H.E. DAVID KEANU SAI, PH.D.
Head, Royal Commission of Inquiry
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/royal-commission

June 22, 2024

Lieutenant Colonel Lloyd C. Phelps
State of Hawai'i Staff Judge Advocate
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: lloyd.c.phelps4.mil@army.mil

Via electronic mail

Re: Civilian interference with a military duty to establish a military government

Lieutenant Colonel Phelps:

It has been brought to my attention, that State of Hawai'i Attorney General Anne E. Lopez has instructed Major General Kenneth Hara and Brigadier General Stephen Logan to ignore my efforts in calling upon MG Hara to perform his military duty of transforming the State of Hawai' into a military government. This baseless statement by Mrs. Lopez has criminal repercussions for herself and MG Hara for the war crime by omission. She has no lawful authority in the Hawaiian Islands because American laws do not apply here. There is no treaty of cession whereby the Hawaiian Kingdom ceded its territorial sovereignty to the United States. Therefore, sovereignty remains in the Hawaiian Kingdom, which the Permanent Court of Arbitration ("PCA") recognized in 1999 in *Larsen v. Hawaiian Kingdom*.[1] The PCA recognized the continued existence of the Hawaiian Kingdom as a "State," and the Council of Regency as its government. At the center of the international dispute was the unlawful imposition of American municipal laws.

Since 1898, the United States has been imposing American laws and administrative measures throughout the Hawaiian Islands in violation of the law of armed conflict and the law of occupation. This constitutes the war crime of usurpation of sovereignty during occupation.[2] The State of Hawai'i was established by an Act of Congress in 1959, which is an American law limited

[1] Permanent Court of Arbitration, *Larsen v. Hawaiian Kingdom*, PCA case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[2] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157 (2020).

in authority to U.S. territory. Because the Hawaiian Kingdom continues to exist, the State of Hawai‘i cannot exist "except by virtue of a permissive rule derived from international custom or from a convention [or treaty]."[3] American law is not international custom nor is it a treaty. The violation of this rule has led to war crimes by the State of Hawai‘i being committed with impunity.

The State of Hawai‘i Department of Defense is the only department that continues to legally exist because both the Army and Air National Guard are also members of the United States Armed Forces. Their authority, under military law, is not affected by the territorial limitation of the 1959 Statehood Act because the Army and Air National Guard are situated within the territory of an Occupied State—the Hawaiian Kingdom. This reality cannot be denied without violating the law of armed conflict, the law of occupation, and Army regulations. According to para. 2-37, U.S. Army Field Manual 41-10, all "commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949." Civilians have no legal obligations imposed by the law of armed conflict, the law of occupation, and Army regulations, but commanders, such as MG Hara and BG Logan, do. Here follows the treaties and regulations that impose the legal obligation to establish a military government in occupied territory.

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority."
- U.S. Department of Defense Directive 2000.13 states that "Civil affairs operations include…[e]stablish and conduct military government until civilian authority or government can be restored."
- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions obliges the occupant to administer the laws of the occupied State, after securing effective control of the territory according to Article 42 of the 1907 Hague Regulations.
- Para. 3, Army Field Manual 27-5, states the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."
- Para. 62, Army Field Manual 27-10, states that "[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory."

[3] *The Case of the S.S. "Lotus," judgment, Publications of the Permanent Court of International Justice, Collection of Judgments*, Series A, No. 70, 18 (7 Sep. 1927). Generally on this issue see Arthur Lenhoff, "International Law and Rules on International Jurisdiction", 50 *Cornell Law Quarterly* 5 (1964).

- Para. 2-18, Army Field Manual 3-57, states that "DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations]."

As the Staff Judge Advocate for the State of Hawai'i Department of Defense, in the event you were included in or made aware of the communications between Mrs. Lopez and MG Hara, you appear to be allowing a civilian to interfere with a military duty, which is derelict on your part to not intercede. In my letter of communication to you dated February 1, 2024, I stated that "I encourage you to legally advise MG Hara accordingly." It appears you have not. For your information, Mrs. Lopez is a war criminal, subject to prosecution,[4] who is advising MG Hara to commit the war crime by omission.

According to the Uniform Code of Military Justice ("UCMJ"), dereliction of duty comes under the failure to obey an order or regulation, which has no *mens rea* for this offense. Military law maintains obedience and discipline to ensure that servicemembers are ready to perform their mission. A negligent dereliction offense provides commanders with one means to assure that the objectives of the military mission are achieved by holding servicemembers accountable for performance of their military duties, whether by court-martial or nonjudicial punishment, under Article 15, UCMJ. See *United States v. Blanks*, 77 M.J. 239 (2018).

The war crime by omission has a direct link to the willful dereliction of duty, which, in this case, is the establishment of a military government. The willful failure to perform this duty has led to the war crime of usurpation of sovereignty, which, by its nature, has set in motion secondary war crimes, *e.g.* deprivation of a fair and regular trial, destruction of property, unlawful confinement, *etc.* The failure or omission to establish a military government is dereliction of duty. According to article 92(3) of the UCMJ, the three elements of dereliction of duty are: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties. While the first two elements can be met without difficulty, the last element will be triggered once the accused knew of this duty and was, thereafter, derelict in his or her performance. These three elements are the elements for the war crime by omission.

As a result of the continuing and ongoing violations of the law of armed conflict, the law of occupation, and Army regulations, the Royal Commission of Inquiry is left with no choice but to take this particular course of action in order to compel the performance of a military duty to transform the State of Hawai'i into a military government under the law of armed conflict, the law of occupation, and Army regulations. At present, there are two scenarios for MG Hara.

[4] Royal Commission of Inquiry, War Criminal Report No. 23-0001, *The War Crime of Usurpation of Sovereignty during Occupation*—Anne E. Lopez, Craig Y. Iha, Ryan K.P. Kanaka'ole, Alyssa-Marie Y. Kau, Peter Kahana Albinio, Jr., and Joseph Kuali'i Lindsey Camara (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf).

FIRST SCENARI: Since the public announcement by MG Hara that he will be retiring in October of 2024, the third element of the offense of dereliction of duty—willfulness would appear to have been met. As a result, the Royal Commission of Inquiry ("RCI") will publish a war criminal report on MG Hara for the war crime by omission for his failure to transform the State of Hawai'i into a military government. Mrs. Lopez would be included in this report as an accomplice.

After the RCI's publication, BG Logan to assume the chain of command to perform the duty by establishing a military government according to the Council of Regency's operational order dated August 14, 2023.[5] BG Logan shall reach out to the 322nd Civil Affairs Brigade, Fort Shafter, to advise him on the function of a military government. It is a function of Civil Affairs to advise commanders on military governments. BG Logan will also hold MG Hara accountable for dereliction of duty by court-martial or nonjudicial punishment, under Article 15, UCMJ. The information in the RCI war criminal report will be the evidential basis for punishment. To not hold MG Hara accountable for dereliction of duty sets the wrong standard for the entire National Guard.

SECOND SCENARIO: To relieve MG Hara from criminal culpability and for the RCI to refrain from publishing a war criminal report, MG Hara must delegate his authority to BG Logan to perform his duty, and, thereafter, MG Hara immediately resigns. This delegation of authority is authorized under paragraph 3, Army Field Manual 27-5, that states the "theater command bears full responsibility for [military government]; […] but has authority to delegate authority and title, in whole or in part, to a subordinate commander." This regulation provides a window for MG Hara to delegate authority because he is currently the theater commander. The second scenario is time sensitive. When the RCI concludes, with evidence, that MG Hara refuses to delegate authority, the first scenario will be implemented.

Should BG Logan be derelict of his duty, a war criminal report on him will be drafted and published, and the next officer in the Army National Guard's chain of command, Colonel David Hatcher II, commander of the 29th Infantry Combat Brigade, will assume the chain of command. This process of publishing war criminal reports will continue down the chain of command to the last enlisted soldier in the Hawai'i Army National Guard, after, which, it will begin anew with the chain of command for the Hawai'i Air National Guard down to the last enlisted soldier.

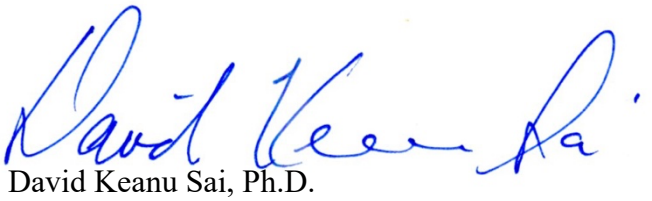
The American occupation is now at 131 years, which is unacceptable. I provided MG Hara and yourself more than enough time to falsify the information and legal basis for the American occupation and the continued existence of the Hawaiian Kingdom under international law. Falsification would have rendered MG Hara without this military duty to perform. Neither yourself nor the State of Hawai'i, to include Mrs. Lopez, has ever provided rebuttable evidence as to the presumption of the continuity of the Hawaiian State under international law. Because he is aware of his duty under military law, MG Hara, as the theater commander, is directly responsible for all the war crimes being committed by members of the State of Hawai'i. There are no statutes of limitations for the prosecution of war crimes. The RCI's published war criminal reports provides the necessary evidence of the *actus reus* and *mens rea* for prosecution.[6] As the Staff Judge

[5] Council of Regency, *Operational Plan Transitioning the State of Hawai'i into a Military Government* (August 14, 2023) (online at: https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf).
[6] Royal Commission of Inquiry website at https://hawaiiankingdom.org/royal-commission.shtml.

Advocate, I recommend that you advise your senior military leadership not to take this communication lightly.

I am including, with this letter, an RCI memorandum on bringing the American occupation of Hawai‘i to an end by establishing a American military government. I am also attaching two recent law articles that were published by the *International Review of Contemporary Law* by myself as Head of the RCI,[7] and by Professor Federico Lenzerini as the Deputy Head of the RCI.[8] I am including these documents to inform you of the military duty to establish a military government and the legal consequences for not performing the military duty.

Should you, or any other person in senior leadership of the Army and Air National Guard, wish to meet with me on this topic please let me know so we can schedule a time and place. I am certain there can be an amicable solution that is factually and legally based.



David Keanu Sai, Ph.D.
Head, *Royal Commission of Inquiry*

cc: Major General Kenneth S. Hara, Adjutant General (kenneth.s.hara.mil@army.mil)

Brigadier General Stephen F. Logan, Deputy Adjutant General
(stephen.f.logan3.mil@army.mil)

[7] David Keanu Sai, "All States have a Responsibility to Protect their Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands," 6(2) *International Review of Contemporary Law* 72 (June 2024) (online at https://hawaiiankingdom.org/pdf/IRCL_Article_(Sai).pdf).
[8] Federico Lenzerini, "Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Suppressing 'Acts of Aggression or Other Breaches of the Peace' à la carte?," 6(2) *International Review of Contemporary Law* 58 (June 2024) (online at https://hawaiiankingdom.org/pdf/IRCL_Article_(Lenzerini).pdf).

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Head, Royal Commission of Inquiry
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/royal-commission

22 June 2024

MEMORANDUM ON BRINGING THE AMERICAN OCCUPATION OF HAWAIʻI TO AN END BY ESTABLISHING AN AMERICAN MILITARY GOVERNMENT

We are now at 131 years of an American occupation of the Hawaiian Kingdom. There are two periods since the occupation began on 17 January 1893. The first period was when the national consciousness of the Hawaiian Kingdom was effectively obliterated in the minds of the population. The second period was when the government was restored as a Regency in 1997 up until the present where the national consciousness had begun to be restored. Underlying the first and second periods, however, was the non-compliance with the law of occupation under international humanitarian law, which the military calls the law of armed conflict.

If the American military in Hawaiʻi complied with the law of occupation when Queen Liliʻuokalani conditionally surrendered to the United States on 17 January, the occupation would not have lasted 131 years. This memorandum will explain the role and function of a military government that presides over occupied territory of a State under international law. And despite the deliberate failure to establish a military government, international law and American military law still obliges the occupant to establish a military government that will eventually bring the American occupation to an end by a treaty of peace between the Hawaiian Kingdom and the United States.

United States Practice during Military Occupation

In a decisive naval battle off the coast of the Cuban city of Santiago de Cuba on 3 July 1898, the United States North Atlantic Squadron under the command of Rear Admiral William Sampson and Commodore Winfield Schley, defeated the Spanish Caribbean Squadron under the command of Admiral Pascual Cervera y Topete. After the surrender, the United States placed the city of Santiago de Cuba under military occupation and began to administer Spanish laws. The practice of the United States military occupying foreign territory prior to a treaty of peace can be gleaned from General Orders no. 101 issued by the President William McKinley to the War Department on 13 July 1898. General Orders no. 101 stated:

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. […] Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[1]

The Battle of Santiago de Cuba facilitated negotiations for a treaty of peace, called the Treaty of Paris, that was signed on 12 August 1898.[2] The Treaty of Paris came into effect on 11 April 1899, which ended the military occupation of the city of Santiago de Cuba, and Spanish law was replaced by American law.

When Japanese forces surrendered to the United States on 2 September 1945, Army General Douglas MacArthur transformed the Japanese civilian government into a military government with General MacArthur serving as the military governor. General MacArthur was ensuring the terms of the surrender were being met and he continued to administer Japanese law over the population. When the treaty of peace, called the Treaty of San Francisco, came into effect on 28 April 1952, the military occupation came to an end.

After the defeat of the Nazi regime, Germany was divided into four zones of military occupation by the United States, the Soviet Union, France and Great Britain in July of 1945. In the American sector, Army General Dwight D. Eisenhower took over the German civilian government as its military governor by proclaiming the establishment of the Office of Military Government United States ("OMGUS"). The United States, French, and British zones of occupation were joined together under one authority in 1949 and the OMGUS was succeeded by the Allied High Commission ("AHC"). The AHC lasted until 1955 after the Federal Republic of Germany joined the North Atlantic Treaty Organization. The American zone of occupation of West Berlin, however, lasted until 2 October 1990 after the Treaty on the Final Settlement with Respect to Germany was signed on 12 September 1990. The treaty was signed by both East and West Germany, the United States, France, Great Britain and the Soviet Union.

In all three military occupations, the sovereignty of Spain, Japan, and Germany was not affected. However, Spanish sovereignty over Cuba ended by the Treaty of Paris, but Japanese sovereignty was uninterrupted by the Treaty of San Francisco, and German sovereignty was uninterrupted by the Treaty on the Final Settlement with Respect to Germany.

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[1] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[2] 30 U.S. Stat. 1742 (1898)

The Duty to Establish a Military Government in Occupied Territory

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by the law of armed conflict while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, "[f]rom a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction."[3]

The 1907 Hague Regulations assumed that after the occupant gains effective control it would establish its authority by establishing a system of direct administration. Since the Second World War, United States practice of a system of direct administration is for the Army to establish a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. This was acknowledged by letter from U.S. President Roosevelt to Secretary of War Henry Stimson dated November 10, 1943, where the President stated, "[a]lthough other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden."[4] Military governors that preside over a military government are general officers of the Army.

Under Article 43, the authority to establish a military government is not with the Occupying State, but rather with the occupant that is physically on the ground—colloquially referred to in the Army as "boots on the ground." Professor Benvenisti explains, "[t]his is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the 'occupying State' as the authority in power, but the delegates preferred to change the reference to 'the occupant.' This insistence on the distinct character of the occupation administration should also be kept in practice."[5] This authority is triggered by Article 42 that states, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Only an "occupant," which is the "army," and not the Occupying State, can establish a military government.

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals—FM 27-10, *The Law of Land Warfare*,[6] and FM 27-5, *Civil*

[3] William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).
[4] Earl F. Ziemke, The U.S. Army in the Occupation of Germany 1944-1946 22 (1975).
[5] Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).
[6] Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956).

Affairs Military Government.[7] Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states, "[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."

According to the U.S. Manual for Court-Martial United States, it states that the duty to establish a military government may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.[8] A military government is the civilian government of the Occupied State. The practice of the United States is to establish a military government after the surrender by the government of the Occupied State. Since the Second World War, it is the sole function of the Army to establish a military government to administer the laws of the occupied State until there is a treaty of peace that will bring the military occupation to an end. Here follows the treaties and regulations to establish a military government in occupied territory.

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority."
- U.S. Department of Defense Directive 2000.13 states that "Civil affairs operations include…[e]stablish and conduct military government until civilian authority or government can be restored."
- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions obliges the occupant to administer the laws of the occupied State, after securing effective control of the territory according to Article 42 of the 1907 Hague Regulations.
- Para. 2-37, Army Field Manual 41-10, states that all "commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949."
- Para. 3, Army Field Manual 27-5, stating the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."
- Para. 62, Army Field Manual 27-10, states that "[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory."

[7] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947).
[8] Department of Defense, Manual for Courts-Martial United States, 2024 ed., IV-28.

- Para. 2-18, Army Field Manual 3-57, states that "DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations]."

Under the Uniform Code of Military Justice ("UCMJ"), the failure to establish a military government is dereliction of duty, which is also the war crime by omission. According to article 92 of the UCMJ, the elements of dereliction of duty are: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

From a British Protectorate to a Sovereign and Independent State

Sovereignty is defined as the "supreme, absolute, and uncontrollable power by which any independent state is governed."[9] For the purposes of international law, Wheaton explains:

> Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people or any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law […], but which may be more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law […], but may more properly be termed international law.[10]

In an agreement between King Kamehameha I and Captain George Vancouver on 25 February 1794, the Kingdom of Hawai‘i joined the international community of States as a British Protectorate.[11] By 1810, the Kingdoms of Maui and Kaua‘i were consolidated under Kamehameha I who's kingdom was thereafter called the Kingdom of the Sandwich Islands. In 1829, Sandwich Islands was replaced with Hawaiian Islands. According to Captain Finch of the U.S.S. Vincennes who was attending a meeting of King Kamehameha III and the Council of Chiefs, "[t]he Government and Natives generally have dropped or do not admit the designation of Sandwich Islands as applied to their possessions; but adopt and use that of Hawaiian; in allusion to the fact of whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was the

[9] *Black's Law Dictionary* 1396 (6th ed., 1990).
[10] Henry Wheaton, *Elements of International Law* §20 (3rd ed., 1866).
[11] George Vancouver, *A Voyage of Discovery to the North Pacific Ocean and Round the World*, vol. 3, 56 (1798). "Mr. Puget, accompanied by some of the officers, immediately went on shore; there displayed the British colours, and took possession of the island in His Majesty's name, in conformity to the inclinations and desire of *Tamaahmaah* [Kamehameha] and his subjects."

Chief of the principal Island of Owwhyee, or more modernly Hawaii."[12] The Kingdom of the Hawaiian Islands eventually became known as the Hawaiian Kingdom.

Government reform from an absolute to a constitutional monarchy began on 8 October 1840, when the first constitution was proclaimed by King Kamehameha III. Government reform continued, which led Great Britain and France to jointly recognize the Hawaiian Kingdom as an "independent State" on 28 November 1843.[13] By this proclamation, Great Britain terminated its possession of external sovereignty over the Hawaiian Islands as a British Protectorate and recognized the internal sovereignty of the Hawaiian Kingdom. Both external and internal sovereignty was vested in the Hawaiian Kingdom. The United States followed and recognized the "independence" of the Hawaiian Kingdom on 6 July 1844.

While all three States recognized Hawaiian independence, it was Great Britain, being vested with the external sovereignty by cession from King Kamehameha I in 1794, that mattered. This transfer of external sovereignty by the proclamation made the Hawaiian Kingdom a successor State to Great Britain. The recognitions by France and the United States were merely political and not legally necessary for the Hawaiian Kingdom to be admitted into the Family of Nations. The legal act necessary for the United States to obtain its external sovereignty from Great Britain was the 1783 Treaty of Paris that ended the American revolution. Article 1 states:

> His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof.

Hawaiian Sovereignty Unaffected by Military Occupation

By orders of the U.S. resident Minister John Stevens, on 16 January 1893, a "detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu. The men upwards of 160, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and

[12] "Capt. Finch's Cruise in the U.S.S. Vincennes," U.S. Navy Department Archives.
[13] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 120 (1895) ("Executive Documents"). "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich [Hawaiian] Islands as an Independent State, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed."

medical supplies."[14] President Grover Cleveland determined, after a Presidential investigation, that "[t]his military demonstration upon the soil of Honolulu was of itself an act of war."[15] He also concluded that the overthrow of the Hawaiian Government the following day on January 17th was also an "act of war."[16] President Cleveland concluded:

> Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister. Therefore the military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.[17]

Because international law provides for the presumption of State continuity in the absence of its government, the burden of proof shifts as to what must be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[18] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[19] Addressing the presumption of the German State's continued existence, despite the military overthrow of the German Reich, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence. The very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty. A similar case, recognized by the customary law for a very long time, is that of the belligerent occupation of enemy territory in time of war. The important features of 'sovereignty' in such cases are the continued legal existence of a legal personality and the attribution of territory to that legal person and not to holders for the time being.[20]

"If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United

[14] Executive Documents, 451.
[15] *Id*.
[16] *Id*., 456.
[17] *Id*., 452.
[18] James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006).
[19] *Id*.
[20] Ian Brownlie, *Principles of Public International Law* 109 (4th ed., 1990).

States, absent of which the presumption remains."[21] Evidence of 'a valid demonstration of legal title, or sovereignty, on the part of the United States' would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[22] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[23] There is no treaty of peace between the Hawaiian Kingdom and the United States, and, therefore, sovereignty remains vested in the Hawaiian Kingdom even as an Occupied State.

While Hawaiian State sovereignty is maintained during military occupation, international law restricts the exercise of power by a foreign State within the territory of the Hawaiian Kingdom. In the *Island of Palmas* arbitration, which was a dispute between the United States and the Netherlands, the arbitrator explained that "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[24] And in the *S.S. Lotus* case, which was a dispute between France and Turkey, the Permanent Court of International Justice stated:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention (treaty).[25]

Since 1893, the United States has been exercising its authority over Hawaiian Kingdom territory without any 'permissive rule derived from international custom or from a convention (treaty).' The actions taken by the provisional government and the Republic of Hawai'i are unlawful because they were puppet governments established by the United States. President Cleveland sealed this fact when he informed the Congress on 18 December 1893, that the "provisional government owes its existence to an armed invasion by the United States."[26] This status did not change when the insurgents changed their name to the Republic of Hawai'i on 4 July 1894. According to Professor Marek:

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[21] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020) (online at https://hawaiiankingdom.org/royal-commission.shtml).
[22] 9 Stat. 922 (1848).
[23] 30 Stat. 1754 (1898).
[24] *Island of Palmas* Case (Netherlands v. United States) 2 R.I.A.A. 838 (1928).
[25] *The Case of the S.S. "Lotus," judgment, Publications of the Permanent Court of International Justice, Collection of Judgments*, Series A, No. 70, 18 (7 Sep. 1927). Generally on this issue see Arthur Lenhoff, "International Law and Rules on International Jurisdiction", 50 *Cornell Law Quarterly* 5 (1964).
[26] Executive Documents, 454.

> From the status of the puppet governments as organs of the occupying power the conclusion has been drawn that their acts should be subject to the limitation of the Hague Regulations. The suggestion, supported by writers as well as by decisions of municipal courts, seems at first both logical and convincing. For it is true that puppet governments are organs of the occupying power, and it is equally true that the occupying power is subject to the limitations of the Hague Regulations. But the direct actions of the occupant himself are included in the inherent legality of belligerent occupation, whilst the very creation of a puppet government or State is itself an illegal act, creating an illegal situation. Were the occupant to remain within the strict limits laid down by international law, he would never have recourse to the formation of puppet governments or States. It is therefore not to be assumed that puppet governments will conform to the Hague Regulations; this the occupant can do himself; for this he does not need a puppet. The very aim of the latter, as has already been seen, is to enable the occupant to act in *fraudem legis*, to commit violations of the international regime of occupation in a disguised and indirect form, in other words, to disregard the firmly established principle of the identity and continuity of the occupied State. Herein lies the original illegality of puppet creations.[27]

The permissive rule under international law that allows one State to exercise authority over the territory of another State is Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention, that mandates the occupant to establish a military government to provisionally administer the laws of the occupied State until there is a treaty of peace. For the past 131 years, there has been no permissive rule of international law that allows the United States to exercise any authority in the Hawaiian Kingdom. Instead, the United States continues to commit the war crime of denationalization where the national consciousness of the Hawaiian Kingdom has been obliterated through classroom instruction and propaganda, which concealed the prolonged occupation.

From 17 January 1893 to 7 July 1898, the United States has been unlawfully exercising its power, indirectly, over the territory of the Hawaiian State, through its puppet governments. From 7 July 1898 to the present, the United States has been directly exercising unlawful authority over the territory of the Hawaiian State. How does international law and the law of occupation see this unlawful exercise of authority? If the United States, to include the State of Hawai'i, has no lawful authority to exercise its power in Hawaiian territory, then everything that derives from its unlawful authority is invalid in the eyes of international law. This comes from the rule of international law *ex injuria jus non oritur*, which is Latin for "law (or right) does not arise from injustice." This international rule's "coming of age" is traced to the latter part of the nineteenth century,[28] and was acknowledged by President Cleveland in his message to the Congress. President Cleveland stated:

[27] Krystyna Marek, *Identity and Continuity of States in Public International Law* 115 (1968).
[28] Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* 43-45 (1993).

> As I apprehend the situation, we are brought face to face with the following conditions:
>
> The lawful Government of Hawaii was overthrown without a drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.
>
> But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.
>
> But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.
>
> But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building.
>
> And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.
>
> Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.[29]

From this international rule—*ex injuria jus non oritur*, when applied to an Occupied State, springs forth another rule of international law called *postliminium*, where all unlawful acts that an Occupying State may have been done in an occupied territory, are invalid and cannot be enforced when the occupation comes to an end. According to Professor Oppenheim, "[i]f the occupant has performed acts which are not legitimate acts [allowable under the law of occupation], postliminium makes their invalidity apparent."[30] Professor Marek explains:

> Thus, the territory of the occupied State remains exactly the same and no territorial changes, undertaken by the occupant, can have any validity. In other words, frontiers

[29] Executive Documents, 455-456.
[30] L. Oppenheim, *International Law—A Treatise*, vol. II, War and Neutrality §283 (2nd ed. 1912).

> remain exactly as they were before the occupation. The same applies to the personal sphere of validity of the occupied State; in other words, occupation does not affect the nationality of the population, who continues to owe allegiance to the occupied State. There can hardly be a more serious breach of international law than forcing the occupant's nationality on citizens of the occupied State.[31]

The Law of Armed Conflict Prohibits Annexation of the Occupied State

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[32] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. Because the Hawaiian Kingdom retained the sovereignty of the State despite being occupied, only the Hawaiian Kingdom could cede its sovereignty and territory to the United States by way of a treaty of peace. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[33] International law does not permit annexation of territory of another state.[34]

Furthermore, in 1988, the U.S. Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[35] The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[36] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[37] and not the Congress.

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[31] Krystyna Marek, *Identity and Continuity of States in Public International Law* 83 (1968).
[32] 30 Stat. 750 (1898).
[33] There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.
[34] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
[35] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[36] *Id.*, 242.
[37] *Id*., 242.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[38] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[39] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC investigated whether it could be accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional 9 miles by statute because its authority was limited up to the 3-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[40]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[41] Professor Willoughby also stated that the "incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is […] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[42] According to Professor Lenzerini:

> [I]ntertemporal-law-based perspective confirms the illegality—under international law—of the annexation of the Hawaiian Islands by the US. In fact, as regards in particular the topic of military occupation, the affirmation of the *ex injuria jus non oritur* rule predated the Stimson doctrine, because it was already consolidated as a principle of general international law since the XVIII Century. In fact, "[i]n the course of the nineteenth century, the concept of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied territory, the fate of which could be determined only by a peace treaty"; in other words, "the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory."[43]

[38] *Id*.
[39] *Id.*, 262.
[40] *The Apollon*, 22 U.S. 362, 370 (1824).
[41] Kmiec, 252.
[42] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[43] Federico Lenzerini, "Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying wit the Supreme Imperative of Suppressing 'Acts of Aggression or other Breaches of the Peace' à la carte?," 6(2) *International Review of Contemporary Law* 64 (June 2024).

According to Professor Rim, the State continues "to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain."[44] In 1997, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in similar fashion to governments established in exile during the Second World War.[45] By virtue of this process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[46]

Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. While the last Executive Monarch was Queen Lili'uokalani who died on November 11, 1917, the office of the Monarch remained under Hawaiian constitutional law. The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and third, prepare for an effective transition to a *de jure* government when the occupation ends.

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,[47] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-

[44] Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," 20(20) *European Journal of International Law* 1, 4 (2021).
[45] David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).
[46] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).
[47] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

legal changes in government" of an existing State.[48] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, "[w]here a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[49]

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[50] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes. This brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[51]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal on 9 June 2000 after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[52] As Professor Talmon states, the "government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[53]

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[48] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[49] American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States* §203, comment c (1987).
[50] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[51] Lenzerini, *Legal Opinion*, 322.
[52] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[53] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity" in its case repository.[54] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).[55]

It should also be noted that the United States, by its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.[56]

As an American Puppet Regime, the Role of the Hawai'i Adjutant General

The military force of the provisional government was not an organized unit or militia but rather armed insurgents under the command of John Harris Soper. Soper attended a meeting of the leadership of the insurgents calling themselves the Committee of Safety in the evening of 16 January 1893, where he was asked to command the armed wing of the insurgency. Although Soper served as Marshal of the Hawaiian Kingdom under King Kalākaua, he admitted in an interview with Commissioner James Blount on 17 June 1893, who was investigating the overthrow of the Hawaiian Kingdom government by direction of U.S. President Grover Cleveland, that he "was not a trained military man, and was rather adverse to accepting the position [he] was not especially trained for, under the circumstances, and that [he] would give them an answer on the following day; that is, in the morning."[57] Soper told Special Commissioner Blount he accepted the offer after learning that "Judge Sanford Dole [agreed] to accept the position as the head of the [provisional] Government."[58] The insurgency renamed the Hawaiian Kingdom's Royal Guard to the National

[54] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[55] *Id*.
[56] Sai, *The Royal Commission of Inquiry*, 25-26.
[57] Executive Documents, 972.
[58] *Id*.

Guard by *An Act to Authorize the Formation of a National Guard* on 27 January 1893.[59] Soper was thereafter commissioned as Colonel to command the National Guard and was called the Adjutant General.

Under international law, the provisional government was an armed force of the United States in effective control of Hawaiian territory since 1 April 1893, after the departure of U.S. troops. As an armed proxy of the United States, they were obliged to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty was negotiated and agreed upon between the United States and the Hawaiian Kingdom. As a matter of fact and law, it would have been Soper's duty to head the military government as its military governor after President Cleveland completed his investigation of the overthrow of the Hawaiian Kingdom government and notified the Congress on 18 December 1893. A military government was not established under international law but rather the insurgency maintained the facade that they were a *de jure* government.

The insurgency changed its name to the Republic of Hawai'i on 4 July 1894. Under *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard* of 13 August 1895, the National Guard was reorganized and commanded by the Adjutant General that headed a regiment of battalions with companies who were comprised of American citizens.[60]

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on 30 April 1900,[61] the Act of 1895 continued in force. According to section 6 of the Act of 1900, "the laws not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." Soper continued to command the National Guard as Adjutant General until 2 April 1907, when he retired. The Hawai'i National Guard continued in force under *An Act To provide for the admission of the State of Hawaii into the Union* enacted by the U.S. Congress on 18 March 1959.[62] The State of Hawai'i governmental infrastructure is the civilian government of the Hawaiian Kingdom.

Article V of the State of Hawai'i Constitution provides that the Governor is the Chief Executive of the State of Hawai'i. He is also the Commander-in-Chief of the Army and Air National Guard and appoints the Adjutant General who "shall be the executive head of the department of defense

[59] *An Act to Authorize the Formation of a National Guard,* Laws of the Provisional Government of the Hawaiian Islands 8 (1893).
[60] *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard*, Laws of the Republic of Hawaii 29 (1895).
[61] *An Act To provide a government for the Territory of Hawaii*, 31 Stat. 141 (1900).
[62] *An Act To provide for the admission of the State of Hawaii into the Union*, 73 Stat. 4 (1959).

and commanding general of the militia of the State."[63] Accordingly, the "adjutant general shall perform such duties as are prescribed by law and such other military duties consistent with the regulations and customs of the armed forces of the United States […]."[64] In other words, the Adjutant General operates under two regimes of law, that of the State of Hawai'i and that of the United States Department of Defense.

The State of Hawai'i Constitution is an American municipal law that was approved by the Territorial Legislature of Hawai'i on 20 May 1949 under *An Act to provide for a constitutional convention, the adoption of a State constitution, and appropriating money therefor*. The Congress established the Territory of Hawai'i under *An Act To provide a government for the Territory of Hawaii*, on 30 April 1900.[65] The constitution was adopted by a vote of American citizens in the election throughout the Hawaiian Islands held on 7 November 1950. The State of Hawai'i Constitution came into effect by *An Act To provide for the admission of the State of Hawaii into the Union* passed by the Congress on 18 March 1959.[66]

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[67] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[68] Therefore, the State of Hawai'i cannot claim to be a *de jure* government because its only claim to authority derives from American legislation that has no extraterritorial effect. And under international law, the United States "may not exercise its power in any form in the territory of another State."[69] To do so is the war crime of usurpation of sovereignty during occupation.[70]

"The occupant," according to Professor Sassòli, "may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation." Professor Sassòli further explains that the "expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents

[63] Hawai'i Revised Statutes, §121-7.
[64] *Id*., §121-9.
[65] 31 Stat. 141 (1900).
[66] 73 Stat. 4 (1959).
[67] *United States v. Curtiss Wright Export Corp*., 299 U.S. 304, 318 (1936).
[68] *The Apollon*, 22 U.S. 362, 370 (1824).
[69] *Lotus* case, 18.
[70] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157 (2020).

(especially in territories of common law tradition), as well as administrative regulations and executive orders."[71]

Conclusion

Any and all authority of the State of Hawai'i is by virtue of American laws, which constitutes war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of Hawai'i is invalid because it never legally existed in the first place. What remains valid, however, is the authority of the State of Hawai'i Department of Defense, which is its Army and Air National Guard. The authority of both branches of the military continues as members of the United States armed forces that are situated in occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the Army.

As the occupant in effective control of the majority of the territory of the Hawaiian Kingdom at 10,931 square miles, while the U.S. Indo-Pacific Combatant Command is in effective control of less than 500 square miles, the Army National Guard is vested with the authority to transform the State of Hawai'i into a Military Government of Hawai'i forthwith. Enforcement of the laws of an occupied State requires the occupant to be in effective control of territory so that the laws can be enforced. The current Adjutant General is an Army general officer and not an Air Force general officer. To guide this transformation is the Council of Regency's operational plan with essential and implied tasks.[72] The military government will continue to govern until a treaty of peace between the Hawaiian Kingdom and the United States shall take effect.

David Keanu Sai, Ph.D.
Head, Royal Commission of Inquiry

[71] Marco Sassòli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century," *International Humanitarian Law Research Initiative* 6 (2004) (online at https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf).
[72] Council of Regency, *Operational Plan Transitioning the State of Hawai'i into a Military Government* (August 14, 2023) (online at: https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf).

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77ème anniversaire de la Charte des Nations Unies
77 Years of the United Nations Charter

Graphics by Marylia Cabane, Chitro Shihabuddin, the Movement for Palestine

Federico Lenzerini Professor of International Law and Human Rights, University of Siena (Italy). Professor at the LLM programme in Intercultural Human Rights, St. Thom-as University School of Law, Miami (FL), USA. Pro-fessor at the Tulane-Siena Summer School on Inter-national Law, Cultural Heritage and the Arts. Deputy Head of the Hawaiian Kingdom's Royal Commission of Inquiry.	**Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Supreme Imperative of Suppressing "Acts of Aggression or Other Breaches of the Peace" à la carte?** The author concludes that "Unfortunately, still today, abundantly inside the XXI Century, while the "cosmopolitan right" Kant referred to has actually developed, the goal of perpetual peace appears a chimera, especially due to the distorted use of the main pertinent rules at the service of States' imperialistic interests."
Juan Fernando Romero Tobon Candidat au doctorat (2019). Maîtrise en droit de l'Université nationale de Colombie (2013). Spécialiste en droit économique de l'Université catholique de Louvain en Belgique (1995). Juriste de l'Universidad de los Andes (1991) et anthropologue de l'Universidad Nacional de Colombia (1994). Auteur des livres Por los caminos de la excepcionalidad, La deriva de lo social y su respuesta autoritaria en Latinoamérica y Colombia (Grupo editorial Ibáñez 2020), El Derecho fundamental a la salud. Loi 1751 de 2015. (Grupo editorial Ibáñez 2019), Las acciones públicas de inconstitucionalidad en Colombia (1992-2013), 8030 días a bordo del Nautilus (Grupo editorial Ibáñez 2016) et Huelga y servicio público en Colombia. Historia de una Prohibición (Rodríguez Quito Editores, 1992) et les recueils de poésie En la caza (casa) de un eterno desconocido (2001), La mirada del cangrejo (2005) et los ojos de los árboles (2010-2021, ediciones lobo estepario) ainsi que la nouvelle El retorno del navegante Colón (ediciones lobo estepario, 2018). Il a publié les articles de recherche suivants Reflexiones e inflexiones en torno a la pandemia por la Covid 19 (2020), El péndulo del constitucionalismo social (2019), La construcción del enemigo interior, La regulación de los estados de excepción en el siglo XIX (2018), Del estado de sitio a la anormalidad permanente : los nuevos caminos de la excepcionalidad (2016), La puerta alterna de las acciones de inconstitucionalidad (2015), Las consti-tuciones de Bolivia y Colombia y las acciones de defensa (2015) et Constitucionalismo social en América Latina (2013) et dans les revues Pensamiento Jurídico, Trabajo y Derecho, Planeación y Desarrollo, Sindéresis, entre autres. Membre du groupe de recherche CC - Comparative Constitutionalism et responsable de la ligne de recherche numéro 6 Constitutional Justice.	**Homage à Nydia Tobon**
Géraud de Geouffre de la Pradelle	

Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Supreme Imperative of Suppressing "Acts of Aggression or Other Breaches of the Peace" à la carte?

Federico Lenzerini

1. Introduction. The Suppression of Acts of Aggression or Other Breaches of the Peace as Supreme Purpose of the UN Charter

Article 1, para. 1 of the UN Charter[11] identifies the paramount purpose of the United Nations in the commitment "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace". Unfortunately, it appears that, nearly 78 years after the adoption of the Charter, such a solemn commitment remains in a large part unrealized, as demonstrated, *inter alia*, by the armed aggression launched by Russia against Ukraine on 24 February 2022, which triggered a quasi-world war still ongoing at the moment of this writing (June 2023). The geopolitical stability paradoxically preserved by the Cold War collapsed after the fall of the Berlin wall, when the flames of a number of interstate and interethnic clashes – previously forcibly kept under control by the above (artificial) stability – suddenly revived. Since then, the world has been affected by several military conflicts, effectively addressed by the UN Security Council (SC) only in a very few cases, the SC being unable to properly react to them in most situations, especially when one of its permanent members is involved. Among other effects, such conflicts have also threatened the effectiveness and credibility of pertinent rules of international law, especially those concerning *jus ad bellum*, international humanitarian law and military occupation.

2. Military Occupation, Sovereignty and the ex-injuria jus non oritur Principle

According to Article 42 of the 1907 Hague Regulations,[2] "a territory is considered occupied when it is actually placed under the authority of the hostile army", the latter obtaining *effective control* of the occupied territory. Military occupation is a *factual* phenomenon, as it is not influenced by any considerations concerning whether or not the military action leading to the fact of the occupation could be considered lawful under international law.[3] It follows that the relevant rules governing military occupation are equally applicable irrespective of the lawfulness of the use of force in one particular circumstance. One of these rules – which is particularly pertinent to the present investigation – rests in the fact that, as codified by common Article 2(2) of the four Geneva Conventions of 1949,[4] the laws regulating military occupation apply even when the latter does not meet any armed resistance by the troops or the people of the occupied territory.[5] The decisive requirement is rather that the occupation is *hostile*, i.e. that it is not consented by the territorial State, while "[t]he lack of armed resistance of the territorial state cannot be interpreted as consent to the foreign armed forces' presence, nor can the fact that part of the local population welcomes the occupying forces".[6] Also, "[o]ccupying forces do not need to be present everywhere at all times to maintain the state of occupation. What matters is whether occupying forces can project their authority throughout the territory. For example, occupying forces may only

1 * Professor of International Law and Human Rights, University of Siena (Italy). Professor at the LLM programme in Intercultural Human Rights, St. Thomas University School of Law, Miami (FL), USA. Professor at the Tulane-Siena Summer School on International Law, Cultural Heritage and the Arts. Deputy Head of the Hawaiian Kingdom's Royal Commission of Inquiry.

Available at https://www.un.org/en/about-us/un-charter (accessed 11 January 2023).

2 See *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 1907, at https://ihl-databases.icrc.org/en/ihl-treaties/ hague-conv-iv-1907 (accessed 11 January 2023).

3 See Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", 885 *International Review of the Red Cross* 94 (2012) 133, at 135.

4 See https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016 (accessed 11 January 2023).

5 See Adam Roberts, "What is a Military Occupation?", (1984) 55 *British Year Book of International Law* 249.

6 See RULAC, "Military Occupation", 4 September 2017, at https://www.rulac.org/classification/military-occupations (accessed 11 January 2023).

be present in strategic positions from where they could be dispatched within a reasonable time frame".[7]

Last but not least, "[t]he foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty";[8] "[e]ven if [a] whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right of annexation".[9] This rule represents a declination of the *ex injuria jus non oritur* principle, literally meaning that law cannot arise from injustice, or, in other words, that illegal acts cannot be a source of legal rights. This principle gained relevance in the dialectics of international diplomacy on 7 January 1932, when a note sent to China and Japan by the US Secretary of State Henry Stimson gave rise to the so-called *Stimson doctrine*. The note read that the American government "cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between [China and Japan] which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial or administrative integrity of the Republic of China [...]".[10] In taking this position, the US government clarified that it would have not recognized any territorial changes determined through the use of force, advocating the illegality of acquisitions of territories following military occupation per se. The Stimson doctrine was "quickly adopted by the League of Nations as one of the cardinal principles for the solution of the Sino-Japanese dispute",[11] with a resolution adopted by the Assembly on 11 March 1932, affirming that "it is incumbent upon the members of the League of nations not to recognize any situation, treaty or agreement which may brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris".[12] More recently the *ex injuria jus non oritur* principle has been confirmed by the International Court of Justice (ICJ), excluding that "facts which flow from wrongful conduct [may] determine the law" and paying explicit tribute to the "principle *ex injuria jus non oritur*" itself.[13] In sum, "occupation cannot of itself terminate statehood",[14] and, in case of annexation based on occupation only, "the legal existence of [...] States [is] preserved from extinction".[15]

3. Kuwait, Crimea, and Ukraine. Examples of Recent Practice Concerning Military Occupation of Foreign Territories

Since the end of the XIX Century many situations of foreign military occupation have occurred in the world. Only a relatively small portion of them has been followed by the political annexation of the occupied territory by the occupying power. Of course, it is not the purpose of the present article to provide a systematic and comprehensive taxonomy of all such situations. However, it is certainly possible to refer to a few examples in the context of which the international community – including most States and the United Nations – have strongly condemned the annexation of foreign States or of part of their territories following military occupation as contrary to the basic principles of international law. In some cases, they have even reacted militarily in order to restore the pre-existing legality.

7 Ibid.

8 See Eyal Benvenisti, *The International Law of Occupation*, 2nd Ed., Oxford, 2012, at 6. See also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom", (2021) 3 HAW. J.L. & POL. 317, at 320; Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", (1990) 84 *American Journal of International Law* 44, at 38; Conor McCarthy, "Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", (2005) 10 *Journal of Conflict and Security Law* 43, at 49-51; Oma Ben-Naftali, Aeyal M. Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Terrority", (2005) 23 *Berkeley Journal of International Law* 551, at 560; Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations", (2006) 51(3) *New York Law School Law Review* 497, *passim*; Nicholas F. Lancaster, "Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still Be Considered Customary International Law", (2006) 189 *Military Law Review* 51, at 63.

9 See Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100(3) *American Journal of International Law* 580, at 583.

10 See Quincy Wright, "The Stimson Note of January 7, 1932", 26 AJIL 1932 342.

11 See Kisaburo Yokota, "The Recent Development of the Stimson Doctrine", 8 *Pacific Affairs* (1935) 133, at 133.

12 See Quincy Wright, cit. n. 7, at 343.

13 See *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C. J. Reports 1997, p. 7, at 76, para. 133.

14 See Ian Brownlie, Principles of Public International Law, 7th Ed., Oxford, 2008, at 78.

15 See James Crawford, The Creation of States in International Law, 2nd Ed., Oxford, 2006, at 702.

One of the most known recent instances of military occupation followed by annexation of the occupied territory is represented by the case of Kuwait, invaded by Iraq in August 1990 and eventually annexed to the Iraqi territory as its 19th province shortly after the establishment by the then Iraqi leader Saddam Hussein of the puppet government defined as The Republic of Kuwait. The invasion of Kuwait by Iraq was strongly condemned by the majority of States. At the UN level, on 2 August 1990 the SC adopted Resolution 660 by 14 votes to none (with Yemen not participating in the vote), in which condemned the Iraqi invasion of Kuwait and demanded Iraq to "withdraw immediately and unconditionally all its forces" from the territory of the invaded country. A few days later, on 9 August, the SC adopted unanimously Resolution 662, deciding that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void", and calling upon all States, "international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation". As is well-known, after adopting several other resolutions requesting Iraq to put the invasion of Kuwait to an end, on 29 November 1990 the SC adopted Resolution 678 – by 12 votes to two (Cuba and Yemen), with the abstention of China – which authorized UN member States cooperating with Kuwait "to use all necessary means to uphold and implement resolution 660(1990) and all subsequent relevant resolution and to restore international peace and security in the area". This resolution represented the legal basis for the military action – known as "Gulf War" – waged by a coalition of 35 States, led by the United States, which began on 17 January 1991 and lasted until the liberation of Kuwait on 28 February 1991.[16]

Another example of interest for the present investigation is represented by the invasion and subsequent annexation of Crimea by the Russian Federation in February and March 2014. Following a referendum held on 16 March 2014 (resulting in a plebiscite for the integration in the Russian territory), the Russian Federation formally incorporated Crimea on 18 March. At the moment of this writing, the Russian Federation still retains effective control over the territory of Crimea, despite the fact that only a handful of States (namely Afghanistan, Belarus, Bolivia, Cuba, Nicaragua, North Korea, Sudan, Syria and Venezuela) have recognized or supported the annexation. Most other countries have condemned the annexation as a violation of international law and a threat to the territorial integrity of Ukraine, and, following the annexation, the Russian Federation was suspended from the G8. As far as the United Nations is concerned, on 15 March 2014 a draft resolution proposed by the United States declaring the commitment to preserve the sovereignty, independence, unity and territorial integrity of Ukraine – supported by 13 out of 15 members of the Council (with the abstention of China) – was vetoed by the Russian Federation.[17] However, on 27 March the General Assembly adopted Resolution 68/262, entitled "Territorial integrity of Ukraine", with 100 votes in favour, 11 against and 58 abstentions. Among other things, this resolution affirmed the commitment of the General Assembly "to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders".[18] The resolution also called "upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means".[19] It also underscored that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Re-

16 For a comprehensive assessment of the facts and legal implications concerning the invasion of Kuwait by Iraq and the subsequent actions by the United Nations see Mary Ellen O'Connell, "Enforcing the Prohibition on the Use of Force: The UN's Response to Iraq's Invasion of Kuwait", (1991) 15 Southern Illinois University Law Journal 453. See also Christopher Greenwood, "Iraq's Invasion of Kuwait: Some Legal Issues", (1991) 47 *The World Today* 39; Christopher Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law", (1992) 55 *The Modern Law Review* 153; Stanley J. Glod, "International Claims Arising from Iraq's Invasion of Kuwait" (1991) 25(3) *International Lawyer* (ABA) 713; Christopher J. Sabec, "The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait", (1991) 21 *Georgia Journal of International and Comparative Law* 63; Colin Warbrick, "The Invasion of Kuwait by Iraq", (1991) 40 *International and Comparative Law Quarterly* 482; Colin Warbrick "The Invasion of Kuwait by Iraq: Part II", 1991) 40 *International and Comparative Law Quarterly* 965.

17 See Somini Sengupta, "Russia Vetoes U.N. Resolution on Crimea", The New York Times, 15 March 2014, at https://www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html (accessed 12 January 2023).

18 See para. 1

19 See para. 2.

public of Crimea or of the city of Sevastopol".[20] It finally called "upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status".[21]

Since 2014, and before the beginning of the armed conflict between Russian Federation and Ukraine on 24 February 2022, the General Assembly has repeatedly reiterated "that the temporary occupation of Crimea and the threat or use of force against the territorial integrity or political independence of Ukraine by the Russian Federation is in contravention" of international law,[22] and that "the seizure of Crimea by force is illegal and a violation of international law [...] [implying that] those territories must be immediately returned" to Ukraine.[23] It has consequently urged the Russian Federation, "as the occupying Power", *inter alia*, "immediately, completely and unconditionally to withdraw its military forces from Crimea and end its temporary occupation of the territory of Ukraine without delay".[24]

The third example that we intend to describe is very well known at the time of this writing. On 24 February 2022, the Russian Federation launched an armed aggression against Ukraine, followed by the invasion of some Ukrainian territories in the southern and south-eastern fronts of the conflict. The intervention was justified by Russian President Putin and by the Permanent Representative of the Russian Federation to the United Nations, respectively, as a "special operation" aimed at reacting to the situation of "horror and genocide, which almost 4 million people [were] facing" in the area of Donbass,[25] and as having the purpose "to protect people who ha[d] been subjected to abuse and genocide by the Kyiv regime for eight years".[26] However, the ICJ held that, even in the event that the Russian Federation's assertion that Ukraine has committed or is committing genocide in the Luhansk and Donetsk regions of Ukraine would be true,[27] "[t]he acts undertaken by the Contracting Parties 'to prevent and to punish' genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter".[28]

Consequently, "it is doubtful that the [1948 Genocide] Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide".[29] It follows, according to the ICJ, that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".[30] Obviously the Court formally used a not conclusive language, for the reason that an order cannot prejudice "any questions relating [...] to the merits" of the case,[31] but the position of the ICJ on the legitimacy of the Russian armed intervention in Ukraine appears very explicit.[32] On 25 February 2022 a Draft resolution by the SC was blocked by the Russian Federation's veto, while China, India and the United Arab Emirates abstained. The Draft, among other things, deplored "in the strongest terms the Russian

20 See para. 5.
21 See para. 6.
22 See, e.g., Resolution 76/70 of 9 December 2021, "Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov", tenth recital of the preamble.
23 Ibid., 14th recital of the preamble.
24 Ibid., para. 1. Generally on the Crimean case see Ferdinand Feldbrugge, "Ukraine, Russia and International Law" (2014) 39(1) Review of Central and East European Law 95. Generally on the annexation of Crimea by the Russian Federation see Trevor McDougal, "A New Imperialism? Evaluating Russia's Acquisition of Crimea in the Context of National and International Law", (2016) 2015 Brigham Young University Law Review 1847.
25 See ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, at https://www.icj-cij.org/public/ files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed 16 January 2023), para. 38.
26 Ibid., para. 40.
27 In this regard the Court stated that "[a]t the present stage of these proceedings, the Court is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case", as well as that "the acts complained of by the Applicant appear to be capable of falling within the provisions of the [1948] Genocide Convention"; see ibid., paras. 43 and 45.
28 Ibid., para. 58.
29 Ibid., para. 59.
30 Ibid., para. 60.
31 Ibid., para. 85.
32 For more details about the controversy between Russia and Ukraine before the ICJ see Prabhash Ranjan and Achyuth Anil, "Russia-Ukraine War, ICJ,

Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter",[33] and decided "that the Russian Federation shall immediately cease its use of force against Ukraine and shall refrain from any further unlawful threat or use of force against any UN member state".[34] On 2 March 2022 the UN General Assembly – in Resolution ES-11/1 – condemned "the 24 February 2022 declaration by the Russian Federation of a 'special military operation' in Ukraine" and reaffirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal". On 30 September 2022, following four referenda organized and managed by the Russian occupation authorities (all resulting in an almost absolute support for the integration in the Russian territory), the Russian Federation unilaterally declared the annexation of territories of four Ukrainian regions, namely Donetsk, Kherson, Luhansk and Zaporizhzhia. On the same day, the United States and Albania submitted a draft resolution to the SC, defining the annexation as a threat to international peace and security, considering the referenda held in the four Ukrainian regions as illegal and requesting Russian Federation to immediately and unconditionally withdraw its decision. The resolution was supported by ten members of the SC, with Brazil, China, Gabon and India abstaining, but was again vetoed by the Russian Federation.[35] On 12 October 2022, the GA adopted Resolution ES-11/4, with a majority of 143 votes in favour, 35 abstentions, and only five votes against (Belarus, Democratic People's Republic of Korea, Nicaragua, Russian Federation and Syria). This resolution noted that "the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine are areas that, in part, are or have been under the temporary military control of the Russian Federation, as a result of aggression, in violation of the sovereignty, political independence and territorial integrity of Ukraine",[36] declared that the referenda held in the above regions, "and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine",[37] and demanded that

the Russian Federation immediately and unconditionally reverse its decisions of 21 February and 29 September 2022 related to the status of certain areas of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine, as they are a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations, and immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.[38]

Also, on 16 February 2023, the GA adopted Resolution ES-11/L.7, which reaffirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal"[39] and reiterated its demand that "the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders, [also calling] for a cessation of hostilities".[40]

Generally speaking, both the armed attack as well as the occupation and annexation of the aforementioned Ukrainian territories by the Russian Federation have strongly and almost universally been condemned by the international community.[41] Immediately after the beginning of the aggression the Russian Federation became the object of economic sanctions applied by the European Union as well as by a long list of Western and other countries, which also granted military, logistic, economic and humanitarian aid in favour of Ukraine. Such sanc-

and the Genocide Convention", (2022) 9 *Indonesian Journal of International & Comparative Law* 101.

33 See Draft resolution S/2022/155, 25 February 2022, at https://documents-dds-ny.un.org/doc/UNDOC/ GEN/N22/271/07/PDF/N2227107.pdf?OpenElement (accessed 16 January 2023), para. 2.

34 Ibid., para. 3.

35 See "Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions", UN News, 30 September 2022, at https://news.un.org/en/story/2022/09/1129102 (accessed 16 January 2023).

36 See the fourth recital of the preamble.

37 Ibid., para. 3.

38 Ibid., para. 5.

39 See the third recital of the preamble.

40 See para. 5.

41 Generally on the Russian-Ukrainian war see Sofia Cavandoli, Gary Wilson, "Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine", (2022) 69 *Netherlands International Law Review* 383; Fengcheng Xiao, Keran Zhao, "Aggression and Determination: Two Basic issues of International Law in the Russia-Ukraine Conflict", (2022) 13 *Beijing Law Review* 278; Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law", Torkel Opsahl Academic EPublisher, Brussels, 2022, Occasional Paper Series No. 13.

tions and aid continue to be applied/granted at the time of this writing. On 16 March 2022, the Committee of Ministers of the Council of Europe expelled the Russian Federation from the Organization.[42] At the time of this writing, North Korea is the only member of the United Nations which has recognized the Russian annexation of the four occupied Ukrainian regions,[43] while most governments (in addition to international organizations) have defined the referenda held in such regions "sham" and have considered the annexation illegal.

The examples described in this section irrefutably show that military occupation of a foreign country or of part of its territory is unconditionally condemned by the international community as an intolerable violation of international law.

The Case of the Hawaiian Kingdom

On 16 January 1893, US marines entered into the territory of the Hawaiian Kingdom and, together with about 1,500 armed non-Hawaiian mercenaries, occupied the Hawaiian territory and overthrew the Kingdom's monarchy. On the following day, Queen Lili'uokalani, as the executive monarch of a constitutional government, conditionally surrendered her authority to the United States "to avoid any collision of armed forces and perhaps the loss of life".[44] In December 1893, after receiving the report by the Special Commissioner that he had appointed to investigate the incident, US President Grover Cleveland recognized that "[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair".[45] Subsequently, in his 1893 State of the Union Address to the Congress, President Cleveland emphasized that "the only honorable course for our Government to pursue was to undo the wrong that had been done" to the Hawaiian Kingdom "and to restore as far as practicable the status existing at the time of our forcible intervention".[46] On the same day, an Executive Agreement was concluded by exchange of notes with Queen Lili'uokalani, in which President Cleveland took the commitment of restoring the Queen as the constitutional sovereign of Hawai'i, while the Queen accepted – after some initial hesitation – to grant a full pardon to the insurgents. The implementation of the agreement, however, was blocked by the Congress. In 1898, Cleveland's successor, William McKinley, signed the Newlands Resolution, proclaiming the annexation of Hawai'i as a territory of the United States and abrogating all international treaties previously in force between the two countries. Following the annexation, the Hawaiian Islands were named "Territory of Hawai'i" in 1900, and in 1959 became the 50th State of the US under the heading of "State of Hawai'i". on 23 November 1993, President Bill Clinton signed an official Apology Resolution passed by the Congress, in which the latter acknowledged, "on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893 [...] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people".[47] It also apologized "to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination",[48] and expressed "its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people".[49]

42 See "The Russian Federation is excluded from the Council of Europe", Council of Europe Newsroom, 16 March 2022, at https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (accessed 16 January 2023).

43 See Hayonhee Shin, "N. Korea backs Russia's proclaimed annexations, criticises U.S. 'double standards'", Reuters, 4 October 2022, at https://www.reuters.com/world/asia-pacific/nkorea-backs-russias-proclaimed-annexations-criticises-us-double-standards-2022-10-03/ (accessed 16 January 2023).

44 See Queen Lili'uokalani, Statement to James H. Blount, 1893, at https://libweb.hawaii.edu//digicoll/ annexation/protest/pdfs/liliu1.pdf (accessed 25 January 2023).

45 See "December 18, 1893: Message Regarding Hawaiian Annexation", at https://millercenter.org/the-presidency/presidential-speeches/december-18-1893-message-regarding-hawaiian-annexation (accessed 25 January 2023).

46 See President Grover Cleveland, "State of the Union 1893", 4 December 1893, at http:// www.let.rug.nl/usa/presidents/grover-cleveland/state-of-the-union-1893.php (accessed 25 January 2023).

47 See 107 STAT. 1510 PUBLIC LAW 103-150—NOV. 23, 1993, Public Law 103-150, 103d Congress, at https:// www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg1510.pdf (accessed 25 January 2023), para. 1.

48 Ibid., para. 3.

49 49 Ibid., para. 5. For more comprehensive assessments of the US occupation of Hawai'i see Noelani Goodyear-Ka'opua, "Hawaii. An Occupied Coun-

As a *factual* situation, the occupation of Hawai'i by the US does not substantially differ from the examples provided in the previous section. Since the end of the XIX Century, however, almost no significant positions have been taken by the international community and its members against the illegality of the American annexation of the Hawaiian territory. Certainly, the level of military force used in order to overthrow the Hawaiian Kingdom was not even comparable to that employed in Kuwait, Donbass or even in Crimea. In terms of the illegality of the occupation, however, this circumstance is irrelevant, because, as seen in section 2 above, the rules of international humanitarian law regulating military occupation apply even when the latter does not meet any armed resistance by the troops or the people of the occupied territory. The only significant difference between the case of Hawai'i and the other examples described in this article rests in the circumstance that the former occurred well before the establishment of the United Nations, and the resulting acquisition of sovereignty by the US over the Hawaiian territory was already consolidated at the time of their establishment. Is this circumstance sufficient to uphold the position according to which the occupation of Hawai'i should be treated differently from the other cases? An attempt to provide an answer to this question will be carried out in the next section, through examining the possible arguments which may be used to either support or refute such a position.

4. Applicable Law. Intertemporal Law and (Lack of) Legal Coherence. Irrelevance of the Temporal Argument and Exclusive Role of the Treaty in the Transfer of Sovereignty

The main argument that could be used to deny the illegality of the US occupation of Hawai'i rests in the doctrine of *intertemporal law*. According to this doctrine, the legality of a situation "must be appraised [...] in the light of the rules of international law as they existed at that time, and not as they exist today".[50] In other words, a State can be considered responsible of a violation of international law – implying the determination of the consequent "secondary" obligation for that State to restore legality – only if its behaviour was prohibited by rules already in force at the time when it was held. In the event that one should ascertain that at the time of the occupation of Hawai'i by the US international law did not yet prohibit the annexation of a foreign territory as a consequence of the occupation itself, the logical conclusion, in principle, would be that the legality of the annexation of Hawai'i by the United States cannot reasonably be challenged. In reality even this conclusion could probably be disputed through using the argument of "continuing violations", by virtue of the violations of international law which continue to be produced today as a consequence of the American occupation and of its perpetuation.[51] In fact, it is a general principle of international law on State responsibility that "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". [52]

However, it appears that there is no need to rely on this argument, for the reason that also an intertemporal-law-based perspective confirms the illegality – under international law - of the annexation of the Hawaiian Islands by the US. In fact, as regards in particular the topic of military occupation, the affirmation of the *ex injuria jus non oritur* rule predated the Stimson doctrine, because it was already consolidated as a principle of general international law since the XVIII Century. In fact, "[i]n the course of the nineteenth century, the concept

try", (2014) *Harvard International Review* 58; Karin Louise Hermes, "Making a nation and faking a state: illegal annexation and sovereignty miseducation in Hawai'i", (2016) 46 *Pacific Geographies* 11; David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020) 97; Andrew B. Reid, "Perpetual War in Paradise: Illegal Occupation, Humanitarian Law, and Liberation of the Hawaiian Kingdom", (2021) 78 *National Lawyers Guild Review* 6.

50 See Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", (1953) 30 *British Year Book of International Law* 1, at 5. On the doctrine of intertemporal law see Taslim Olawale Elias, "The Doctrine of Intertemporal Law", (1980) 74 *American Journal of International Law* 285; Ulf Linderfalk, "The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law", (2011) LVIII *Netherlands International Law Review* 147; Li Zhenni, "International Intertemporal Law", (2018) 48 *California Western International Law Journal* 341; Steven Wheatley, "Revisiting the Doctrine of Intertemporal Law", (2021) 41 *Oxford Journal of Legal Studies* 484.

51 With regard to the issue of continuing violations in the Hawaiian territory, related in particular to human rights and the principle of self-determination of peoples, see Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020) 173, at 185-92.

52 See Article 14(2) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001, at https://legal.un.org/ilc/texts/instruments/english/draft_articles/ 9_6_2001.pdf (accessed 25 January 2023).

of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied territory, the fate of which could be determined only by a peace treaty";[53] in other words, "the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory".[54] Consistently, "[l]es États qui se font la guerre rompent entre eux les liens formés par le droit des gens en temps de paix; mais il ne dépend pas d'eux d'anéantir les faits sur lesquels repose ce droit des gens. Ils ne peuvent détruire ni la souveraineté des États, ni leur indépendance, ni la dépendance mutuelle des nations".[55] This was already confirmed by domestic and international practice contemporary to the occupation of the Hawaiian Kingdom by the United States. For instance, in 1915, in a judgment concerning the case of a person who was arrested in a part of Russian Poland occupied by Germany and deported to the German territory without the consent of Russian authorities, the Supreme Court of Germany held that an occupied enemy territory remained enemy and did not become national territory of the occupant as a result of the occupation.[56]

Also, in 1925, the Swiss arbitrator Eugène Borel, in the famous *Affaire de la Dette publique ottomane*, held that

> "[q]uels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté [...] L'occupation, par l'un des belligérants, de [...] territoire de l'autre belligérant est un pur fait. C'est un état de choses essentiellement provisoire, qui ne substitue pas légalement l'autorité du belligérant envahisseur à celle du belligérant envahi".[57]

In the context of international diplomatic practice, already in 1815

> "the Congress of Vienna endorsed the principle of legitimacy of the original (indigenous) sovereign over a territory. On the basis of this principle, the original sovereigns of most of the nations conquered by Napoleon were regarded as having retained their sovereignty, despite having been conquered by the Napoleonic armies [...] sovereignty remained with the original holder of the territory, who was regarded as the 'legitimate sovereign'. The conqueror of the territory [...] was illegitimate and therefore could not acquire *de jure* sovereignty"[58].

This principle was eventually codified in Article 42 of the 1907 Hague Regulations.[59] It follows that, already at the time of the American occupation of the Hawaiian Kingdom, military occupation was considered as "not affect[ing] sovereignty. The displaced sovereign loses possession of the occupied territory *de facto* but it retains title *de jure* [i.e. "as a matter of law"]".[60] Consistently, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[61] because "illegal occupation cannot of itself terminate statehood".[62] The fact that the occupation of the Hawaiian Kingdom has continued uninterrupted for a long time does in no way impact on this conclusion, since "[p]rolongation of the occupation does not affect its innately temporary nature".[63] As a consequence, for how precarious it may be, "the sovereignty of the displaced sovereign over the oc-

53 See Andrea Carcano, *The Transformation of Occupied Territory in International Law* (Brill, The Hague, 2015) at 18-19.

54 See Nehal Bhuta, "The Antinomies of Transformative Occupation", (2005) 16 *European Journal of International Law* 721, at 726; see also Matthew Craven, "The tyranny of strangers: transformative occupations old and new", (2021) 9 *London Review of International Law* 197, at 201-2, writing that "[b]y the early 19th century [...] the idea had started to emerge [...] that mere military occupation would not, in itself, result in a transfer of sovereignty. Rather, it constituted a provisional regime of factual occupation that left untouched the question of sovereignty and, as a consequence, brought with it certain constraints upon the authority of the occupant".

55 Théophile Funck-Brentano and Albert Sorel, *Précis du droit des gens* (Plon, Paris, 1877) at 233.

56 See *Judgment IV, 407/15*, Supreme Court of Germany in Criminal Cases, 26 July 1915, in 21 *Deutsche Juristenzeitung* 134 (1916).

57 See *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, *Reports of International Arbitral Awards*, Volume I, 529, also available at <https://legal.un.org/riaa/cases/vol_I/529-614.pdf> (accessed 30 January 2023), at 555.

58 See Carcano, cit., at 20-21 (footnotes omitted).

59 See section 2 above.

60 See Yoram Dinstein, *The International Law of Belligerent Occupation*, 2nd Ed., Cambridge, 2019, at 58.

61 See James Crawford, *The Creation of States in International Law*, 2nd Ed., Oxford, 2006, at 702.

62 See Brownlie, cit., at 78.

63 See Dinstein, cit., at 58.

cupied territory is not terminated".[64]

In light of the foregoing, it appears that the theories according to which the *effective* and *consolidated* occupation of a territory would determine the acquisition of sovereignty by the occupying power over that territory – although supported by eminent scholars[65] – must be confuted. Consequently, under international law, "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur",[66] which means that "[t]he only form in which a cession [of a territory] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war".[67] This conclusion had been confirmed, among others, by the US Supreme Court Justice John Marshall in 1928, holding that the fate of a territory subjected to military occupation had to be "determined at the treaty of peace".[68]

The validity of the conclusion just reached is also confirmed under the perspective of the right of peoples to self-determination. As is well known, it is a prerogative which – in its *external* dimension – entitles a people under colonization or foreign occupation to exercise a right to independence, or secession, from the State by which it is *de facto* occupied or subjugated. In principle, it appears evident that the Hawaiian people – it being a people subjected to foreign occupation – is entitled to benefit from such a right. However, also in this case an issue of *intertemporality* arises. In fact, according to a reputable scholarly position, the right of peoples to self-determination could not be applied retroactively, i.e. to situations of foreign domination produced before the consolidation of the right in point as a rule of positive international law. In practical terms this would mean that the right of peoples to self-determination would be applicable only to instances of foreign dominations established before World War II,[69] with the consequence that for all such instances the acquisition of sovereignty by the occupying power should be considered as crystallized and legally incontrovertible. With all due respect, this position is not agreeable, for the reason that, while it is indubitable that the right of peoples to self-determination developed as a rule of general international law after World War II,[70] in the context of relevant practice it has been mainly applied (retroactively) to support the acquisition of political independence by peoples subjected to colonization, hence to situations of foreign domination produced *long before* World War II. In this respect, since the right of peoples to self-determination equally applies to situations of colonization and of subjugation determined by military occupation, there is clearly no reason why the situation of the Hawaiian people should be considered as differing from that of colonized peoples. It is also noteworthy that the ICJ has recently held that the right to self-determination of peoples, where it has not been properly exercised and the current political situation of a territory does not reflect "the free and genuine expression of the will of the people concerned",[71] cannot be considered as having been extinguished with the passing of time. In fact, the circumstance of preventing a people from exercising its right to self-determination over time "is an unlawful act of a continuing character"[72] resulting from the fact of maintaining the situation of foreign domination.

5. Conclusion. Applying International Law on the Use of Force à la carte?

In 1795 – in his masterpiece *Perpetual Peace* – Immanuel Kant wrote that "[t]he intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world

64 Ibid. (footnotes omitted). See also, consistently, Peter M.R. Stirk, *The Politics of Military Occupation*, Edinburgh, 2009, at 168 and 230.

65 See, e.g., Benendetto Conforti, *Diritto internazionale* (Editoriale Scientifica, Napoli, 2018), at 209.

66 See *Affaire de la Dette publique ottomane*, cit., at 555.

67 See Lassa FL Oppenheim, *Oppenheim's International Law*, 7th Ed., vol. 1, 1948, at 500. See also Emmerich de Vattel, *The Law of Nations* (English edn., 1849), Bk. III, chap. XIII, para. 197; Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* – Part IXA, The Laws of War (1978) 151; Jonathan Gumz, "International law and the transformation of war, 1899-1949: the case of military occupation", (2018) 90 *Journal of Modern History* 621, at 627.

68 See *American Insurance Company v. Peters*, US Supreme Court, 1828, 1 *Peters* 542.

69 See Conforti, cit., at 27.

70 See Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", cit., at 209-10.

71 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (25 February 2019), at https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf (accessed 30 January 2023), para. 172.

72 Ibid., para. 177.

is felt all over it. Hence the idea of a cosmopolitan right is no fantastical, high-flown notion of right, but a complement of the unwritten code of law— constitutional as well as international law—necessary for the public rights of mankind in general and thus for the realisation of perpetual peace".[73] Unfortunately, still today, abundantly inside the XXI Century, while the "cosmopolitan right" Kant referred to has actually developed, the goal of perpetual peace appears a chimera, especially due to the distorted use of the main pertinent rules at the service of States' imperialistic interests. Even with regard to the supreme imperative of preventing and suppressing acts of aggression or other breaches of the peace, it clearly appears that States behave like they were seated at a restaurant, deciding à la carte which violations are justified on the basis of a valid excuse (their own) and which must be absolutely suppressed in the interest of the whole international community (those committed by others), (only) the latter being considered as representing an intolerable offence for humanity. Unfortunately, in fact, the same States which raise their voices highest when a breach occurs, have more than one spot on their sheets. While the human gender has immensely evolved in terms of technology and scientific knowledge, international law – i.e., the law regulating the relations among the main actors of the international community – remains still today at a primitive stage, being too much exposed to power games. This results in huge injustices and legal vacuousness, which frustrate the path of humanity towards the most important aspect of evolution to which it should aspire, i.e., justice, peace, mutual confidence and friendship among the peoples living in the world.

73 See *Perpetual Peace. A Philosophical Essay* (London 1795), eBook version available at https:// www.gutenberg.org/files/50922/50922-h/50922-h.htm (accessed 26 March 2023).

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77ème anniversaire de la Charte des Nations Unies
77 Years of the United Nations Charter

Graphics by Marylia Cabane, Chitro Shihabuddin, the Movement for Palestine

Daniel Lagot Daniel Lagot après ses études à l'Ecole Polytech-nique, a fait une carrière scientifique au cours de laquelle il a présidé plusieurs grandes conférences scientifiques internationales. Depuis les années 2000, il s'est orienté vers les questions de la guerre et la paix et a publié ou dirigé la publication d'une dou-zaine de livres dans ce domaine.	**Non-agression et intangibilité des fron-tières : quel rôle pour l'ONU ? Les cas du Kosovo, de la guerre en Ukraine et de Taiwan** Après une discussion sur les trois principes énumérés par l'auteur (Non agression et intangibilité des frontières, le droit à l'autodétermination et la responsablité de protéger) et sur ce que pourrait ou devrait être le rôle de l'ONU, sont évoquées la manière dont les guerres se terminent et les solutions éventuelles pour le Kosovo, Taïwan et pour la paix en Ukraine, le jour où les parties seraient prêtes à négocier, dont la solution proposée par le présent auteur.
Dr. David Keanu Sai Dr. David Keanu Sai is a Lecturer in Political Science and Hawaiian Studies at the University of Hawai'i Windward Community College and at the University of Hawai'i at Mānoa College of Education grad-uate division. Dr. Sai received his Ph.D. in Political Sci-ence from the University of Hawai'i at Mānoa spe-cializing in International Relations and Law. His re-search and publications have centered on the con-tin-ued existence of the Hawaiian Kingdom as an inde-pendent State. Dr. Sai also served as Lead Agent for the Council of Regency repre-senting the Hawaiian Kingdom at the Permanent Court of Arbitration in Larsen v. Hawaiian Kingdom from 1999-2001.	**The Responsibility of the Hawaiian Kingdom to Protect its Popula-tion from War Crimes and Crimes Against Humanity** This article address the first pillar of the principle of Responsibility to Pro-tect: "every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing"and the legal stugule for its application in the the Hawaiian Kingdom.
Jean-Pierre PAGE Ancien responsable du Département international de la CGT. Derniers ouvrages parus : - "La Chine sans oeillères", 2021, Editions Delga . Ouvrage collectif, co-dirigé avec Maxime Vivas. - "Les divagations des antichinois en France, 2022, Editions Delga. Avec Aymeric Monville et Maxime Vivas. - "La Russie sans oeillères", 2022, Editions Delga. Ouvrage collectif, co-dirigé avec Aymeric Monville et Maxime Vivas.	**Les pays occidentaux aggravent leur déclin en suivant aveuglément Washington - La Charte des Na-tions Unies comme but et moyen de la coopération internationale** C'est une contribution de l'auteur lors d'un un forum international qui a réuni des délégations venant de 100 pays à Pékin Les 14 et 15 juin 2023 sur le thème "International cooperation and global human rights governance"

All States have a Responsibility to Protect their Population from War Crimes — Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands

David Keanu Sai

At the United Nations World Summit in 2005, the *Responsibility to Protect* was unanimously adopted.[1] The principle of the *Responsibility to Protect* has three pillars: (1) every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; (2) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; and (3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. In 2009, the General Assembly reaffirmed the three pillars of a State's responsibility to protect their populations from war crimes and crimes against humanity.[2] And in 2021, the General Assembly passed a resolution on "The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity."[3] The third pillar, which may call into action State intervention, can become controversial.[4]

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."[5] This "rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general."[6]

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by proclamation on 17 April 2019,[7] established a Royal Commission of Inquiry ("RCI") in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War "to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course." The author serves as Head of the RCI and Professor Federico Lenzerini from the University of Siena, Italy, as its Deputy Head. This article will address the first pillar of the principle of *Responsibility to Protect*.

On 22 March 2022, the International Association of Democratic Lawyers and the American Association of Jurists notified the United Nations Human Rights Council at its 49th session that war crimes and human rights violations are taking place in the Hawaiian Islands through the unlawful imposition of American laws over Hawaiian territory since 1898.[8] This imposition of American laws

1 2005 World Summit Outcome A/60/L.1

2 G.A. Resolution 63/308 The responsibility to protect, A/63/308.

3 G.A. Resolution 75/277 The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277.

4 Marjorie Cohn, "The Responsibility to Protect – the Cases of Libya and Ivory Coast," *Truthout* (16 May 2011) (online at https://truthout.org/articles/the-responsibility-to-protect-the-cases-of-libya-and-ivory-coast/).

5 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

6 *Id.*, 608.

7 Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

8 IADL, Video: Dr. Keanu Sai's oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom (online at https://

constitutes the war crime of *usurpation of sovereignty during military occupation* under particular customary international law, which has denied Hawaiian subjects their right to self-determination for over a century. The thought that Hawai'i, which is called the Hawaiian Kingdom, has been under a prolonged occupation by the United States for over a century would come as a shock to many who don't know Hawaiian history.

On 28 November 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.[9] The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.[10] By 1893, the Hawaiian Kingdom maintained over 90 Legations and Consulates throughout the world.

Driven by the desire to attain naval superiority in the Pacific, U.S. troops, without cause, invaded the Hawaiian Kingdom on 16 January 1893 and unlawfully overthrew its Hawaiian government and replaced it with their puppet the following day with the prospect of militarizing the islands. The State of Hawai'i today is the successor to this puppet government. However, despite the unlawful overthrow of its government, the Hawaiian Kingdom as a State would continue to exist as a subject of international law and come under the regime of international humanitarian law and the law of occupation. The military occupation is now at 130 years.

According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[11] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[12] And the "duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be 'derecognized.'"[13]

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[14] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[15] Addressing the presumption of the German State's continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[16]

"If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[17] Evidence of

iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/).

9 David Keanu Sai, "Hawaiian Constitutional Governance," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

10 "Treaties with Foreign States," in David Keanu Sai, ed., The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom 237-310 (2020).

11 Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).

12 Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).

13 Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.

14 James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

15 *Id.*

16 Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

17 Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

"a valid demonstration of legal title, or sovereignty, on the part of the United States" would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[18] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[19]

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[20] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[21] Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[22] International law does not permit annexation of territory of another state.[23]

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[24] The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[25] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[26] and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[27] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[28] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[29]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be gov-

18 9 Stat. 922 (1848).
19 30 Stat. 1754 (1898).
20 30 Stat. 750 (1898).
21 *Black's Law Dictionary* 88 (6th ed. 1990).
22 There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.
23 Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
24 Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
25 *Id.*, 242.
26 *Id.*, 242.
27 *Id.*
28 *Id.*, 262.
29 *The Apollon*, 22 U.S. 362, 370 (1824).

erned, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[30] Professor Willoughby also stated that the "incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is […] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[31]

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands and within three generations the national consciousness of the Hawaiian Kingdom was obliterated.[32] Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals and nationals of countries of the world, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in 1997.[33] Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917.

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[34] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes that brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[35]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[36] As Professor Talmon states, the "government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[37]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity" in its case repository.[38] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

30 Kmiec, 252.
31 Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
32 David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 114 (2020).
33 David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).
34 *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
35 Lenzerini, 322.
36 *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
37 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).
38 Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).[39]

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on 9 June 2000.[40]

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,[41] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[42] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, "Where a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[43]

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative policies of the Occupying State over the territory of the Occupied State. Usurpation "is the "unlawful encroachment or assumption of the use of property, power or authority which belongs to another."[44]

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Article 43 is the codification of customary international law that existed on 17 January 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate

39 *Id.*
40 Sai, *The Royal Commission of Inquiry*, 25-26.
41 U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
42 M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
43 *Restatement (Third)*, §203, comment c.
44 Black's Law 1545.

at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[45]

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this "rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[46] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, "there do not appear to have been any prosecutions for that crime by international criminal tribunals."[47] However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the International Law Commission, "A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[48] In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting Heads of State for the listed war crimes by conduct or omission.

The RCI views *usurpation of sovereignty during military occupation* as a war crime under particular customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the Hawaiian situation, *usurpation of sovereignty during military occupation* serves as a source for the commission of secondary war crimes within the territory of an occupied State, *i.e. compulsory enlistment*, *denationalization*, *pillage*, *destruction of property*, *deprivation of fair and regular trial*, *deporting civilians of the occupied territory*, and *transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions or measures of the occupying State is addressed by Professor Eyal Benvenisti:

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.

In the situation of Hawai'i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the

45 *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).
46 *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
47 William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 156 (2020).
48 Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State's proxies such as the State of Hawai'i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty during military occupation* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai'i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists' accommodations collected by the State of Hawai'i and the Counties.

The Counties have recently added 3% surcharges to the State of Hawai'i's 10.25% transient accommodations tax. Added with the State of Hawai'i's general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American duties on goods that are imported to the United States destined to Hawai'i. These duty rates are collected by the United States according to the United States Tariff Act of 1930**,** as amended, and the Trade Agreements Act of 1979.

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.[49] Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*,[50] Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai'i at Mānoa when the author of this article entered the political science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,[51] to *Nation Within—The History of the American Occupation of Hawai'i*.[52] Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai'i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai'i, the might of the United States does not make it right.[53]

49 Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).
50 David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).
51 Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).
52 Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.
53 *Id.*, xvi.

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and members of the judiciary of the State of Hawai'i dated 25 February 2018.[54] Dr. deZayas stated:

I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[55] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."[56]

In a letter to Governor David Ige, Governor of the State of Hawai'i, dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai'i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization (NGO) of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[57] In its resolution, the IADL also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of

54 Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

55 Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf).

56 National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/).

57 International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/).

the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[58] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

On 22 March 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council ("HRC") at its 49th session in Geneva. The oral statement read:

The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for."[59] Silence conveys consent. Since they "did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[60]

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai'i, which includes President Joseph Biden Jr., Governor David Ige, Hawai'i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua'i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and all of the named perpetrators have met the requisite element of *mens rea*.[61] In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. "It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result."[62]

Professor Schabas states three elements of the war crime of *usurpation of sovereignty during military occupation* are:

1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for mili-

58 International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

59 Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).

60 See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

61 Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.

62 Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535 (2013).

tary purposes of the occupation.
2. The perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

With respect to the last two elements of war crimes, Professor Schabas explains:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non- international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non- international;
3. There is only a requirement for the awareness of the factual circumstance that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."[63]

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators' own pleadings and the rulings by the court in a U.S. federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT. The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves "State action or policy or the action or policies of an occupying State's proxies" and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.[64]

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. Except for the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the United States, the State of Hawai'i and the Counties begin to comply with Article 43 of the 1907 Hague Regulations and administer the laws of the Occupied State—the Hawaiian Kingdom. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation being the longest occupation in the history of international relations.

63 Schabas, 167.

64 United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).