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Ex Injuria Jus Non Oritur: A Principle Misapplied

Sherman L. Cohn*

INTRODUCTION: THE QUESTION

In the year 1928 of the common era, a treaty was concluded between fifteen sovereign nations by which they solemnly renounced the use of war as an instrument of national policy.¹ Soon thereafter, sixty-five nations,² consisting of virtually every state then existing,³ became parties.⁴ Nine years before, many of the same nations had undertaken other solemn engagements in the Covenant of the League of Nations. They had announced the "acceptance of obligations not to resort to war"⁵ and undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."⁶

In 1933 the nations of the American hemisphere condemned wars of aggression and agreed that the settlement of controversies of any kind should be effected "only by the pacific means which have the sanction of international law."⁷ Finally, "peoples . . . determined to save succeeding generations from the scourge of war"⁸ created the United Nations "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means . . . adjustment or settlement of international disputes or situations which might lead to a breach of the peace."⁹ In partial fulfillment of that purpose, the Security Council was given the powers to "determine the existence of any threat to the peace, breach

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¹ The General Pact for the Renunciation of War, commonly known as the Kellogg-Briand Pact, in pertinent part:

Art. 1. 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.

Art. 2. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

46 Stat. 2343, 2345-46 (effective July 24, 1929); reprinted in full in FENWICK, *INTERNATIONAL LAW* 684-85 (3d ed. 1948).

² FENWICK, *op. cit. supra* note 1, at 526.

³ NEVINS & HACKER, *THE UNITED STATES AND ITS PLACE IN WORLD AFFAIRS*, 1918-43, 228 (1943).

⁴ *Ibid.*

⁵ LEAGUE OF NATIONS COVENANT, Preamble. The Covenant is reprinted in full in BARTLETT, *THE RECORD OF AMERICAN DIPLOMACY* 461-70 (2d ed. 1952).

⁶ LEAGUE OF NATIONS COVENANT art. 10. Other articles of the Covenant spell out procedures for settlement of disputes, articles 11-15, and for action on the part of the international community should any Member resort to war in disregard of its covenants, article 16.

⁷ Article I, International Conferences of American States 496 (Supp. 1933-40).

⁸ U.N. CHARTER, Preamble, 59 Stat. 1035 (1945); see GOODRICH & HAMBRO, *CHARTER OF THE UNITED NATIONS* 582-611 (rev. ed. 1949); FENWICK, *op. cit. supra* note 1, at 688-709.

⁹ U.N. CHARTER art. 1.

of the peace, or act of aggression" and to "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."¹⁰

Thus the international community through legislation has prohibited aggressive war and conquest.¹¹ The question remains as to whether these acts of international legislation are to be enforced or are to be merely, in the words of Professors Nevins and Hacker, "promise[s] of good behavior."¹² This question involves the whole complex of difficulties in creating a world order out of the chaos that has for so long existed. True, there have been some notable examples of the use of political action to enforce the legislation outlawing aggression. On a world-wide scale one can mention Iran,¹³ Korea,¹⁴ and the Suez crisis of 1956. The most notable achievements on the political level, however, have been in the Western Hemisphere where the Panamanian incident of the Spring of 1959 is a late example.¹⁵ Nevertheless, a conclusion that the enforcement of this legislation on the political level has been largely a failure appears justified.

In addition to political enforcement of the treaties outlawing aggression and conquest, the proposition has been seriously advanced that they be enforced in the juridical arena. It is not suggested that a court reach out a prosecuting arm to bring violators before the bar of justice, but rather that, whenever a court has occasion to consider a situation involving an act of aggression, it should refuse to recognize the fruits of that act.¹⁶ The theory has been best summarized by Judge Lauterpacht, one of its principal advocates. He has declared that the usual rules of acquiring territory do not apply

. . . when the act alleged to be creative of a new right is in violation of an existing rule of customary or conventional International Law. In such cases the act in question is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise.¹⁷

¹⁰ U.N. CHARTER art. 39.

¹¹ These treaties are international legislation, and, as such, constitute a part of the body of international law applicable to at least those nations party to them. See FINCH, *THE SOURCES OF INTERNATIONAL LAW* (1937); Schechter, *Towards a World Rule of Law*, 29 *FORDHAM L. REV.* 313 (1960); 1 OPPENHEIM, *INTERNATIONAL LAW* §§15-19c (6th ed. 1944); HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, 601-30 (1943); 1 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 17 (1940).

¹² NEVINS & HACKER, *op. cit. supra* note 3, at 228.

¹³ EAGLETON, *INTERNATIONAL GOVERNMENT* 503-05 (3d ed. 1957).

¹⁴ *Id.* at 541-45.

¹⁵ *New York Times*, April 29, 1959, p. 1; *id.*, April 30, 1959, p. 12; *id.*, May 1, 1959, pp. 1, 11; *id.*, May 2, 1959, pp. 1, 2; *id.*, May 4, 1959, p. 14; *id.*, May 5, 1959, p. 5; *id.*, June 19, 1959, p. 3.

¹⁶ Cf. proposal of Charles S. Rhyne, Chairman of American Bar Association's Committee on "World Peace Through Law," *Life Magazine*, May 11, 1959, p. 32; Rhyne, *World Peace Through Law*, 44 *A.B.A.J.* 937 (1958); Dewey, *A Sacred Goal: Peace Under Law*, 44 *A.B.A.J.* 1047 (1958).

¹⁷ 1 OPPENHEIM, *INTERNATIONAL LAW* 141-42 (8th ed. 1955). That this theory is Lauterpacht rather than a holdover from Oppenheim can be seen from the fact that it nowhere appears in Oppenheim's first edition published in 1905. Nor does it appear in McNair's fourth edition of OPPENHEIM, published in 1928.

This paper is intended to be an examination of the theory that an aggressive act, because of its illegality, cannot be the basis of any legal right or defense and the extension of this principle to the individual. But it is not intended to treat the entire range of the problem. Such a treatment to have any value must be built on a thorough study of each instance in modern history in which the question arose. This, again to be of any value, would need to be a study not only of the theory offered by writers, but also of the facts of particular situations and of the application of the theory to those facts by judicial authorities. This paper is designed as an examination of one case in point: Austria between 1938 and 1945, in the light of both theory and reality.

THE FACTS

The State of Austria emerged in 1919 as one of the successors to the Austro-Hungarian Empire. The old Hapsburg State had been an ally of Germany in the First World War; after the war, when the victorious Allies broke up the heterogeneous empire under the doctrine of self-determination,¹⁸ they wished to be sure that the new Austria, populated largely by ethnic Germans,¹⁹ would not unite with Germany to again pose a threat to the rest of Europe. This desire to keep Austria out of Germany was strong enough to overcome even the well-touted principle of self-determination,²⁰ for, when on November 12, 1918, the new Austrian Provisional Assembly declared German Austria to be a corporate part of the German Republic, the Allied Supreme Council in Paris, and then the Versailles Peace Conference itself, firmly squelched any hopes of Austria to follow its self-determined course.²¹

The perpetual separation of Germany and Austria except with the consent of the Allies was written into the peace treaties. The Treaty of Versailles between Germany and the Allied and Associated Powers provides:

Germany acknowledges and will respect strictly the independence of Austria, within the frontiers which may be fixed in a treaty between that State and the Principal Allied and Associated Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations.²²

Austria assumed a complementary obligation in the Treaty of St. Germain:

The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently Austria undertakes in the

¹⁸ CHAMBERS, *THIS AGE OF CONFLICT* 187 (rev. ed. 1950). See Reut-Nicolussi, *The International Legal Status of Austria since 1918*, 39 TRANSACT. GROT. SOC'Y 119, 121 (1954).

¹⁹ CHAMBERS, *op. cit. supra* note 18, at 188.

²⁰ See Point 5 of Woodrow Wilson's 14 Points, 56 CONG. REC. 680-81 (1918), reprinted in ROBERT LANSING, *THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE* 314 (1921).

²¹ SCHEVILL, *A HISTORY OF EUROPE* 824 (rev. ed. 1947); CHAMBERS, *op. cit. supra* note 18, at 188; see Reut-Nicolussi, *supra* note 18, at 123, 124; Kunz, *Infelix Austria*, 48 AM. J. OF INT'L L. 453, 454 (1954).

²² Article 80, 1 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE TREATIES OF PEACE, 1919-25*, 59 (1924). These frontiers were established in the Treaty of St. Germain of September 10, 1919, between the Allies and Austria, *id.* at 277.

absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatsoever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participating in the affairs of another power.²³

But the sentiment for an *anschluss* with somebody, particularly with Germany, continued to exist in postwar Austria.²⁴ The existence of this sentiment prompted Great Britain, France, Italy, and Czechoslovakia to require Austria to reiterate its promise not to unite with any state as a price for the granting of a \$130,000,000 loan.²⁵ By this promise, embodied in the Geneva Protocol of October 1922, the Austrian government undertook, in accordance with the terms of Article 88 of the Treaty of St. Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to comprise this independence.²⁶ In return, the other parties to the treaty declared "that they respect the political independence, the territorial integrity, and the sovereignty of Austria."²⁷

The next chapter in this story was written by Austria, which in 1931 entered into the negotiations which it foreswore nine years earlier. These negotiations resulted in a proposal for a customs-union with Germany.²⁸ Immediate reaction came from Italy, France, and the Little Entente of Hapsburg successors.²⁹ Juridically, the result was an advisory opinion from the Permanent Court of International Justice that such a union would be contrary to the Geneva Protocol.³⁰ The *Anschluss* collapsed for the moment.

Then came the emergence of Adolf Hitler, National Socialism, and the Third German Reich on January 30, 1933. In Austria, however, the power of the National Socialists had become quite formidable by 1930, and the connection between the Nazis of the two countries was close and strong.³¹ Again, in 1933, agitation for *anschluss* came out into the open. Now, however, it was vigorously opposed by the Austrian governments of Dollfuss and Schuschnigg. Nevertheless, matters became serious enough for France, Great Britain, and Italy in February

²³ *Id.* at 297. See SONTAG, *EUROPEAN DIPLOMATIC HISTORY 1871-1932*, 294 (1933); PRATT, *A HISTORY OF UNITED STATES FOREIGN POLICY* 502 (1955).

²⁴ CHAMBERS, *op. cit. supra* note 18, at 191-92. See BALL, *POSTWAR GERMAN-ANSCHLUSS RELATIONS: THE ANSCHLUSS MOVEMENT, 1918-36* (1937), for a complete, contemporary development of this subject.

²⁵ CHAMBERS, *op. cit. supra* note 18, at 192-93.

²⁶ 2 HUDSON, *INTERNATIONAL LEGISLATION* 882-83 (1932).

²⁷ *Ibid.* The precise stimulus for the Protocol was Czechoslovakia's fear of economic union of Austria with Italy. CHAMBERS, *op. cit. supra* note 18, at 405.

²⁸ *Austro-German Protocol of March 19, 1931*, reprinted in 2 HUDSON, *WORLD COURT REPORTS* 746-48 (1931).

²⁹ CHAMBERS, *op. cit. supra* note 18, at 405.

³⁰ 2 HUDSON, *WORLD COURT REPORTS* 711-43 (1931); see Borchard, *The Customs Union Advisory Opinion*, 25 *AM. J. INT'L L.* 711 (1931).

³¹ CHAMBERS, *op. cit. supra* note 18, at 481, 483. Chambers states that the *Anschluss* was always a "primary Nazi aim," which Hitler was committed to fulfill as the first step in the realization of the *drang nach osten*. CHAMBERS, *op. cit. supra* at 615. See 22 *INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS* 433 (1946).

1934 to issue another guaranty of Austrian independence and for Italy, Austria, and Hungary to sign the Rome Protocol of May 1934 by which Italy became Austria's protector.³² In July 1934 a Nazi putsch was attempted but failed.³³ Italy again announced a guarantee of Austrian independence.³⁴ In September, France, Great Britain, and Italy renewed their previous guarantees of February.³⁵ Then in January 1935 France and Italy agreed to consult in case of a threat to Austrian independence.³⁶ This agreement was reiterated in April, with England becoming a party to it.³⁷ Fourteen months later, in July 1936, Germany and Austria agreed not to interfere in each other's internal affairs and Germany recognized Austrian independence.³⁸ This was repeated by both parties on February 12, 1938,³⁹ after another planned Nazi putsch proved abortive.⁴⁰

Meanwhile, the Nazi pressure on Austria had continued to increase, with the Austrian government yielding to Hitler's demand for the inclusion of Nazis.⁴¹ Schuschnigg then announced a plebiscite on the *anschluss* question for March 13, 1938.⁴² Hitler on March 11 issued ultimatums demanding the indefinite postponement of the plebiscite, the resignation of Schuschnigg, and the appointment of a majority National-Socialist government. The ultimatums referred to the presence of a German army at the frontier, ready to enter Austria and to act so as "to shed no blood in Austria."⁴³ Minutes before the ultimatums expired Schuschnigg broadcast the government's decision to capitulate. In this broadcast he made it clear that Austria had "yielded to force."⁴⁴ The Nazi government was appointed at midnight on the night of March 11, but German troops had already marched into Austria, unopposed, a few hours earlier.⁴⁵ The new government then invited German troops into Austria "to prevent bloodshed"—after they were already

³² 6 HUDSON, *INTERNATIONAL LEGISLATION* 641-46 (1932).

³³ CHAMBERS, *op. cit. supra* note 18, at 483-84. TRIAL OF MAJOR WAR CRIMINALS, *op. cit. supra* note 31, at 433.

³⁴ CHAMBERS, *op. cit. supra* note 18, at 484.

³⁵ Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621, 625 (1944).

³⁶ *Id.* at 626.

³⁷ *Ibid.*

³⁸ CHAMBERS, *op. cit. supra* note 18, at 484-485; New York Times, July 12, 1936, p. 1. See CHURCHILL, *THE GATHERING STORM* 206 (1948).

³⁹ See Wright, *supra* note 35, at 627.

⁴⁰ CHAMBERS, *op. cit. supra* note 18, at 615.

⁴¹ CHURCHILL, *THE GATHERING STORM* 262-63 (1948); H. M. Stationery Office, NUREMBERG DOCUMENTS, Part I, p. 249; HENDERSON, *FAILURE OF A MISSION* 119-29 (1940); SHIRER, *BERLIN DIARY* 92 (1941); CHAMBERS, *op. cit. supra* note 18, at 617-18.

⁴² CHURCHILL, *op. cit. supra* note 41, at 267; HENDERSON, *op. cit. supra* note 41, at 121; SHIRER, *op. cit. supra* note 41, at 98; CHAMBERS, *op. cit. supra*, note 18, at 618.

⁴³ CHURCHILL, *op. cit. supra* note 41, at 268-69; CHAMBERS, *op. cit. supra* note 18, at 618-19.

⁴⁴ Broadcast reprinted in LENHOFF, *THE LAST FIVE HOURS OF AUSTRIA* 213-14 (1936); see also SHIRER, *op. cit. supra* note 41, at 98-99.

⁴⁵ CHURCHILL, *op. cit. supra* note 41, at 269, 270; CHAMBERS, *op. cit. supra* note 18, at 619.

within the country.⁴⁶ On the 13th the Austrian Nazi government published a law providing for Austria's incorporation into Germany, which was accepted by a German law of the same date. A plebiscite in Austria on April 10 "ratified" the Anschluss by an affirmative vote of 99.75 per cent.⁴⁷ Austria was made a German *land*.⁴⁸ And on July 3 a German decree granted German citizenship to all who had been citizens of Austria at the time of Anschluss.⁴⁹

The reaction of foreign states, including those who so profusely gave guarantees, was less than reassuring. Great Britain and France protested to Germany. Mexico lodged a protest with the Secretary-General of the League of Nations. Russia proposed a conference on the situation with Britain and France to discuss a pact against Germany; Britain and France refused.⁵⁰ Beyond that the international community satisfied itself with pious condemnations.⁵¹ The Austrian minister in Washington informed the Department of State that "that country has ceased to exist as an independent nation and has been incorporated in the German Reich."⁵² The United States in a note to the German Foreign Minister stated:

The Government of the United States finds itself under the necessity as a practical measure of closing its Legation at Vienna and of establishing a Consulate General.⁵³

The United States added in a second note:

In view of the announcement made to the Government of the United States by the Austrian Minister on March 17, 1938, my Government is under the necessity for all practical purposes of accepting what he says as a fact and accordingly consideration is being given to the adjustments in its own practices and procedure in various regards which will be necessitated by the change of status of Austria.⁵⁴

Finally, in a third note, the United States expressed the hope that the German government would live up to the principles of international law, according to which:

[I]n case of absorption of a State, the substituted sovereignty assumes the debts and obligations of the absorbed state, and takes the burdens with the benefits.⁵⁵

⁴⁶ CHAMBERS, *op. cit. supra* note 18, at 619. The International Military Tribunal at Nuremberg found that the invitation, dictated by the German Field Marshall Göring to the Austrian Nazi Chancellor Seyss-Inquart and which Göring wished to be sent to Hitler, was not actually sent. TRIAL OF MAJOR WAR CRIMINALS, *op. cit. supra* note 31, at 434-35. But, the Tribunal found, Seyss-Inquart agreed to Göring's demand that German troops occupy Austria. TRIAL OF MAJOR WAR CRIMINALS, *supra* at 435.

⁴⁷ SNYDER, *THE WAR* 46 (1960).

⁴⁸ CHAMBERS, *op. cit. supra* note 18, at 619.

⁴⁹ See United States *ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 901 (2d Cir. 1943).

⁵⁰ CHURCHILL, *op. cit. supra* note 41, at 274.

⁵¹ LANGER, *SEIZURE OF TERRITORY* 161 (1947); CHURCHILL, *op. cit. supra* note 41, at 275; Henderson, *op. cit. supra* note 41, at 124; Reut-Nicolussi, *supra* note 18, at 124.

⁵² Department of State Press Release, March 19, 1938, p. 374, quoted in 1 HYDE, *INTERNATIONAL LAW* 391 (2d rev. ed. 1945).

⁵³ LANGER, *op. cit. supra* note 51, at 162.

⁵⁴ *Ibid.*

⁵⁵ *Id.* at 166.

Besides closing its Vienna Legation, the United States took other action in recognition of the reality of the situation. For example, it cancelled the Austrian immigration quota and increased the German quota to include the amount formerly allocated to Austria;⁵⁶ it announced that former Austrian citizens "who automatically became German citizens by the turn of events on March 13, 1938," should renounce "The German Reich" in petitioning for naturalization;⁵⁷ and it included Austria in Germany as an enemy country for Selective Service purposes.⁵⁸ And in 1943 the United States Government took the position in court that Austria was annexed into Germany so that (1) a native of Austria was, in the contemplation of the law, then a native of Germany,⁵⁹ and (2) a citizen of Austria at the time of the Anschluss became a German citizen by the force of the German decree bestowing German citizenship upon him.⁶⁰

This attitude on the part of the United States was met by a similar reaction from other countries. Foreign missions in Austria were either closed down or turned into consulates. Austria's name disappeared from the membership rosters of the League of Nations, the International Labor Organization, and the Uni-

⁵⁶ Exec. Proc. No. 2283, 52 Stat. 1544 (1938).

⁵⁷ Letter of Instruction of Commissioner of Immigration and Naturalization, dated Feb. 19, 1939, cited in *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 901 (2d Cir. 1943).

⁵⁸ Local Board Release No. 112, dated March 16, 1942, cited in *United States ex rel. Schwarzkopf v. Uhl*, *supra* note 57, at 901.

⁵⁹ *United States ex rel. D'Esquiva v. Uhl*, 137 F.2d 903 (2d Cir. 1943). The court did not decide the issue here under discussion. Rather it remanded for further evidence on whether the political arm of the United States had recognized the Anschluss. The court was satisfied to answer the problem here involved under the Act of State Doctrine, which it would apply to give validity to the German statutes during the Anschluss. See *Bernstein v. Van Heygen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947). This writer believes that the *D'Esquiva* case is an example of the use of the Doctrine to derogate law and right to political decree. As long as the Doctrine remains a part of national law, a "World Rule of Law," as is now advocated by so many, see notes 16 and 17 *supra*, is, in the opinion of this writer, doomed to remain but a utopian dream. For a recent discussion of the Doctrine, see Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881 (1962).

⁶⁰ *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943). The court again did not reach the present question, deciding, on international law principles, that, no matter what validity might be given to the Anschluss, the German decree could not bestow citizenship on Austrians who were not in either Germany or Austria at the time of the decree.

Curiously, the United States also argued to the Second Circuit that a German decree of November 25, 1941, which purported to deprive Jews residing abroad of German citizenship should not be given validity. As this writer has been unable to locate a copy of the brief filed by the United States in this case, he is unable to explain on what theory the United States assumed this position, which, it appears, contradicts its argument that the decree of July 3, 1938, should be given validity.

It should be noted that, after the United States entered World War II, its attitude seems to have changed, except of course in the *Schwarzkopf* and *D'Esquiva* cases. The Department of Justice on February 8 and June 11, 1942, announced that it would permit Austrians who registered themselves erroneously as Germans in 1940 to correct their registration. The deputy Commissioner of Immigration on May 18, 1943, announced that Austrian citizens who had never voluntarily acquired German nationality are not alien enemies. See *United States ex rel. Schwarzkopf v. Uhl*, *supra* at 901, n. 2. Cf. Declaration of the United States, Great Britain, and Russia at Moscow of October 30, 1943, wherein the three powers declared that "they regard the annexation imposed upon Austria by Germany on March 15th, 1938, as null and void." Quoted in Reut-Nicolussi, *supra* note 18, at 125. But see Kelsen, *The International Legal Status of Germany*, 38 AM. J. INT'L L. 421, 422 (1944).

versal Postal Union.⁶¹ Finally, Austrian nationals were considered, at least in the United States and Great Britain, as German nationals and their property was vested as belonging to enemy aliens.⁶²

PROPOSITIONS

These historical facts establish several propositions:

1. Germany achieved control over Austria by aggression. This aggression took the form of pressure and threats and was without bloodshed, but that it was aggression can not be doubted. Such a position was taken by Professor James Garner in an article published just four months after the Anschluss:

[I]t is of course true that Austria made no resistance to the German invasion but its Government protested and the German Reich's Chancellor refused to permit it to hold a plebiscite to determine the question whether the Austrian people desired to be annexed to Germany, after which a German army occupied the country and the Government of Austria was forcibly replaced by a Nazi regime set up by the German authorities. The Austrian Government so established, thereupon promulgated on March 13 a "constitutional law" proclaiming the union of Austria with Germany. It is submitted that to hold upon these circumstances that the annexation thus brought about was not the result of force directed from Germany would be to ignore the actual procedure for forms the hollowness of which is as clear as daylight.⁶³

This view was affirmed by the Nuremberg Tribunal, for it concluded that the Anschluss was on the part of Germany "a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries."⁶⁴

2. This aggressive act on the part of Germany violated international law. It violated the fundamental right to independence under international law:⁶⁵ "Every

⁶¹ MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 344 (1954); Garner, *State Succession in Annexation of Austria by Germany*, 32 AM. J. INT'L L. 421, 422 (1938).

⁶² LANGER, *op. cit. supra* note 51, at 167-81; MAREK, *op. cit. supra* note 61 at 345, and cases cited therein at n. 4. For a fuller development of the facts, in addition to the works previously cited, see AULT, *EUROPE IN MODERN TIMES* (1945); BORKENAU, *AUSTRIA AND AFTER* (1936); BULLOCK, *AUSTRIA, 1918-38* (1939); COMMANGER, *THE STORY OF THE SECOND WORLD WAR* (1945).

⁶³ Garner, *supra* note 61, at 422.

⁶⁴ Judgment of the International Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 and Oct. 1, 1946, 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 433 (1946).

⁶⁵ WILSON, *INTERNATIONAL LAW* 57 (1939). See *Underhill v. Hernandez*, 168 U.S. 250 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State"; FENWICK, *INTERNATIONAL LAW* 249 (3d ed. 1948). DANA'S WHEATON, *INTERNATIONAL LAW* 89-90 (8th ed. 1866), calls this right "that which lies at the foundation of all the rest." Lauterpacht says that independence is not a right but one of the "recognized and therefore protected qualities of States as International Persons," and that there is a duty in "every State itself to abstain, and to prevent its agents . . . from committing any act which constitutes a violation of another State's independence." 1 OPPENHEIM, *INTERNATIONAL LAW* 286, 288 (8th ed. 1955). Hall and Hyde take the same view but add that this is subject to the superior right of the international community to end the existence of a state "for the general good." HYDE, *INTERNATIONAL LAW* 204-07 (2d ed. 1945); HALL, *INTERNATIONAL LAW* 51 (8th ed. 1924). Although the authorities prior to 1919 spoke in terms of a "right" of a state to exist, one must

state has the right to exist and the right to protect and preserve its existence."⁶⁶ It also violated the conventional law to which Germany was a party. As we have seen above, Germany had the obligation under Article 80 of the Versailles Treaty to "respect strictly the independence of Austria," a promise which the German Reich reiterated to Austria in July 1936 and again in February 1938. The aggression was also in violation of the Pact of Paris of 1938, to which Germany was a party.⁶⁷ In addition, it can be argued that the German action was prohibited by the international community under the statement of September 1937, through the Assembly of the League of Nations, that "all wars of aggression are, and shall always be, prohibited."⁶⁸ It also might be argued that this action violated article 10 of the Covenant of the League of Nations, which prohibited aggression against "territorial integrity and existing political independence."⁶⁹ These last two arguments lose some weight, however, by the fact that Germany was not a member of the League in 1938.⁷⁰

In conclusion, then, this writer must agree with Krystena Marek's statement that "the Anschluss constituted an unlawful act on the part of Germany . . . against a specifically protected major European interest."⁷¹

3. The international community recognized the *fait accompli* of Germany's action. Recognition was given to the fact that Austria had become a part of Germany and had ceased to be an independent State. None of her vociferous guarantors came forward to fulfill their promises. No international action was taken to regain freedom for Austria,⁷² not even the little that had been done for Ethiopia and Manchuria.⁷³ No Austrian government organ survived the Anschluss; none went into exile.⁷⁴

question whether this "right" existed prior to the time that the international community recognized the correlative duty in other states not to transgress this right. This correlative duty had no recognition prior to the League of Nations.

⁶⁶ Article 1, Draft Declaration on Rights and Duties of States, Memorandum submitted by the Secretary-General to the General Assembly (1948), p. 49, U.N. A/CN. 4/2, 15 Dec. 1948.

⁶⁷ See HARVARD RESEARCH ON INTERNATIONAL LAW 865 (1939).

⁶⁸ 2 OPPENHEIM, INTERNATIONAL LAW 180 (7th ed. 1952). Any person who might claim that the German action in Austria was other than aggressive war because of the absence of mass bloodshed, in the opinion of this writer, has his eyes closed to substance in favor of form. The Nuremberg tribunal faced with these same arguments stated:

It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was obtained without bloodshed.

These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered.

TRIAL OF MAJOR WAR CRIMINALS, *op. cit. supra* note 64, at 435.

⁶⁹ Reprinted in part in text at note 6, *supra* at p. 1; reprinted in full in BARTLETT, THE RECORD OF AMERICAN DIPLOMACY 461-70 (2d ed. 1952).

⁷⁰ PALMER, HISTORY OF THE MODERN WORLD 795 (1951).

⁷¹ MAREK, *op. cit. supra* note 61, at 343.

⁷² CHEN, THE INTERNATIONAL LAW OF RECOGNITION 67 (1951).

⁷³ See *id.* at 149-53; Reut-Nicolussi, *supra* note 18, at 125.

⁷⁴ CHEN, *op. cit. supra* note 72, at 67; LANGER, *op. cit. supra* note 51, at 161.

THE THEORY

The continuity of states in international law is not interrupted by internal change, even of a revolutionary type.⁷⁵ This rule is well stated by Moore:

Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.⁷⁶

The rule has retained its vitality in the face of attempts to change it. Such attempts, from the Holy Alliance of 1815 through the Tobar Doctrine of 1907 and the Central American Treaty of 1923, uniformly failed when they were met by the fundamental international-law principle of noninterference in the internal affairs of foreign states.⁷⁷ Thus, internationally, the right to revolution exists.

But one apparent exception should be noted: the continuity of a state will not survive a sham revolution by which in effect it is conquered by a foreign state. Marek says:

[T]here is intervention, and not revolution, if the revolutionary movement in one State is instigated and supported by a foreign State; if the alleged revolution is conducted by citizens or, *a fortiori*, by organs of that foreign State; if it takes place under foreign pressure, as for example military occupation.⁷⁸

Marek cites as examples of sham revolutions the Kuusinen episode in Finland in 1939-40 and the revolutionary Polish government of 1920.⁷⁹ More recent examples involving the Soviets easily come to mind.

A second legal situation that does not affect the existence of a State is belligerent occupation. Belligerent occupation is the control of the territory of one state by an enemy state during hostilities or for a temporary period thereafter.⁸⁰ In the usual case the occupied power retains control of a portion of his territory and is fighting to regain the rest. But there are instances in which the territory of the occupied state has been entirely lost to the invader and the government has fled to the territory of an ally, from which point both continue the fight against

⁷⁵ MAREK, *op. cit. supra* note 61, at 24-51. The question of continuity of states should not be confused with the problem of recognizing a government within a state. See FENWICK, *INTERNATIONAL LAW* 157 (3d ed. 1948).

⁷⁶ 1 MOORE, *DIGEST OF INTERNATIONAL LAW* 249 (1906). See *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870); FENWICK, *op. cit. supra* note 75, at 158.

⁷⁷ MAREK, *op. cit. supra* note 61, at 51-59. In recent years there appears to be renewed sentiment on the part of the international community to limit or extinguish the right of revolution. The United Nations effort to prevent or reverse the secession of Katanga and Oriental provinces in the Republic of the Congo is one example; another is the present movement on the part of Western Hemisphere countries to explore what might be done to prevent or reverse military revolutions in the Hemisphere. See, *The Washington Post*, Aug. 9, 1962, p. A 10, col. 1.

⁷⁸ MAREK, *op. cit. supra* note 61, at 65.

⁷⁹ *Id.* at 66-68; FEILCHENFELD, *INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 8 (1942).

⁸⁰ 1 OPPENHEIM, *INTERNATIONAL LAW* 570 (8th ed. 1955); MAREK, *op. cit. supra* note 61, at 74-75.

the common enemy.⁸¹ These instances are exceptions to the basic rule that to exist a state must have territory, people, and sovereignty as well as government.⁸² International law looks at this situation as a temporary one and as long as matters are still in flux the government in exile is deemed to have constructive sovereignty over the conquered territory and people.⁸³

These situations should be distinguished from subjugation, where there is a transfer of sovereignty to the conquering state and the concomitant extinction of the conquered state.⁸⁴ Subjugation, called conquest by some writers, is generally termed occupation plus annexation.⁸⁵ Annexation has been defined by Hyde as the mode by which the conqueror:

. . . announces to the outside world both the design to acquire the rights of sovereignty over the area concerned, and the achievement of that end solely by its own act. . . . [Conquest] betokens not only the acquisition of rights of sovereignty by virtue of sheer power, but also unconcern on the part of the conqueror as to the lack of any agreement manifesting acceptance of the change by its foe.⁸⁶

Thus to have subjugation there must be an effective occupation, an intent on the part of the occupying power to permanently retain title to the occupied territory, and a manifestation of this intent through some form of annexation.

It must be noted, however, that an occupying power can not validly annex occupied territory during the existence of the war.⁸⁷ The war must first terminate either by an agreed end to hostilities, express or tacit, or by the complete conquering of the other party so that no appreciable resistance remains—in which case there is no state with which the conquering power can agree to end hostilities. However, the war does not terminate should the government of the con-

⁸¹ Brown, *Sovereignty in Exile*, 35 AM. J. INT'L L. 666, 667 (1941); LANGER, *op. cit. supra* note 51, at 123-85. Chen states the principle in a succinct manner:

As long as international action is being taken to thwart the conqueror from consolidating his gains, the mere fact of the loss of territory does not ipso facto entail the extinction of the dispossessed State.

CHEN, *op. cit. supra* note 72, at 65.

⁸² 1 OPPENHEIM, *INTERNATIONAL LAW* 118 (8th ed. 1955); Brown, *supra* note 81, at 667; CHEN, *op. cit. supra* note 72, at 63-64; see FEILCHENFELD, *op. cit. supra* note 79, at 4-5.

⁸³ 1 OPPENHEIM, *op. cit. supra* note 81, at 118.

⁸⁴ HERSEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW* 276 (rev. ed. 1930); FENWICK, *op. cit. supra* note 75, at 430; 1 MOORE, *op. cit. supra* note 76, Ch. IV; BRIGGS, *THE LAW OF NATIONS* 182-83 (1938); 1 OPPENHEIM, *op. cit. supra* note 82, at 567; McMAHON, *CONQUEST AND MODERN INTERNATIONAL LAW* 4-6 (1940); 1 HYDE, *op. cit. supra* note 65, at 356. It must be recognized, however, that a few dissidents do exist. See HALL, *op. cit. supra* note 65, at §31, and Bonfils, Fiori, Accioly, and Dispagnet, cited in McMAHON, *op. cit. supra* at 6, nn. 14, 16.

⁸⁵ Hackworth has stated it as follows:

Conquest is the taking of possession of territory of an enemy State by military forces; it becomes a mode of acquisition of territory—and hence of transfer of territory—only if the conquered territory is effectively reduced to possession and annexed by the conquering State.

HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 427 (1940).

The problem of definition is fully explored by McMahon in the introduction to his *CONQUEST AND MODERN INTERNATIONAL LAW* (1940).

⁸⁶ 1 HYDE, *op. cit. supra* note 65, at 357-58; see FEILCHENFELD, *op. cit. supra* note 79, at 4-5.

⁸⁷ 1 OPPENHEIM, *op. cit. supra* note 82, at 580; FEILCHENFELD, *op. cit. supra* 79, at 8, 110.

quered state go into exile, and from exile, along with its allies, it puts up a fight that could lead to a recovery of the conquered territory.⁸⁸

It should also be noted that subjugation need not be by open warfare. This rule is corollary to the principle discussed above that a sham revolution is not a revolution. Thus in the guise of a revolution or by the use of a threat of force one state can force another to give to it all or none of its territory. That in substance is as much subjugation as would be conquest through open warfare with widespread bloodshed.⁸⁹

The third category offered in this area, the state subjugated in violation of international law either customary or conventional, is the theory with which we are primarily concerned. It would be well to repeat at this point the statement of Lauterpacht's Oppenheim that the usual rules for acquiring territory do not apply

. . . when the act alleged to be creative of a new right is in violation of an existing rule of customary or conventional International Law. In such cases the act in question is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise.⁹⁰

This invalidity, Lauterpacht adds, can be cured by international recognition of the act.⁹¹ Krystena Marek agrees with Lauterpacht that an illegal act can not bestow title, but does not agree that recognition of the illegal act suddenly makes it legal.⁹² A third adherent to the view that title should not pass through an illegal act is Herbert Wright in his article on the legality of Germany's annexation of Austria.⁹³

The nations of the Western Hemisphere have embodied this theory in a rule of law, contained in the 1933 Anti-War Pact of Non-Aggression and Conciliation. In Article 2 of this treaty they agreed not to "recognize any territorial arrangement which is not obtained by pacific means, nor the validity of an occupation or acquisition of territory brought about by armed force."⁹⁴ The Conference of American States at Lima, Peru, in 1938 adopted a similar resolution.⁹⁵ This was implemented in July 1940 when the foreign ministers of the American Republics adopted a convention providing that, in view of the principle of nonrecognition

⁸⁸ OPPENHEIM, *INTERNATIONAL LAW* 437 (7th ed. 1952); McNAIR, *LEGAL EFFECTS OF WAR* 320 (1948); CHEN, *op. cit. supra* note 72, at 64-65; FEILCHENFELD, *op. cit. supra* note 79, at 7-8.

⁸⁹ See MAREK, *op. cit. supra* note 61, at 67-71; see especially Article 2 of the London Convention for Definition of Aggression of July 3, 1933, 6 HUDSON, *INTERNATIONAL LEGISLATION* 413 (1937), and Article 6 of the Rio de Janeiro Pact of September 2, 1947, 62 Stat. 1681, reprinted at 43 AM. J. INT'L L. 329 (1949).

⁹⁰ 1 OPPENHEIM, *op. cit. supra* note 82, at 141-42. See note 17, *supra*.

⁹¹ *Ibid.*

⁹² MAREK, *op. cit. supra* note 61, at 271-72.

⁹³ Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621 (1944).

⁹⁴ International Conferences of American States 496 (Supp. 1933-40).

⁹⁵ Reprinted at 34 AM. J. INT'L L. SUPP. 197 (1940).

of transfer of territory by force, all territories in the Western Hemisphere that were colonies of nations subjugated by aggressive acts of other nations would be administered by one or more American states on a mandate-type system.⁹⁶ Finally, the Bogota Charter of the Organization of American States, adopted on April 30, 1948, provides that "No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."⁹⁷

The Draft Declaration on the Rights and Duties of States proposes a worldwide adoption of the rule that "every State [is] to refrain from recognizing territorial acquisitions obtained through force or the threat of force."⁹⁸ The United States early adopted just such a rule in its attitude on the Japanese conquest of Manchuria. Secretary of State Stimson, in an identical note sent to the governments of both China and Japan, stated that the United States "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 27, 1928. . . ."⁹⁹ The League of Nations Assembly adopted this theory two months later in stating its refusal to accept the Japanese action:

It is incumbent 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 to the Pact of Paris.¹⁰⁰

This doctrine has an important implication, for if it be followed with logic the result must be that no act of conquest today can be given any validity. Aggression and conquest have been prohibited internationally since the Covenant of the League of Nations. This prohibition has received added force through the Kellogg-Briand Treaty and the United Nations Charter. Under this theory the Italian subjugation of Ethiopia, the German annexation of Austria and the Sudetenland, the Soviet Union's admitted annexation of the Baltic countries and their actual annexation of the rest of Eastern Europe, the Indian conquest of Goa and other Portuguese enclaves, and the Israeli incorporation of Arab territory not given to her by the United Nations might now be ruled illegal and hence null and void.

And this is what the theorists have declared to be the situation with Austria after March 1938—although Lauterpacht's allowance that recognition of an illegal act makes it legal puts him in a somewhat different category.

⁹⁶ 35 AM. J. INT'L L. SUPP. 28 (1941).

⁹⁷ 46 AM. J. INT'L L. SUPP. 47 (1952). The strong Pan-American stand on this issue may be attributable to the writings of Victor Maurtua and Alejandro Alvarez in 1931. See quotations in note to Draft Declaration on Rights and Duties of States, *supra* note 66, at 114.

⁹⁸ Draft Declaration on Rights and Duties of States, *supra* note 66, at 111.

⁹⁹ S. Doc. No. 55, 72d Cong., 1st Sess. 54 (1931). See McNair, *The Stimson Doctrine of Non-Recognition*, 1933 BRIT. YB. INT'L L. 65.

¹⁰⁰ LEAGUE OF NATIONS OFF. J., Special Supp. No. 101 at 8. See DEVISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 233 (1947). Lauterpacht says that this was no more than declaratory of the obligation under Article 10 of the Covenant to guarantee the existing territorial integrity and political independence of other members of the League. 1 OPPENHEIM, *op. cit. supra* note 82, at 143-44.

The theoretical argument concerning Austria's survival of the Anschluss recognized, as it must, that in theory Austria's continuity between 1938 and 1945 can not be based on any of the traditional concepts. First of all, there is no doubt that Austria lost all of her territory to Germany. And secondly, there was no government in exile or continuation of the fight from abroad on which to peg a theory of constructive sovereignty. However, an attempt has been made to argue that the beginning of the Second World War eighteen months later and pious declarations that the Allies were fighting for Austria's freedom as well as for their own add up to a situation akin to a government in exile carrying on the old fight and therefore a condition of belligerent occupation existed.¹⁰¹ Nevertheless, the basic claim of Austria's continuity after 1938 is founded on the thesis that the Anschluss was illegal and therefore null and void. Marek declares:

It has been fully proved that the Anschluss constituted an illegal act on the part of Germany. It must therefore be concluded that . . . it was the principle *ex injuria jus non oritur* which, failing any crystallized rule of international law protecting State continuity in the particular circumstances, formed the legal basis of Austria's survival.¹⁰²

The postwar Austrian courts have adopted a thesis of continuity which they have reiterated many times. This thesis was first fully spelled out by the Austrian Supreme Court in 1947:

In March 1938, the Republic of Austria lost its independence and sovereignty as the result of its occupation by the German Reich. On April 27, 1945, it was liberated from the National Socialist rule of force. That liberation did not create a new State. The Austrian Republic recovered its sovereign rights and was declared to be again an independent State. From March 13, 1938, to April 27, 1945, the sovereign prerogatives in the territory of the Austrian Republic were exercised by the Government of the German Reich. . . . On April 27, 1945, the Austrian Republic did not take over power from the German Reich. It recovered, after the collapse of the National Socialist regime, that authority which it was prevented from exercising between March 13, 1938 and April 27, 1945.¹⁰³

Again in 1948 the Austrian Supreme Court, in a case involving the existence of an obligation on the part of the Republic of Austria to pay for work done on the Austrian railway system during German control, said:

The assets of the Railways remained its [the Republic of Austria's] property even when it was deprived of possession by the arbitrary occupation of Austria by Germany, and was forcibly debarred from exercising its rights of ownership. The liberation of Austria and the abrogation of the provisions which purported to give a legal basis to the acts of force committed against

¹⁰¹ See MAREK, *op. cit. supra* note 61, at 346-47. Cf., speech of President F. D. Roosevelt, May 27, 1941, reprinted in part, ROSENMAN, *WORKING WITH ROOSEVELT* 286 (1952).

¹⁰² MAREK, *op. cit. supra* note 61, at 365-66.

¹⁰³ *Jordan v. Austrian Republic*, [1947] Ann. Dig. 41.

the Republic of Austria, restored the Republic to the full exercise of its rights.¹⁰⁴

The court on another occasion referred to the Austrian Declaration of Independence for support:

The continuity of the Austrian State before the occupation in 1938 and after the liberation in 1945 can not be seriously contested, having regard to Article I of the Declaration of Independence of May 1, 1945, which reconstituted the Republic of Austria.¹⁰⁵

Finally, the Administrative Court of Austria has expressed the same view:

Both doctrine and jurisprudence are of opinion that Austrian sovereignty continued to exist during the occupation of Austria by the German Reich, and that its exercise was merely in abeyance during that period.¹⁰⁶

Thus, in theory, Austria has been held to have continued even after the Anschluss with Germany and not to have been extinguished by it.¹⁰⁷ Her sovereignty has been held on high—on high because, admittedly, it had no people, territory, or government on which to attach itself.

The logical consequence of this view should be the treatment of German control of Austria as a mere belligerent occupation. Citizens of Austria on March 11, 1938, should have remained just that, citizens of Austria, after that date. Their primary allegiance should have been to Austria, although they owed a duty of obedience to their occupier.¹⁰⁸ Any Austrian citizens who voluntarily aided the occupier or swore allegiance to him should have been treated by the returning Austrian authorities as guilty of treason. Transfer of title to property by the

¹⁰⁴ *Kleih v. Republic of Austria*, [1948] Ann. Dig. 51.

¹⁰⁵ *In re Police Constable P.*, [1949] Ann. Dig. 63. The Declaration of Independence reads in material part:

Art. I. The democratic republic of Austria is reestablished and shall be conducted in the spirit of the constitution of 1920.

Art. II. The Anschluss imposed on the Austrian people in the year 1938 is null and void. . . .

Art. IV. From the day of the publication of this declaration of independence all the military, official or personal oaths taken by Austrians with regard to the German Reich and its government are to be considered as null and void and not binding.

Art. V. From this day on all Austrians are again in loyalty bound as citizens to the Republic of Austria.

Reprinted in MAREK, *op. cit. supra* note 61, at 359. Marek agrees with the Austrian court that Article I is an expression of continuity. This writer asks how a state that has existed all the while can be "re-established?"

¹⁰⁶ *Tax Legislation (Austria) Case*, [1949] Ann. Dig. 66. See also *German Railway (Austria) Case*, [1949] Ann. Dig. 61 (*Landesgericht, Vienna, Austria*); *Schake v. Republic of Austria*, [1950] Int'l L. Rep. 34 (*Supreme Restitution Comm'n. Austria*); *Wasservogel v. Federal Dept. of Justice and Police*, [1949] Ann. Dig. 184 (*Federal Tribunal, Switzerland*); *Z. v. B.*, [1950] Int'l L. Rev. 312 (*Ct. of Appeals, Turin, Italy*).

¹⁰⁷ It must be noted, however, that not all writers have taken this view. See CHEN, *THE INTERNATIONAL LAW OF OCCUPATION* 62 (1951).

¹⁰⁸ See VON GLAHN, *OCCUPATION OF ENEMY TERRITORY* 45-74 (1947), and Major Baxter's excellent study, *The Duty of Obedience to the Belligerent Occupant*, 27 B.Y.I.L. 240-44 (1950); see *De Jager v. Attorney General of Natal*, [1907] A.C. 326 (P.C.); Powers, *Treasons and Aliens*, July 1962 *MILITARY JUSTICE LAW REVIEW* 123, 125-29.

occupier should have been recognized only within the occupier's legal ability under international law to transfer property rights.¹⁰⁹ Perhaps, since the occupation, having resulted from an unlawful aggression,¹¹⁰ was illegal, it should logically be considered a trespass bestowing on the occupier not even the rights of a legitimate belligerent occupier; the occupier should for that reason be held internationally responsible for all losses resulting from its occupation, and not just for those that resulted from violations of the ordinary rules of belligerent occupation.¹¹¹

THE REALITY

Yet the reality of such a doctrinal view applied to its logical conclusion can be harsh on the law's primary object of concern: the private individual. Even the Austrian courts have tempered their theoretical conclusions with some consideration for this reality. For example, in 1952 the Austrian Administrative Court was faced with the problem of interpreting in the light of the Anschluss an Austrian law which provided that any Austrian who entered the public service of a foreign state automatically lost his Austrian nationality. Logically, under the continuity thesis, Germany was a state foreign to Austria and one who entered the service of Germany should come under the ban of the statute. An exception could logically have been made, perhaps, for a person who did not enter the foreign service voluntarily, or, perhaps, for one who held only a menial position upon which he had to depend for his livelihood, a position in which he may have given more aid to his fellow countrymen than to the enemy. Yet, the Austrian court drew no such distinction. It simply held that Germany should not be considered as a "foreign country" during the Anschluss, "because there was only one State territory, in which the territory of the incorporated State had been merged." No inquiry was made into, or even suggested on, the question of voluntariness or the importance of that position.¹¹²

A question has also arisen as to the validity of administrative awards made during the Anschluss. Again, logically, these awards should have been tested against the rules of belligerent occupation, and those awards violating such rules should have been invalidated. Yet, the Austrian Supreme Court in 1953 and again

¹⁰⁹ See VON GLAHN, *op. cit. supra* note 108, at 185-91, *cf. Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1952); *Aboitz & Co. v. Price*, 99 F.Supp. 602 (D. Utah) (1951); compare *Fleming v. Page*, 50 U.S. (9. How.) 603 (1850); *U.S. v. Rice*, 17 U.S. (4 Wheat.) 245 (1819).

¹¹⁰ This is not to suggest that any aggression may be lawful, but that under the theory stated the aggression was unlawful.

¹¹¹ Baxter, 1953 Proceedings of American Society of International Law 119.

¹¹² *R. v. Provincial Gov't of Upper Austria*, [1952] Int'l L. Rep. 335, 336. Three years previously the Austrian Supreme Court had held that a police constable who had taken on oath of allegiance to prewar Austria need take no new oath. In *re Police Constable P.*, [1949] Ann. Dig. 63.

in 1954 held that it would not even question those awards; that they would be considered *ipso facto* valid.¹¹³

An interesting problem arose concerning whether the Berne Copyright Convention had retained its force in postwar Austria without a new ratification. The appellant had published in a 1948 Austrian newspaper a novel, the copyright to which was held by a German. Appellant was convicted, in accordance with the convention, of "international infringement." The first question the court had to face was whether the Convention had been in force in Austria in 1948 in spite of the fact that no new ratification had taken place since the war.¹¹⁴ The court held that Austria had never left the Convention, apparently relying on a thesis of continuity. However, the court then went on to say that, because there had been legitimate doubts regarding Austria's continued adherence, it could not say that appellant's infringement was intentional.¹¹⁵ The court also, curiously, stated that Austria had belonged to the Berne Union while part of Germany "and within the latter's factual sphere of sovereignty."¹¹⁶ Thus the court necessarily implied that (1) Austria had two memberships in the union from 1938 through 1945, and (2) the domestic law of Germany automatically applied to Austria during that period. The first implication appears absurd and the second contradicts any thesis other than a valid, sovereign annexation of Austria into Germany.¹¹⁷

Finally, it was held that German laws on taxation could be enforced in Austria after the reestablishment of the Republic.¹¹⁸

The German courts have looked at the same question at least twice. Both times they held that the legality or illegality of the annexation was immaterial—the only relevant consideration being that Austria was in fact a part of Germany. One case involved the validity of the German proclamation of 1938 giving German nationality to all Austrians.¹¹⁹ The other involved the question whether a German court imposing a sentence under a recidivism law applying to German convictions could

¹¹³ 84 JOURNAL DU DROIT INTERNATIONAL (Clunet) 673 (1958). One case is cited as Sheet 228 2/50/10 (May 2, 1953); the other as Sheet 953/50 (Nov. 27, 1954).

¹¹⁴ Austria had ratified the Convention in 1920.

¹¹⁵ Infringement of Copyright (Austria) Case, [1959] Int'l L. Rep. 47 (Austrian Sup. Ct.). The Court of Appeals of Turin, Italy, has also held that prewar Austrian treaties resumed their force in 1945. Z. v. B., [1950] Int'l L. Rep. 312.

¹¹⁶ Infringement of Copyright (Austria) Case, *supra* note 115.

¹¹⁷ This position is held by Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT'L L. 421, 432 (1938); Kelsen, *The International Legal Status of Germany, To Be Established Immediately Upon Termination of the War*, 38 AM. J. INT'L L. 689 (1944); and Brandweiner, *The International Status of Austria* in LIPSKY, LAW AND POLITICS IN THE WORLD COMMUNITY, 221 (1953). The validity of this proposition is not germane here however, for our discussion is limited to whether, assuming that aggression is illegal and Germany committed aggression against Austria (propositions that Kelsen, Brandweiner, and Garner would concede), acts of Germany in Austria during the Anschluss should be considered void as far as individuals are concerned under the principle of *ex injuria jus non oritur*.

¹¹⁸ Tax Legislation (Austria) Case, [1949] Ann. Dig. 66 (Administrative Court, Austria).

¹¹⁹ Nationality (Secession of Austria) Case, [1954] Int'l L. Rep. 175 (Sup. Administrative Court).

consider a conviction for a crime in Austrian territory during the Anschluss.¹²⁰

The cases point up the result of pursuing the continuity thesis to its logical consequences. The first involved the question of title to real property confiscated by the Germans who then sold it to the plaintiff in 1939. After Austria regained its independence in 1945, Austrian legislation forced the plaintiff to return the property to its pre-Anschluss owners. The plaintiff then sued Austria for damages for nonfulfillment of the 1939 contract. The court held that the sales contract had been made with the *land* of Austria and that the Republic of Austria was not the *land's* successor and therefore not obligated by its contracts.¹²¹

The second case is a decision by the Federal Tribunal of Switzerland. Plaintiff had married one Wasservogel, originally an Austrian citizen who, if the German proclamation of July 3, 1938, mentioned above, had any validity, became a German citizen as a result of it. He then fled to Switzerland. In 1941 he lost this German nationality by force of a German decree taking away that nationality from all Jews permanently resident abroad. At that point Switzerland regarded Wasservogel as stateless. Therefore when the plaintiff married him it was thought that she retained her Swiss citizenship. (The Swiss law depriving of Swiss citizenship women who married foreign nationals did not apply to those who married stateless persons.) However, Austria had decreed on July 10, 1945, that all who had been Austrian citizens on March 13, 1938, were again Austrian citizens. Therefore, the court ruled, Wasservogel had been an Austrian all the time and the plaintiff had lost her Swiss citizenship by marrying him.¹²²

This writer concludes that, no matter how well the theory of Austria's continuity may appear as an abstract thesis to be used in the denial of validity to the fruits of aggression, in reality it does not work. The spinners of this thesis forget that they are dealing with people, people who at the moment when a decision concerning conduct must be made can not use hindsight to raise theories of legality or illegality. For example, the purchasers of that piece of property in Austria in 1939, assuming that they acted in the best of faith and under the advice of competent counsel, an assumption on which all law should be based, would have asked where the title to the property stood in the eyes of the law. If there were a belligerent occupation he might be held to know that title in such a situation probably would not pass. But, to any observer in early 1939, Germany was not a belligerent occupant of Austria—no Austrian resistance remained; no one was fighting for Austria's liberation; in fact, the *de facto* situation stood recognized by the international community. Germany was in reality the sovereign and dealing with the people of

¹²⁰ Recidivism (Germany) Case, [1953] Int'l L. Rep. 89 (Fed. Sup. Ct.); cf. Recidivist (Tribunal of Saar Territory) Case, [1951] Ann. Dig. 42 (Ct. of Apps., Frankfurt, Germany).

¹²¹ Schäcke v. Republic of Austria, [1950] Int'l L. Rep. 34 (Sup. Restitution Comm'n, Austria). Compare Soc. au Grand Marche v. City of Metz, [1952] Int'l L. Rep. 607 (France Cour de Cassation). See the treatment of a similar problem in Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

¹²² Wasservogel v. Federal Dep't of Justice & Police, (1949) Ann. Dig. 184 (Switzerland, Fed. Tribunal).

Austria as a sovereign would deal with them—unchallenged in every way. To the cautious purchaser such a government could pass title with no regard to the legality under international law of its act in becoming sovereign.

Again, examine the average citizen. To whom should he owe allegiance in 1939? To an Austria that does not even exist in far off London as a government in exile? To a sovereign in a vacuum? Or, should he give a sigh of regret and settle down to live as best he can with the new but apparently permanent situation of German rule? After all, so many adults in 1939 Europe had lived under a number of sovereigns through their lifetimes; this was nothing new. Yet, by living as a loyal German he would be committing treason against Austria which the armchair theorists say still existed *en vacuum*.

Lauterpacht has recognized that this theory is "an imperfect weapon" of enforcing the outlawry of aggression.

[I]n the absence of regularly functioning international machinery for enforcing the law, it must be regarded as a supplementary weapon of considerable legal and moral potency. It prevents any law-creating effect of prescription. It constitutes a standing challenge to the legality of the situation which results from an unlawful act and which, in relation to the courts of the non-recognizing State, is a mere nullity.¹²³

This writer agrees with the thesis of Lauterpacht and Marek as to its application in the political arena. The international community should not accept an aggressive act as a *fait accompli*, but rather should do everything possible to reverse the aggression and to vindicate the rights of the downtrodden, whether they be in Ethiopia, Hungary, Tibet, or Austria. However, this writer does not agree with the theorists that this doctrine should be extended into the realm of judicial decision-making when the rights of individuals are at stake. To do so is to forget the reality of the situation facing the individual. This is especially so in those instances, such as Austria after 1938, in which the fighting has stopped and to everyone but a soothsayer it appears as if the condition is permanent. The individual has to live with that situation and adjust to it. To demand that the Austrian of 1939 act at his peril as if Austria still existed is to ignore reality.¹²⁴

The thesis that the existence of a state depends not on the reality of its existence or nonexistence but on the legality of its demise cannot be accepted until the international community is strong and willing enough to enforce that legality and vindicate the rights of the person who attempts to act in accordance

¹²³ 1 OPPENHEIM, INTERNATIONAL LAW 145 (8th ed. 1955).

¹²⁴ It is of note that the principle of utter nullity for an unconstitutional Act of Congress established in *Norton v. Shelby County*, 118 U.S. 425, 442 (1866), has come under attack for similar reasons. See *Chicot County v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940); Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 793, 801-02 (1962); Note, *The Effect of Unconstitutionality of the Statute*, 37 GEO. L.J. 574 (1949).

with what is legal.¹²⁵ Until that millennium arrives, international law should continue as it has in the past to recognize and expect people to live in accordance with the reality of the political situation.¹²⁶

¹²⁵ Cf. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 233 (1957):

It must be observed . . . that as a sanction for law breaking, nonrecognition is not effective even in law except insofar as it is the starting point for other sanctions sustained by collective action employing means adequate to prevent or reverse a situation of fact that is contrary to law.

¹²⁶ I realize that this thesis brings me close to the view that all that matters is what has been decreed by the controlling powers. See, e.g., Kelsen, *GENERAL THEORY OF LAW AND STATE*, (1945), and the study of Heinrich Brandweiner, a disciple of Kelsen, *The International Status of Austria*, in LIPSKY, *LAW AND POLITICS IN THE WORLD COMMUNITY*, 221-42 (1953). See Rose, *Ethical Theory and Legal Philosophy*, 15 *VAND. L. REV.* 327 (1962). I do not wish, however, my position to be construed as a repudiation of a normative basis for law. Rather, I regard one of those norms to be a consideration of the reality that faces the individual at the time he must act. For a further development of these views, see my *Conversion of Foreign Money Obligations Maturing During War*, 50 *GEO. L.J.* 513 (1962). I do not at all suggest that the Anschluss was legal because it in fact occurred and became effective; nor do I suggest that the right or wrong of the Anschluss is immaterial as far as international law is concerned. See *Case of the Free Zones of Upper Saxony and the District of Cex*, P.C.I.J., ser. A, No. 24 (1927); *Case Concerning the Legal Status of the South-Eastern Territory of Greenland*, P.C.I.J., ser. A/B, No. 48 (1932); and *Legal Status of Eastern Greenland*, P.C.I.J., ser. A/B, No. 53, pp. 75, 95 (1933); *Jurisdiction of the Courts of Danzig*, P.C.I.J., ser. B, No. 15, p. 26 (1928).

As a closing note, mention might be made that the question of Austria's status during the Anschluss is not a peculiar one. For example, there was considerable controversy after 1945 as to whether Germany survived, although occupied, its unconditional surrender or whether it ceased to exist in 1945, giving way first to a four-power subjugation and then to the creation of one and possibly two entirely new states. See the symposium on *Status of Germany*, 1 *Yearbook of World Polity* 177-247 (1957).