The Stimson Doctrine of Non-recognition of Territorial Conquest

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In the recent *Case Concerning East Timor*[1] in the International Court of Justice, the Stimson doctrine of non-recognition was alluded to in the dissenting opinion of the Portuguese Judge *ad hoc* as follows:

> The policy of non-recognition, which goes back to before the First World War, started to be transformed into an obligation of non-recognition in the thirties. Through the Stimson doctrine, the United States of America played a pioneering — and beneficial — role in this development.[2]

Given that the Stimson Doctrine was the first concerted attempt by the international community to create a collective obligation of non-recognition of territorial conquest, an examination of its origins is warranted.

Six decades ago Quincy Wright noted how forceful acquisitions of territory had been accorded full legal validity if they were recognised by other states: 'Recognition has been the magic formula that has converted violence into legality, robbery into title, might into right'.[3] The Stimson Doctrine of non-recognition of territorial conquest was directed to breaking this link in international law between 'might' and 'right'. It denied recognition to territorial acquisitions in China brought about by non-pacific means.

The Stimson Doctrine emerged as the response of the United States and the League of Nations to Japanese conquest of Chinese territory in 1931. This conquest was in breach of Japan's obligations under the Kellogg-Briand Pact (Pact of Paris),[4] the League of Nations Covenant[5] and the Nine Power Treaty.[6]

A sanction had to attach to such breaches of international law. That which was found was aimed only indirectly at Japan. It was aimed at the new 'state' that the Japanese occupation forces had established in Manchuria, 'Manchukuo', nominally headed by the last emperor of imperial China. The sanction found was the Stimson Doctrine of non-recognition. Following this doctrine the majority of states refused to legally recognise 'Manchukuo'.

The Stimson Doctrine was named for United States Secretary of State Henry Stimson. Stimson had conflicting impulses towards idealism and acute pragmatism.[7] The Stimson Doctrine was an expression of his restricted idealism.

On 7 January 1932 Stimson announced:

> [T]he American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic

1 ICJ Rep, 1995, p 90.
2 *Id* 262 (para 125) (Dissenting Opinion of Judge Skubiszewski).
3 Q Wright, 'The Stimson note of January 27, 1932' (1932) 26 *American Journal of International Law* 342, 344.
4 *General treaty for the renunciation of war as an instrument of national policy*, Paris, 27 August 1928, 94 LNTS 57.
5 *Covenant of the League of Nations*, Versailles, 28 June 1919, 225 CTS 195.
6 *Treaty relating to principles and policies to be followed in matters concerning China*, Washington, 6 February 1922, 38 LNTS 277.
7 See E Thomas, 'Councils of War', *Time* (Aust ed), 25 July 1995, 61.

> That it cannot admit the legality of any situation *de facto*, nor does it intend to recognize any treaty or agreement entered into between those Governments or agents thereof which may impair treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China or the international policy relative to China commonly known as 'The Open Door Policy', [Nine Power Treaty]
>
> And that it does not intend to 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 27th, 1928, to which treaty both China and Japan as well as the United States are parties.[8]

The practical effect of the Stimson announcement was very limited indeed. As Christopher Thorne put it, from the Japanese government the Stimson Note 'evoked only a sarcastically-phrased official denial of territorial ambitions'.[9]

On 11 March the League Assembly followed Stimson's lead with a resolution that 'it is incumbent upon 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'.[10]

The application of this sanction was negative, requiring abstention from a course of action rather than any positive action. Many considered this its fundamental shortcoming because

> the principle of non-recognition is not sufficient to compel a treaty-breaking state to live up to its obligations. It did not lead to a restoration of the *status quo ante* in Manchuria and did not much help China. . . . As a matter of fact, the members of the League simply refrained from recognising the new situation, but did not take any positive action to enforce the law.[11]

A further issue was whether international law recognised a duty not to recognise territorial acquisitions made through the use of force, as the Assembly resolution appeared to create. In the 1930s the status of the Stimson doctrine in international law was highly controversial. Many commentators saw it as being merely a statement of common international policy upon a particular issue, though they acknowledged that it could eventually prove a catalyst for the development of a new rule of law.

Kisaburo Yokota considered that nations subscribing to it were not irrevocably bound by the doctrine, and were free to alter their position at some future time. Stimson's declaration only represented a declaration of intention as to United States foreign policy. The Assembly resolution was binding upon the particular governments which passed it, though those which changed government would no longer be bound.[12]

However, it was responsible for beginning the development of such a principle in international law through its adoption in other situations. The first occasion where the doctrine was applied beyond the Far Eastern crisis was in August 1932. During the Chaco Dispute between Bolivia and Paraguay, nineteen American states sent a note embodying

8 Secretary of State to the Ambassador in Japan (Forbes), 7 January 1932, *Foreign Relations of the United States* 1931 Vol I (Washington: US Government Printing Office, 1946), 76; Department of State, *Press Releases*, January 1932, 40-41; League of Nations, *Official Journal*, Special Supplement No 101, p 155.

9 C Thorne, *The limits of foreign policy: the West, the League and the Far Eastern crisis of 1931-1933* (New York: G P Putman's Sons, 1973), 211. See also I Nish, *Japanese foreign policy 1869-1942: Kasumigaseki to Miyakezaka* (London: Routledge and Kegan Paul, 1977), 181. The text of the Japanese reply appears in *Foreign Relations of the United States* 1931 Vol 1 (Washington: US Government Printing Office, 1946), 77.

10 League of Nations, *Official Journal*, Special Supplement No 101, p 87.

11 M Gonsiorowski, 'The interpretation of the Covenant in the Sino-Japanese Dispute' (1936) 13 *New York University Law Quarterly Review* 216, 237.

12 Kisaburo Yokota, 'The recent development of the Stimson doctrine' (1935) 8 *Pacific Affairs* 133, 134-135.

its approach.[13] Then in October 1933 an 'Anti-War Treaty of non-aggression and conciliation' incorporated its principles into a treaty for the first time.[14] By April 1934, almost a third of all states were party to this treaty, and therefore the Doctrine might have qualified as a rule of 'quasi-general law'.[15]

Herbert Briggs reached many of the same conclusions as did Kisaburo Yokota. Historically, recognition by other nations of title by conquest was not essential for its validity.[16] He did not consider that Stimson's declaration had altered this, as juridically it was 'merely a statement of policy like the Monroe Doctrine'. The Assembly resolution was binding as regards Manchukuo but subsequent League practice between 1932 and 1940 did not suggest that it regarded itself as bound not to recognise other conquests.[17] However he conceded that the old rule might be modified if by general and continued practice states assumed the role of deciding the legitimacy of title by conquest.[18] As for the present situation, it was not the non-recognition of other states that made the Manchurian conquest contrary to law. That illegality resulted from the violation of prior treaty commitments. Non-recognition could only be a factor in determining illegality if title to territory acquired by conquest were inchoate without recognition, which he denied.[19]

Others regarded the Doctrine as a new rule of international law. One of the more enthusiastic proponents of this idea was the prolific writer Quincy Wright. He saw the Stimson Note as marking the possible inception of several new legal doctrines which would 'revolutionise' international law if they were truly made effective.[20] These new principles were that (1) military occupation of foreign territory did not confer title, (2) that treaties contrary to the rights of third states were void, (3) and that treaties in the making of which non-pacific means had been utilised were void.[21]

Wright considered that the Assembly resolution was not a 'supplementary sanction' to the Pact of Paris or the League Covenant. Rather it was a statement of the legal obligations as to non-recognition by which parties which had ratified these agreements were to abide. The Doctrine had the force of 'universal international law' since virtually all nations were parties to one or both of these instruments.[22]

He argued that states were under no obligation to recognise a *de facto* situation. If such a situation was the result of the use of illegal violence by a state, recognition would be an act of favour to the violator. The withholding of recognition would prevent the acquisition of those advantages securable by recognition.

Wright took issue with claims that title could be validly gained by conquest, saying that international law 'had never held that naked force could secure a *legal* end'. He however acknowledged that international law did permit the acquisition of a valid title by subsequent treaty or general recognition.[23] This was doubtless what made acceptance of the Stimson Doctrine seem so imperative to him.

13 Telegram from the Representatives of nineteen American Republics assembled in Washington to the Ministers for Foreign Affairs of Bolivia and Paraguay, 3 August 1932, *Foreign Relations of the United States* 1932 Vol V (Washington: US Government Printing Office, 1948), 159-160; Department of State, *Press Releases*, August 1932, 100-101.

14 Art 2, *Anti-War Treaty of non-aggression and conciliation*, Rio de Janeiro, 10 October 1933, 163 LNTS 393 ('Saavedra Lamas Treaty'). See also Art 11, *Pan-American Convention on the Rights and Duties of States*, Montevideo, 26 December 1933, 165 LNTS 19.

15 Kisaburo Yokota, *supra* note 12, 136-137.

16 H Briggs, 'Non-recognition of title by conquest and limitations on the doctrine' [1940] *Proceedings of the American Society of International Law* 72.

17 *Id* 76.

18 *Id* 79.

19 *Id* 75.

20 Wright, *supra* note 3, 348.

21 *Id* 344.

22 Q Wright, 'The legal foundation of the Stimson Doctrine' (1935) 8 *Pacific Affairs* 439, 440.

23 *Id* 443.

The status of the Stimson Doctrine in international law was greatly affected by the fact that Manchukuo was the sole occasion where the League Assembly resorted to collective non-recognition.[24] An examination of the application and observance of the policy by the League shows that its force in law was weak.

Its application in the case of Manchukuo was not an unqualified success, but the fact that the majority of League members respected the Assembly resolution suggests that they regarded themselves as bound by its terms, and probably in a legal rather than a hortatory sense. The doctrine was not entirely successful in denying recognition to Manchuria because seven nations acted in defiance of the Assembly resolution. Much of the impetus for this defiance came from the fascist powers, which remained members of the League at this stage.

Japan openly flouted the League's authority by prematurely extending *de jure* recognition in September 1932 while the Report of the League's Commission of Enquiry into the crisis (the Lytton Report[25]) awaited consideration by the Assembly.[26]

Then Salvador recognised Manchukuo in May 1934, despite being also a member of the League though not a party to the Pact of Paris.[27] It defended its decision as being in the exercise of an express domestic constitutional provision by which recognition was a sovereign right unaffected by treaty or League membership.

Italy was also a League member and a party to the Nine Power Treaty. Yet its fascist government gave *de jure* recognition on 29 November 1937.[28] On 11 December 1937 it notified its intention to leave the League.[29] The first occasion when Manchukuo purported to recognise a foreign government was when it gave to and received mutual recognition from the new Franco government of Spain in December 1937.[30]

By conclusion of a treaty of amity opening full diplomatic relations, Germany gave *de jure* recognition in May 1938.[31] In October, Poland gave *de facto* recognition by an exchange of consuls with Manchukuo.[32] The Kingdom of Hungary recognised Manchukuo in January 1939.[33] Finally, Finland extended recognition in 1941.[34] A number of these nations even signed 'treaties' with Manchukuo, abolishing extraterritoriality and making it a party to the Anti-Comintern Pact[35] of the fascist powers.[36]

These examples suggest that even during the immediate period of its formulation, the efficacy of the Stimson Doctrine was detracted from by the willingness of seven nations

24 H Aufricht, 'Principles and practices of recognition of international organisations' (1949) 43 *American Journal of International Law* 683.

25 League of Nations Commission of Enquiry into the Sino-Japanese Dispute, *Report of the Commission of Enquiry / signed by the members of the Commission on September 4th 1932, at Peiping* (Series of League of Nations Publications VII. Political, 1932. VII.12. Official No C.663, M.320,1932.VII).

26 League of Nations, *Official Journal*, Special Supplement No 111, pp 79-81. See also *How 'Manchukuo' came into being* (Peiping: North Eastern Affairs Research Institute, 193?), 88-90.

27 League of Nations, *Official Journal*, August 1934, pp 964-967.

28 League of Nations, *Official Journal*, January 1938, p 11; *Foreign Relations of the United States* 1937 Vol III (Washington: US Government Printing Office, 1954), 788-789, 943, 946-947.

29 League of Nations, *Official Journal*, January 1938, p 10.

30 *Foreign Relations of the United States* 1937 Vol III (Washington: US Government Printing Office, 1954), 789, 945.

31 *Foreign Relations of the United States* 1938 Vol III (Washington: US Government Printing Office, 1954), 445-446.

32 *Id*, 486-87, citing *Monitor Polski*, 7 December 1938, pp 2-4.

33 League of Nations, *Official Journal*, January 1939, p 23.

34 J Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987), 34.

35 *Anti-Comintern Pact between Japan and Germany*, Berlin, 25 November 1936, reproduced in J A S Grenville, *The major international treaties 1914-1973: a history and guide with texts* (London: Methuen, 1974), 168.

36 *German-Manchukuo Treaty of Amity*, Berlin, 12 May 1938, RGBl (Reichsgesetzblatt), 1938, Pt II, p 286, summarised in *Foreign Relations of the United States* 1938 Vol III (Washington: US Government Printing Office, 1954), 451; 'Abolition of extraterritoriality in Manchuria and transfer of administrative rights over the South Manchuria Railway Zone' (1937) 1, 6 *Tokyo Gazette* 8; 'Manchukuo joins Anti-Red Pact', *Milestones of Progress: Monthly Supplement of the Contemporary Manchuria*, April 1939, p 10.

to simply ignore it. However disobedience to the law does not deny its existence, and the open disregard of the doctrine by these powers does not detract from its status in law.

Rather it is the subsequent state practice of the international community which most strongly suggests that the doctrine was no more than an *ad hoc* measure. It did not represent a rule of customary international law binding on all states because observance of the policy was far from uniform even assuming those state parties that observed it did so under a sense of legal obligation. What force it had derived only from its incorporation into a general anti-war treaty, which bound only its parties and not the international community at large. DJ Harris thinks that the Assembly resolution was the 'high water mark' of the doctrine.[37] This assessment is justified. Above all, there was no consistent state practice at the time.

In 1935 the Doctrine could have been collectively applied to the Italian conquest of Abyssinia, which had also been in violation of the Pact of Paris and the Covenant. It was not.[38] With few exceptions most nations recognised Italy's title to this territory.

Some nations applied the Doctrine to the German annexation of Austria and Czechoslovakia and to the forcible seizure of territory from Finland by the Soviet Union which was subsequently embodied in a treaty settlement. The United States maintained a relatively consistent practice of not recognising conquests made in violation of treaties. But in 1940 Herbert Briggs stated that he would 'hazard the guess that non-recognition of title ha[d] been the exception rather than the rule in general practice'.[39] Thus observance was selective rather than universal.

The Stimson Doctrine has not fared well in the decades since its enunciation. Though it ceased to be known by that name, it was embodied in a United Nations General Assembly Resolution in 1970[40] and has been sporadically applied. It was applied in the cases of the Turkish Republic of Northern Cyprus[41] and of Iraq's purported incorporation of Kuwait as Iraqi territory.[42] On the other hand, the United Nations did not adopt a policy of collective non-recognition in respect of East Timor.[43]

The Stimson doctrine demanded only abstinence of states. But given the spirit of *realpolitik* that animated international politics then and now, it is not surprising that such a far-reaching doctrine should have failed to achieve uniform application to subsequent territorial conquests.

37 D J Harris, *Cases and materials on international law* 4th ed (London: Sweet and Maxwell, 1991), 202.
38 League of Nations, *Official Journal*, May-June 1938, pp 335-346.
39 Briggs, *supra* note 16, 80.
40 *General Assembly Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 24 October 1970, 25 UNGAOR Supp No 28 (A/8028), 121, 123. See also Art 11, Draft Declaration on the Rights and Duties of States, *Yearbook of the International Law Commission 1949 Vol. II* p 288.
41 UN SC Res 541 (1983), UN SC Res 550 (1984). See also S K N Blay, 'Self-determination in Cyprus: the new dimension of an old conflict' (1981-83) 10 *Australian Yearbook of International Law* 67, 79, 92-93.
42 UN SC Res 661 (1990), 6 August 1990, 29 ILM 1325; UN SC Res 662 (1990), 9 August 1990, 29 ILM 1327.
43 *International Court of Justice. East Timor (Portugal v Australia). Counter-Memorial of the Government of Australia* (1992), 156 (para 349).