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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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Juan Fernando Romero Tobon Candidat au doctorat (2019). Maîtrise en droit de l'Université nationale de Colombie (2013). Spécialiste en droit économique de l'Université catholique de Louvain en Belgique (1995). Juriste de l'Universidad de los Andes (1991) et anthropologue de l'Universidad Nacional de Colombia (1994). Auteur des livres Por los caminos de la excepcionalidad, La deriva de lo social y su respuesta autoritaria en Latinoamérica y Colombia (Grupo editorial Ibáñez 2020), El Derecho fundamental a la salud. Loi 1751 de 2015. (Grupo editorial Ibáñez 2019), Las acciones públicas de inconstitucionalidad en Colombia (1992-2013), 8030 días a bordo del Nautilus (Grupo editorial Ibáñez 2016) et Huelga y servicio público en Colombia. Historia de una Prohibición (Rodríguez Quito Editores, 1992) et les recueils de poésie En la caza (casa) de un eterno desconocido (2001), La mirada del cangrejo (2005) et los ojos de los árboles (2010-2021, ediciones lobo estepario) ainsi que la nouvelle El retorno del navegante Colón (ediciones lobo estepario, 2018). Il a publié les articles de recherche suivants Reflexiones e inflexiones en torno a la pandemia por la Covid 19 (2020), El péndulo del constitucionalismo social (2019), La construcción del enemigo interior, La regulación de los estados de excepción en el siglo XIX (2018), Del estado de sitio a la anormalidad permanente : los nuevos caminos de la excepcionalidad (2016), La puerta alterna de las acciones de inconstitucionalidad (2015), Las consti-tuciones de Bolivia y Colombia y las acciones de defensa (2015) et Constitucionalismo social en América Latina (2013) et dans les revues Pensamiento Jurídico, Trabajo y Derecho, Planeación y Desarrollo, Sindéresis, entre autres. Membre du groupe de recherche CC - Comparative Constitutionalism et responsable de la ligne de recherche numéro 6 Constitutional Justice.	**Homage à Nydia Tobon**
Géraud de Geouffre de la Pradelle	

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

Federico Lenzerini

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

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

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

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

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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 Terrority", (2005) 23 *Berkeley Journal of International Law* 551, at 560; Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations", (2006) 51(3) *New York Law School Law Review* 497, *passim*; Nicholas F. Lancaster, "Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still Be Considered Customary International Law", (2006) 189 *Military Law Review* 51, at 63.

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

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

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

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

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

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

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

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

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

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

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

18 See para. 1

19 See para. 2.

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

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

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

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

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

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

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

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

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

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

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

34 Ibid., para. 3.

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

36 See the fourth recital of the preamble.

37 Ibid., para. 3.

38 Ibid., para. 5.

39 See the third recital of the preamble.

40 See para. 5.

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

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

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

The Case of the Hawaiian Kingdom

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

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

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

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

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

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

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

48 Ibid., para. 3.

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

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

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

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

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

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

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

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

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

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

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

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

In the context of international diplomatic practice, already in 1815

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

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

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

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

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

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

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

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

59 See section 2 above.

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

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

62 See Brownlie, cit., at 78.

63 See Dinstein, cit., at 58.

cupied territory is not terminated".[64]

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

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

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

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

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

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

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

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

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

69 See Conforti, cit., at 27.

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

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

72 Ibid., para. 177.

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

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