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July 13, 2024

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: kenneth.s.hara.mil@army.mil

Via electronic mail

Re: Consequences for not delegating complete authority and title to Brigadier General
Stephen Logan to establish a military government

Major General Hara:

The suspense date of 1200 hours on July 31, 2024, for your delegation or not of complete authority and title to Brigadier General Stephen Logan (“BG Logan”), is fast approaching. The purpose of this letter is to expand on the consequences should you not delegate authority and title for BG Logan to establish a military government. Your failure to do so will have dire consequences down the chain of command for the Army National Guard, and, potentially, for the Air National Guard.

The Council of Regency employs *lawfare* to achieve compliance with international law obligations. According to U.S. Air Force Major General Charles Dunlap, Jr., *lawfare* is the strategy of using “law as a substitute for traditional military means to achieve an operational objective.”¹ The Council of Regency’s operational objective is to compel compliance with international laws. Pursuant to prior written and verbal communication providing undisputed historical, factual and legal evidence of the continued existence of

¹ Major General Charles J. Dunlap, Jr., USAF, “Lawfare Today: A Perspective,” 3 *Yale Journal of International Affairs* 146 (2008).

the Hawaiian Kingdom, fully substantiated at the conclusion of due diligence by your own Staff Judge Advocate, the use of *lawfare* in this instance by the Council of Regency is wholly justified.

The duration of the American occupation, which is now at 131 years, is not only unlawful but morally unacceptable. President Cleveland, in his message to the Congress, relied on *jus ad bellum* (law concerning the resort to military force) when he concluded that the invasion of Honolulu by U.S. Marines on January 16, 1893, and the overthrow of the government of the Hawaiian Kingdom on January 17, 1893, were unjustified “acts of war.”² President Cleveland stated:

It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory. By 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.³

The 2015 *Law of War Manual* identifies certain *jus ad bellum* criteria to be “a competent authority to order the war for a public purpose,”⁴ and “a just cause (such as self-defense).”⁵ These criteria were relied on by President Cleveland in his message to the Congress in 1893, which has remained unchanged under current U.S. military doctrine. Despite the unlawfulness of the *acts of war* that have led to this prolonged occupation, *jus in bello* (laws of war) continues to be obligatory under the law of armed conflict, which is the military term for international humanitarian law.

According to Lauterpacht, an illegal war is “a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy.”⁶ However, despite the President’s admittance that the acts of war were not in compliance with *jus ad bellum*, the United States was still obligated

² United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* 451, 456 (1895) (online at [https://hawaiiankingdom.org/pdf/Cleveland's_Message_\(12.18.1893\).pdf](https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf)).

³ *Id.*, 456.

⁴ *Law of War Manual*, §1.11.1, *Jus ad Bellum* Criteria.

⁵ *Id.*

⁶ H. Lauterpacht, “The Limits of the Operation of the Law of War,” 30 *British Year Book of International Law* 206 (1953).

to comply with *jus in bello* when it occupied Hawaiian territory. In particular, the international rule for the occupant to transform the civilian government into a military government to administer the laws of the occupied State until the conclusion of a peace treaty. In the *Hostages Trial* (the case of *Wilhelm List and Others*), the Tribunal stated, “whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, [and what] may be done.”⁷ What ‘must not be done’ is the unlawful imposition of American municipal laws and administrative measures within the territory of the Hawaiian Kingdom. In other words, the law of occupation still applies despite the illegality of the American occupation of the Hawaiian Kingdom.

President Cleveland’s conclusion that 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’ remains true then as it does today. This falls under your duties to perform as the theater commander in the occupied State of the Hawaiian Kingdom. The failure for the U.S. Marines to establish a military government on January 17, 1893, and the failure since by all preceding Adjutant Generals, beginning with Colonel John H. Soper, does not relieve you of your duty to do so today. This duty, under U.S. Department of Defense Directive 5100.01 and Army regulation paragraph 3, FM 27-5, to establish a military government, is directly linked to President Cleveland’s conclusion that ‘the rights of the injured people requires we should endeavor to repair.’ The establishment of a military government will serve both to end the prolonged violations and victimizations and begin to repair the rights of the injured Hawaiian people under the law of occupation.

In its *Law of War Manual*, the U.S. Department of Defense concluded that “[c]ommanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war [*jus in bello*].”⁸ It should also be noted that a commander can be held accountable for the conduct of forces under his command, either by taking an active role in the commission of a war crime(s), or by omission in failing to prevent the commission of a war crime(s).⁹ The forces under your command are the Hawai‘i Army and Air National Guard, which include police officers.

On May 29, 2024, police officers, both active and retired from across the islands, called upon you to perform your duty.¹⁰ This letter from law enforcement officers is at odds with the instructions given to you by Attorney General Lopez to ignore the calls for you to transform the State of Hawai‘i into a military government. Their letter to you stated:

⁷ *United States v. William List et al.* (Case No. 7, Trials of War Criminals before the Nuremburg Military Tribunals, Vol. XI, 1247 (1950).

⁸ Department of Defense, *Department of Defense Law of War Manual* §18.23, at 1122-24 (2015).

⁹ *Id.*

¹⁰ Online at https://hawaiiankingdom.org/pdf/HI_Law_Enforcement_Ltr.pdf.

We hope this letter finds you in good health and high spirits. We are writing to you on behalf of a deeply concerned group of Active and Retired law enforcement officers throughout the Hawaiian Islands, about the current governance of Hawaii and its impact on the vested rights of Hawaiian subjects under Hawaiian Law.

As you are well aware, the historical transition of Hawai'i from a sovereign kingdom to a U.S. state is fraught with significant legal and ethical issues. The overthrow of the government of the Hawaiian Kingdom in 1893 and its subsequent annexation by the United States in 1898 continue to be an illegal act. The Hawaiian Kingdom was recognized as a Sovereign State by the Permanent Court of Arbitration in The Hague, Netherlands, in *Larsen vs. Hawaiian Kingdom* (<https://pca-cpa.org/en/cases/35/>).

At the center of the dispute, as stated on the PCA's website on the Larsen case, was the unlawful imposition of American laws over Lance Larsen, a Hawaiian subject, that led to an unfair trial and incarceration. It was a police officer, who believed that Hawai'i was a part of the United States and that he was carrying out his lawful duties, that cited Mr. Larsen, which led to his incarceration. That police officer now knows otherwise and so do we. This is not the United States but rather the Hawaiian Kingdom as an occupied State under international law.

It is deeply troubling that the State of Hawaii has not been transitioned into a military government as mandated by international law. This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws. This very issue was brought to the attention of the Maui County Corporation Counsel by Maui Police Chief John Pelletier in 2022. In their request to Chief Pelletier, which is attached, Detective Kamuela Mawae and Patrol Officer Scott McCalister, stated:

We are humbly requesting that either Chief John Pelletier or Deputy Chief Charles Hank III formally request legal services from Corporation Counsel to conduct a legal analysis of Hawai'i's current political status considering International Law and to assure us, and the rest of the Police Officers throughout the State of Hawai'i, that we are not violating International Law by enforcing U.S. domestic laws within what the federal lawsuit calls the Hawaiian Kingdom that continues to exist as a nation state under international law despite its government being overthrown by the United States on 01/17/1893.

Police Chief Pelletier did make a formal request to Corporation Counsel, but they did not act upon the request, which did not settle the issue and the possible liability that Police Officers face.

Your failure to initiate such a transition may be construed as a violation of the 1907 Hague Regulations and the 1949 Geneva Convention, which outlines the obligations of occupying powers. Also, your actions, or lack thereof, deprive Hawaiian subjects of the protections and rights they are entitled to under Hawaiian Kingdom laws and international humanitarian law. According to the Geneva Convention, occupying powers are obligated to respect the laws in force in the occupied territory and protect the rights of its inhabitants. Failure to comply with these obligations constitutes a serious violation and can result in accountability for war crimes for individuals in positions of authority.

The absence of a military government perpetuates an unlawful governance structure that has deprived the rights of Hawaiian subjects which is now at 131 years. The unique status of these rights is explained at this blog article on the Council of Regency's weblog titled "It's About Law—Native Hawaiian Rights are at a Critical Point for the State of Hawai'i to Comply with the Law of Occupation" (<https://hawaiiankingdom.org/blog/native-hawaiians-are-at-a-critical-point-for-the-state-of-hawaii-to-comply-with-the-law-of-occupation/>). It is imperative that steps be taken to rectify these historical injustices and ensure the protection of the vested rights of Hawaiian subjects.

We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstances, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an **acting capacity** that is allowed under Hawaiian law.

We urge you to work with the Council of Regency in making sure this transition is not only lawful but is done for the benefit of all Hawaiian subjects. Please consider the gravity of this situation and take immediate action to establish a military government in Hawaii. Such a measure would align with international law and demonstrate a commitment to justice, fairness, and the recognition of the rights of Native Hawaiians.

The U.S. military's failure to establish a military government in 1893 has a direct nexus to the war crime of imposing American municipal laws and administrative measure here—*usurpation of sovereignty during occupation*, which the police officers brought to your attention. BG Logan is a former officer of the Honolulu Police Department, and his brother, Arthur Joseph Logan, was the former Adjutant General and is currently Chief of the Honolulu Police Department.

The establishment of the military government will, consequently, put a stop to this war crime and to the secondary war crimes it had set in motion. By your omission, in failing to prevent the commission of war crimes, you are accountable, as a commander, under the war crime by omission, which comprise two offenses under the Uniform Code of Military Justice: Article 92(1) for failure to obey [...] regulation, and Article 92(3) for dereliction in the performances of duties. This conduct will result in the publication of War Criminal Report no. 24-0001 after 1200 hours on July 31, 2024, on the Royal Commission of Inquiry's ("RCI") website (<https://hawaiiankingdom.org/royal-commission.shtml>). As a matter of international law, the Council of Regency has a duty to protect the population from war crimes, which prompted the formation of the RCI on June 17, 2019. On this subject, I am attaching two recent law articles written by myself, as the Head of the RCI, and by Professor Federico Lenzerini, as the Deputy Head of the RCI, that was published by the *International Review of Contemporary Law* last month.

After the publication of the war criminal report, your Deputy Adjutant General, BG Logan, will assume the chain of command as the theater commander, because, as a war criminal, you would be unfit to continue to serve. BG Logan will then request Attorney General Lopez to provide him rebuttable evidence as to the Hawaiian Kingdom's continued existence as a State since the nineteenth century. In particular, she would need to refute the legal opinions, as to the continuity of the Hawaiian Kingdom under international law, I mentioned in my letter to you dated July 1, 2024, to wit:

Professor Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 125-149 (2020).¹¹

Professor William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151-169 (2020).¹²

Professor 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.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 173-216 (2020).¹³

¹¹ Online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

¹² *Id.*

¹³ *Id.*

Professor 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).¹⁴

Professor Federico Lenzerini, *Legal Opinion of Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (December 5, 2021).¹⁵

In the absence of evidence by the Attorney General refuting these legal opinions, BG Logan will have seven days, from the date of the publication of the war criminal report, to perform his duty of establishing a military government.

Should BG Logan fail to perform his duty, he will also be the subject of a war criminal report for the war crime by omission to be published on the RCI’s website. This will result for the Commander of the 25th Infantry Brigade Combat Team, Colonel David R. Hatcher II, to assume the chain of command and request that the Attorney General provide him evidence refuting the mentioned legal opinions. In the absence of such evidence, Colonel Hatcher will have seven days, from the date of the publication of BG Logan’s war criminal report, to perform his duty of establishing a military government. This process will continue down the chain of command until there is a soldier that understands what it is to be duty bound in order to perform his/her duty of establishing a military government.

To prevent this sequence of events, you are duty bound to determine whether Attorney General Lopez’s instruction to you is a lawful order under military law. As I stated in my letter to you dated July 3, 2024, to determine that it is a lawful order, you should request she provide you evidence that the Hawaiian Kingdom no longer exists as an occupied State under international law. Just as you tasked your Staff Judge Advocate, LTC Phelps, you should demand that Attorney General Lopez provide you with evidence that rebut the presumption of State continuity of the Hawaiian Kingdom under international law. In the absence of such evidence, you must perform your duty to establish a military government.

You should be aware that Attorney General Lopez does not possess the qualifications of an expert in international law matters as does Professor Matthew Craven from the University of London SOAS, Law Department; Professor William Schabas from Middlesex London University, Law Department; and Professor Federico Lenzerini from the University of Siena Department of Political and International Science, who authored legal opinions for the Council of Regency and the Royal Commission of Inquiry. Professor Lenzerini previously served as a professor of international law at the University of Siena

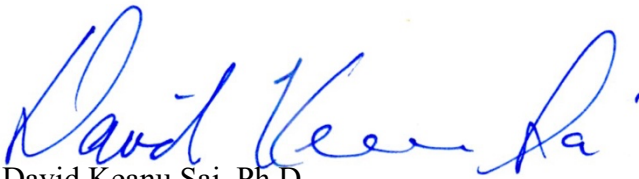
¹⁴ Online at [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).

¹⁵ Online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf.

Law Department. All three are professors of international law. Should you rely on her unqualified opinion, you, and you alone, have created a crisis for the chain of command of the Army National Guard, and, possibly, the Air National Guard.

You should also be aware that the Attorney General is a subject of the RCI's War Criminal Report no. 23-0001 for the war crime of *usurpation of sovereignty during military occupation* that was published on March 29, 2023.¹⁶ You are receiving instructions from a war criminal that is subject to prosecution by a competent court with subject matter jurisdiction. There are no statutory limitations for war crimes.

Your decision to delegate or to not delegate has profound ramifications for the Hawai'i National Guard that you lead as their Adjutant General. Commanders must make command decisions to protect the men and women under their command. As I stated, if Attorney General Lopez can provide you clear evidence that the Hawaiian Kingdom ceases to exist, then you have no military duty to perform. But if she is unable to provide you with evidence, except for an unqualified instruction, you, and you alone, will be derelict in your military duty and will be held accountable as a war criminal in the annals of Hawaiian history. These letters to you will serve as evidence of the war crime by omission. This is lawfare.



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

cc: Brigadier General Stephen F. Logan, Deputy Adjutant General
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¹⁶ Online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf.

International
Review of
Contemporary Law

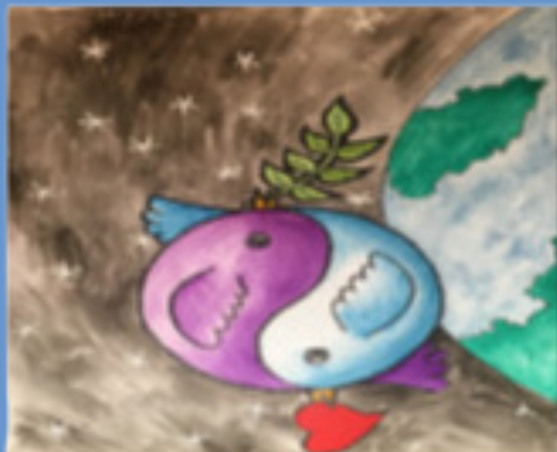


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77ème anniversaire de la Charte des Nations Unies 77 Years of the United Nations Charter

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





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| <p>Daniel Lagot</p> <p>Daniel Lagot après ses études à l'Ecole Polytechnique, 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 douzaine de livres dans ce domaine.</p> | <p>Non-agression et intangibilité des frontières : quel rôle pour l'ONU ? Les cas du Kosovo, de la guerre en Ukraine et de Taiwan</p> <p>Après une discussion sur les trois principes énumérés par l'auteur (Non agression et intangibilité des frontières, le droit à l'autodétermination et la responsabilité 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.</p> |
| <p>Dr. David Keanu Sai</p> <p>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 graduate division. Dr. Sai received his Ph.D. in Political Science from the University of Hawai'i at Mānoa specializing in International Relations and Law. His research and publications have centered on the continued existence of the Hawaiian Kingdom as an independent State. Dr. Sai also served as Lead Agent for the Council of Regency representing the Hawaiian Kingdom at the Permanent Court of Arbitration in <i>Larsen v. Hawaiian Kingdom</i> from 1999-2001.</p> | <p>The Responsibility of the Hawaiian Kingdom to Protect its Population from War Crimes and Crimes Against Humanity</p> <p>This article address the first pillar of the principle of Responsibility to Protect: "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 struggle for its application in the the Hawaiian Kingdom.</p> |
| <p>Jean-Pierre PAGE</p> <p>Ancien responsable du Département international de la CGT.</p> <p>Derniers ouvrages parus :</p> <ul style="list-style-type: none"> - "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. | <p>Les pays occidentaux aggravent leur déclin en suivant aveuglément Washington - La Charte des Nations Unies comme but et moyen de la coopération internationale</p> <p>C'est une contribution de l'auteur lors d'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"</p> |



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](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 Bolshevik 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 occupa-*

tion 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 *Ham. 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).

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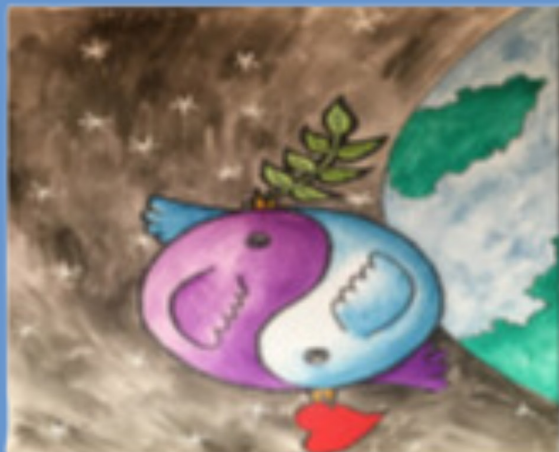


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77ème anniversaire de la Charte des Nations Unies 77 Years of the United Nations Charter

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





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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 Charter¹¹ 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

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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 Territory”, (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 *Gabčíkovo-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 Represen-

tative 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 de-

clared 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 Krefß, "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 re-

pair”.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 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 illegal-

ity 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 Lindersfalk, “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 scholars⁶⁵ – 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 *inter-temporality* 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 instanc-

es 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., Beneditto Conforti, *Diritto internazionale* (Editoriale Scientifica, Napoli, 2018), at 209.

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

67 See Lassa F.L. 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](https://www.gutenberg.org/files/50922/50922-h/50922-h.htm) (accessed 26 March 2023).