

# *Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur,* and the Elusive Search for Equilibrium After Ukraine

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*Russia's 2014 annexation of Crimea following the forestalled Euromaidan movement in Ukraine prompts a reconsideration of the international laws governing regime transition. State secession and territorial acquisition are reconsidered within the framework of the primordial Roman law principles of *ex injuria jus non oritur* and *ex factis jus oritur* in light of recent doctrinal problems stemming from Kosovo and other areas of the former Soviet Union. The problem of implementing a peer review system of orderly state secession is assessed in terms of international law's ongoing struggle to balance countervailing interests in legitimate governance and effective rule grounded in social fact. Factors complicating achievement of equilibrium are identified and discussed, including the selective application of rules, the lure of *uti possidetis*, and the International Court of Justice's (ICJ) perceived avoidance of juridical guidance in its Kosovo Advisory Opinion.*

I. INTRODUCTION .....	143
II. THE UNEASY INTERFACE .....	149
III. A CONJOINED RELATIONSHIP .....	150
IV. AN EXISTENTIAL CRISIS? .....	151
V. <i>EX INJURIA</i> 'S "COMING OF AGE"? .....	154
VI. ALL ROADS LEAD TO KOSOVO .....	161
A. <i>Kosovo's Double-Edge and the Overworking of Sui</i> <i>Generis Circumstance</i> .....	164
B. <i>The Problem of Uti Possidetis</i> .....	167
C. <i>Implied Non Liquet and the ICJ's Missed</i> <i>Opportunity</i> .....	170
VII. CONCLUSION .....	171

## I. INTRODUCTION

In November 2013, Ukraine's president, Viktor Yanukovich, abruptly rejected a political and economic Association Agreement with the European Union (EU) and instead accepted a \$15 billion Russian

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counteroffer.<sup>1</sup> The move signaled a pivotal turn away from more than two decades of increasing association with the West and an ominous turn toward Russia's renewed sway over its Cold War satellite. The forestalled agreement with the West, writ large, had promised Ukraine EU membership, democratic partnership, and ultimately, security rewards by North Atlantic Treaty Organization (NATO) Heads of State as long ago as the 2008 Bucharest Summit.<sup>2</sup> But it was not to be. By March 21, 2014, following a chaotic popular revolt that ousted Yanukovych as part of the so-called "Euromaidan movement," the U.S.-preferred candidate Arseniy Yatsenyuk was installed as prime minister.<sup>3</sup> Turmoil ensued, and the country devolved into partitions following a Russian-supported insurgency in eastern and southern regions of Ukraine.<sup>4</sup> Russia then ratified an accession treaty with the newly declared Autonomous Republic of Crimea and Sevastopol following an internationally criticized referendum.<sup>5</sup> The Republic of Crimea and Sevastopol's independence lasted only long enough to facilitate absorption by Russia, mooted questions of lawful state secession,<sup>6</sup> in what appeared worldwide as an example of illegal annexation.<sup>7</sup>

Russia orchestrated Crimea's *denouement* with whirlwind speed. Occupied and annexed by Russian troops and ethnic-Russian auxiliaries in defense of the newly recognized Russian Federation homeland while

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1. John Mearsheimer, *Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions that Provoked Putin*, 93 FOREIGN AFF. 77, 80 (2014).

2. *Bucharest Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Bucharest*, N. ATLANTIC TREATY ORG. (Apr. 3, 2008), [http://www.nato.int/cps/en/natolive/official\\_texts\\_8443.htm](http://www.nato.int/cps/en/natolive/official_texts_8443.htm) ("NATO welcomes Ukraine's and Georgia's Euro-Atlantic aspirations for membership in NATO. We agreed today that these countries will become members of NATO.").

3. *Ukraine Crisis: Transcript of Leaked Nuland-Pyatt Call*, BBC NEWS (Feb. 7, 2014), <http://www.bbc.com/news/world-europe-26079957> (publishing a transcript between the U.S. Assistant Secretary of State, Victoria Nuland, and the U.S. Ambassador to Ukraine, Geoffrey Pyatt).

4. Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 367, 369 (2014).

5. For the declaration, see *Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol*, VOLTAIRE NETWORK (Mar. 11, 2014), <http://www.voltairenet.org/article182723.html>. For Russian accession, see *Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed*, OFFICIAL INTERNET RESOURCES PRESIDENT RUSSIAN FED'N (Mar. 18, 2014, 4:00 PM), <http://eng.kremlin.ru/news/6890>. For references to western criticism of the agreement, see *West Furious as Crimea Accepted into Russia*, RT (Mar. 18, 2014, 7:09 PM), <http://rt.com/news/putin-speech-crimea-reactions-606/>.

6. See Marxsen, *supra* note 4, at 371.

7. See *World Leaders Condemn Russia's Annexation of Crimea*, GMANEWS ONLINE (Mar. 19, 2014, 8:38 AM), <http://www.gmanetwork.com/news/story/353202/news/world/world-leaders-condemn-russia-s-annexation-of-crimea>.

laying bare NATO pieties regarding “intensive engagement”<sup>8</sup> with Ukraine as part of its eastern expansion policy, Crimea’s *current* fate is now a matter more for political forensics experts rather than builders of an expanded Atlantic Alliance. The turmoil continues.<sup>9</sup>

While digesting the prospects of an on-going, low-grade civil war involving cross-border Russian support, observers are also left to contemplate Russian President Vladimir Putin’s pronouncements signaling greater territorial consolidation.<sup>10</sup> Bluster, perhaps, but some seasoned diplomats disagree.<sup>11</sup> The Russian diaspora following the 1991 collapse of the Soviet Union relocated 25 million Russians to newly created territories outside the country’s territorial contours;<sup>12</sup> spreading across fourteen borderland states of the former USSR, including the dominant ethnic Russian communities living abroad in the provinces of eastern Ukraine in Crimea and the Donbas region.<sup>13</sup>

Diasporic communities have the potential to destabilize localities or regions based on genuine desires for independence, revanchist impulses

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8. *Bucharest Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Bucharest*, *supra* note 2.

9. Representatives of Ukraine, the Russian Federation, and separatist regions of Ukraine—the Donetsk People’s Republic, and the Lugansk People’s Republic (which later formed the self-proclaimed Federal State of Novorossiia)—signed the Minsk agreement on September 5, 2014, implementing an immediate cease-fire agreement in the aftermath of Crimea’s annexation by Russia. In November 2014, the break-away regions elected separatist leaderships. Western governments and Ukraine’s president condemned the votes as a farce and as violations of the cease-fire agreement; Russia recognized the results, signaling a deepening crisis with the asserted secession of these regions from Ukraine and their declarations as newly-created micro-states. See Andrew E. Kramer, *Rebel-Backed Elections To Cement Status Quo in Ukraine*, N.Y. TIMES (Nov. 2, 2014), <http://www.nytimes.com/2014/11/03/world/europe/rebel-backed-elections-in-eastern-ukraine.html>.

10. TARAS KUZIO, *THE CRIMEA: EUROPE’S NEXT FLASHPOINT?* 4 (2010) (ebook) (noting the rise of irredentist threat since Putin’s 2000 election).

11. Ben Judah, *Putin’s Coup: How the Russian Leader Used the Ukraine Crisis To Consolidate His Dictatorship* (Oct. 19, 2014), POLITICO MAG., <http://www.politico.com/magazine/story/2014/10/vladimir-putins-coup-112025.html> (citing revanchist fears expressed by Poland’s and Sweden’s former Foreign Ministers Radek Sikorski and Carl Bildt); see also Griff Witte, *Finland Feeling Vulnerable Amid Russian Provocations*, WASH. POST (Nov. 23, 2014), [http://www.washingtonpost.com/world/europe/finland-feeling-vulnerable-amid-russian-provocations/2014/11/23/defc5a90-69b2-11e4-bafd-6598192a448d\\_story.html](http://www.washingtonpost.com/world/europe/finland-feeling-vulnerable-amid-russian-provocations/2014/11/23/defc5a90-69b2-11e4-bafd-6598192a448d_story.html) (discussing high ranking Finnish diplomatic concerns about risks of unintended escalation due to Russian provocations).

12. Scott Romaniuk, *The Russian Minority in Post-Communist Politics: A Case Study of Ukraine, Moldova and Chechnya*, 2 CEN. EUR. J. INT’L SECURITY STUD. 56, 56 (2008); see also Timothy G. Ash, *Putin’s Deadly Doctrine: “Protecting” Russians in Ukraine Has Fatal Consequences*, N.Y. TIMES (July 5, 2014), <http://www.nytimes.com/2014/07/20/opinion/sunday/protecting-russians-in-ukraine-has-deadly-consequences.html>.

13. Graham Smith & Andrew Wilson, *Rethinking Russia’s Post-Soviet Diaspora: The Potential for Political Mobilisation in Eastern Ukraine and North-East Estonia*, 49 EUROPE-ASIA STUD. 845, 845 (1997).

from the historical homelands, or something in between.<sup>14</sup> President Putin referenced something in between when defending Russia's de facto invasion of Crimea: he underscored the Russia *ethnos* rather than the established borders of the Russian state<sup>15</sup> by ordering assistance for "brothers in arms."<sup>16</sup> Russia's devastating 2008 invasion of Georgia, following pro-NATO Georgian President Mikheil Saakashvili's attempt to reincorporate the separatist regions of Abkhazia and South Ossetia, retrospectively serves as a reminder of Russia's fraternal response to westernizing encroachments on its doorstep, Kosovo's 1991 secession from Yugoslavia notwithstanding.<sup>17</sup> It also appears to have served as a prelude to events in Ukraine,<sup>18</sup> suggesting that consolidating this diaspora may be part of President Putin's grander plan to restore Russia to great power status.<sup>19</sup>

President Putin invoked a variety of legal justifications for the annexation (in addition to protection of the Russian *ethnos*), and he employed a discursive style that suggested any or all of them may form the basis of an omnibus international cause of action.<sup>20</sup> Included among his rationale were collective self-defense,<sup>21</sup> humanitarian intervention,<sup>22</sup> historical title,<sup>23</sup> the protection of nationals,<sup>24</sup> self-determination,<sup>25</sup> and the

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14. *Id.*

15. Natalia Kosmarskaya, *Post-Soviet Russian Diaspora*, in ENCYCLOPEDIA OF DIASPORAS: IMMIGRANT AND REFUGEE CULTURES AROUND THE WORLD 264, 265 (Melvin Ember et al. eds., 2004).

16. Steven Myers, *Putin, Flashing Disdain, Defends Action in Crimea*, N.Y. TIMES (Mar. 4, 2014), <http://www.nytimes.com/2014/03/05/world/europe/putin-flashing-disdain-defends-action-in-crimea.html>.

17. Georgia attempted to litigate the case before the ICJ on the attenuated basis involving the Convention on the Elimination of All Forms of Racial Discrimination, but the ICJ concluded it lacked jurisdiction. *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*, Preliminary Objection, 2011 I.C.J. Rep. 70, ¶ 187 (Apr. 1).

18. KUZIO, *supra* note 10, at 10.

19. *See Ash, supra* note 12; Ilai Saltzman, *The Putin Doctrine*, L.A. TIMES (Sept. 12, 2013), <http://articles.latimes.com/2013/sep/12/opinion/la-oe-saltzman-syria-putin-doctrine-20130912>.

20. *See Myers, supra* note 16; *Transcript: Putin Defends Russian Intervention in Ukraine*, WASH. POST (Mar. 4, 2014), [http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9caded1a-a3a9-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9caded1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html).

21. *Transcript: Putin Defends Russian Intervention in Ukraine, supra* note 20 ("[W]e have a direct appeal from the incumbent and . . . legitimate President of Ukraine, Mr. Yanukovich, asking us to use the Armed Forces to protect the lives, freedom and health of the citizens of Ukraine.")

22. *Id.* ("This is a humanitarian mission.")

23. *See Address by President of the Russian Federation*, OFFICIAL INTERNET RESOURCES OF THE PRESIDENT OF THE RUSSIAN FED'N (Mar. 18, 2014, 3:50 PM), <http://eng.kremlin.ru/news/6889#sel=53:1,53:6> ("Crimea is our common historical legacy. [Russia] is against having

emerging U.N.-sanctioned responsibility to protect.<sup>26</sup> The Euromaidan movement's first legislative proposal following the overthrow of the Yanukovich regime repealed Ukraine's tolerant multicultural language law, an act, though quickly vetoed, that nevertheless directly targeted Ukraine's considerable number of Russian language speakers.<sup>27</sup> In a reformulation of the Brezhnev Doctrine, which now bears President Putin's eponymous signature,<sup>28</sup> the language issue sparked Kremlin suspicions of anti-Russian motivations behind the Euromaidan movement.<sup>29</sup> One can now add Crimea's right of remedial secession to President Putin's list of defenses, attributing a right of secession to a people denied of meaningful internal means of self-determination.<sup>30</sup> Putin asserted this claim with Kosovo's unilateral declaration of independence in mind,<sup>31</sup> a disputed doctrine nevertheless presaged by the International Committee of Jurists' 1921 Report in the hallmark Åland

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[NATO] making itself at home . . . in our historic territory."); see also Gudrun Persson & Carolina V. Pallin, *Setting the Scene—The View from Russia*, in *A RUDE AWAKENING: RAMIFICATIONS OF RUSSIAN AGGRESSION TOWARDS UKRAINE* 25, 29 (Niklas Granholm et al. eds., 2014).

24. Mark Kersten, *Does Russia Have a 'Responsibility To Protect' Ukraine? Don't Buy It*, GLOBE & MAIL (Mar. 4, 2014), <http://www.theglobeandmail.com/globe-debate/does-russia-have-a-responsibility-to-protect-ukraine-dont-buy-it/article17271450/> ("Foreign Minister Sergei Lavrov similarly evoked [Responsibility-to-Protect] rhetoric in stating that 'we are talking here about protection of our citizens and compatriots, about protection of the most fundamental of the human rights.'").

25. Brad Simpson, *Self-Determination in the Age of Putin: Does Crimea Have the Right To Join Russia? The Answer Isn't as Clear as Moscow's Critics or its Defenders Think*, FOREIGN POL'Y (Mar. 21, 2014), [http://www.foreignpolicy.com/articles/2014/03/21/self\\_determination\\_in\\_the\\_age\\_of\\_putin\\_crimea\\_referendum](http://www.foreignpolicy.com/articles/2014/03/21/self_determination_in_the_age_of_putin_crimea_referendum) (citing Russia's parliamentary house speaker's claim of the Crimean people's "right of self-determination").

26. Kersten, *supra* note 24 (referencing Russian deployment of "[Responsibility-to-Protect]-style rhetoric" as justification for this and other military incursions).

27. *Voiding Ukraine's Minority Languages Law 'Wrong' Luxembourg FM*, RT (Feb. 25, 2014, 3:13 PM), <http://www.rt.com/news/ukraine-language-lavrov-asselborn-627/>.

28. See David Francis, *How NATO Could Confront the Putin Doctrine*, FOREIGN POL'Y (Aug. 26, 2014), [http://thecable.foreignpolicy.com/posts/2014/08/26/how\\_nato\\_could\\_confront\\_the\\_putin\\_doctrine\\_petro\\_poroshenko\\_belarus](http://thecable.foreignpolicy.com/posts/2014/08/26/how_nato_could_confront_the_putin_doctrine_petro_poroshenko_belarus) (describing the Putin doctrine as Russia's right to protect Russian-speakers wherever they are). The Brezhnev Doctrine, named after Soviet Premier Leonid Brezhnev, originated with a September 26, 1968 announcement in *Pravda* that affirmed the "limited sovereignty" of Socialist states to militarily intervene on behalf of any other member of the Warsaw Pact. See Leon Romaniecki, *Sources of the Brezhnev Doctrine of Limited Sovereignty and Intervention*, 5 ISR. L. REV. 527 (1970).

29. *Address by President of the Russian Federation*, *supra* note 23 (referencing forces standing behind the Euromaidan movement's draft law to revise language policy); see also *Voiding Ukraine's Minority Languages Law 'Wrong' Luxembourg FM*, *supra* note 27.

30. See *infra* note 34 and accompanying text.

31. *Address by President of the Russian Federation*, *supra* note 23 (noting that the unilateral separation of Kosovo from Serbia, based on a right of self-determination, is "exactly what Crimea is doing" vis-à-vis Ukraine).

Islanders' dispute with Finland,<sup>32</sup> and alluded to by the Canadian Supreme Court in its 1998 Advisory Opinion concerning Québécois self-determination.<sup>33</sup>

The invocation of any one or a combination of these defenses as a pretext in order to disaggregate an existing state is illegal,<sup>34</sup> and unpacking these defenses is a task left to others, as might be a review of some democratic contradictions within the Euromaidan movement itself.<sup>35</sup> Scholarly discourse has quickly moved in the direction of contextualizing this crisis in terms of the international legal concepts proffered by President Putin.<sup>36</sup> Surely more analysis will develop as does the situation, but this Article has a deeper focus.

The crisis in Ukraine demonstrates the uneasy interface between familiar international legal principles present at the base of the country's ongoing deconstruction. This Article underscores the relevance of these legal common denominators and puts the crisis in Ukraine in the context of the rudimentary relationship between *ex injuria jus non oritur* (legal rights cannot arise from wrongdoing) and *ex factis jus oritur* (law arises

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32. Following the Bolshevik Revolution, Finland declared its independence from the Soviet Union. Its Åland Islanders, inhabiting an archipelago in the Baltic Sea, demanded accession to Sweden, which was resisted by Finland. In 1920, the Åland Commission of Jurists formed under the aegis of the League of Nations to advise on the legal aspects of the dispute. Max Huber served as one of the commissioners and the report is considered a seminal contribution to the history of self-determination. The Commission found that a legal right of secession could be asserted but only if no other means existed to protect the rights of the Islanders: "If it were true that incorporation with Sweden was the only means of preserving its Swedish language for Åland, we should not have hesitated to consider this solution. But such is not the case. There is no need for separation." *Report Presented by the Comm. of Rapporteurs on the Åland Islands Question*, League of Nations Doc. B7/21/68/106, at 28-29 (1921), *microformed on* League of Nations Documents, 1919-1946, Reel 4 (Research Pub. Inc.).

33. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 134 (Can.) ("[W]hen a people is blocked from a meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.").

34. See generally G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

35. Mearscheimer notes the pro-west government installed after Yanukovych fled contained four high-ranking fascists. See Mearscheimer, *supra* note 1, at 80.

36. See, e.g., Robert Delahunty, *The Crimean Crisis*, U. ST. THOMAS J. L. & PUB. POL'Y (2014); Simpson, *supra* note 25; Michael Averko, *Humanitarian Intervention Undertaken in Crimea*, FOREIGN POL'Y J. (Mar. 4, 2014), <http://www.foreignpolicyjournal.com/2014/03/04/humanitarian-intervention-undertaken-in-crimea/>; Sina Etezazian, *Ukraine Insta-Symposium: The Crisis in Crimea—The Protection of Nationals Abroad and the Legality of Ukraine's Possible Use of Force in Self-Defense*, OPINIO JURIS (Mar. 9, 2014), <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-crisis-crimea-protection-nationals-abroad-legality-ukraines-possible-use-force-self-defense/>; Kersten, *supra* note 24; Jens D. Ohlin, *Crisis in Crimea: Can Putin Claim Consent?*, VERDICT (Mar. 8, 2014), <https://verdict.justia.com/2014/03/08/crisis-crimea-can-putin-claim-consent>.

from the facts)—a relationship marked by international law’s deeply ambivalent embrace of both principles.<sup>37</sup> The crisis in Ukraine may escape legal solution. If so, international law’s conflicting balance of these often counterpoising principles accounts for much of this problem.

## II. THE UNEASY INTERFACE

Ukraine’s predicament underscores international law’s struggle with the relationship between legality and effectiveness, as expressed by these two underpinning and primordial principles of international law.<sup>38</sup> A concern about legitimating ill-gotten gains has marked *ex injuria jus non oritur*’s close association with the doctrine of nonrecognition and the law of state responsibility, perhaps establishing the obligation of states not to recognize results from forcible territorial acquisitions.<sup>39</sup> Although not directly, reference to these principles arose quickly in relation to Ukraine. Russia’s annexation of Crimea provoked a rebuke by the U.N. that mentioned the *ex injuria* principle in all but name.<sup>40</sup> It declared the attempt to modify Ukraine’s borders through an “unauthorized” referendum as “having no validity, [and thereby it] cannot form the basis for any alteration of the status.”<sup>41</sup> Russia’s control of the factual circumstances indicated the opposite: 25,000 troops stationed in the region, an extended 1997 Partition Treaty upholding Russian upkeep of military bases in Crimea (including the naval hub for its extensive Black Sea Fleet in Sevastopol),<sup>42</sup> long-standing historical interest in the region

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37. YAËL RONEN, *TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW* (2011).

38. *Id.*

39. See generally Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 677-86 (J. Crawford et al. eds. 2010).

40. G.A. Res. 68/262, ¶ 5 U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

41. *Id.*

42. Угода між Україною і Російською Федерацією про статус та умови перебування Чорноморського флоту Російської Федерації на території України, ВЕРХОВНА РАДА УКРАЇНИ, [http://zakon4.rada.gov.ua/laws/show/643\\_076](http://zakon4.rada.gov.ua/laws/show/643_076) (last visited Nov. 10, 2015) [Ukrainian]. The Partition Agreement was extended following the demise of the USSR until 2042 (the Kharkiv Pact), accommodating Russia’s Black Sea Fleet (including missile cruisers, antisubmarine ships, amphibious vessels, fast attack crafts, submarines, antisubmarine and mine hunting vessels, and hydrographic boats; a Russian naval presence of 25,000 troops; 24 small caliber artillery systems; and an assortment of armored vehicles, military planes). Additionally, Russia operates two airbases in Crimea. See *Russia’s 25,000-Troop Allowance & Other Facts You May Not Know About Crimea*, RT (Mar. 4, 2007, 8:07 PM), <http://rt.com/news/russian-troops-crimea-ukraine-816/>. Having lost its *raison d’être* following the annexation referendum, Russia denounced the agreement and its extension. See *Russian Federal Council Terminates Black Sea Fleet Agreements with Ukraine*, TASS RUSSIAN NEWS AGENCY (Apr. 2, 2014, 12:36 PM), <http://itar-tass.com/en/russia/726063>.

dating to Catherine the Great,<sup>43</sup> and spreading support for separatist and irredentist declarations in the two adjoining regions of Lugansk and Donetsk.<sup>44</sup> The crisis in Ukraine, fluid as it is, indicates one hardened truth: these two Roman law principles have and will continue to come squarely into contact. Topical discussions of international law concentrating on President Putin's legal causes of action should not obscure the significance of these two time-tested Roman law corollaries to state creation and territorial acquisition.

### III. A CONJOINED RELATIONSHIP

Territorial status depends on the conjoined relationship between the *ex injuria* and *ex factis* principles, but may, as the case in Ukraine suggests, reflect a contest for supremacy between the two.<sup>45</sup> Such conflict is often unavoidable because “[any] contest over territory is a contest for recognition”<sup>46</sup> and control. But if international law is in some measure a function of social reality, then the validity of law, like the validity of grammar, does not depend on absolute observance. However, it does depend on a degree of observance, and continuous breaches of law undermine its validity and attachment to social facts.<sup>47</sup> In such circumstances, “gap[s] emerge[] between the effectiveness of the illegal regime’s conduct and its validity under international law.”<sup>48</sup>

One such gap has emerged in Ukraine as international law struggles to apply the *ex injuria jus non oritur* principle. Russia’s aggressive *fait accompli* in Crimea attacks the validity of the principle through its seizure of territory by means of threats, use of force, and a widely perceived sham referendum.<sup>49</sup> Other social factors relating to the Russian

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43. David R. Marples & David F. Duke, *Ukraine, Russia, and the Question of Crimea*, 23 NATIONALITIES PAPERS 261, 263 (1995) (noting Crimea became a focus of Russian foreign policy during the reign of Catherine the Great [1762-1796]); see also ALAN W. FISHER, *THE RUSSIAN ANNEXATION OF THE CRIMEA 1772-1783* (1970).

44. See Mark Galeotti, *‘Hybrid War’ and ‘Little Green Men’: How It Works, and How It Doesn’t*, E-INT’L REL. (Apr. 16, 2015), <http://www.e-ir.info/2015/04/16/hybrid-war-and-little-green-men-how-it-works-and-how-it-doesnt/>.

45. RONEN, *supra* note 37, at 1.

46. Thomas D. Grant, *Hallstein Revisited: Unilateral Enforcement of Regimes of Nonrecognition Since the Two Germanies*, 36 STAN. J. INT’L L. 221, 221 (2000).

47. TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES* 420 (L.C. Green ed., 1951).

48. RONEN, *supra* note 37, at 312.

49. See Oliver Bullough, *The Crimean Referendum to Join Russia Was an Unconstitutional Sham*, NEW REPUBLIC (Mar. 16, 2014), <http://www.newrepublic.com/article/117044/crimean-referendum-join-russia-was-unconstitutional-sham>; Ian Birrell, *Crimea’s Referendum Was a Sham Display of Democracy*, GUARDIAN (Mar. 17, 2014), <http://www.theguardian.com/commentisfree/2014/mar/17/crimea-referendum-sham-display-democracy-ukraine>; Ilya Somin,



diaspora and Russia's historical connection to and military presence in Crimea support Russia's application of the *ex factis jus oritur* principle. In ideal situations, the two principles balance each other, with the *ex injuria* principle serving "as a bulwark against *injustice*," and the *ex factis* principle safeguarding against disorder.<sup>50</sup> However, the elusive search for equilibrium remains problematic.<sup>51</sup>

#### IV. AN EXISTENTIAL CRISIS?

Recent scholarship suggests the balance between legal and illegal regime analysis (including territorial acquisition) suffers from an "existential crisis,"<sup>52</sup> particularly since the demise of the Soviet Union. The long-running debate between declaratory (de facto) and constitutive (de jure) schools of recognition has resulted in inconsistent and arbitrary applications now controlled by politics.<sup>53</sup> The balance now distinctly inclines in favor of the *ex factis* principle. The declaratory school, aligned with the *ex factis* principle, asserts that statehood, or territorial acquisition, is determined fully by a set of factual conditions, such as those suggested by article 1 of the Montevideo Convention.<sup>54</sup> States obtain their status by possessing a permanent population, a defined territory, a government, and capacity to enter into relations.<sup>55</sup> In the

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*The Dubious Crimean Referendum on Annexation by Russia*, WASH. POST (Mar. 17, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/17/the-dubious-crimean-referendum-on-annexation-by-russia/>.

50. GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 176 (Kate Elliot ed., 2004).

51. Finding a proper balance is not the sole problem of international law. The political world's reaction is equally nonplussed: NATO and its Parliamentary Assembly immediately condemned Russia's military escalation, all the while evidencing the belief that Ukraine is not a core strategic interest, making clear the West has no intention of defending the country it promised to make a future NATO member. See Mearsheimer, *supra* note 1, at 88; Ian Davis, *NATO Condemns Russia's Military Escalation in Crimea*, NATO WATCH (Mar. 3, 2014, 4:46 PM), <http://www.natowatch.org/node/1419>; *NATO Parliamentary Assembly President "Aghast" at Putin Speech on Annexation of Crimea and Calls for Deeds Not Words on Sanctions*, NATO PARLIAMENTARY ASSEMBLY (Mar. 19, 2014), <http://www.nato-pa.int/default.asp?SHORTCUT=3417>.

52. See Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT'L L. 467, 467 (2011).

53. *Id.*

54. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

55. See *id.*; see also *Kadic v. Karadzic*, 70 F.3d 232, 244-45 (2d Cir. 1995) (applying declaratory standards); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 201, 202 cmt b (AM. LAW. INST. 1987) ("An entity that satisfies the requirements of § 201 is a state whether or not its statement is formally recognized by other states."); Martti

declarantist's view, new state formation is a "matter of fact" and the doctrine of recognition formally acknowledges that "factual situation."<sup>56</sup> As quintessentially expressed in Oppenheim's first edition of *International Law*, "[T]he formation of a new State is . . . a matter of fact, and not of law . . . and it matters not how this territory was acquired. . . ."<sup>57</sup>

The constitutive school marks the state-centric emphasis on "peer review."<sup>58</sup> It makes external recognition by other states the *sine qua non* for the establishment of statehood, or, as the U.N. response indicates, territorial integrity.<sup>59</sup> This external validation implies, but does not require, the kind of moral assessment embedded in the *ex injuria* principle's emphasis on withholding legal recognition in the face of wrongdoing, but it does, at a minimum, deny that state creation or territorial acquisition is purely a function of automatic interpretation.

A long-standing debate exists over which school, and impliedly, which principle, prevails.<sup>60</sup> Complicating this discussion is the lack of precise meaning about secession. It surfaces in discussions on state dismemberment, dissolution, separation as a precursor to state creation, devolution, decolonization, and unilateral (nonconsensual) emancipation.<sup>61</sup> Conceptual boundaries blur in discussions of state creation, territorial acquisition, and recognition. Nevertheless, Zohar Nevo and Tamar Megiddo assert that "[r]ecognition is today predominantly considered declaratory and not constitutive," a conclusion that would favor application of the *ex factis* principle over *ex injuria*.<sup>62</sup>

Yaël Ronen recently explored the fundamental tension between the two principles and ultimately concluded that the *ex injuria* principle was "weak" and "limited," and that violations of international law can produce legally valid outcomes beneficial to the wrongdoer.<sup>63</sup> This idea is not new. Sixty years ago, Robert W. Tucker noted that rigid reliance on

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Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 2 EUR. J. INT'L L. 215, 241 (1997).

56. KREIJEN, *supra* note 50, at 16.

57. I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 373 (Ronald F. Roxburgh ed., 1905).

58. KREIJEN, *supra* note 50, at 13.

59. Ryngaert & Sobrie, *supra* note 52, at 469.

60. See Ian Brownlie, *Recognition in Theory and Practice*, in *THE BRITISH YEAR BOOK OF INTERNATIONAL LAW* 1982, at 197 (Ian Brownlie & D.W. Bowett eds., 1983) (criticizing the debate for creating a third element which hovers over the discussion "like a bank of fog").

61. See JOHN DUGARD, *THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO* 18-20 (2013) (ebook).

62. Zohar Nevo & Tamar Megiddo, *Lessons from Kosovo: The Law of Statehood and Palestinian Unilateral Independence*, 5 J. INT'L L. & INT'L REL. 89, 90 (2009).

63. RONEN, *supra* note 37, at 320.

the *ex injuria* principle would produce illogical if not “undesirable consequences.”<sup>64</sup> Although doctrinally useful, he found it limited and thought it best not to press the principle “to its logical conclusion.”<sup>65</sup> Questioned about a possible unilateral secession decree by Quebec, the Canadian Supreme Court opined in 1998 that “an illegal act may at some later point be accorded some form of legal status.”<sup>66</sup> This opinion expressed a pragmatic approach underscored by Robert Jennings, when he wrote: *Ex factis jus oritur* expresses “a truth that no law can ignore save at its peril.”<sup>67</sup>

Essentially, this truth reflects international law’s “lack of institutional and executive machinery to guarantee the enforcement of legal rules,” consequently fostering reliance on “established facts as decisive for the determination of legal title.”<sup>68</sup> These facts, tethered closely to the social function of law, support a rational choice model of state decision making. Without effective and reliable institutions to support the peer review prestige of *ex injuria jus non oritur*, states rely less on coordinated solutions and more on independent and internal calculations of national interest.<sup>69</sup>

Foregoing the rational choice model and its implied support of the *ex factis* principle invites an unattractive alternative: the reliance on the “contradictory faith” of *global legalism*.<sup>70</sup> This “faith” acknowledges international law’s problem of “law without government,” but also unrealistically affirms the belief “that international law can nonetheless carry out its functions and deserves loyalty beyond national interest-based cost-benefit [rational choice] calculations.”<sup>71</sup> *Ex factis jus oritur* challenges the project of global legalism, which in turn asserts external international community values that are meant to form the peer review basis for the application of *ex injuria jus non oritur*.

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64. ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 5 (1955).

65. *Id.* If no good could come from wrongdoing, argued Tucker, aggressive rebellions could exempt themselves from the laws of war and humanitarian conduct. *Id.*

66. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶146 (Can.) It cautioned, however, “that a subsequent condonation of an initially illegal act [cannot] retroactively create[] a legal right to engage in the act in the first place.” *Id.*

67. R.Y. Jennings, *Nullity and Effectiveness in International Law*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR* 64, 74 (1965).

68. KREIJEN, *supra* note 50, at 175.

69. See *id.*

70. ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM*, at xiii (2009).

71. *Id.*

V. *EX INJURIA'S* "COMING OF AGE"?

However, a perceived period of stable and orderly post-Second World War secession supports the *ex injuria jus non oritur* principle,<sup>72</sup> signifying a more recent coming of age of the peer review process for legitimate territorial acquisition. In his preface to the second edition of his leading treatise, *The Creation of States in International Law*, James Crawford impliedly recounted this relatively consistent period—mentioning global examples such as the successful emergence of Namibia, Zimbabwe, a united Germany, micro states, East Timor, Hong Kong, the Baltic countries, and indeed, the ending of the period of decolonization.<sup>73</sup> Prospects for expanding Europe's liberal governance machinery seemed well-fitted to democratizing eastern Europe in the wake of the Soviet Union's 1991 demise. The lawful emergence of these new states is substantiated and illustrated in Crawford's thesis, where he explains that state creation emerged as a principle governed by international law, and not by the discretion of individual states.<sup>74</sup> Moreover, international law, Crawford argued, could maintain neither its coherence nor its values supporting self-determination, the prohibition of territorial annexation by force, and human rights were statehood conditioned only by "effectiveness."<sup>75</sup> To concede this point vis-à-vis, "[international law's] most fundamental concept," (i.e., statehood)—that is, to acknowledge that statehood "is purely a question of fact"—would amount to international law's "unilateral disarmament" in the face of the modern project to establish peremptory norms.<sup>76</sup> The same argument would apply to state dismemberment by illegal annexation, which was evident by the U.N.'s swift rebuke of Russia's bid to reconfigure Ukraine's border, proffered in support of the peremptory norm proscribing threats and use of force.<sup>77</sup> But even Crawford sensed that

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72. See Clifton van der Linden, *Secession: Final Frontier for International Law of Site of Realpolitik Revival?*, 5 J. INT'L L. & INT'L REL. 1, 1-10 (2009) (noting the nearly half-century of relatively stable borders following World War II).

73. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, at v (2006). Crawford's listing of Hong Kong as a success might be premature; questions involving Hong Kong's successful emergence surfaced in September 2014 following widespread protests against alleged Chinese government interference with Hong Kong's electoral system (the Umbrella Movement). See Chris Buckley, *Three Months of Protests End Quietly in Hong Kong*, N.Y. TIMES (Dec. 14, 2014), <http://www.nytimes.com/2014/12/15/world/asia/three-months-of-protests-end-quietly-in-hong-kong.html>.

74. CRAWFORD, *supra* note 73.

75. See *id.* at v-vi.

76. *Id.* at vi.

77. U.N. Charter art. 2, ¶ 4.

new situations have arisen, “especially those resulting from the dissolution of states in central and eastern Europe.”<sup>78</sup>

*Ex injuria*’s “coming of age” traces to the latter part of the nineteenth century,<sup>79</sup> but its guidance took hold in the twentieth century when the unfettered right of conquest gave way to the rising state interest in regulating force in terms of its conduct (*jus in bello*) and commencement (*jus ad bellum*).<sup>80</sup> Modern restrictions on the use of force first arose during the Hague Conventions of 1899 and 1907 and developed through the Covenant of the League of Nations in 1919, the so-called Kellogg-Briand Pact of 1928 (which outlawed war) and the 1945 U.N. Charter (which more broadly outlawed threats and use of force).<sup>81</sup>

Within this context, the *ex injuria* principle began to illuminate a pathway based on the doctrinally reinforced argument that if legal rights could not arise out of wrongdoing, then neither could the lawfully recognized results. Hersch Lauterpacht became the chief *norm entrepreneur*<sup>82</sup> of this interpretation, owing his view to the darkening clouds of aggressive nationalism during the interwar period (1919-1939).<sup>83</sup> Furthermore, it is certain that the demise of the League of Nations informed his viewpoint.<sup>84</sup> The League of Nations’ greatest failure, implied by its lack of universal membership, was its inability to secure the *ex injuria* principle against insults to the purported collective security system the League sought to establish. Japanese territorial aggression against Manchuria in 1931; Italy’s invasion of Abyssinia (Ethiopia) in 1935 and its 1939 annexation of Albania; the 1936 Nazi

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78. CRAWFORD, *supra* note 73.

79. *See generally* CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 43-45 (1993).

80. *See* Adolf Sprudz, “*Ex Iniuria Ius Non Oritur*” and the Baltic Case: A Brief Western Perspective, in THE BALTIC STATES AT HISTORICAL CROSSROADS 651, 651 (Tālavš Jundzis ed., 1998).

81. *See* Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts art. 1, Oct. 18, 1907, 36 Stat. 2241; General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; *see also* Edward E. Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT’L L. 271 (1985).

82. The term “norm entrepreneur” derives from Cass R. Sunstein, who defined them as “people interested in changing social norms.” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996). Norms are attitudes of social [legal] approval and disapproval that specify what ought to be done. *Id.* at 914; *see also* Christopher Rossi, *The Responsibility To Protect and the Plenitudinal Mindset of International Humanitarian Law*, 5 J. INT’L HUMANITARIAN LEGAL STUD. 352, 379 (2014).

83. *See generally* Koskenniemi, *supra* note 55.

84. *See id.* at 215 (discussing Lauterpacht’s address to the League of Nations Union of Cambridge University in November 1938).

takeover of the Rhineland and its 1938 annexation of Austria; and takeover of the Sudetenland all failed to engender a collective response.<sup>85</sup> By the time the League called forth the *ex injuria* principle as the implied basis for the expulsion of the Soviet Union (following its 1939 invasion of Poland, then Finland, and its annexations of Estonia, Latvia, and Lithuania, pursuant to a secret nonaggression pact with the Nazis),<sup>86</sup> its significance was mooted by the baser form of peer review: world war.

Undaunted by the failures of the League, or perhaps motivated by them, Lauterpacht highlighted the *ex injuria* principle in his articles on territorial acquisition beginning in the 1930s and early 1940s.<sup>87</sup> The “wounded idealist” returned to the subject in his work, *The Principle of Non-Recognition in International Law*.<sup>88</sup> Presaging the path taken up by Crawford, he intended to “prevent [the doctrine] from being treated as a purely physical phenomenon uncontrolled by legal rule and left entirely within the precarious orbit of politics.”<sup>89</sup> By 1955, as editor of Oppenheim’s eighth edition of *International Law*, Lauterpacht

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 . . . is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer . . .’<sup>90</sup>

Martti Koskenniemi construed this view as Lauterpacht’s “modernist, neo-Kantian epistemology,” which melded the constitutive and declaratory schools<sup>91</sup> to “establish the connection” between “abstract

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85. See generally F.S. NORTHEDGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES 1920-1946* (1986); GEORGE SCOTT, *THE RISE AND FALL OF THE LEAGUE OF NATIONS* (1973) (accounting for the breakdown of the League’s collective security system).

86. Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics, Ger.-U.S.S.R., Aug. 23, 1939, reprinted in *NAZI-SOVIET RELATIONS 1939-1941*, at 76-79 (Raymond James Sontag & Stuart Beddie eds., 1948).

87. See Hersch Lauterpacht et al., *The Principle of Non-Recognition in International Law*, in *LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT* 139 (1941) [hereinafter Lauterpacht, *Principle of Non-Recognition*]. See generally HERSCHE LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947) [hereinafter LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*]; HERSCHE LAUTERPACHT, *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCHE LAUTERPACHT* 179-444 (E. Lauterpacht ed., 1970).

88. Koskenniemi, *supra* note 55, at 238-39 (referencing LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 87).

89. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, *supra* note 87, at 73.

90. Sherman Cohn, *Ex Injuria Jus Non Oritur: A Principle Misapplied*, 3 SANTA CLARA L. REV. 23, 24 (1962); see also Kuzio, *supra* note 10 (crediting Lauterpacht’s editorship, beginning with its 5th edition, published in 1935).

91. Koskenniemi, *supra* note 55, at 242; see also Eliav Lieblich & Yoram Shachar, *Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of*

rule [*ex injuria*] and its concrete manifestation [*ex factis*]<sup>92</sup> to “remove international status from the precarious realm of politics.”<sup>93</sup> In order to uphold *ex injuria*, new law-validating procedures had to emerge. A territory’s status required an interpretive act, an expression of external cognition,<sup>94</sup> in order to secure a “degree of legitimacy.”<sup>95</sup> To dispose “finally of self-judgment,” recognition had to be “collectivized [and] allocated to an ‘impartial international organ.’”<sup>96</sup>

New validating procedures emerged with the creation of the U.N., but they encountered problems. The U.N. Charter embraced, at least textually, criteria reflective of the lawful, constitutive, peer review school—as applied to membership in the organization.<sup>97</sup> Applicants were to undergo a substantive membership evaluation by the General Assembly, which, in turn, was to act upon the recommendation of the Security Council.<sup>98</sup> Membership was to be open to all other peace-loving states accepting of the Charter’s obligations, provided they were willing and able to carry out Charter responsibilities.<sup>99</sup> Once admitted, the Charter remained silent on secession,<sup>100</sup> and a Cold War membership deadlock on the issue of voting blocs presented the U.N. with its first test.<sup>101</sup>

The exhaustive nature of the Charter’s admission criteria became the subject of an ICJ *Admission of a State Advisory Opinion* in 1948,<sup>102</sup> after members began conditioning their affirmative votes to the

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*Independence*, 84 BRIT. Y.B. INT’L L. 1, 24-25 (2014) (discussing Lauterpacht’s blending of objective criteria for statehood that entail a duty of recognition as well).

92. Koskenniemi, *supra* note 55, at 239.

93. *Id.*

94. *See id.* at 241-42.

95. *Id.* at 242.

96. *Id.* (discussing Lauterpacht’s views).

97. U.N. Charter art. 4, ¶ 1.

98. *Id.*

99. *See id.* at ¶ 2; *see also* Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948 I.C.J. Rep. 57, 62 (May 28) (noting the five-fold eligibility conditions embedded in Art. 4: applicant must be: (1) a state, (2) peace-loving, (3) accepting of Charter obligations, (4) able to carry out those obligations, and (5) willing to do so).

100. *See* Michael Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT’L L.J. 33, 33 (1995).

101. *See* Steven Holloway, *Forty Years of United Nations General Assembly Voting*, 23 CAN. J. POL. SCI. 279, 279 (1990).

102. *See Conditions of Admission of a State*, Advisory Opinion, 1948 I.C.J. Rep. at 62 (opining that the natural meaning of Article 4 constitutes an “exhaustive enumeration” of membership conditions).

admission of other states.<sup>103</sup> State practice in the U.N., controlled by Cold War politics, could not uphold the admission criteria.<sup>104</sup> Additionally, decolonization resulted in heterogeneous, institutionally weak, small, and ideologically diffuse members, splintering the prospect of a cohesive peer review assembly of like-minded states as the framers of the liberal post-War order had envisioned.<sup>105</sup>

Such a liberal view was indeed thought possible at the time. As expressed by French jurist Georges Scelle's pleading in the 1948 *Advisory Opinion*, the new collective security system depended "sur la nécessité d'une certaine homogénéité d'ordre politico-psychologique."<sup>106</sup> His Polish counterpart, Manfred Lachs, expressed a less sanguine vision.<sup>107</sup> In line with the Soviet's Cold War membership position,<sup>108</sup> his vision also represented a jurisprudential broadside against Lauterpacht's liberally minded and Grotian-inspired attempt to subject the "totality of international relations to the rule of law."<sup>109</sup> To Lachs, peer review membership presented "no legal question."<sup>110</sup> Such questions were "predominately political,"<sup>111</sup> and "jurists should hold firmly to what is theirs, and not enter domains which are not theirs to till."<sup>112</sup>

But important authorities sustain Lauterpacht's view on the primacy of the *ex injuria* principle, which became tightly intertwined with doctrines of nonrecognition,<sup>113</sup> such as the Tobar Doctrine (1907),<sup>114</sup> the

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103. The General Assembly asked the ICJ for advice on whether a Member was "juridically entitled to make its consent to the admission dependent on conditions not expressly provided" by U.N. Charter paragraph 4(1). *Id.* at 97.

104. See Thomas Grant, *Regulating the Creation of States: From Decolonization to Secession*, 5 J. INT'L L. & INT'L REL. 11, 18 (2009).

105. *Id.* at 19.

106. The new collective security system depended "on the necessity of a certain homogeneity of the political-psychological order." Memorial of France, *Conditions of Admission of a State*, Advisory Opinion, 1948 I.C.J. Rep. at 69 (author's translation). Scelle represented the French Republic in pleadings before the ICJ. *Id.* at 60; see also Grant, *supra* note 104, at 19.

107. See Memorial of Poland, *Conditions of Admission of a State*, Advisory Opinion, 1948 I.C.J. Rep. at 60.

108. Lachs pled on behalf of the Government of Poland, which by this time, was in the Soviet's camp. See *id.*

109. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 19 (1946).

110. See Memorial of Poland, *Conditions of Admission of a State*, Advisory Opinion, 1948 I.C.J. Rep. at 106 (statement by Dr. Lachs, Representative of the Polish government).

111. *Id.* at 105.

112. *Id.* at 112.

113. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 120-21 (July 9); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶¶ 46-47 (June 1); Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko



Stimson Doctrine (1932),<sup>115</sup> and the Hallstein Doctrine (1955).<sup>116</sup> These variations on nonrecognition attached political consequences to the violation of the *ex injuria* principle and safeguarded the “notion that certain facts, whatever their prominence, cannot create law.”<sup>117</sup> The decolonization movement heavily relied on moral implications of nonrecognition doctrine,<sup>118</sup> as does the commentary to the International Law Commission (ILC),<sup>119</sup> and the norms of *jus cogens*, which are based in part on *ex injura jus non oritur*.<sup>120</sup> This was the peer review foundation on which Crawford constructed his view of orderly post-War secession, a view fortified by John Dugard’s conclusion that however “uncertain, contradictory and inconsistent” these rules may appear, they do indeed

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Area Award (Rep. Srpska v. Bosn. & Herz.), ¶ 77 (Feb 14, 1997), [http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content\\_id=5327](http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5327); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 187 (1987).

114. The Tobar Doctrine, named after Ecuadorian Minister of Foreign Relations, Carlos Tobar, sought a “denial of recognition to *de facto* governments springing from revolution against the constitutional order;” the aim was to foster political stability and to forestall revolutionary activity in Latin America, but “elicited little favorable response from Latin American leaders. Charles Stansifer, *Application of the Tobar Doctrine to Central America*, 23 THE AMERICAS 251, 251 (1967).

115. The Stimson Doctrine, named after U.S. Secretary of State Henry Stimson, articulated the doctrine of non-recognition of changes to international territory acquired by force. It was presented in identical notes on January 7, 1932, to the Imperial Japanese Government and the Government of the Chinese Republic following Japan’s invasion of Manchuria in northeastern China and applied, *in extensio*, to any situation, treaty or other agreement secured by illegal means; it was adopted by resolution by the Assembly of the League of Nations in the same year. See Arnold McNair, *The Stimson Doctrine Of Non-Recognition*, 14 BRIT. Y.B. INT’L L. 65, 65-74 (1933).

116. The Hallstein Doctrine, named after Federal Republic of Germany (FRG) Secretary for Foreign Minister, Walter Hallstein, promised FRG severance of diplomatic relations with any country that recognized the German Democratic Republic [GDR; East Germany]. It was immediately tested by Yugoslavia and Cuba, which recognized the GDR, and modified by Germany through graduated punishments. Resort to the doctrine has surfaced in a variety of settings: The Republic of China (Taiwan) asserted the doctrine following the UN General Assembly’s decision to seat the People’s Republic of China; it has had some bearing on Greece and the Turkish Republic of Northern Cyprus; Nigeria applied it vis-à-vis the failed Biafran independence movement in 1967; Morocco invoked it vis-à-vis Mauritania after the latter signed a separate peace agreement in Western Sahara with the separatist Polisario movement in 1979; and Russia has invoked it vis-à-vis putative independence claims of Chechnya. See generally Grant, *supra* note 46.

117. KREIJEN, *supra* note 50, at 175; CHENG, *supra* note 113.

118. KREIJEN, *supra* note 50, at 173.

119. See Int’l Law Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 72 (1996), reprinted in [1996] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2); Int’l Law Comm’n, Rep. on the Work of Its Forty-Fifth Session, U.N. Doc. A/48/10, at 55 (1993), reprinted in [1993] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/1993/Add.1 (Part 2).

120. Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area Award (Rep. Srpska v. Bosn. & Herz.), ¶ 77 (Feb 14, 1997), [http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content\\_id=5327](http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5327).

exist.<sup>121</sup> These latter day norm entrepreneurs, like Lauterpacht, now attempt to secure *ex injuria jus non oritur's* primary place.

Lauterpacht, much like Crawford, seemed motivated to uphold one aspect of global legalism. Allowing the *a contrario* argument to stand (that is, allowing an unlawful act to become a source of a legal right) would amount to a form of unilateral disarmament; it would “introduce into the legal system a contradiction which cannot be solved.”<sup>122</sup> Certainly, such contradictions have long challenged the peer review efficacy of the *ex injuria* principle. Consequently, the rejection of the *a contrario* argument has produced practical oscillations in terms of international law's management of both the *ex injuria* and *ex factis* principles, and a “deterioration of normative structure”<sup>123</sup> governing territorial acquisition. Reframing the contradictions as “antinom[ies] of legality”<sup>124</sup> only adds to the sense of existential crisis.

Obviously, reliance on the *ex injuria* principle in practice has not had a preventive effect on wrongdoing, but in defense of Lauterpacht's perspective, perhaps his object was more nuanced. *Ex injuria jus non oritur's* rationale, in line with doctrines of nonrecognition, may suffice as a means of preventing not the act of wrongdoing, but its effect. Lauterpacht viewed *ex injuria* as preventing “the validation of an unlawful situation by seeking to ensure that [*faits accomplis*] resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order.”<sup>125</sup> Acting as a guardian against inaction interpreted as acceptance of wrongdoing—as a prophylaxis against the doctrine of acquiescence—Lauterpacht construed *ex injuria jus non oritur* as a “supplementary weapon of considerable legal and moral potency,” which “prevented any law-creating effect of prescription,”<sup>126</sup> as well. As Lauterpacht emphasized, the function of nonrecognition is to vindicate the “legal character of international law” against the “law-creating effect of facts.”<sup>127</sup>

Even so, what has become of this perspective more recently? Has the formerly and relatively consistent post-Second World War period

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121. DUGARD, *supra* note 61, at 27.

122. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, *supra* note 87, at 140.

123. *See generally* ALVIN W. GOULDNER, THE TWO MARXISMS 170 (1980) (providing background for a wonderful distillation of the costs of paradigmatic contradiction, from which this analysis derives).

124. Dawidowicz, *supra* note 39, at 677.

125. *Id.* at 678.

126. OPPENHEIM, *supra* note 57, at 145.

127. Dawidowicz, *supra* note 39, at 678 (quoting LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, *supra* note 87).

been upended by turbulent events stemming from the former Yugoslavia, the Kosovo and Georgia experiences,<sup>128</sup> and now perhaps Ukraine (or what is left of it)? How did international law's relatively placid post-Second World War period of state secession degenerate so quickly into existential crisis? Gérard Kreijen wrote that the end of the process of decolonization was supposed to mark the decisive "victory" of *ex injuria* over *ex factis*<sup>129</sup>—the end of legality over the notion that subjugating power relations and factual circumstances could forestall a postcolonial right of self-determination.<sup>130</sup> Even if events on the southern tier of the former Soviet Union do not fit squarely within the bounds of post-colonial secession, how has it come to pass that Kreijen's emphasis on *ex injuria*'s "pendulum" of moral authority<sup>131</sup> has generated such limited momentum in relation to the newly Russian-*dependent* region of Crimea?

#### VI. ALL ROADS LEAD TO KOSOVO

It seems the situation in Ukraine has upset the calibrated, or perhaps emerging, post-Second World War interplay between the *ex injuria jus non oritur* and *ex factis jus oritur* principles—to the disadvantage of the *ex injuria* principle. But Ukraine's problem might be better understood in terms of problems emanating from Kosovo. Russia's invasion of Georgia over Abkhazia and South Ossetia are noteworthy, but they serve as a prelude, too distant from global legalism's western European perimeter, too regional to roil international passions, and too cross-cutting in terms of assessing blame for aggression.<sup>132</sup> The broader conflicts of Kosovo have made apparent international law's struggle to close the gap between legitimacy and effectiveness in matters of state creation and territorial acquisition.

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128. Ryngaert & Sobrie, *supra* note 52, at 471; see Anne Peters, *Crimea: Does "The West" Now Pay the Price for Kosovo*, EJIL: TALK! (Apr. 22, 2014), <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/>.

129. KREIJEN, *supra* note 50, at 173.

130. *Id.* at 175.

131. *See id.* at 172-78.

132. A fact-finding report commissioned by the EU (the Tagliavini Commission Report), the first of its kind in EU history, found that Georgia started the five day war following a long period of provocations. The conflict was limited to the Caucus region and described as "a combined inter-state and intrastate-conflict between involving Russian, Georgian, South Ossetian and Abkhaz military units." 1 *Independent International Fact-Finding Mission on the Conflict in Georgia*, at 10 (Sept. 20, 2009), [http://echr.coe.int/Documents/HUDOC\\_38263\\_08\\_Annexes\\_ENG.pdf](http://echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf).

Kosovo's unilateral declaration of independence from Serbia in 2008,<sup>133</sup> which was supported in the West,<sup>134</sup> save for separatist-sensitive Spain and Cyprus,<sup>135</sup> and boycotted by Kosovo's ten Serbian minority Assembly members,<sup>136</sup> asserted a right of remedial secession; it followed Serbia's and Russia's rejection of a U.N.-sponsored draft settlement proposal.<sup>137</sup> Unlike Russia's swift dismemberment of Crimea from Ukraine, Kosovo's cleaving from Serbia took more time, even though it was aided by external assistance.<sup>138</sup> Kosovo initially decreed independence in 1990,<sup>139</sup> a decree punctuated in 1999 by NATO's seventy-eight-day bombing campaign against Yugoslavia to prevent destabilizing and possibly genocidal conflict in the region.<sup>140</sup> The bombing forced a retreat of Serbian forces from Kosovo,<sup>141</sup> but generated much discussion about its legality. Kosovo's 2008 unilateral declaration of independence referenced the painful legacy of its recent past: the inability and unwillingness of the governing regime to protect the diversity of inhabitants, the forestalling of international attempts to implement a comprehensive framework for human rights protection and good governance, and the moral opprobrium of the international community against the Belgrade regime.<sup>142</sup> Although not by name and distinct from colonial context, the declaration asserted a right of self-determination on

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133. *Kosovo Declaration of Independence*, REPUBLIC OF KOSOVO ASSEMBLY (Feb. 17, 2008), <http://www.assembly-kosova.org/?cid=2,128,1635>.

134. Seventy U.N. member states recognized Kosovo's declaration of independence of February 17, 2008, including 22 EU states. See Grace Bolton & Gezim Visoka, *Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?*, U. OXFORD 1, 2 (Oct. 2010), <http://www.sant.ox.ac.uk/sites/default/files/recognizingkosovosindependence.pdf>.

135. See *Spain Will Not Officially Recognize Kosovo*, NEWS FROM SPAIN, (Feb. 18, 2008), <http://news-spain.euroresidentes.com/2008/02/spain-will-not-officially-recognise.html> (denying the decision related to Castilian concerns about separatist movements in the regions of Catalonia and the Basque Country); Christopher Borgen, *Is Kosovo a Precedent? Secession, Self-Determination and Conflict Resolution*, GLOBAL EUR. PROGRAM WILSON CTR. (July 7, 2001), <http://www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution> (noting Cyprus' claim that Kosovo's declaration breached international law).

136. *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008), <http://news.bbc.co.uk/2/hi/europe/7249034.stm>.

137. U.N. Secretary General, *Comprehensive Proposal for the Kosovo Status Settlement*, U.N. Doc. S/2007/168/Add.1 (Mar. 27, 2007).

138. See Marxsen, *supra* note 4, at 387-88.

139. Kosovo Albanian parliamentarians declared independence September 7, 1990, to little effect, which was followed by a referendum favoring the establishment of an independent Kosovo republic in 1991. See Daniel Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L. J. 417, 421-22 (2008).

140. See Rossi, *supra* note 82, at 365.

141. See Javier Solana, *NATO's Success in Kosovo*, 78 FOREIGN AFF. 114, 118 (1999).

142. See *Kosovo Declaration of Independence*, *supra* note 133.

the basis of remedial secession, also sparking a hot dispute about its legality.

The idea of remedial secession, sometimes called a “qualified right of unilateral secession” or “external self-determination,” derives from an inverted reading of the “safeguard clause” of the 1970 Declaration on Friendly Relations.<sup>143</sup> It holds that states that do not conduct themselves in compliance with the principle of equal rights and self-determination of peoples and are not possessed of governments representing the whole people may be subject to dismemberment.<sup>144</sup> The concept, distinct from self-determination’s application to problems of decolonization, “supports the right of non-colonial ‘people’ to secede from an existing state when the group is collectively denied civil and political rights and subject to egregious abuses.”<sup>145</sup>

Although widely supported in the West, the post-Kosovo situation in Europe has raised multiple problems for supporters of international law’s peer review principle of *ex injuria jus non oritur*. These problems underscore international law’s ambivalent balancing of the *ex injuria* and *ex factis* principles and account for much doctrinal disarray. One problem relates to whether Kosovo created a legal precedent. A second problem relates to *ex injuria*’s uncomfortable relationship with *uti possidetis* (as you possess, so you may possess), a relationship that involves consideration of the role of *les effectivités* (factual circumstances) and their law-creating effects.<sup>146</sup> A third problem concerns the ICJ’s advisory opinion on the lawfulness of Kosovo’s unilateral declaration of independence.<sup>147</sup> The Court went out of its way

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143. Bolton & Visoka, *supra* note 134.

144. See LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978); DAVID RAIC, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* (2002); MARC WELLER, *CONTESTED STATEHOOD: KOSOVO’S STRUGGLE FOR INDEPENDENCE* (2008).

145. Michael Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 *DENV. J. INT’L L. & POL’Y* 373, 382 (2003).

146. *Uti possidetis* entered into modern international law following the end of Spanish colonial rule in the New World, beginning in 1810. To quiet title and preempt disputes over boundaries, emerging republics in Central and South America adopted Spanish border demarcations that existed in fact or according to Spanish legal descriptions to essentially “freeze” title out the moment of each republic’s independence. The principle has been criticized widely for its agnostic regard for human populations, certainly in Latin America, even more so in Africa. But it has kept its place. In support of *uti possidetis*, international courts and tribunals look to factual circumstances to weigh opposing claims, bringing *uti possidetis* into contact with both the *ex jure* and *ex factis* principles. See Christopher R. Rossi, *The Northern Sea Route and the Seward Extension of Uti Possidetis (Juris)*, 83 *NORDIC J. INT’L L.* 476, 487-89 (2014).

147. General Assembly Resolution 63/3 requested the I.C.J. to provide advice on the question, “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Accordance with International

not to advise on that question, opening itself to criticism that it breached the judicial prohibition against *non liquet*.<sup>148</sup> These three factors contribute substantially to the indeterminacy of *ex injuria jus non oritur*'s place in post-Crimea Europe.

A. *Kosovo's Double-Edge and the Overworking of Sui Generis Circumstance*

The precedential problem of Kosovo actually has two dimensions: one relates to the NATO bombing campaign; the other to the claim of remedial secession unrelated to decolonization. Both problems conjure up criticisms of rampant hypocrisy because *ex injuria* has been interpreted not to apply in Kosovo (or, for that matter against western (U.S.) actions in Grenada (1983), Panama (1989), Iraq (2003), and arguably Libya (2011)), but made to apply against Russia's unlawful actions against Ukraine.<sup>149</sup>

Many scholars find the cases of Kosovo and Crimea too close for legal comfort,<sup>150</sup> particularly Kosovo's establishment of a legal precedent. Several scholars agree that even if Kosovo did not create a precedent, *stricto sensu*, it serves as a dangerous complication.<sup>151</sup> John Dugard thinks it is naïve that Kosovo would be accepted as a *sui generis* circumstance.<sup>152</sup> Michael Mandelbaum, writing shortly after NATO's 1999 bombing campaign, predicted Kosovo's *renvoi* that "NATO acted without U.N. authorization, implying either that the Atlantic alliance can disregard international law . . . or . . . giving, for example [Russia] the

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Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404, at 407 (July 22).

148. *Id.*

149. Eric Posner, *The Kosovo Precedent* (Mar. 18, 2014), <http://ericposner.com/the-kosovo-precedent/>.

150. See Marko Milanovic, *Crimea, Kosovo, Hobgoblins and Hypocrisy*, EJIL: TALK! (Mar. 20, 2014), <http://www.ejiltalk.org/crimea-kosovo-hobgoblins-and-hypocrisy>; see also Simon Tisdall, *Opinion: Obama Can't Have It Both Ways on Crimea*, CNN (Mar. 18, 2014), <http://www.cnn.com/2014/03/17/opinion/crimea-vote-putin-obama/>; DUGARD, *supra* note 61, at 199 (arguing Kosovo, as well as Abkhazia and South Ossetia, will be invoked as justification for recognition by secessionist movements in non-colonial situations).

151. See Renaud Francois, *Independence of Kosovo: Does it Set a Dangerous Precedent?*, EUR. STRATEGIC INTELLIGENCE & SECURITY CENTURY (Feb. 28, 2008), <http://www.esisc.org/upload/publications/analyses/independence-of-kosovo-does-it-set-a-dangerous-precedent/29.%20INDEPENDENCE%20OF%20KOSOVO%20DOES%20IT%20SET%20A%20DANGEROUS%20PRECEDENT%2028-02-08.pdf>; Sebastian Schäffer, *The Kosovo Precedent—Directly Applicable to Abkhazia and South Ossetia: A Comment*, 3 CAUCASIAN REV. INT'L AFF. 108, 108-10 (2009).

152. DUGARD, *supra* note 61, at 200.

[future] right to intervene in Ukraine if it believes ethnic Russians there are being mistreated.”<sup>153</sup>

The war was widely regarded as morally necessary, yet illegal, and it promoted an uncomfortable antinomy in the minds of international legal scholars, who, in Michael Reisman’s words, could not “look back at the incident without disquiet.”<sup>154</sup> The international community was presented with a choice between equally bad alternatives: sacrificing the Charter’s rule prohibiting intervention to save a multitude of people or upholding the letter of a law deemed essential to international security (the prohibition against use of force absent Security Council approval) while forsaking the innocent.<sup>155</sup> The Independent Kosovo Commission, chaired by Richard Goldstone and Carl Tham, concluded that the NATO campaign was “illegal, yet legitimate,”<sup>156</sup> blurring the idea of wrongfulness central to the *ex injuria* principle. To avoid the boomerang of dangerous precedent, Bruno Simma advocated acknowledging the illegal nature of the act *and* the “thin red line” separating the NATO action from international legality, suggesting the contradiction could be contained by characterizing the lessons of Kosovo as *sui generis*.<sup>157</sup> Antonio Cassese also acknowledged the illegal act and its “exceptional” nature, but he construed the gap between lawfulness and legitimacy as almost an existential gulf, not as a mere “thin red line.”<sup>158</sup> Out of this breach of *lex lata*, or the law as it is, he suggested that the *ex injuria* principle might be evolving as a new customary law legitimizing the use of force absent Security Council authorization in stringently circumscribed instances.<sup>159</sup>

Additionally, the uniqueness question arises in discussions on Kosovo and remedial secession. Supporters have attempted to void the application of *ex injuria jns non oritur* either by asserting the lawfulness of remedial secession—a divisive legal question—or (in line with the

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153. W. Michael Mandelbaum, *A Perfect Failure: NATO’s War Against Yugoslavia*, 78 FOREIGN AFF. 2, 6 (1999).

154. M. Reisman, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 860, 860 (1999).

155. Rossi, *supra* note 82, at 365.

156. INDEP. INT’L COMM’N ON KOS., THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 186 (2000).

157. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 6 (1999) (“thin red line”); *id.* at 14 (“regard the Kosovo crisis as a singular case”). Kosovo’s Declaration of Independence of February 17, 2008 also observed “that Kosovo is a special case arising from Yugoslavia’s non-consensual breakup and is not a precedent for any other situation”). *Kosovo Declaration of Independence*, *supra* note 133.

158. Antonio Cassese, *Ex Iniuria ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 24 (1999).

159. *See id.* at 23-30.

United States' and European Union's official justifications)<sup>160</sup> the *sui generis* conditions that validate a unilateral declaration of independence that otherwise would be illegal.<sup>161</sup> Kosovo's exceptional circumstances argument has been relied upon here to help explain or mitigate tensions in view of the Charter's proscription against the use of force absent Security Council approval and *ex injuria's* proscription against validating outcomes that violate international law. But the "special circumstances" explanation excusing application of *ex injuria jus non oritur* has not only contributed to the "existential" conflict regarding the rules of secession and territorial acquisition, but has once again resulted in circular legal reasoning. How else should one interpret President Putin's omnibus appropriation of the West's legal justifications for Russia's aggression in Crimea, except as a veiled attempt to deconstruct the language of state secession in an overt attempt to showcase the West's hypocrisy?<sup>162</sup>

Not as obvious, but also damaging to international law, is the potential overworking of the idea of a *sui generis* circumstance, making it an increasingly convenient gap-filler for anomalous legal situations that strain the relationship between legitimacy and legality. The overworking of the *sui generis* claim does not arise from the factual situation in Kosovo itself, which as Adam Roberts noted, "has many claims to uniqueness."<sup>163</sup> It was the "first sustained use of armed force" by NATO in its history; the first use of force for the "stated purpose of implementing U.N. Security Council resolutions but without Security Council authorisation"; the first use of force to "halt crimes against humanity committed by a state within its own borders"; and the first successful completely airborne operation to compel policy change by the targeted government.<sup>164</sup> But facts often present unique circumstances. The true overworking of the *sui generis* claim comes from international law's restless tendency to claim uniqueness in the face of paradigm failure. Eric Posner cited Michael Mathesen, who, like Adam Roberts,

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160. See *U.S. Recognizes Kosovo as an Independent State*, U.S. DEP'T ST. ARCHIVE (Feb. 18, 2008), <http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>; Council of the European Union Press Release 6498/08, General Affairs and External Relations, The Commission and the Council Discussed Kosovo Following the Kosovo Declaration of Independence (Feb. 18, 2008), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/98818.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf).

161. Both Russia and China, two veto-wielding permanent members of the Security Council, opposed Security Council action on behalf of Kosovo. See Thalif Deen, *Security Council Deadlocked over Kosovo*, GLOBAL POL'Y F., (Feb. 18, 2008), <http://www.globalpolicy.org/component/content/article/192/38743.html>.

162. Milanovic, *supra* note 150.

163. Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL 102, 102 (Autumn 1999).

164. *Id.*



noted Kosovo's "unique combination of a number of factors."<sup>165</sup> He also labeled the United States' justification of NATO's military action "exquisitely tortured," tantamount to NATO's admission "that we broke the law [but] we won't do it again, and you better not, either."<sup>166</sup>

The *sui generis* defense is becoming a problematic palliative for excepting application of *ex injuria*. It masks fundamental tensions about international law's embrace of *ex injuria*'s proscription against validating wrongdoing. This exemption casts a pall over scholarly discussions involving post-Soviet problems of state creation and dismemberment, shrouding the application of *ex injuria* in a fog that is likely to get thicker.

### B. *The Problem of Uti Possidetis*

Another complicating factor concerns international law's historical regard for the law-creating effect of facts. Although *ex injuria* stands in opposition to ill-gotten territorial gains, international law historically has been protective of territorial boundaries, notwithstanding complications posed for human populations and people's rights.<sup>167</sup> This expedient perspective derives from international law's embrace of the Roman law principle *uti possidetis* (as you possess, so you may possess).

The principle first found expression in modern international law as a means of affirming administrative or de facto boundaries in Latin America following Spain and Portugal's nineteenth century imperial retreat from the New World.<sup>168</sup> It had the quieting but blunt effect of preventing competing *terra nullius* claims by awarding title to the successor state holding better title through constructive (administrative/legal) possession (*uti possidetis juris*) or actual control (*uti possidetis de facto*).<sup>169</sup> African elites incorporated the principle into the 1964 Organization of African Unity Cairo Declaration,<sup>170</sup> but it generated criticism about its lack of regard for human geography.<sup>171</sup>

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165. *Id.*

166. *Id.*

167. DUGARD, *supra* note 61, at 30, 183-84.

168. See GIUSEPPE NESI, *L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE* 1-3 (1996) (Ital.).

169. See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. Intervening)*, Judgment, 1992 I.C.J. Rep. 351, ¶ 42 (Sept. 11) (reaffirming its key aspect is the denial of the possibility of *terra nullius*); see also NESI, *supra* note 168, at 5-7 (on the distinction between *uti possidetis juris* and *uti possidetis de facto*).

170. Org. of African Unity [OAU], Resolution on the Intangibility of Frontiers, OAU Doc. AGH/Res.16(1) (1964).

171. See generally SAADIA TOUVAL, *THE BOUNDARY POLITICS OF INDEPENDENT AFRICA* (1972); Steven Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 595 (1996).

Yet, *uti possidetis* “keeps its place” as a bedrock principle of international law,<sup>172</sup> and has shown a surprising adaptability to new circumstances. Originally meant to quite title and demarcate territorial boundaries of retreating empires, it has been separated from its colonial context and applied to the dissolution of Yugoslavia.<sup>173</sup> Once considered a “regional norm”<sup>174</sup> or a “special rule which pertains solely to one specific system of international law,” it has been elevated to the stature of a “general principle which is logically connected with the phenomenon of obtaining independence, wherever it occurs.”<sup>175</sup> Meant to prevent land grabs based on claims of *terra nullius*, *uti possidetis* has been repurposed “to prevent the independence and stability of new states being endangered by fratricidal struggles.”<sup>176</sup> Conceived as a terrestrial tool of border demarcation, it has found pelagic application in the Pacific waters of Central America.<sup>177</sup> Leading legal scholars have noted and complained about its historical redefinition,<sup>178</sup> its unreasoned application,<sup>179</sup> its “evolution,”<sup>180</sup> and its “open-textured”<sup>181</sup> ontogeny, threatening that careless usage will “come to mean all things to all people.”<sup>182</sup> Despite complaints of juridical mission creep, *uti possidetis* remains closely connected to questions of territorial integrity;<sup>183</sup> it serves as an implied

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172. Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 26 (Dec. 22).

173. See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 3, 31 I.L.M. 1488, 1499-1500 (Jan 11, 1992).

174. Giuseppe Nesi, *Uti Possidetis Doctrine*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 626 (2012).

175. *Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. Rep. at ¶ 20 (Dec. 22); see also Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 127 (Feb. 3) (separate opinion of Ajibola, J.) (affirming it as a “principle of customary international law”); see also Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, *supra* note 173 (recognizing *uti possidetis* as a “general principle”).

176. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, *supra* note 173.

177. See *generally* Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. Intervening), Judgment, 1992 I.C.J. Rep. 351, ¶ 42 (Sept. 11).

178. See T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 20 (Catherine Brölmann et al. eds., 1993).

179. DUGARD, *supra* note 61, at 106.

180. Nesi, *supra* note 174, at 627.

181. Tomas Bartoš, *Uti Possidetis. Quo Vadis?*, 18 AUSTL. Y.B. INT'L L. 37, 39 (1997); Jan Klabbers & René Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW, *supra* note 178, at 61.

182. Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession, Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW, *supra* note 178, at 34.

183. DUGARD, *supra* note 61, at 31, 209.

support for the *ex factis* principle notwithstanding its many detractors, and like philosophy, *uti possidetis* “always buries its undertakers.”<sup>184</sup>

International courts and tribunals have dealt with its “open-textured” potential by connecting the principle to discernible expressions of sovereign authority (*à titre de souverain*).<sup>185</sup> These expressions focus, in part, on the actions and intentions of the occupier. To occupy territory *à titre de souverain* requires that a state exercise “functions of state authority over the territory on behalf of those authorities.”<sup>186</sup> These two elements, namely “the intention and the will to act as sovereign and some actual exercise of or display of such authority” were noted by the Permanent Court of International Justice as key ingredients of sovereign authority.<sup>187</sup> In discussions of *uti possidetis*, the factual acts that demonstrate the exercise of state authority became known as *effectivités*, which “play an essential role in showing how the title is interpreted in practice.”<sup>188</sup>

The central role of *les effectivités* in the historical development of *uti possidetis* becomes a powerful expression of support for the *ex factis jus oritur* principle, undercutting, at least by analogy, Lauterpacht’s placeholder role of *ex injuria jus non oritur* to safeguard against the law-creating effects of facts.<sup>189</sup> Russian auxiliaries cannot yet lay prescriptive claim to the dangerously contested eastern Ukraine regions of Donetsk and Lugansk, but they may be able to sustain the annexation of Crimea. All is not quiet in Crimea, but the situation is demonstrably under Russian control.<sup>190</sup>

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184. Apologies to Étienne Gilson, who wrote: “[T]he first law to be inferred from philosophical experience is: *Philosophy always buries its undertakers.*” ETIENNE GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 306 (1937).

185. Malcolm Shaw, *The International Court of Justice and the Law of Territory*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 151, 168 (C. Tams & J. Sloan eds., 2013); see also *Eritrea v. Yemen*, 22 R.I.A.A. 211, ¶ 241 (1998) (determining where the tribunal determined claims regarding *à titre de souverain* required evidence of consolidation of title).

186. *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 1999 I.C.J. Rep. 1045, ¶ 98 (Dec. 13).

187. *Legal Status of Eastern Greenland (Nor. v. Den.)*, Judgment, 1993 P.C.I.J. (Ser. A/B) No. 53, at 46 (Sept. 5).

188. *Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. Rep. ¶ 63 (Dec. 22); see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Merits, Judgment, 2001 I.C.J. Rep. 248, ¶ 20 (Mar. 16) (separate opinion of Al-Khasawneh, J.).

189. *Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. Rep. at 586-87.

190. Michael Birnbaum, *Eight Months After Russia Annexed Crimea from Ukraine, a Complicated Transition*, WASH. POST, (Nov. 27, 2014), [http://www.washingtonpost.com/world/europe/eight-months-after-russia-annexed-crimea-from-ukraine-a-complicated-transition/2014/11/27/d42bcf82-69b3-11e4-bafd-6598192a448d\\_story.html](http://www.washingtonpost.com/world/europe/eight-months-after-russia-annexed-crimea-from-ukraine-a-complicated-transition/2014/11/27/d42bcf82-69b3-11e4-bafd-6598192a448d_story.html).

Lurking at the backdoor of *ex injuria's* peer review project to establish orderly transitions of territory is *ex factis's* reliance on *les effectivités*, which has an analogous connection to *uti possidetis*. International law's ambivalent response to *uti possidetis's* juridical "mission creep" away from its historical decolonial setting also explains part of the existential conflict of state succession in a post-Ukraine environment.

*C. Implied Non Liqueur and the ICJ's Missed Opportunity*

The ICJ contributed to this current state of uncertainty in its 2010 Kosovo Advisory Opinion.<sup>191</sup> There, the General Assembly (on Serbia's motion) asked the ICJ whether Kosovo's declaration of independence was "in accordance with international law [or not]."<sup>192</sup> The question was meant to address Kosovo's western-supported attempt to secede.<sup>193</sup> The Court did not provide guidance on this question, responding instead that Kosovo's declaration "did not violate international law."<sup>194</sup> It demurred on whether Kosovo's declaration was acceptable, and it expressly held Kosovo's declaration did not affect Kosovo's final status.<sup>195</sup> According to the Court:

[It] is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to breakaway from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.<sup>196</sup>

The narrowness of this opinion provoked scholarly criticisms about the inconsequentiality of its advice,<sup>197</sup> and criticism came from the bench, as well. Judge Bennouna labeled the ICJ's advice as "trivial," amounting to

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191. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404, ¶ 1 (July 22).

192. *Id.*

193. *Id.*

194. *Id.* ¶ 123.

195. *Id.* ¶ 114.

196. *Id.* ¶ 56.

197. See Richard Falk, *Agora: The ICJ's Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50, 51 (2011); see also Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 LEIDEN J. INT'L L. 151, 155-61 (2011); Robert Muharremi, *Note on the ICJ Advisory Opinion on Kosovo*, 11 GER. L.J. 867, 875-89 (2010).

“no more than foam on the tide of time,” and a good reason why the Court should have refrained from acceding to the General Assembly’s request for an opinion in the first place.<sup>198</sup> Judge Simma lamented the Court’s “old, tired . . . nineteenth century” thinking, which restricted its analysis to stilted binary options relating to permission and prohibition;<sup>199</sup> he implied that the ICJ skirted the bounds of *non liquet* through the narrowness of its opinion.<sup>200</sup> By conjuring up discussion of international law’s residual negative principle, Judge Simma criticized the ICJ for its “excessively deferential” nod to the *S.S. Lotus* dictum that international law permits all that is not expressly prohibited.<sup>201</sup> By forsaking “great shades of nuance” that might tolerate (rather than legally permit) nonprohibited options, Judge Simma declared the Court passed up an opportunity to remain consciously silent rather than intentionally evasive of the plain wording of the request.<sup>202</sup>

The application of the *ex injuria* principle to the question of remedial secession does not appear to be ripe for ICJ consideration. Its evasive reasoning suggests an ambivalent attitude given the indeterminate, cross-cutting practice of states. It further suggests the ICJ’s awareness of international law’s uncomfortable regard for social facts and their law-creating effect.

## VII. CONCLUSION

The prospect of a fully reconstituted Ukraine is remote. The tools developed by international law to deal with state dismemberment and territorial acquisition are difficult to apply and subject to manipulation, as recent history records. The historical attempt to establish a peer review system based on the *ex injuria* principle continues to face challenges based on claims of hypocrisy, an overworking of *sui generis* circumstances (which erodes theoretical support for the doctrines of state secession and recognition), the ongoing if not widening application of *ex factis*’ factual circumstances (which draw under-appreciated analogous

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198. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404, ¶¶ 67, 69 (Bennouna, J., dissenting).

199. *Id.* ¶ 2 (“old, tired”); *id.* ¶ 8 (“nineteenth century”) (declaration of Simma, J.).

200. *Id.* ¶ 9. In Judge Simma’s formulation, *non liquet* arises when “a judicial institution [is] unable to pronounce itself on a point of law because it concludes that the law is not clear.” *Id.*

201. *Id.* ¶ 8. The principle receives its most famous exposition in *S.S. Lotus* (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10 (Sept. 7).

202. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 404, ¶ 9 (declaration of Simma, J.) (“shades of nuance”); *id.* ¶ 10 (Court “consciously” chose to narrow the scope “ignor[ing] some of the most important questions”).

sustenance from the historical power of *uti possidetis*' establishment of sovereign authority (*à titre de souverain*) through an analysis of *les effectivités*), and juridical evasion of an opinion on the lawfulness of remedial secession. Lauterpacht's vision of a balanced and rule-ordered peer review system of territorial acquisition remains enmeshed in countervailing concerns of legitimacy and effectiveness, making this review of international law's primordial concepts of *ex injuria jus non oritur* and *ex factis jus oritur* topical and relevant.<sup>203</sup> Taken together, these considerations help clarify the reasons contributing to state secession's current sense of existential turmoil and perhaps underscore the need for global legalism advocates to rethink the ability of international law to secure their vision of world order.

Any vision supportive of the progressive development of international law would bear some attachment to social facts. For instance, Russia's long-standing psychological interest in securing a geo-strategic buffer zone against possible western pathways of aggression, like Ukraine, remains strong. This interest is hewn from remembrances of invasions by Napoleonic France, Imperial Germany, Nazi Germany, and perceived NATO encirclement strategy, which has accelerated since the Clinton Administration in the mid-1990s (following German reunification) through the addition of twelve new members (enlarging NATO membership to twenty-eight countries from its original twelve).<sup>204</sup> Having lost strategic access to Baltic ports following demise of the Soviet Union in 1991 and impeding Russia's once-proud North Sea Fleet, President Putin seems determined not to preside over further predations against Russia's pelagic interests in the Azov, Black, and Mediterranean Seas: the secession of seaborne passageways leading its Black Sea Fleet to larger waters.<sup>205</sup> In response to displays of Russian illegal annexation, the United States and its European allies have expressed the view President Putin long may have suspected they harbored: Ukraine does not represent a core strategic interest of the West.

Under such circumstances, at best, the project of international law can only facilitate the placeholder role of *ex injuria jus non oritur* in the

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203. See generally LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, *supra* note 87.

204. See Mearsheimer, *supra* note 1, at 82. But see Alexander Motyl, *The Ukraine Crisis According to John J. Mearsheimer: Impossible Logic, Wrong Facts*, EUROPEAN LEADERSHIP NETWORK (Sept. 3, 2014), [http://www.europeanleadershipnetwork.org/the-ukraine-crisis-according-to-john-j-mearsheimer-impeccable-logic-wrong-facts\\_2079.html](http://www.europeanleadershipnetwork.org/the-ukraine-crisis-according-to-john-j-mearsheimer-impeccable-logic-wrong-facts_2079.html) (arguing that Mearsheimer misapplies realist principles and twists historical facts).

205. Russia, presumptively until the annexation vote, leased from Crimea the crucial naval base at Sevastopol (with a pre-annexation expiration date in 2042) and since 2007, has been fortifying its naval station at Novorossiysk.

face of Russia's aggression against Ukraine. The fate of Crimea will remain caught in the interstice between the two time-tested Roman law concepts of *ex injuria jus non oritur* and *ex factis jus oritur* until the instrumental *effectivités* that quite title to this territory change, if indeed they do. At that juncture, or even now, it would be appropriate to ask whether the existential crisis on state secession issues is due in part to international law's selective incorporation and ambivalent reliance on the *ex injuria* principle because it is so obviously due to Russia's aggression.