State Identity, Deconstruction and “Functional Splittting”: The Case of Illegal Annexations

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I. Introduction

Since its very origins, the basis of international law has been sought in two fundamental yet conflicting principles: ex factis oritur ius and ex iniuria ius non oritur. While centralized domestic legal systems have been reluctant to recognize law-creating effect to facts originating in illegal behavior, international law, due to its decentralized structure, has not been in the position to resist consistently the power of illegal acts. It has been a specific feature of classical international law that it has attempted to accommodate what is with what ought to be.

However, the traditional predominance of the principle ex factis oritur ius over ex iniuria ius non oritur in international law has not been a petrified and static fact. With the maturing of international law, the increased quest for normativity has started to challenge the law-creating effect of illegally effectuated facts. A landmark step in this process of maturing has been the prohibition of aggressive war in the Pact of Paris of 27 August 1928, and of the use and threat of force in the UN Charter of 26 July 1945. When the community of States decided to make this revolutionary step

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1 See 1928 General Treaty for Renunciation of War as an Instrument of National Policy, 94 LNTS 57 (1929).

forward and prohibit aggressive use of force, it inevitably was confronted with the challenge how to react against the violations of this prohibition. One of the answers suggested in State practice and legal doctrine has been the principle of non-extinction (continuity) of illegally annexed States.\(^3\)

The rule that an illegally annexed State would not lose its statehood as a subject of international law has been a courageous intervention into the realm of effectiveness. Traditionally, international lawyers have accepted the presumption that the creation and extinction of States is an extra-legal affair. Although recognition by other States undoubtedly played a role – it was debated whether a constitutive or declarative one –, it remained primarily a political act. International law neither “created” States nor influenced their creation considerably. It just accepted the birth and extinction of States as historical facts.

Inimitably, one can recognize in this line of thinking the Vattelian analogy, according to which States as principal subjects of international law are functionally similar to human beings in domestic legal systems.\(^4\) Notwithstanding open-ended debates about when exactly does a human life start and end, domestic law cannot “create” human beings. How then could international law prolong the life of any of its subjects, just for the reason that the attack against a given State was illegal? This analogy looms behind the rigid interpretation of the 1933 Montevideo Convention on the Rights and Duties of States\(^5\): a State exists then, and only then, when a government exercises control over population on a given territory. Statehood is a sociological fact. The rule of continuity claimed above, protecting the statehood of illegally annexed States, implies an important exception to the Montevideo criteria, or even a considerable departure from them. Statehood becomes a normative concept, potentially in conflict with certain sociological facts.

Thence, the suggested rule according to which an illegally annexed State would preserve its international legal status is not uncontested. Several authors writing on statehood and use of force in international law have raised doubts about the viability of such a rule, arguing that neither the international community nor international legal doctrine would be in the position to support such “fictional” States.\(^6\)

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\(^3\) See especially K. Marek, Identity and Continuity of States in International Law (1954).


\(^5\) 165 LNTS 19.