16th, 1935, by the Advisory Committee on the situation created by the replies of Bolivia and Paraguay concerning the recommendations adopted by the Assembly on November 24th, 1934*.

[35] The Report finally adopted by the Advisory Committee on March 15, 1935, relied completely on the efforts to be made by American countries at the Peace Conference in Buenos Aires (see League of Nations Official Journal, Special Supplement 134, 56-58 and League of Nations Official Journal, Special Supplement 143, 15). The League

object of an arbitral award released on October 10, 1938 by the official representatives of Argentina, Brazil, Chile, the United States, Peru and Uruguay.[36] Since some of Paraguayan conquests had been accepted by the award, scholars[37] strongly criticized the League's inaction as well as the American nations' denial of the obligation of non-recognition that they had reiterated with regard to the Chaco dispute in the *Declaration of Principles of the American nations* of August 3rd, 1932.[38]

Without denying the less incisive response by the League of Nations compared to the other two cases outlined above, there is another possible interpretation of the facts – which draws on from Quincy Wright and Hersh Lauterpacht's understanding of the doctrine. According to both authors, the instrument of non-recognition responded to a logic of legality, but without breaking away from reality. Indeed, situations unrecognized in law could be the object of international purview. It was the international community that had to decide whether to validate or to invalidate an illegal conduct in order to safeguard the peace of nations.[39] In this respect, it should be stressed that on several occasions, before and during the American effort to settle the dispute, the delegates of almost every member State reiterated in the Assembly that the American nations were acting in performance of the principles contained in the Covenant of the League of Nations (in particular Art. 10) and on behalf of the entire collectivity of States. These elements should not be disregarded because they signify that the members of the League were still holding to the theoretical collective obligation of non-recognition while entrusting a group of States of its practical application, maybe also for a reason of subsidiarity. Moreover, before 1945 peaceful settlement of disputes was the other side of the coin of non-recognition. The process of peaceful settlement of disputes perfectly represented the way by which a solution to a dispute arising out of an illegal act could be settled by the international community even without returning to the *status quo ante*. In this light, an arbitral award could be an alternative way by which States sought to adjust law with facts.[40] Consider, indeed, that in that period non-recognition was considered as a means of diplomatic dispute resolution. Stimson placed great reliance on non-recognition in conjunction with the practice of consultation, capable of transforming the Pact from a simply inspiring declaration to an instrument for the peaceful settlement of disputes. Indeed, the US government excluded both the sanction of armed force and the economic boycott to respond to violations of the Pact. Non-recognition was conceived as a moral sanction preferable to any other coercive means as far as they would have been acts of war themselves. The logic of pacific settlement of disputes was inherent also in the obligation of non-recognition as formulated by the League. In its resolution of March 11, 1932, the Assembly stated that the provisions of the Covenant and of the Pact of Paris, at least in so far as 'the principles governing international relations and the peaceful settlement of disputes' were concerned, they were in full harmony.

---

was not only delegating to the American nations the determination of the guilty party, but also the restatement of the principle of non-recognition ('The Venezuelan delegation does not forget that the League has the right to hope, in the present deadlock, that its American Members will fulfil their primary and inescapable duty of maintaining the declaration made jointly on August 3rd, 1932. My Government maintains it in its entirety', League of Nations Official Journal, Special Supplement 134, 17).

[36] *Chaco Arbitral Award* reproduced in [1939] 33 AJIL 180-82.

[37] Herbert W. Briggs and Norman J. Padelford, 'Non-recognition of title by conquest and limitations on the doctrine' [May 13-15, 1940] 34 *American Society of International Law at Its Annual Meeting (1921-1969)* 77.

[38] 'The American nations [..] declares that they will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms', AJIL Special Supplement, 1934, 168.

[39] Wright, The Legal Foundation of the Stimson Doctrine (n 4) 444-46; Lauterpacht, Recognition in International Law (n 22) 412, 427.

[40] 'Of all conquests and titles which have been taken by conquest since 1932, Paraguay was perhaps most influenced by the doctrine of non-recognition and the principle that disputes must be settled by peaceful means, in the long run and the final analysis. Non-recognition here was coupled with the latter doctrine, and the American States did influence the final settlement', see Padelford in Briggs and Padelford (n 37) 85.

Thus, also in the Covenant of the League of Nations the obligation of non-recognition was seen as a 'peaceful' alternative to other forms of sanctions provided in the Pact. Not only, but also the content of the obligation itself was dissociated completely from military or economic measures.[41] It is true that the obligation as implemented by the Covenant provided for some measures of economic character, but it fell short of encompassing economic boycott.

The next crisis was the Italian invasion of Ethiopia in 1935-36.[42] Scholars agree that since this moment onwards, the doctrine of non-recognition was completely abandoned, and States returned to a logic of alliances and power politics.[43] There was no more space for collective security and solidarity in the venue of the League of Nations. However, here as well another interpretation may be propounded.

There was, of course, a general decline of the League's collective security system that finally led to WWII, but there are underlying dynamics yet to be discovered. The two fundamental dynamics are the following. In the first place, inside the League there were forces pushing for an application of the principle of non-recognition, notwithstanding the stumbling block of the *appeasement* policy played out by some major powers towards fascist States. This pressure then proved not to be useless, since the Allied Powers at some point rejected *appeasement* and got back to the principles enshrined in the Covenant, thus enabling the non-extinction of States victim of aggression between 1935 and 1941.

On October 7th, 1935, four days after the conflict between Italy and Ethiopia had officially started, the Council adopted a report according to which Italy had resorted to war contrary to Art. 12[44] and labelled as the aggressor. Despite the urgent appeals by the Ethiopian government to restate the obligation of non-recognition, however, both the Council and the Assembly did not respond.[45] The League instead moved to the very first attempt to apply Art. 16 on economic sanctions.[46]

This move soon proved to be ineffective and on July 4th, 1936[47], the Council decided to terminate the application of the economic sanctions.[48] However, the Council stressed that it remained strongly attached to the principles of the Covenant and other diplomatic instruments such as the Declaration of the American States of August 3rd, 1932. It follows that it was then possible for Member States to pronounce on the question of non-recognition.

This possibility faded away when in the meeting of May 12th, 1938, Lord Halifax spoke in the Council of the League in order to obtain support for Britain's opinion that the question of Italy's

---

[41] 'In Article 16 the Covenant provided for economic sanctions as an instrument of redress, but Article 10, stipulating that members should undertake "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members", was not linked to the sanctions system. Rather, the Council of the League was entrusted with the task of 'advising' on the methods of complying with this obligation. The uncertainty on the precise implications of this provision was the main reason why the United States Senate refused to ratify the Covenant', see Peter Malanczuk, *Akehurst's Modern Introduction to International Law* [Seventh Revised Edition, Routledge, London and New York, 1997] 24.

[42] See Ennio Di Nolfo, Storia delle Relazioni Internazionali. Dal 1918 ai giorni nostri [Edizioni Laterza, Bari, 2009] 189.

[43] See, for instance, Schwarzenberger (n 2) 496-504 and Herbert Briggs in Briggs and Padelford (n 37) 79.

[44] League of Nation Official Journal, no. 16, November 1935, 1225.

[45] League of Nations Official Journal, no 16, November 1935, 1141.

[46] League of Nations Official Journal, Special Supplement 145, 2 *Recommendation adopted by the Assembly on October 10th, 1935.*

[47] Reproduced in Quincy Wright, 'The British Courts and the Ethiopian crisis' [October 1937] 31(4) AJIL 683-84.

[48] As it is well-known, economic sanctions provided for many exceptions regarding important strategic goods in the armaments sector, such as iron, steel, copper, zinc, lead, cotton, and wool. Moreover, there was the exception of the sanction of the interruption of oil supplies, which alone could have led to the paralysis of the Italian action. It should be remembered that while the League of Nations carried out its effort to condemn Italian invasion, the secret Anglo-French negotiations went ahead, in search for that diplomatic pact known as 'Hoare-Laval compromise', see Di Nolfo (n 42) 194.

position in Ethiopia was to be left to the individual decision of Member States.[49] Most members of the Council – including France[50] – fell in line with the British Government and emphasized the freedom of States in the field of recognition.[51]

This is the well-known story, but the crucial fact to underline is that both the Council and the Assembly tried as long as possible to continue to recognize Ethiopia as an independent State and its membership in the League, although not adopting an express declaration of non-recognition of the Italian claim over Ethiopia.[52]

In May 1936, Mussolini indeed proclaimed the annexation of the whole Ethiopian territory to the Kingdom of Italy and solemnly conferred the title of Emperor of Ethiopia upon King Victor Emmanuel II. The Negus was forced to leave his country and was in exile in the UK. The Credential Committee of the Assembly was thus confronted with the difficult task of deciding whether the credentials issued by a Head of State in exile should be accepted or not. On several occasions, both the Council and the Assembly, disregarding the Italian demand for the exclusion of Ethiopia from the Assembly as a condition for its return to Geneva, reported that Ethiopian delegates were entitled to their seats. As late as September 1937, the Negus was allowed to communicate to the League's organs the atrocities that its population was suffering.[53] Most importantly, even after the British proposal on the complete 'decentralization' of the policy of non-recognition, Ethiopia was kept on the official list of the League's members.[54] This is what we have called 'indirect non-recognition', ie the non-recognition of the unlawful annexation through the continuing accreditation of the government in exile as the official representative of the country.[55]

It was the first time in which the doctrine of non-recognition was applied against the extinction of States. The Italian aggression on Ethiopia presented a different situation either from the Japanese invasion and occupation of Manchuria and from the Latin-American border disputes. In the Manchurian conflict, third States had something not to recognize, ie the puppet

---

[49] League of Nations Official Journal 19, May-June 1938, 335.

[50] 'It [the French Government] associates itself with that Government in expressing to you the desire for general recognition of fact that cirmustances henceforward entitle every State Member to judge for itself as to the decisions to be taken', *Ibid* 340.

[51] Only China, New Zealand and the Soviet Union protested against this interpretation, arguing that the principle of non-recognition was implicit in Art. 10 of the Covenant and had been endorsed by a Resolution of the Assembly. Consequently, the principle could be repealed only by a collective decision of the Assembly. However, no vote was taken on this issue in the Council (*Ibid*, URSS (340), China (344), New Zealand (355)). Mr. Munters of Latvia, President of the session, finally concluded that '[i]t is, however, clear that, in spite of regrets which have been expressed, the great majority of the Members of the Council feel that, so far as the question which we are now discussing is concerned, it is for the individual Members of the League to determine their attitude in the light of their own situations and their own obligations' (*Ibid* 346-47).

[52] Magliveras (n 1) 31; James W. Garner, 'Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty' [October 1936] 30(4) AJIL 683.

[53] "During the year 1937 the Ethiopian delegation did not participate in the sessions of the Assembly. In notifying the Secretary General to this effect, the Emperor of Ethiopia never failed to stress the continuing membership of his country in the League of Nations", Robert Langer, *Seizure of territory. The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* [Princeton University Press, New Jersey, 1947] 139.

[54] Langer (n 53) 151-52.

[55] In conclusion, it may be said that the international community, led by Great Britain and France, violated obligations under the Covenant of the League by recognizing the Italian title over Ethiopia. However, a form of indirect non-recognition – through the issuing of credentials to the Negus and his delegates – was put into effect. The Italian case indeed inaugurated a period in which the doctrine would be used against the extinction of States, giving government in exile the hope to regain full sovereignty at the end of the war.

Moreover, the decision about the decentralization of the policy of non-recognition was taken without vote in the Assembly, but per *consensus*, showing how member States were unwilling to go openly against a norm of the Covenant, that embodied in Art. 10. We can thus suppose that States were aware to act contrary to international law; see Quincy Wright in Briggs and Padelford (n 37) 90.

government of Manchukuo, and a treaty entered into by Japan and the purported new regime.[56] In South America as well, third States could invoke non-recognition of the territorial gains by the aggressors. Ethiopia instead was completely annexed by Italy. In this case, non-recognition of the Italian *de jure* title to territory meant the survival of a State, an action against the extinction of Ethiopia.[57]

The same formula was then applied to subsequent occupations and annexations of territories. However, this was not a coherent path of immediate results. All States victims of aggression had to experiment two periods in their international legal status: ranging from *de facto* recognition of the annexation to the affirmation of their continued international personality, as far as the stance of the international community is concerned.

Since the Italian occupation of Ethiopia, as already outlined, the United Kingdom and France adopted the so-called policy of appeasement towards fascist and/or aggressive States. The consequence of appeasement on the issue of recognition was that territorial acquisitions were only slightly condemned. States indeed usually conceded *de facto* recognition.[58]

It seems, however, that the Allies acted aware appeasement was a temporary accommodation. Not by chance, when the precarious peace of the '30s had collapsed and WWII had broken out in September 1939 – with the German invasion of Poland – different considerations were applied, and all victim States were given back the status of independence through an act of non-recognition of the results of aggressions.[59]

As for Italy, many States granted recognition to the new *de facto* status of Ethiopia following the Italian military occupation, even if most of them did not concede *de jure* recognition. One exception was the United Kingdom that by a joint British-Italian declaration, signed in Rome on November 16, 1938, finally conceded *de jure* recognition to the Italian title.[60] However, also this case experienced a considerable reversal. In a communication sent in November 1940 by the British Secretary of State for the Colonies to the High Commission for Palestine, in connection with an action pending there, it was stated that the 'de jure recognition by His Majesty's government of the Italian conquest of Ethiopia had been withdrawn'.[61] On February 5, 1941, the Foreign Secretary announced in the House of Commons that 'His majesty's government would welcome the re-appearance of an independent Ethiopian State and recognize the claim of the Emperor Haile Selassie to the throne'.[62]

As for the annexation of Austria by Germany[63], from 1938 to 1940 most States granted *de facto* recognition to the Anschluss. From 1940 onwards, States instead began to change their

---

[56] Protocol singed at Changchun on 15 September 1932 by the representative of Japan and Manchukuo, League of Nations Official Journal, Special Supplement 111, 79-81.

[57] Garner, Non-Recognition of Illegal Territorial Annexations and claims to Sovereignty (n 52) 679.

[58] The interpretation put upon the obligation of non-recognition by the majority of States throughout the era of the League of Nations, reflected the view that States considered only *de jure* recognition as contrary to the principles of the Covenant (see Lauterpacht, *Recognition in International Law* (n 22) 347-48). The granting of *de facto* recognition permitted the undertaking of some measures of intercourse with the non-recognized regime for the sake of international order as well as not to create an unduly high burden on non-recognizing states.

[59] Turns (n 18) 129.

[60] Langer (n 53) 151.

[61] Reproduced in Lauterpacht, *Recognition in International Law* (n 22) 356.

[62] *Ibid.* Lauterpacht supposed that such withdrawal of recognition was due to the fact that the reason underlying *de jure* recognition in 1938, i.e. the achievement of a general settlement aiming at the pacification of Europe and the world, was destroyed with the Italian declaration of war upon Great Britain and France in 1940. More generally, we can even argue that in presence of a manifest violation of international law, such as the prohibition of conquest by the force of arms, also a *de jure* recognition (by which an estoppel effect would be expected) can be subsequently withdrawn without incurring in international liability.

[63] As for the annexations perpetrated by Germany, they were placed outside the reach of the League of Nations. The German government, indeed, adopted a very preventive behaviour by increasing its military arsenal before and by proceeding to the occupation of neighbouring countries only after its effective withdrawal from the League

attitude vis-à-vis the (il)legality of the Anschluss. On July 27, 1942, the Secretary of the United States announced that the US government 'had never taken the position that Austria was legally absorbed in the German Reich'. Prime Minister Churchill, as well, in a speech at Mansion House on November 9th, 1940, referred to Austria as one of the countries for whom Great Britain had 'drawn the sword' and for whom victory would provide liberation.[64] This movement finally culminated in the Moscow Declaration of October 30th, 1943 that declared the Anschluss to be 'null and void'.[65] The signatories were in no way 'bound by any changes effected in Austria' and they wished to 'see re-established a free and independent Austria'. It seems that the Allies regarded the Moscow Declaration as having re-established pre-Anschluss Austria. As a matter of fact, today the majority of scholars agree on the legal continuity of the Austrian State between the two periods, that is the continuity of its legal status before and after the annexation.

The recognition attitude of the international community was the same also for the Czechoslovakian case. Until the beginning of March 1939, the United Kingdom still put forward the policy of appeasement, whose apex moment and most flagrant failure was the Munich Agreement, signed in the night of September 29, 1938 among Germany, France, Italy, and the UK, and concerning the cession to Germany of the territory of the Sudetes.[66] However, following the establishment of the protectorates on March 15, 1939, the United States condemned German actions and announced their intention not to recognize the legality of the conquest. On their part, the UK and France recognized the government in exile of President Beneš, called 'Czechoslovak National Liberation Committee', based in Paris. At the end of the war, Czechoslovakia returned to the situation *ex ante* the aggression. Moreover, Czechoslovakia remained a member of the League until 1945.

Not even the annexation of Albania by Italy in 1939 was recognized by the United States and other western governments which only conceded *de facto* recognition. As for Ethiopia and Czechoslovakia, Albania retained membership in the League throughout the period.[67]

With the beginning of the war, the German annexation of Warthegau in conquered Poland in 1939 was not recognized by the Allied Powers,[68] who also refused to recognize the puppet States established in Slovakia in 1939 and in Croatia in 1941. These last two cases strongly resembled that of Manchukuo, where States did not recognize the advantage deriving from

---

in October 1935. The massive rearmament policy pursued since 1933, shortly after the rise of Hitler to power, did not flow into the adoption of a policy of non-recognition, nor did the customs union with Austria in 1931 (which had been the object of a PCIJ Advisory Opinion). The matter of the recognition of the Anschluss was thus left to each individual State to decide. Nevertheless, the attitude of the international community was the same as for the Ethiopian annexation. States, indeed, conceded only de facto recognition to the German title over Austria, not hesitating to condemn it as an illegal act. The fundamental difference with respect to the Ethiopian case was that the Austrian government itself recognized the annexation. The fact that there was no other government embodying the legal continuity of the Austrian state placed the country in a more difficult situation compared to Ethiopia. From this point of view, the policy of non-recognition, not being supported by a government in exile, was far less efficient than for Ethiopia or Czechoslovakia.

[64] Reproduced in Clute R. E., *The International legal Status of Austria, 1938-1955*, [PhD Dissertation] Department of Political Science in the Graduate School of Arts and Sciences of Duke University, September 1957, at 27, available from ProQuest Dissertations and Theses database.

[65] The Moscow Conference; October 1943, Joint Four-Nation Declaration, available at Avalon Project website <https://avalon.law.yale.edu/> accessed 18 February 2020.

[66] Munich Pact, September 29, 1938, available at Avalon project website <https://avalon.law.yale.edu/> accessed 09 July 2019.

[67] Brownlie (n 11) 415, 417.

[68] It is true that as regards the Finnish territories ceded to the Soviet Union by the Peace Treaty of 1940 was not the object of non-recognition by any State or on the part of the agencies of the League. On 14th December 1939, the Council of the League of Nations had adopted a Resolution through which it associated 'itself with the condemnation by the Assembly of the action of the Union of the Socialist Republics against the Finnish State' and it decided that by its acts, the URSS 'has placed itself outside of the League of Nations'. In other words, the Union of the Socialist Republics was expelled from the League of Nations.

conquest, an advantage taking here the form of puppet entities. After the Soviet occupation of Eastern Poland by Soviet armed forces in September 1939, the US and other countries recognized a government in exile as the lawful government of Poland. The Soviet incorporation of the Baltic Republics too was not recognized by the majority of States, with the US in particular continuing to give diplomatic status to representatives of the former governments within their country.[69]

It has been suggested that the Allied Powers' attitude towards new entities like Slovakia was due 'to the special circumstances of wartime and the fact that these entities were established by and allied to the Axis Powers, rather than to any sudden enthusiasm for the Stimson Doctrine per se'.[70] This factor obviously has to be taken into account when examining the revival of non-recognition in wartime. However, it seems that the war took back the Allied Powers to a 'level of truth', especially in the Declarations by the Great Powers between 1941 and 1945.[71] Allied Powers' attitude, indeed, had the merit of having guaranteed the non-extinction of States victim of aggression between 1935 and 1941.

4. Non-Recognition, Solidarity and the Preservation of the International Order

Such a practice of the League of Nations in cases of violations by aggressor States – *inter alia*, Japan, Italy and Germany – is a telling example of the importance for the international community to maintain a legal discourse based on solidarity when addressing collective security and the related goal to preserve the existing international legal order.

As a matter of fact, the doctrine (later principle) of non-recognition, while not impeding changes to occur,[72] restrains the possibilities that an illegal act could permanently affect the international legal order without any challenge or process of verification.[73] Its inherent ***raison d'être*** is the maxim *ex iniuria ius non oritur* by which an illegality cannot become *suo vigore* a source of

---

[69] Brownlie (n 11) 417.

[70] James Crawford, *The creation of States in International Law* [2nd edition, Clarendon Press, Oxford, 2006] 130.

[71] We have talked about the Moscow Declaration, which was the most explicit as far as it was directed towards the situation of Austria. The fact that Austria did not have a government in exile nor before nor during the war probably made necessary for the Allies to stress out in a written declaration that they were 'in no way bound by any changes affected in Austria since that date'. However, other declarations have been important, for instance the Cairo Declaration by which UK, China and France stated that it was 'their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed' (Cairo Conference 1943, Released December 1, 1943, available at Avalon project website <https://avalon.law.yale.edu/> accessed 18 February 2020). See also Hathaway and Shapiro (n 13), 318-319: 'Led by Secretary of State Henry Stimson, the world refused to recognize the conquests. The seizures of land were reversed as soon as the war was over [..] Might was no longer Right'. As these authors correctly point out the legal transformation that happened in between the two world wars reflected also in the fact that: '[i]n contrast to the end of the First World War (and most wars before it), the losing States of the Second World War were not carved up and parcelled out to the victors' (*ibid.*, 321).

[72] As a matter of fact, the introduction into international law of an obligation of non-recognition of illegal use of force did not mean the fossilization of any *status quo* in the system of collective security, as detractors of the doctrine argued. On the contrary, it permitted changes in the system only through a concerted action of the international community.

[73] 'The peace of the community of nations is more important than the interests of any state and it is for procedures of general consultation to determine whether that peace requires non-recognition or recognition of a given status quo. The Stimson doctrine therefore does not fossilize any status quo, it merely insists that general shall be substituted for individual action in conferring the sanction of law upon a situation which originated in violence', Wright, *The legal foundation of the Stimson Doctrine* (n 4) 444-446.

legal right for the wrongdoer.[74] As a result, the law of the strongest cannot replace existing law, at least not until there is a widespread agreement amongst the members of the international community corresponding to a shared interest to modify existing rules.[75]
It does emerge that the doctrine of non-recognition was not only a peaceful sanction,[76] but its ultimate function was also exactly that of preserving international law.[77]
One can does suppose that it is for this continuous effort by the League to vindicate the force of the law against the force of arms that there had been a passing of the baton between the League of Nations and the United Nations (UN). Surely, WWII had a strong role in the restoration of the situation prior to aggressions. A world conflict always rectifies the discrepancy between the force of stability and the force of change.[78] However, there was like an 'ideal' continuity before and after WWII based on the fact that the Allies resumed the principles enshrined in the Covenant and the Pact of Paris and applied them.
As remarked by Brownlie: 'By 1942 the war against Germany and its allies was regarded by many governments as a war of collective defence and sanction *against a source of aggression and lawlessness* which constituted a common danger. It was with this spirit that the United Nations Declaration of 1 January 1942 was made'.[79]
The doctrine of non-recognition is based upon the assumption of the existence of law and the possibility to distinguishing between what is lawful and what is unlawful; and indeed, the present international legal order requires us to distinguish between aggressor and victim

---

[74] See recently Anne Lagerwall, *Le principe ex iniuria ius non oritur en droit international* [Édition Bruylant, Bruxelles, 2016] 141-159.

[75] The results of an illegal act can become part of international law in three ways: 1) by prescription; 2) by consent of the injured party; 3) by recognition. Under an obligation of non-recognition, resulting from a violation of a rule of international law – such as the prohibition on the use of force, these methods of 'validation' of illegal acts are subject to considerable restraints. First, the consent of the injured party alone can hardly influence the legal situation, being it usually subject to duress. For example, the fact that German authorities organized a plebiscite to endorse the annexation of Austria did not convince the world that the *Anschluss* was the result of democratic aspirations of the inhabitants of both countries. The international community, even if recognizing *de facto* the new territorial situation, did not acquiesce the fact that Austria had freely expressed its will and condemned it as an illegal act. Moreover, the Pact of Paris and the Covenant established a system of objective law according to which substantial violations, such as the prohibition of the use of armed force, was a matter of concern for all the contracting parties and not only for the States directly concerned. As for recognition, when it is used to validate an illegal act is meant to have a 'quasi-legislative' function. However, recognition must be carried out by the community of States as a whole for the sake of international peace and progress. The international community's response to the Chaco dispute which recognize to Paraguay part of its conquest can be read under this light. Finally, prescription, i.e. the passage of time with undisturbed possession, may eventually lead to historical consolidation of title. Here, the principle of non-recognition plays its fundamental role. Indeed, continued protests and condemnations by third States prevent the changing of the *status quo* by defiant States.

[76] In this regard, it should be stressed, as already outlined above in this work, that – even only conceived as a peaceful sanction – the obligation of non-recognition within the League was given a slightly different content from that formulated by Stimson. Assembly's Resolutions in the Manchurian case indeed set forth some additional measures aiming at isolating as completely as possible the unlawful territorial situation from the rest of the world. Thus, it was not a mere moral sanction based on the pressure of the public opinion of the world as the US administration claimed (on the uthopian background of this belief see Edward H. Carr, *The Twenty Years Crisis 1919-1939* [Macmillan Amp Co Ltd, London, 1946] 25, 31 ff.).

[77] 'Being a sanction is not the only, and perhaps not the main, function of the principle of non-recognition'; Lauterpacht, *Recognition in International Law* (n 22) 434.

[78] 'It is indeed true that war performs an important function in international society, and like revolution within a State, it is a means of rectifying the discrepancy between law and fact, between the force of stability and the force of change', Ti-Chiang Chen, *International Law of Recognition* [Stevens & Sons Limited, London, 1951] 422.

[79] Brownlie (n 11) 108, 109 (emphasis added).

States. This derives from the abandonment of the 'might is right' principle which governed international relations in the old World order.[80]
The Covenant of the League of Nations, as well as the Pact of Paris and then the Charter of the United Nations contemplate the establishment of a system of objective laws in the international community. The development of such objective obligatory laws clearly points to the creation of an international community in which a breach of law is deemed to be an offence against the entire community and each of its members. It is against this objective (and solidarity) standard that the legal validity of the acts of States should be tested.[81]

5. Conclusive Remarks

From the preceding analysis, it has emerged the necessity to reconsider some legal-historical conceptualizations offered by internationalists with regard to the period under consideration. The League of Nations, too often cited only as a failed experiment of an international order based on peace, has to be revalued as the starting point of a new international order, and in particular as the organization which established a rule of law on the international plane, and which thus modified (or better revolutionized) existing norms of public international law. Notwithstanding its imperfections and pitfalls, the League was based on a new concept of solidarity originating by the consideration that now there existed common values of the international community to be protected.
Whereas economic and military sanctions were ineffective, the sanction of non-recognition was the first solidarity tool in the hands of the new international order forerunners. Here too, a different legal-historical perspective has been offered. Rather than a pathetic paper sword, the doctrine of non-recognition was a fundamental instrument of the new order, by which legality was maintained, the aggressor identified and sanctioned.
There are other few points that need to be restated here. In particular, the fact that the doctrine of non-recognition developed at a faster rate with respect to the rules contained in the text of the Covenant and the Pact of Paris.[82] Resolutions of the Assembly comprehended a wider conception of 'use of force' in international relations, applying the doctrine of non-recognition to conflicts not properly labelled as 'resort to war'. Art. 10 of the Covenant, from which the doctrine was said to derive, was indeed the less technical article of the whole Covenant and it permitted the Organization to exit the strict limits of 'war'. By negating States the material advantages of armed force irrespective of the justification adduced by them to initiate violence,[83] it indirectly sought to significantly diminish the manifestations of armed force themselves in international relations.[84] Furthermore, notwithstanding scholars has hastily declared the death of non-recognition – and with-it solidarity – after the Manchurian crisis, the life of the doctrine was evolving, adapting its effects and operating modes according to the situation on the ground. Such a flexibility, included the very fact that the organization itself,

[80] 'The standard reasoning that connected legal war to just war held that in the light of the impossibility to establish among sovereigns who had right on his side, both sides as well as third parties in the external forum had to act as if both sides had just cause. By consequence, all belligerents were supposed to have a right to wage war. Under the conception of legal war, the discrimination between the just and the unjust belligerent was lifted since the judgment of the underlying claims was suspended until the final judgment. This explanation for legal war as a default solution to the riddle of justice in war was repeated by numerous writers from the 15th to the early 20th centuries', Randall Lesaffer, 'Aggression before Versailles' [2018] 29(3) *The European Journal of International Law* 780.

[81] Chen (n 78) 427-28.

[82] McNair (n 8) 68.

[83] Whereas war was permitted when the imperfect tools of collective security failed, indeed, conquest was never considered as legal and thus ought not to be recognized. In other words, even a legitimate war could never give rise to seizures of 'enemy' territory (see Langer (n 53).

[84] Hathaway and Shapiro (n 13) 314-315.

irrespective of States' behaviour, used it successfully, it is an enduring characteristic of non-recognition till nowadays.

A lesson to be learned from the practice of the '30s is that one of the greatest threats for international law lies in the absence of an international legal discourse on solidarity[85] – intended as the commitment to preserve the fundamentals of the international legal order of which the collective security system is the most relevant expression.[86] In this perspective, non-recognition should always represent a tool to maintain a minimum solidarity level among States, even when the international community is at its most critical crossroads.

The ultimate responsibility is thus upon each single State of the international community to reinforce the solidarity principle inherent in our international legal order, and the collective security system in particular, at least through a vindication of the legality of that order through the principle of non-recognition.[87]

As stated by Chen: '[w]hile it is maintained that the doctrine of non-recognition is indispensable to international legal order, it must also be realised that it is the force which sustains this international legal order that gives flesh and bones to the doctrine. [..] The great problem is, in the last analysis, the building up and the strengthening of this social force'.[88]

.

[85] See, in this respect, Anne Lagerwall, 'The non-recognition of Jerusalem as Israel's capital: A condition for international law to remain relevant?' [2018] Zoom-in 50 *Questions of International Law* 45-46.

[86] It is important also to underline that the introduction of the principle of non-recognition in the international legal order represented and still represents a direct 'attack' on the concept of neutrality. See Quincy Wright, 'The present status of neutrality' [1940] *The American Journal of International Law* 396-97; Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in (M. Weller ed.), *The Oxford Handbook of the Use of Force*, [Oxford University Press, Oxford, 2015] 1229-1230.

[87] The principle of non-recognition in international law is inherently related to what Lauterpacht called 'the maintenance of international law' as a valid world-ordering legal system (Lauterpacht, *Recognition in international law* (n 22) 435). The object and purpose of non-recognition is indeed to maintain peace and stability through the preservation of the authority, the integrity and the legal character of international law; see Raič (n 14) 111.

[88] Chen (n 78) 443.