

THE CONTINUITY OF THE HAWAIIAN STATE AND THE LEGITIMACY OF THE  
*ACTING* GOVERNMENT OF THE HAWAIIAN KINGDOM

August 4, 2013  
(Revised)

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1. THE BRIEF

1.1. It has been 120 years since the United States of America, hereafter referred to as “United States,” illegally overthrew the government of the Hawaiian Kingdom on January 17, 1893, and claimed to have annexed the Hawaiian Islands in 1898. Much has occurred since, but an exhaustive legal analysis has been lacking, to say the least, that could serve to clarify and qualify matters that have significant and profound legal consequences within the Hawaiian Islands and abroad. At present, there are three levels of government here in the Islands: first, the Federal government of the United States; second, the State of Hawai‘i government; and, third, the County governments on the Islands of Hawai‘i, Maui, O‘ahu, and Kaua‘i. The claim of sovereignty by the United States over the Hawaiian Islands underpins the authority of these governments. If this claim were answered in the negative, it would consequently render these governments in the Hawaiian Islands “self-declared” and their authority “unfounded.” Furthermore, where then would the sovereignty lie, and is there a government that can be regarded legitimate? The answer to this question does not lie within the purview of politics, but rather on the objective principles and rules of international law together with actions taken by the *acting* government of the Hawaiian Kingdom that gradually developed, through time, into a customary right of legitimacy.

1.2. In order to address these matters, this Brief will answer two underlying issues:

A. Whether the Hawaiian Kingdom continues to exist an independent State and a subject of International Law, which also addresses the United States’ claim of sovereignty over the Hawaiian Islands?

B. Whether the present *acting* government may be regarded as the legitimate government of the Hawaiian Kingdom with a customary right to represent the Hawaiian State?

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- 1.3. Since the *acting* government's claim to be the legitimate governmental authority in the Hawaiian Islands, it follows that the continuity of the Hawaiian Kingdom as an independent State and subject of international law is *condicio sine qua non*. Furthermore, while continuity underpins the *acting* government's claim to act as the legitimate authority, it does not automatically confer international recognition under international law. It is therefore necessary to examine first the question of Hawaiian State continuity, which will include the United States of America's claim as a successor State, then followed by an examination of governmental authority displayed by the *acting* government as the legitimate authority.

#### A. THE CONTINUITY OF THE HAWAIIAN KINGDOM

##### 2. *GENERAL CONSIDERATIONS*

- 2.1. The issue of State continuity usually arises in cases in which some element of the State has undergone some significant transformation, such as changes in its territory or in its form of government. A claim as to State continuity is essentially a claim as to the continued independent existence of a State for purposes of international law in spite of such changes. It is predicated, in that regard, upon an insistence that the State's legal identity has remained intact. If the State concerned retains its identity it can be considered to "continue" and *vice versa*. Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered in such a way that it has ceased to exist as an independent State and, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another "successor" State to the extent provided by the rules of succession. At its heart, therefore, the issue of State continuity is concerned with the parameters of a State's existence and demise, or extinction, in international law.
- 2.2. The claim of State continuity on the part of the Hawaiian Kingdom has to be opposed as against a claim by the United States as to its succession. It is apparent, however, that this opposition is not a strict one. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one State to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a great deal in terms of their effect.
- 2.3. Even if it is relatively clear as to when States may be said to come into being for purposes of international law, the converse is far from being the case. Beyond the theoretical circumstance in which a body politic has dissolved, *e.g.* by submergence of the territory or the dispersal of the population, it is apparent that all cases of putative extinction will arise in cases where certain

changes of a material nature have occurred—such as a change in government and change in the territorial configuration of the State. The difficulty, however, is in determining when such changes are merely incidental, leaving intact the identity of the State, and when they are to be regarded as fundamental going to the heart of that identity. It is evident, moreover, that States are complex political communities possessing various attributes of an abstract nature which vary in space as well as time, and, as such, determining the point at which changes in those attributes are such as to affect the State's identity will inevitably call for very fine distinctions.

- 2.4. It is generally held, nevertheless, that there exist several uncontroversial principles that have some bearing upon the issue of continuity. These are essentially threefold, all of which assume an essentially negative form. First, that the continuity of the State is not affected by changes in government even if of a revolutionary nature. Secondly, that continuity is not affected by territorial acquisition or loss, and finally that it is not affected by military occupation. Crawford points out that,

“There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”<sup>1</sup>

- 2.5. Each of these principles reflects upon one of the key incidents of statehood—territory, government (legal order) and independence—making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of Statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity. As Hall was to express the point, a State retains its identity

“so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.”<sup>2</sup>

The only exception to this general principle is to be found in case of multiple changes of a less than total nature, such as where a revolutionary change in

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<sup>1</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 34 (2<sup>nd</sup> ed., 2006).

<sup>2</sup> WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 22 (4<sup>th</sup> ed. 1895).

government is accompanied by a broad change in the territorial delimitation of the State.<sup>3</sup>

- 2.6. If one were to speak about a presumption of continuity, 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. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other States. It is commonly recognized that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entirety of the territory of the State, as they do in case of Hawai'i, and when they are accompanied by effective governance to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is, it seems, premised upon the "legal" basis of present or past United States claims to sovereignty over the Islands.
- 2.7. In light of such considerations, any claim to State continuity will be dependent upon the establishment of two legal facts: *first*, that the State in question existed as a recognized entity for purposes of international law at some relevant point in history; and, *secondly*, that intervening events have not been such as to deprive it of that status. It should be made very clear, however, that the issue is not simply one of "observable" or "tangible facts," but more specifically of "legally relevant facts." It is not a case, in other words, simply of observing how power or control has been exercised in relation to persons or territory, but of determining the scope of "authority," which is understood as "a legal entitlement to exercise power and control." Authority differs from mere control by not only being essentially rule governed, but also in virtue of the fact that it is not always entirely dependent upon the exercise of that control. As Arbitrator Huber noted in the *Island of Palmas Case*:

"Manifestations of sovereignty assume... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas."<sup>4</sup>

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<sup>3</sup> See generally, KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (2<sup>nd</sup> ed. 1968).

<sup>4</sup> *Island of Palmas Case (Netherlands v. United States)* 2 R.I.A.A. 829.

Thus, while “the continuous and peaceful display of territorial sovereignty” remains an important measure for determining entitlements in cases where title is disputed, or where “no conventional line of sufficient topographical precision exists,” it is not always an indispensable prerequisite for legal title. This has become all the more apparent since the prohibition on the annexation of territory became firmly implanted in international law, and with it the acceptance that certain factual situations will not be accorded legal recognition, *ex inuria ius non oritur*.

### 3. THE STATUS OF THE HAWAIIAN KINGDOM AS A SUBJECT OF INTERNATIONAL LAW

3.1. When the United Kingdom and France formally recognized the Hawaiian Kingdom as an “independent state” at the Court of London on November 28, 1843,<sup>5</sup> and later formally recognized by the United States of America on July 6, 1844 by letter to the Hawaiian government from Secretary of State John C. Calhoun,<sup>6</sup> the Hawaiian State was admitted into the Family of Nations. Since its recognition, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.<sup>7</sup> To quote the *dictum* of the Permanent Court of Arbitration in 2001:

“A perusal of the material discloses that in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”<sup>8</sup>

Additionally, the Hawaiian Kingdom became a full member of the Universal Postal Union on January 1, 1882.

3.2. As an independent State, the Hawaiian Kingdom, along with other independent States within the Family of Nations, obtained “international personality” and, as such, all independent States “are regarded equal, and the

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<sup>5</sup> The Joint Declaration can be accessed online at: <http://hawaiiakingdom.org/pdf/Annex%202.pdf>.

<sup>6</sup> The Letter can be accessed online at: <http://hawaiiakingdom.org/pdf/Annex%203.pdf>.

<sup>7</sup> The Hawaiian Kingdom entered into treaties with Austria-Hungary, June 18, 1875; Belgium, October 4, 1862; Bremen (succeeded by Germany), March 27, 1854; Denmark, October 19, 1846; France, September 8, 1858; French Tahiti, November 24, 1853; Germany, March 25, 1879; New South Wales (now Australia), March 10, 1874; Hamburg (succeeded by Germany), January 8, 1848); Italy, July 22, 1863; Japan, August 19, 1871, January 28, 1886; Netherlands, October 16, 1862; Portugal, May 5, 1882; Russia, June 19, 1869; Samoa, March 20, 1887; Spain, October 9, 1863; Sweden-Norway (now separate States), April 5, 1855; and Switzerland, July 20, 1864; the United Kingdom of Great Britain and Northern Ireland) March 26, 1846; and the United States of America, December 20, 1849, January 13, 1875, September 11, 1883, December 6, 1884. These treaties can be accessed online at: [http://hawaiiakingdom.org/UN\\_Protest\\_Annexes.shtml](http://hawaiiakingdom.org/UN_Protest_Annexes.shtml).

<sup>8</sup> *Larsen v. Hawaiian Kingdom*, 119 INT’L L. REP. 566, 581 (2001), available at [http://hawaiiakingdom.org/pdf/Arbitral\\_Award\\_Larsen\\_v\\_HK\\_2\\_5\\_01.pdf](http://hawaiiakingdom.org/pdf/Arbitral_Award_Larsen_v_HK_2_5_01.pdf), reprinted in 1 HAW. J. L. & POL. 299 (Summer 2004).

rights of each not deemed to be dependent upon the possession of power to insure their enforcement.”<sup>9</sup> According to Dickinson, the

“principle of equality has an important legal significance in the modern law of nations. It is the expression of two important legal principles. The first of these may be called the equal protection of the law or equality before the law. ...The second principle is usually described as equality of rights and obligations or more often as equality of rights.”<sup>10</sup>

International personality is defined as “the capacity to be bearer of rights and duties under international law.”<sup>11</sup> Crawford, however, distinguishes between “general” and “special” legal personality. The former “arises against the world (*erga omnes*),” and the latter “binds only consenting States.”<sup>12</sup> As an independent State, the Hawaiian Kingdom, like the United States of America, has both “general” legal personality under international law as well as “special” legal personality under the 1893 executive agreements that bind both the Hawaiian Kingdom and the United States to certain duties and obligations as hereinafter described.

- 3.3. The consequences of statehood at that time were several. States were deemed to be sovereign not only in a descriptive sense, but were also regarded as being “entitled” to sovereignty. This entailed, among other things, the rights to free choice of government, territorial inviolability, self-preservation, free development of natural resources, of acquisition and of absolute jurisdiction over all persons and things within the territory of the State.<sup>13</sup> It was, however, admitted that intervention by another State was permissible in certain prescribed circumstances such as for purposes of self-preservation, for purposes of fulfilling legal engagements, or of opposing wrongdoing. Although intervention was not absolutely prohibited in this regard, it was generally confined as regards the specified justifications. As Hall remarked, “The legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it.”<sup>14</sup> A desire for simple aggrandizement of territory did not fall within these terms, and intervention for purposes of supporting one party in a civil war was often regarded as unlawful.<sup>15</sup> In any case, the right of independence was regarded as so fundamental that any action against it “must be looked upon with disfavor.”<sup>16</sup>

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<sup>9</sup> CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 20 (Vol. I, 1922).

<sup>10</sup> EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 335 (1920).

<sup>11</sup> SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 53 (6<sup>th</sup> ed., 1976).

<sup>12</sup> See CRAWFORD, at 30.

<sup>13</sup> ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, VOL. I, 216 (1879).

<sup>14</sup> See HALL, at 298.

<sup>15</sup> THOMAS LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 134 (4<sup>th</sup> ed. 1913).

<sup>16</sup> See HALL, at 298.

- 3.4. “Governmental authority,” states Crawford, “is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial.”<sup>17</sup> On January 17, 1893, Queen Lili‘uokalani, who was constitutionally vested with the “executive power” under Article 31 of the Hawaiian constitution,<sup>18</sup> was unable to apprehend certain insurgents calling themselves the provisional government without armed conflict between United States troops, who were illegally landed by the United States Legation to protect the insurgents, and the Hawaiian police force headed by Marshal Charles Wilson. She was forced to temporarily assign her executive power to the President of the United States under threat of war calling for an investigation of its diplomat and military commanders who have intervened in the internal affairs of the Hawaiian Kingdom, and, thereafter, restore the government.<sup>19</sup> Upon receipt of the Queen’s diplomatic protest, United States President Cleveland initiated an investigation by first withdrawing a treaty, which provided for the cession of Hawaiian territory, from the United States Senate, and appointed a Special Commissioner, James Blount, to travel to the Hawaiian Islands in order to provide reports to the United States Secretary of State Walter Gresham. Blount reported that, “in pursuance of a prearranged plan [between the insurgents, claiming to be a government, and the U.S. Legation], the Government thus established hastened off commissioners to Washington to make a treaty for the purpose of annexing the Hawaiian Islands to the United States.”<sup>20</sup>
- 3.5. The investigation concluded that the United States Legation accredited to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government with the ultimate goal of transferring the Hawaiian Islands to the

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<sup>17</sup> See CRAWFORD, at 56.

<sup>18</sup> Hawaiian constitution, art. 31, provides: “The person of the King is inviolable and sacred. His Ministers are responsible. To the King belongs the executive power. All laws that have passed the Legislative Assembly, shall require His Majesty’s signature in order to their validity” The constitution can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%204.pdf>.

<sup>19</sup> The diplomatic protest stated, “I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom. That I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said provisional government. Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.”

<sup>20</sup> United States House of Representatives, 53<sup>rd</sup> Congress, Executive Documents on Affairs in Hawai‘i: 1894-95, (Government Printing Office 1895), 587, [hereafter Executive Documents]. Reprinted at 1 HAW. J. L. & POL. 136 (Summer 2004).

United States from an installed puppet government.<sup>21</sup> The President acknowledged that the

“military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawai‘i or for the *bona fide* purpose of protecting the imperiled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government.”<sup>22</sup>

“When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in a manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*.”<sup>23</sup>

The investigation also detailed the culpability of the United States government in violating international laws, as well as Hawaiian State territorial sovereignty and concluded it must provide *restitutio in integrum*—restoration to the original situation before the United States intervention occurred on January 16, 1893.

- 3.6. Through negotiations and *exchange of notes* between the Queen and the new United States Minister Plenipotentiary Albert Willis, assigned to the Hawaiian Islands, settlement for the illegal overthrow of the Hawaiian government was achieved by executive agreement. On the part of the United States, the President committed to restore the government as it stood before the landing of United States troops on January 16, 1893, and, thereafter, on the part of the Hawaiian Kingdom, the Queen committed to grant amnesty to the insurgents and assume all obligations of the self-proclaimed provisional government. Myers explains, “*Exchange of notes* is the most flexible form of a treaty... The exchange consists of an offer and an acceptance... The offering instrument contains a text of the proposed agreement and the acceptance invariably repeats it verbatim, with assent.”<sup>24</sup> According to Garner,

“Agreements in the form of an *exchange of notes* between certain high officials acting on behalf of States, usually their Ministers of Foreign Affairs or diplomatic representatives are numerous... They are employed for a variety of purposes and, like instruments which are designated as ‘treaties’, they may deal with any matter which is a proper subject of international regulation. One of their most common objects is to record the understandings of the parties to a treaty which they have previously entered into; but they may record an entirely new agreement, sometimes one which has been reached as a result of

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<sup>21</sup> *Id.* at 567.

<sup>22</sup> *Id.*, at 451.

<sup>23</sup> *Id.*, at 453.

<sup>24</sup> Denys P. Myers, *The Names and Scope of Treaties*, 51 AM. J. INT’L L. 590 (1957).

negotiation. While the purpose of an agreement effected by any *exchange of notes* may not differ from that of instruments designated by other names, it is strikingly different in its form from a ‘treaty’ or a ‘convention.’ Unlike a treaty, the relations which it establishes or seeks to establish is recorded, not in a single highly formalized instrument, but in two or more letters usually called ‘notes,’ signed by Ministers or other officials.”<sup>25</sup>

The first executive agreement, by *exchange of notes*, was the temporary and conditional assignment of executive power (police power) from the Queen to the President on January 17, 1893, and the acceptance of the assignment by the President on March 9, 1893 when he initiated the investigation. The second executive agreement, by *exchange of notes*, was the President’s “offer” to restore the *de jure* government on condition that the Queen would commit to grant amnesty to the insurgents on November 13, 1893, and the “acceptance” by the Queen of this condition on December 18, 1893. The two executive agreements are referred to herein as the *Lili‘uokalani assignment* and the *Agreement of restoration*, respectively.

- 3.7. By virtue of the *Lili‘uokalani assignment*, executive power (police power) of the Hawaiian Kingdom is temporarily vested in the President of the United States to faithfully administer Hawaiian Kingdom law, until the Hawaiian Kingdom government is restored pursuant to the *Agreement of restoration*, whereby the executive power is reassigned and thereafter the Monarch, or its successor, to grant amnesty. The failure of Congress to authorize the President to use force in carrying out these agreements did not diminish the validity of the *Lili‘uokalani assignment* and the *Agreement of restoration*. Despite over a century of non-compliance, these executive agreements remain binding upon the office of President of the United States to date. According to Wright, the President binds “himself and his successors in office by executive agreements.”<sup>26</sup>
- 3.8. President Cleveland failed to follow through in his commitment to administer Hawaiian law and re-instate the *de jure* government as a result of partisan wrangling in the United States Congress. In a deliberate move to further isolate the Hawaiian Kingdom from any assistance by other States and treaty partners and to reinforce and protect the puppet regime installed by United States officials, the Senate and House of Representatives each passed similar resolutions in 1894 strongly warning other States “that any intervention in the political affairs of these islands by any other Government will be regarded as an act unfriendly to the United States.”<sup>27</sup> Although the Hawaiian government was not restored and the country thrown into civil unrest as a result, the continuity of the Hawaiian State was nevertheless maintained.

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<sup>25</sup> 29 AM. J. INT’L L., Supplement, 698 (1935).

<sup>26</sup> QUINCY WRIGHT, THE CONTROL OF FOREIGN RELATIONS, 235 (1922).

<sup>27</sup> Senate Resolution, May 31, 1894, 53<sup>rd</sup> Congress, 2<sup>nd</sup> Session, vol. 26.

- 3.9. Five years passed before Cleveland’s presidential successor, William McKinley, entered into a second treaty of cession with the same individuals who participated in the illegal overthrow with the United States legation in 1893, and were now calling themselves the Republic of Hawai’i. This second treaty was signed on June 16, 1897 in Washington, D.C., but would “be taken up immediately upon the convening of Congress next December.”<sup>28</sup>
- 3.10. Queen Lili’uokalani was in the United States at the time of the signing of the treaty and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest with the United States Department of State on June 17, 1897. The Queen stated, in part:

I, Lili’uokalani of Hawai’i, by the will of God named heir apparent on the tenth day of April, A.D. 1877, and by the grace of God Queen of the Hawaiian Islands on the seventeenth day of January, A.D. 1893, do hereby protest against the ratification of a certain treaty, which, so I am informed, has been signed at Washington by Messrs. Hatch, Thurston, and Kinney, purporting to cede those Islands to the territory and dominion of the United States. I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.<sup>29</sup>

- 3.11. Hawaiian political organizations in the Islands filed additional protests with the Department of State in Washington, D.C. These organizations were the Men and Women’s Hawaiian Patriotic League (Hui Aloha ‘Aina), and the Hawaiian Political Association (Hui Kalai’aina).<sup>30</sup> In addition, a petition of 21,269 signatures of Hawaiian subjects and resident aliens protesting annexation was filed with the Senate when it convened in December 1897.<sup>31</sup> As a result of these protests, the Senate was unable to garner enough votes to ratify the so-called treaty. Unable to procure a treaty of cession from the Hawaiian government acquiring the Hawaiian Islands as required by international law, Congress unilaterally enacted a *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, which was signed into law by President McKinley on July 7, 1898 during the Spanish-American War.<sup>32</sup> The territorial limitation of Congressional laws are indisputable, and to quote from the United States Supreme Court:

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<sup>28</sup> “Hawaiian Treaty to Wait—Senator Morgan Suggests that It Be Taken Up at This Session Without Result.” *The New York Times*, 3 (July 25, 1897).

<sup>29</sup> LILI’UOKALANI, HAWAI’I’S STORY BY HAWAI’I’S QUEEN, 354 (1964); Protest reprinted in 1 HAW. J. L. & POL. 227 (Summer 2004).

<sup>30</sup> These protests can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2018.pdf>.

<sup>31</sup> The signature petition can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2019.pdf>.

<sup>32</sup> 30 U.S. Stat. 750.

“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens..., and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.”<sup>33</sup>

Many government officials and constitutional scholars were at a loss in explaining how a joint resolution could have extra-territorial force in annexing Hawai‘i, a foreign and sovereign State, because during the 19<sup>th</sup> century, as Born states, “American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction.”<sup>34</sup> During the debate in Congress, Representative Thomas H. Ball (D-Texas) characterized the annexation of the Hawaiian State by joint resolution as “a deliberate attempt to do unlawfully that which can not be lawfully done.”<sup>35</sup> The citizenry and residents of the Hawaiian Kingdom also understood the illegality of the joint resolution. On October 20, 1900, the following editorial was published in the Maui News newspaper making reference to statements made by Thomas Clark who was formerly British, but acquired Hawaiian citizenship through naturalization in 1867. Clark was also a signatory to the 21,269 signature petition against the treaty of annexation that was before the United States Senate.

Thomas Clark, a candidate for Territorial senator from Maui, holds that it was an unconstitutional proceeding on the part of the United States to annex the Islands without a treaty, and that as a matter of fact, the Island[s] are not annexed, and cannot be, and that if the democrats come in to power they will show the thing up in its true light and demonstrate that...the Islands are de facto independent at the present time.<sup>36</sup>

- 3.12. The Hawaiian Kingdom came under military occupation on August 12, 1898 at the height of the Spanish-American War, and the occupation was justified as a military necessity in order to reinforce and supply the troops that have been occupying the Spanish colonies of Guam and the Philippines since 1 May 1898. The justification as a war measure was clearly displayed in a secret session of the United States Senate on May 31, 1898.<sup>37</sup> Following the close of the Spanish-American War by the Treaty of Paris,<sup>38</sup> United States troops remained in the Hawaiian Islands and continued its occupation to date in violation of international law and the 1893 *Lili‘uokalani assignment* and the

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<sup>33</sup> *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>34</sup> GARY BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 493 (3<sup>rd</sup> ed. 1996).

<sup>35</sup> 31 CONG. REC. 5975 (1898).

<sup>36</sup> The Maui News article can be accessed online at: <http://hawaiiankingdom.org/blog/?p=189>.

<sup>37</sup> 1 HAW. J. L. & POL. 230 (Summer 2004).

<sup>38</sup> 30 U.S. Stat. 1754.

*Agreement of restoration.* The United States Supreme Court has also confirmed that military occupation, which is deemed provisional, does not transfer sovereignty of the occupied State to the occupant State even when the *de jure* sovereign is deprived of power to exercise its right within the occupied territory.<sup>39</sup> Hyde states, in “consequence of belligerent occupation, the inhabitants of the district find themselves subjected to a new and peculiar relationship to an alien ruler to whom obedience is due.”<sup>40</sup> In 1900, President McKinley signed into United States law *An Act To provide a government for the Territory of Hawai‘i*,<sup>41</sup> and shortly thereafter, intentionally sought to “Americanize” the inhabitants of the Hawaiian Kingdom politically, culturally, socially, and economically. To accomplish this, a plan was instituted in 1906 by the Territorial government, titled “Programme for Patriotic Exercises in the Public Schools, Adopted by the Department of Public Instruction,”<sup>42</sup> to denationalize the children of the Hawaiian Islands through the public schools on a massive scale. *Harper’s Weekly* reported:

“At the suggestion of Mr. Babbitt, the principal, Mrs. Fraser, gave an order, and within ten seconds all of the 614 pupils of the school began to march out upon the great green lawn which surrounds the building. ...Out upon the lawn marched the children, two by two, just as precise and orderly as you find them at home. With the ease that comes of long practice the classes marched and counter-marched until all were drawn up in a compact array facing a large American flag that was dancing in the northeast trade-wind forty feet about their heads. ...‘Attention!’ Mrs. Fraser commanded. The little regiment stood fast, arms at side, shoulders back, chests out, heads up, and every eye fixed upon the red, white and blue emblem that waived protectingly over them. ‘Salute!’ was the principal’s next command. Every right hand was raised, forefinger extended, and the six hundred and fourteen fresh, childish voices chanted as one voice: ‘We give our heads and our hearts to God and our Country! One Country! One Language! One Flag!’<sup>43</sup>

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<sup>39</sup> *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191 (1815); *United States v. Rice*, 17 U.S. 246 (1819); *Flemming v. Page*, 50 U.S. 603 (1850); see also United States Army Field Manual 27-10,

*Section 358—Occupation Does Not Transfer Sovereignty.* Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.

<sup>40</sup> CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 363 (Vol. II, 1922).

<sup>41</sup> 31 U.S. Stat. 141.

<sup>42</sup> The Programme can be accessed from the United States Archives online at: <http://ia700604.us.archive.org/17/items/programmeforpatr00hawa/programmeforpatr00hawa.pdf>.

<sup>43</sup> WILLIAM INGLIS, *Hawai‘i’s Lesson to Headstrong California: How the Island Territory has solved the problem of dealing with its four thousand Japanese Public School children*, *HARPER’S WEEKLY* 227 (Feb. 16, 1907).

The purpose of the plan was to obliterate any memory of the national character of the Hawaiian Kingdom the children may have and replace it, through indoctrination, with American patriotism. “Usurpation of sovereignty during military occupation” and “attempts to denationalize the inhabitants of occupied territory” was recognized as international crimes since 1919.<sup>44</sup> In the Nuremburg trials, these two crimes were collectively known as Germanization. Under the heading “Germanization of Occupied Territories,” Count III(j) of the Nuremburg Indictment, it provides:

“In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially, and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists. This plan included economic domination, physical conquest, installation of puppet governments, purported *de jure* annexation and enforced conscription into the German Armed Forces. This was carried out in most of the occupied countries including: Norway, France...Luxembourg, the Soviet Union, Denmark, Belgium, and Holland.”<sup>45</sup>

Further usurping Hawaiian sovereignty, President Eisenhower signed into United States law *An Act To provide for the admission of the State of Hawai‘i into the Union*, hereinafter “Statehood Act.”<sup>46</sup> These laws, which have no extraterritorial effect, stand in direct violation of the *Lili‘uokalani assignment and Agreement restoration*, being international compacts, the 1907 Hague Convention, IV, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, IV.

- 3.13. In 1946, prior to the passage of the Statehood Act, the United States further misrepresented its relationship with Hawai‘i when its permanent representative to the United Nations identified Hawai‘i as a non-self-governing territory under the administration of the United States since 1898. In accordance with Article 73(e) of the U.N. Charter, the United States permanent representative erroneously reported Hawai‘i as a non-self-governing territory that was acknowledged in a resolution by United Nations General Assembly.<sup>47</sup> On June 4, 1952, the Secretary General of the United Nations reported information submitted to him by the permanent

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<sup>44</sup> See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919*, 14 Am. J. Int’l L. 95, at (1920).

<sup>45</sup> See Trial of the Major War Criminals before the International Military Tribunal, *Indictment*, vol. 1, at 27, 63 (Nuremberg, Germany, 1947).

<sup>46</sup> 73 U.S. Stat. 4.

<sup>47</sup> *Transmission of Information under Article 73e of the Charter*, December 14, 1946, United Nations General Assembly Resolution 66(I).

representative of the United States regarding American Samoa, Hawai‘i, Puerto Rico and the Virgin Islands.<sup>48</sup> In this report, the United States made no mention that the Hawaiian Islands were an independent State since 1843 and that its government was illegally overthrown by U.S. forces, which was later settled by an executive agreement through *exchange of notes*. The representative also fails to disclose diplomatic protests that succeeded in preventing the second attempt to annex the Islands by a treaty of cession in 1897. Instead, the representative provides a picture of Hawai‘i as a non-State nation, by stating:

“The Hawaiian Islands were discovered by James Cook in 1778. At that time divided into several petty chieftainships, they were soon afterwards united into one kingdom. The Islands became an important port and recruiting point for the early fur and sandalwood traders in the North Pacific, and the principal field base for the extensive whaling trade. When whaling declined after 1860, sugar became the foundation of the economy, and was stimulated by a reciprocity treaty with the United States (1896).

American missionaries went to Hawaii in 1820; they reduced the Hawaiian language to written form, established a school system, and gained great influence among the ruling chiefs. In contact with foreigners and western culture, the aboriginal population steadily declined. To replace this loss and to furnish labourers for the expanding sugar plantations, large-scale immigration was established.

When later Hawaiian monarchs showed a tendency to revert to absolutism, political discords and economic stresses produced a revolutionary movement headed by men of foreign birth and ancestry. The Native monarch was overthrown in 1893, and a republic government established. Annexation to the United States was one aim of the revolutionists. After a delay of five years, annexation was accomplished.

...The Hawaiian Islands, by virtue of the Joint Resolution of Annexation and the Hawaiian Organic Act, became an integral part of the United States and were given a territorial form of government which, in the United States political system, precedes statehood.”<sup>49</sup>

- 3.14. In 1959, the Secretary General received a communication from the United States permanent representative that they will no longer transmit information regarding Hawai‘i because it supposedly “became one of the United States under a new constitution taking affect on [August 21, 1959].”<sup>50</sup> This resulted

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<sup>48</sup> *Information from Non-self-governing Territories: Summary and Analysis of Information Transmitted Under Article 73 e of the Charter. Report of the Secretary General: Summary of Information transmitted by the Government of the United States of America*, 4 June 1952, United Nations, Document A/2135.

<sup>49</sup> *Id.*, at 16-17.

<sup>50</sup> *Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America*, United Nations, Document no. A/4226, at 99.

in a General Assembly resolution stating it “Considers it appropriate that the transmission of information in respect of Alaska and Hawaii under Article 73e of the Charter should cease.”<sup>51</sup> Evidence that the United Nations was not aware of Hawaiian independence since 1843 can be gleaned from the following statement by the United Nations.

“Though the General Assembly considered that the manner in which Territories could become fully self-governing was primarily through the attainment of independence, it was observed in the Fourth Committee that the General Assembly had recognized in resolution 748 (VIII) that self-government could also be achieved by association with another State or group of States if the association was freely chosen and was on a basis of absolute equality. There was unanimous agreement that Alaska and Hawaii had attained a full measure of self-government and equal to that enjoyed by all other self-governing constituent states of the United States. Moreover, the people of Alaska and Hawaii had fully exercised their right to choose their own form of government.”<sup>52</sup>

Although the United Nations passed two resolutions acknowledging Hawai‘i to be a non-self-governing territory that has been under the administration of the United States of America since 1898 and was granted self-governance in 1959, it did not affect the continuity of the Hawaiian State because, foremost, United Nations resolutions are not binding on member States of the United Nations,<sup>53</sup> let alone a non-member State—the Hawaiian Kingdom. Crawford explains, “Of course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States.”<sup>54</sup> Secondly, the information provided to the General Assembly by the United States was distorted and flawed. In *East Timor*, Portugal argued that resolutions of both the General Assembly and the Security Council acknowledged the status of East Timor as a non-self-governing territory and Portugal as the administering power and should be treated as “givens.”<sup>55</sup> The International Court of Justice, however, did not agree and found

“that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States.”<sup>56</sup>

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<sup>51</sup> *Cessation of the transmission of information under Article 73 e of the Charter in respect of Alaska and Hawaii*, December 12, 1959, United Nations General Assembly Resolution 1469 (XIV).

<sup>52</sup> *Repertory of Practice of United Nations Organs, Extracts relating to Article 73 of the Charter of the United Nations*, Supplement No. 1 (1955-1959), volume 3, at 200, para. 101.

<sup>53</sup> IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14 (4<sup>th</sup> ed. 1990).

<sup>54</sup> See CRAWFORD, at 113.

<sup>55</sup> In *East Timor* (Portugal v. Australia) [1995] ICJ Rep. 90, at 103, para. 30.

<sup>56</sup> *Id.*, at 104, para. 32.

Even more problematic is when the decisions embodied in the resolutions as “givens” are wrong. Acknowledging this possibility, Bowett states, “where a decision affects a State’s legal rights or responsibilities, and can be shown to be unsupported by the facts, or based upon a quite erroneous view of the facts, or a clear error of law, the decision ought in principle to be set aside.”<sup>57</sup> Öberg also concurs and acknowledges that resolutions “may have been made on the basis of partial information, where not all interested parties were heard, and/or too urgently for the facts to be objectively established.”<sup>58</sup> As an example, Öberg cited Security Council Resolution 1530, March 11, 2004, that “misidentified the perpetrator of the bomb attacks carried out in Madrid, Spain, on the same day.”<sup>59</sup>

#### 4. RECOGNIZED MODES OF EXTINCTION

- 4.1. In light of the evident existence of Hawai’i as a sovereign State for some period of time prior to 1898, it would seem that the issue of continuity turns upon the question whether Hawai’i can be said to have subsequently ceased to exist according to the terms of international law. Current international law recognizes that a State may cease to exist in one of two scenarios: *first*, by means of that State’s integration with another State in some form of union; or, *second*, by its dismemberment, such as in the case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia. As will be seen, events in Hawai’i in 1898 are capable of being construed in several ways, but it is evident that the most obvious characterization was one of cession by joint resolution of the Congress.
- 4.2. Turning then to the law as it existed at the critical date of 1898, it was generally held that a State might cease to exist in one of three scenarios:
  - (a) By the destruction of its territory or by the extinction, dispersal or emigration of its population, which is a theoretical disposition.
  - (b) By the dissolution of the corpus of the State.<sup>60</sup>
  - (c) By the State’s incorporation, union, or submission to another.<sup>61</sup>

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<sup>57</sup> Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 Eur. J. Int’l L. 89, 97 (1994).

<sup>58</sup> Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EUR. J. INT’L L. 879, 892 (2005).

<sup>59</sup> *Id.*, at n. 82.

<sup>60</sup> Cases include the dissolution of the German Empire in 1805-6; the partition of the Pays-Bas in 1831 or of the Canton of Bale in 1833

<sup>61</sup> Cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886.

- 4.3. Neither (a) nor (b) is applicable in the current scenario. In case of (c) commentators have often distinguished between two processes—one of which involved a voluntary act, *i.e.* union or incorporation, the other of which came about by non-consensual means, *i.e.* conquest and submission followed by annexation.<sup>62</sup> It is evident that annexation or “conquest” was regarded as a legitimate mode of acquiring title to territory,<sup>63</sup> and it would seem to follow that in case of total annexation—annexation of the entirety of the territory of a State, the defeated State would cease to exist.
- 4.4. Although annexation was regarded as a legitimate means of acquiring territory, it was recognized as taking a variety of forms.<sup>64</sup> It was apparent that a distinction was typically drawn between those cases in which, the annexation was implemented by a Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part of the annexing power after the defeat of the opposing State, which the former was at war with. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.<sup>65</sup> Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,<sup>66</sup> title acquired in virtue of a peace treaty was considered to be essentially derivative, *i.e.* being transferred from one State to another. There was little, in other words, to distinguish title acquired by means of a treaty of peace backed by force, and a voluntary purchase of territory: in each case the extent of rights enjoyed by the successor were determined by the agreement itself. In case of conquest absent an agreed settlement, by contrast, title was thought to derive simply from the fact of military subjugation and was complete “from the time [the conqueror] proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act... his intention to retain it as part of his own territory.”<sup>67</sup> What was required, in other words, was that the conflict be complete—acquisition of sovereignty *durante bello* being clearly excluded, and that the conqueror declare an intention to annex.<sup>68</sup>
- 4.5. What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession—a point of

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<sup>62</sup> See J. Westlake, *The Nature and Extent of the Title by Conquest*, 17 L. Q. REV. 392 (1901).

<sup>63</sup> LASSA OPPENHEIM, *INTERNATIONAL LAW*, VOL. I, 288 (9<sup>th</sup> ed. 1996), Oppenheim remarks that “[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory.”

<sup>64</sup> HENRY HALLECK, *INTERNATIONAL LAW*, 811 (1861); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW II*, c. iv, s. 165. (8<sup>th</sup> ed. 1866).

<sup>65</sup> See LAWRENCE, at 165-6 (“Title by conquest arises only when no formal international document transfers the territory to its new possessor.”)

<sup>66</sup> Vienna Convention on the Law of Treaties, art. 52 (1969).

<sup>67</sup> HENRY HALLECK, *INTERNATIONAL LAW*, 468 (3<sup>rd</sup> ed. 1893).

<sup>68</sup> This point was of considerable importance following the Allied occupation of Germany in 1945.

particular importance for possessions held in foreign territory.<sup>69</sup> Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the State in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.<sup>70</sup> Title, in other words, was original, and rights of the occupants were limited to those, which they possessed perhaps under the doctrine *uti possidetis de facto*. Others, by contrast, seemed to assume some form of “transfer of title” as taking place, *i.e.* that conquest gave rise to a derivative title,<sup>71</sup> and concluded in consequence that the conqueror “becomes, as it were, the heir or universal successor of the defunct or extinguished State.”<sup>72</sup> Much depended, in such circumstances, as to how the successor came to acquire title.

- 4.6. It should be pointed out, however, that even if annexation/conquest was generally regarded as a mode of acquiring territory, United States policy during this period was far more skeptical of such practice. As early as 1823 the United States had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization<sup>73</sup> and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that “the principle of conquest shall not...be recognized as admissible under American public law.”<sup>74</sup> It had, furthermore, later taken the lead in adopting a policy of non-recognition of “any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928”<sup>75</sup> which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the United States not to acquire territory by use or threat of force during the latter stages of the 19<sup>th</sup> century, there is the doctrine of estoppel that would operate to prevent the United States subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands. Furthermore, annexation by conquest would not apply to the case at hand because the Hawaiian Kingdom was a recognized neutral State, never at war with the United States, thereby preventing *debellatio* from arising as a mode of acquisition. For the Hawaiian Kingdom, neutrality “constituted a guaranty of

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<sup>69</sup> For an early version of this idea see EMERICH DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, BK. III, SEC. 193-201 (1758, trans. C. Fenwick, 1916). C. BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO*, BK. I, 32-46 (1737, trans. Frank T., 1930).

<sup>70</sup> RIVIER, *PRINCIPES DU DROIT DES GENS*, VOL. I, 182 (1896).

<sup>71</sup> See PHILLIMORE, at 328.

<sup>72</sup> See HALLECK, at 495.

<sup>73</sup> “The American continents, by the free and independent conditions which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.” James Monroe, Message to Congress, December 2, 1823.

<sup>74</sup> JOHN BASSET MOORE, *A DIGEST OF INTERNATIONAL LAW*, VOL. 1, 292 (1906).

<sup>75</sup> J.W. WHEELER-BENNETT (ED.), *DOCUMENTS ON INTERNATIONAL AFFAIRS 1932-23* (1933). See also David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 *CHINESE J. INT’L L.* 105-143 (2003).

independence and peaceful existence, the safeguard of [its] right to be at peace when faced with war.”<sup>76</sup>

## 5. THE FUNCTION OF ESTOPPEL

5.1. The principle that a State cannot benefit from its own wrongful act is a general principle of international law referred to as estoppel.<sup>77</sup> The rationale for this rule derives from the *maxim pacta sunt servanda*—every treaty in force is binding upon the parties and must be performed by them in good faith,<sup>78</sup> and “operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment.”<sup>79</sup> According to MacGibbon, underlying “most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”<sup>80</sup> In municipal jurisdictions there are three forms of estoppel—estoppel by judgment as in matters of court decisions; estoppel by deed as in matters of written agreement or contract; and estoppel by conduct as in matters of statements and actions. Bowett states that these forms of estoppel, whether treated as a rule of evidence or as substantive law, is as much part of international law as they are in municipal law, and due to the diplomatic nature of States relations, he expands the second form of estoppel to include estoppel by “Treaty, Compromise, Exchange of Notes, or other Undertaking in Writing.”<sup>81</sup> Brownlie states that because estoppel in international law rests on principles of good faith and consistency, it is “shorn of the technical features to be found in municipal law.”<sup>82</sup> Bowett enumerates the three essentials establishing estoppel in international law:

1. The statement of fact must be clear and unambiguous.
2. The statement of fact must be made voluntarily, unconditionally, and must be authorized.
3. There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.<sup>83</sup>

To ensure consistency in State behavior, the Permanent Court of International Justice, in a number of cases, affirmed the principle “that a State cannot invoke its municipal law as a reason for failure to fulfill its international

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<sup>76</sup> NICOLAS POLITIS, *NEUTRALITY AND PEACE* 31 (1935).

<sup>77</sup> WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 383 (8<sup>th</sup> ed. 1924).

<sup>78</sup> See Vienna Convention, art. 26.

<sup>79</sup> D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y. B. INT’L L. 201 (1957).

<sup>80</sup> I.C. MacGibbon, *Estoppel in International Law*, 7 INT’L. & COMP. L. Q. 468 (1958).

<sup>81</sup> See Bowett, at 181.

<sup>82</sup> See BROWNLIE, at 641.

<sup>83</sup> See Bowett, at 202.

obligation.”<sup>84</sup> This principle was later codified under Article 27 of the 1969 Vienna Convention on the Law of Treaties, whereby “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>85</sup> It is self-evident that the 1893 *Lili‘uokalani assignment* and the *Agreement of restoration* meets the requirements of the first two essentials establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidence in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27, 1893. As stated in the memorial:

“And while waiting for the result of [the investigation], with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government. The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.”<sup>86</sup>

- 5.2. Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the aforementioned second treaty of cession signed in Washington, D.C., on June 16, 1897. These protests were received and filed in the office of Secretary of State John Sherman and continue to remain a record of both dissent and evidence of reliance upon the conclusion of the investigation by President Cleveland and his obligation and commitment to *restitutio in integrum*—restoration of the *de jure* Hawaiian government. A memorial of the Hawaiian Patriotic League that was filed with the United States Hawaiian Commission for the creation of the territorial government appears to be the last “public” act of reliance made by a large majority of the Hawaiian citizenry.<sup>87</sup> The Commission was established on July 8, 1898 after President McKinley signed the joint resolution of annexation on July 7, 1898, and held meetings in Honolulu from August through September of 1898. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language<sup>88</sup> and the other in English,<sup>89</sup> stated, in part:

WHEREAS: By memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed to the President, the Congress and the People of

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<sup>84</sup> *Id.*, at 473.

<sup>85</sup> See Vienna Convention, art. 27.

<sup>86</sup> See Executive Documents, at 1295, reprinted in 1 HAW. J. L. & POL. 217 (Summer 2004).

<sup>87</sup> Munroe Smith, Record of Political Events, 13(4) POL. SCI. Q. 745, 752 (Dec. 1898).

<sup>88</sup> *Memoriala A Ka Lahui* (Memorial of the Citizenry), KE ALOHA AINA, Sept. 17, 1898, at 3.

<sup>89</sup> *What Monarchists Want*, THE HAWAIIAN STAR, Sept. 15, 1898, at 3.

the United States, to refrain from further participation in the wrongful annexation of Hawaii; and

WHEREAS: The Declaration of American Independence expresses that Governments derive their just powers from the consent of the governed:

THEREFORE, BE IT RESOLVED: That the representatives of a large and influential body of native Hawaiians, we solemnly pray that the constitutional government of the 16<sup>th</sup> day of January, A.D. 1893, be restored, under the protection of the United States of America.

This memorial clearly speaks to the people's understanding and reliance of the *Agreement of restoration* and the duties and obligations incurred by the United States even after the Islands were purportedly annexed.

- 5.3. There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the *de jure* Hawaiian government, and the 1893 executive agreements—the *Lili'uokalani assignment* and the *Agreement of restoration*, constitutes evidence of final settlement. As such, the United States cannot benefit from its deliberate non-performance of its obligation of administering Hawaiian law and restoring the *de jure* government under the 1893 executive agreements over the reliance held by the Hawaiian Kingdom and its citizenry in good faith and to their detriment. Therefore, the United States is estopped from asserting any of the following claims:

1. Recognition of any pretended government other than the Hawaiian Kingdom as both the *de facto* and the *de jure* government of the Hawaiian Islands;
2. Annexation of the Hawaiian Islands by joint resolution in 1898;
3. Establishment of a territorial government in 1900;
4. Administration of the Hawaiian Islands as a non-self-governing territory since 1898 pursuant to Article 73(e) of the U.N. Charter;
5. Establishment of a State government in 1959; and,

The failure of the United States to restore the *de jure* government is a “breach of an international obligation,” and, therefore, an international wrongful act. The severity of this breach has led to the unlawful seizure of Hawaiian independence, imposition of a foreign nationality upon the citizenry of an occupied State, mass migrations and settlement of foreign citizens, and the economic and military exploitation of Hawaiian territory—all stemming from the United States government's violation of international law and treaties. In a 1999 report for the United Nations Centennial of the First International Peace Conference, Greenwood states:

Accommodation of change in the case of prolonged occupation must be within the framework of the core principles laid down in the

Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.<sup>90</sup>

Despite the egregious violations of Hawaiian State sovereignty by the United States since January 16, 1893, the principle of estoppel not only serves as a shield that bars the United States from asserting any legal claim of sovereignty over the Hawaiian Islands, but also a shield that protects the continued existence of the Hawaiian Kingdom, the nationality of its citizenry, and its territorial integrity as they existed in 1893.

## 6. *A CLAIM OF TITLE OVER THE HAWAIIAN ISLANDS BY ACQUISITIVE PRESCRIPTION*

- 6.1. As pointed out above, the continuity of the Hawaiian State may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, which is not strictly limited to annexation. The United States, in other words, would be entitled to maintain its claim over the Hawaiian Islands so long as it could show some basis for asserting that claim other than merely its original claim of annexation in 1898. The strongest type of claim in this respect is the “continuous and peaceful display of territorial sovereignty.” The emphasis given to the “continuous and peaceful display of territorial sovereignty” in international law derives in its origin from the doctrine of occupation, which allowed states to acquire title to territory that was effectively *terra nullius*. Occupation, in this form, is distinct from military occupation of another State’s territory. It is apparent, however, and in line with the approach of the International Court of Justice in the *Western Sahara Case*,<sup>91</sup> that the Hawaiian Islands cannot be regarded as *terra nullius* for purpose of acquiring title by mere occupation. According to some, nevertheless, effective occupation may give rise to title by way of what is known as “acquisitive prescription.”<sup>92</sup> As Hall maintained, title or sovereignty “by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.”<sup>93</sup> Johnson explains in more detail:

“Acquisitive Prescription is the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and

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<sup>90</sup> CHRISTOPHER GREENWOOD, INTERNATIONAL HUMANITARIAN LAW (LAWS OF WAR): REVISED REPORT PREPARED FOR THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE, PURSUANT TO UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS A/RES/52/154 AND A/RES/53/99, 47 (1999).

<sup>91</sup> I.C.J. Rep. 1975.

<sup>92</sup> For a discussion of the various approaches to this issue see OPPENHEIM, at 705-6.

<sup>93</sup> See HALL, at 143.

peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor, in the case of sea territory neighboring states and other states whose maritime interests are affected) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or international tribunal or—exceptionally in cases where no such action was possible—have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.”<sup>94</sup>

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,<sup>95</sup> and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case<sup>96</sup> found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasized as the basis for title in the *Minquiers and Ecrehos Case* (France v. United Kingdom),<sup>97</sup> the *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway)<sup>98</sup> and in the *Island of Palmas Arbitration* (United States v. Netherlands).<sup>99</sup>

- 6.2. If a claim to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indicia* have to be considered including, for example, the length of time of effective and peaceful occupation, the extent of opposition to or acquiescence in that occupation, and, perhaps, the degree of recognition provided by third States. However, “no general rule [can] be laid down as regards the length of time and other circumstances which are necessary to create such a title by prescription. Everything [depends] upon the merits of the individual case.”<sup>100</sup> As regards the temporal element, the United States could claim to have peacefully and continuously exercised governmental authority in relation to Hawai’i for over a century. This is somewhat more than was required for purposes of prescription in the *British Guiana-Venezuela Boundary Arbitration*, for example,<sup>101</sup> but it is clear that time alone is certainly not determinative. Similarly, in terms of the attitude of third States, it is evident that apart from the initial protest of the Japanese Government in 1897, none has opposed the extension of United States

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<sup>94</sup> D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y. B. INT’L L. 332, 353 (1950).

<sup>95</sup> Prescription may be said to have been recognized in the *Chamizal Arbitration*, 5 AM. J. INT’L L. 782 (1911) 785; the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*.

<sup>96</sup> I.C.J. Rep. 1960, at 6.

<sup>97</sup> I.C.J. Rep. 1953, at 47

<sup>98</sup> I.C.J. Rep. 1951, at 116.

<sup>99</sup> See *Palmas arbitration*.

<sup>100</sup> See OPPENHEIM, at 706.

<sup>101</sup> The arbitrators were instructed by their treaty terms of reference to allow title if based upon “adverse holding or prescription during a period of fifty years.” 28 R.I.A.A (1899) 335.

jurisdiction to the Hawaiian Islands. Indeed the majority of States may be said to have acquiesced in its claim to sovereignty in virtue of acceding to its exercise of sovereign prerogatives in respect of the Islands, but this acquiescence by other States was based on misleading and false information that was presented to the United Nations by the United States as before mentioned. It could be surmised, as well, that the United States misled other States regarding Hawai‘i even prior to the establishment of the United Nations in 1945. It is important, however, not to attach too much emphasis to third party recognition. As Jennings points out, in case of adverse possession “[r]ecognition or acquiescence on the part of third States... must strictly be irrelevant.”<sup>102</sup>

- 6.3. More difficult, in this regard, is the issue of acquiescence or protest as between the Hawaiian Kingdom and the United States. In the *Chamizal Arbitration*<sup>103</sup> it was held that the United States could not maintain a claim to the Chamizal tract by way of prescription in part because of the protests of the Mexican government. The Mexican government, in the view of the Commission, had done “all that could be reasonably required of it by way of protest against the illegal encroachment.” Although it had not attempted to retrieve the land by force, the Commission pointed out that:

“however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.”<sup>104</sup>

In other words, protesting in any way that might be “reasonably required” should effectively defeat a claim of acquisitive prescription.

- 6.4. Ultimately, a “claim” to prescription is not equal to a “title” by prescription, especially in light of the presumption of title being vested in the State the claim is made against. Johnson acknowledges this distinction when he states that the “length of time required for the establishment of a prescriptive title on the one hand, and the extent of the action required to prevent the establishment of a prescriptive title on the other hand, are invariably matters of fact to be decided by the international tribunal before which the matter is eventually brought for adjudication.”<sup>105</sup> The United States has made no claim to acquisitive prescription before any international body, but, instead, has reported to the United Nations in 1952 the fraudulent claim that the “Hawaiian Islands, by virtue of the Joint Resolution of Annexation and the Hawaiian Organic Act, became an integral part of the United States and were given a

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<sup>102</sup> See Oppenheim, at 39.

<sup>103</sup> *The Chamizal Arbitration Between the United States and Mexico*, 5 AM. J. INT’L L. 782 (1911).

<sup>104</sup> *Id.*, at 807.

<sup>105</sup> See Johnson, at 354.

territorial form of government which, in the United States political system, precedes statehood.”<sup>106</sup>

- 6.5. When President Cleveland accepted, by *exchange of notes*, the police power from the Queen under threat of war, and by virtue of that assignment initiated a presidential investigation that concluded the Queen, as Head of State, was both the *de fact* and *de jure* government of the Hawaiian Islands, and subsequently entered into a second executive agreement to restore the government on condition that the Queen or her successor in office would grant amnesty to the insurgents, the United States admitted that title or sovereignty over the Hawaiian Islands remained vested in the Hawaiian Kingdom and no other. Thus, it is impossible for the United States to claim to have acquired title to the Hawaiian Islands in 1898 from the government of the so-called Republic of Hawai‘i, because the Republic of Hawai‘i, by the United States’ own admission, was “self-declared.”<sup>107</sup> Furthermore, by the terms of the 1893 executive agreements—the *Lili‘uokalani assignment* and the *Agreement of restoration*, the United States recognized the continuing sovereignty of the Hawaiian Kingdom over the Hawaiian Islands despite its government having yet to be restored under the agreement. Therefore, the presumption may also be based on the general principle of international law, *pacta sunt servanda*, whereby an agreement in force is binding upon the parties and must be performed by them in good faith.

## B. THE LEGITIMACY OF THE ACTING GOVERNMENT OF THE HAWAIIAN KINGDOM

### 7. GENERAL CONSIDERATIONS

- 7.1. The presumption that the Hawaiian Kingdom continues to exist as a State under occupation is not entirely unrelated to the existence of an entity claiming to be the effective and legitimate government. A State is a “body of people occupying a definite territory and politically organized”<sup>108</sup> under one government, being the “agency of the state,”<sup>109</sup> that exercises sovereignty, which is the “supreme, absolute and uncontrollable power by which an independent state is governed.”<sup>110</sup> In other words, sovereignty, both internal and external, is an attribute of an independent State, while the government exercising sovereignty is the State’s physical agent. Hoffman emphasizes that a government “is not a State any more than man’s words are the man himself,” but “is simply an expression of the State, an agent for putting into execution

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<sup>106</sup> See *Communication from the United States of America*.

<sup>107</sup> *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai‘i*, 103d Cong., 107 U.S. Stat. 1510 (1993), reprinted in 1 HAW. J. L. & POL. 290 (Summer 2004). The resolution stated, in part, “Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States.”

<sup>108</sup> BLACK’S LAW DICTIONARY 1407 (6<sup>th</sup> ed. 1990).

<sup>109</sup> *Id.* at 695.

<sup>110</sup> *Id.* at 1396.

the will of the State.”<sup>111</sup> Wright also concluded, “international law distinguishes between a government and the state it governs.”<sup>112</sup> Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Crawford explains this distinction with regard to Iraq. He states,

“The occupation of Iraq in 2003 illustrated the difference between ‘government’ and ‘State’; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid ‘restoration of Iraq’s sovereignty,’ they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored.”<sup>113</sup>

- 7.2. With regard to the recognition of external sovereignty, there are two aspects—recognition of sovereignty and the recognition of government. External sovereignty cannot be recognized with the initial recognition of the government representing the State, and once recognition of sovereignty is granted, Oppenheim asserts that it “is incapable of withdrawal”<sup>114</sup> by the recognizing States. Schwarzenberger also asserts, that “recognition estops [precludes] the State which has recognized the title from contesting its validity at any future time.”<sup>115</sup> According to Wheaton:

“The recognition of any State by other States, and its admission into the general society of nations, may depend...upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever be its ruler, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.”<sup>116</sup>

Therefore, recognition of a sovereign State is a political act with legal consequences.<sup>117</sup> The recognition of governments, however, which could change form through constitutional or revolutionary means subsequent to the recognition of State sovereignty, is a purely political act and can be retracted by another government for strictly political reasons. Cuba is a clear example of this principle, where the United States withdrew the recognition of Cuba’s

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<sup>111</sup> FRANK SARGENT HOFFMAN, *THE SPHERE OF THE STATE OR THE PEOPLE AS A BODY-POLITIC* 19 (1894).

<sup>112</sup> Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) AM. J. INT’L L. 299, 307 (Apr. 1952).

<sup>113</sup> See CRAWFORD, at 34, n. 157.

<sup>114</sup> LASSA OPPENHEIM, *INTERNATIONAL LAW* 137 (3<sup>rd</sup> ed. 1920).

<sup>115</sup> Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51(2) AM. J. INT’L L. 308, 316 (1957).

<sup>116</sup> See WHEATON, at 32.

<sup>117</sup> GERHARD VON GLAHN, *LAW AMONG NATIONS* 85 (6<sup>th</sup> ed. 1992).

government under President Fidel Castro, but at the same time this political act did not mean Cuba ceased to exist as a sovereign State. In other words, sovereignty of an independent State, once established, is not dependent upon the political will of other governments, but rather the objective rules of international law and successorship.

## 8. *THE FORMATION OF THE ACTING GOVERNMENT OF THE HAWAIIAN KINGDOM*

- 8.1. On December 10, 1995, a general partnership was formed in compliance with an *Act to Provide for the Registration of Co-partnership Firms*, 1880.<sup>118</sup> The partnership was named the Perfect Title Company, hereinafter PTC, and functioned as a land title abstracting company.<sup>119</sup> Since the enactment of the 1880 Co-partnership Act, members of co-partnership firms within the Kingdom registered their articles of agreements in the Bureau of Conveyances, being a part of the Interior department of the Hawaiian Kingdom. This same Bureau of Conveyances continues to exist and is presently administered by the United States, by its political subdivision, the State of Hawai'i. The law requires a notary public to acknowledge all documents before being registered with the Bureau,<sup>120</sup> but there have been no lawful notaries public in the Islands since 1893. All State of Hawai'i notaries public are commissioned under and by virtue of United States law. Therefore, in order for the partners of PTC to get their articles of agreement registered in the Bureau of Conveyances in compliance with the 1880 co-partnership statute, the following protest was incorporated and made a part of PTC's articles of agreement, which stated:

“Each partner also agrees that the business is to be operated in strict compliance to the business laws of the Hawaiian Kingdom as noted in the “Compiled Laws of 1884” and the “session laws of 1884 and 1886.” Both partners are native Hawaiian subjects by birth and therefore are bound and subject to the laws above mentioned. And it is further agreed by both partners that due to the filing requirements of the Bureau of Conveyances to go before a foreign notary public within the Hawaiian Kingdom, they do this involuntarily and against their will.”<sup>121</sup>

- 8.2. PTC commenced on December 10, 1995, but there was no *military* government to ensure PTC's compliance with the co-partnership statute from that date. The registration of co-partnerships creates a contract between co-partnerships on the one hand, and the Minister of the Interior, representing the *de jure* government, on the other. It is obligatory for co-partnerships to register their articles of agreement with the Minister of the Interior, and for the

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<sup>118</sup> The partnership act can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2025.pdf>.

<sup>119</sup> PTC partnership agreement can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2026.pdf>.

<sup>120</sup> Hawai'i Revised Statutes, §502-41.

<sup>121</sup> Co-partnership Agreement establishing Perfect Title Company, December 10, 1995, document no. 95-153346, Hawai'i Bureau of Conveyances.

Minister of the Interior, it is his duty to ensure that co-partnerships maintain their compliance with the statute. This is a contractual relationship, whereby:

“there must be a promise binding the person[s] subject to the obligation; and in order to give a binding force to the promise the obligation must come within the sphere of Agreement. There must be an acceptance of the promise by the person to whom it is made, so that by their mutual consent the one is bound to the other. A Contract then springs from the offer of a promise and its acceptance.”<sup>122</sup>

The registration of co-partnerships is the offer of the promise by its members to abide by the obligation imposed by the statute, and the acceptance of this offer by the Interior department creates a contractual relationship whereby “one is bound to the other.” Section 7 of the 1880 Co-partnership Act clearly outlines the obligation imposed upon the members of co-partnerships in the Kingdom, which states:

The members of every co-partnership who shall neglect or fail to comply with the provisions of this law, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefore, without the necessity of joining the other members of the co-partnership in any action or suit, and shall also be severally liable upon conviction, to a penalty not exceeding five dollars for each and every day while such default shall continue; which penalties may be recovered in any Police or District Court.<sup>123</sup>

The partners of PTC desired to establish a legitimate co-partnership pursuant to Hawaiian Kingdom law and in order for the title company to exist as a legal co-partnership firm, the *de jure* government had to be reestablished in an *acting* capacity in order to serve as a necessary party to the contractual relationship created under and by virtue of the statute. An acting official is “not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to which he himself does not claim title.”<sup>124</sup> It is an official that temporarily assumes the duties and authority of government.

- 8.3. The last legitimate Hawaiian Legislative Assembly of 1886 was prevented from reconvening as a result of the 1887 rebellion. The subsequent Legislative Assembly of 1887 was based on an illegal constitution, which altered existing voting rights, and led to the illegal election of the 1887 Legislature. As a result, there existed no legitimate Nobles in the Legislative Assembly when Queen Lili’uokalani ascended to the Office of Monarch in 1891, and therefore, the Queen was unable to obtain confirmation for her named successors from those

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<sup>122</sup> WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 11 (1880).

<sup>123</sup> HAWAIIAN KINGDOM, COMPILED LAWS (CIVIL CODE) 649 (1884). The Compiled Laws can be accessed online at: <http://hawaiiankingdom.org/civilcode/index.shtml>.

<sup>124</sup> See BLACK’S LAW, at 26.

Nobles of the 1886 Legislative Assembly as required by the 1864 Constitution. Tragically, when the Queen died on November 11, 1917, there were no lawful successors to the Throne. In the absence of a confirmed successor to the Throne by the Nobles of the Legislative Assembly, Article 33 of the Constitution of 1864 provides:

“should a Sovereign decease...and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.”

Hawaiian law did not assume that the whole of the Hawaiian government would be made vacant, and, consequently, the law did not formalize provisions for the reactivation of the government in extraordinary circumstances. Therefore, a deliberate course of action was taken to reactivate the Hawaiian government by and through its executive branch as officers *de facto*. In view of such an extreme emergency, Oppenheimer states that, “a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country.”<sup>125</sup>

When properly interpreted, the 1864 Constitution provides that the Cabinet Council shall be a Council of Regency until a proper Legislative Assembly can be convened to “elect by ballot some native Ali‘i [Chief] of the Kingdom as Successor to the Throne.” It further provides that the Regent or Council of Regency “shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.”<sup>126</sup> The Constitution also provides that the Cabinet Council “shall consist of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom, and these shall be His Majesty’s Special Advisers in the Executive affairs of the Kingdom.” Interpretation of these constitutional provisions allows for the Minister of

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<sup>125</sup> F.E. Oppenheimer, “Governments and Authorities in Exile,” 36 AM. J. INT’L L. 581 (1942).

<sup>126</sup> Hawaiian constitution, art. 33, provides: It shall be lawful for the King at any time when he may be about to absent himself from the Kingdom, to appoint a Regent or Council of Regency, who shall administer the Government in His name; and likewise the King may, by His last Will and Testament, appoint a Regent or Council of Regency to administer the Government during the minority of any Heir to the Throne: and should a Sovereign decease, leaving a Minor Heir, and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King, until he shall have attained the age of eighteen years, which age is declared to be the Legal Majority of such Sovereign.”

Interior to assume the powers vested in the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General, and consequently serve as Regent. This is a similar scenario that took place in 1940 when German forces invaded Belgium and captured King Leopold. As a result, the Belgian cabinet became a government in exile and, as a council of Regency, assumed all powers constitutionally vested in the King. Oppenheimer explains:

As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821, as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to the decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.<sup>127</sup>

- 8.4. The 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances, which is within the Interior department.<sup>128</sup> The Minister of the Interior holds a seat of government as a member of the Cabinet Council, together with the other Ministers. Article 43 of the Constitution provides that, “Each member of the King’s Cabinet shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks.” Necessity dictated that in the absence of any “deputies or clerks” of the Interior department, the partners of a registered co-partnership could assume the duty of the same because of the current state of affairs. Therefore, it was reasonable that partners of a registered co-partnership could assume the powers vested in the Registrar of the Bureau of Conveyances in the absence of the same; then assume the powers vested in the Minister of Interior in the absence of the same; then assume the powers constitutionally vested in the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General; and, finally assume the power constitutionally vested in the Cabinet as a Regency. A regency is defined as “the man or body of men intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the [monarch].”<sup>129</sup>

- 8.5. With the specific intent of assuming the “seat of Government,” the partners of PTC formed a second partnership called the Hawaiian Kingdom Trust

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<sup>127</sup> *Id.*, at 569.

<sup>128</sup> *See* COMPILED LAWS, at §1249.

<sup>129</sup> *See* BLACK’S LAW, at 1282.

Company, hereinafter HKTC, on December 15, 1995.<sup>130</sup> The partners intended that this registered partnership would serve as a provisional surrogate for the Council of Regency. Therefore, and in light of the ascension process explained above, HKTC could then serve as officers *de facto* for the Registrar of the Bureau of Conveyances, the Minister of Interior, the Cabinet Council, and ultimately as the Council of Regency. Article 1 of HKTC 's deed of general partnership provided:

“The above mentioned parties have agreed to form a general partnership under the firm name of Hawaiian Kingdom Trust Company in the business of administering, investigating, determining and the issuing of land titles, whether in fee, or for life, or for years, in such manner as Hawaiian law prescribes... The company will serve in the capacity of *acting* for and on behalf of the Hawaiian Kingdom government. The company has adopted the Hawaiian Constitution of 1864 and the laws lawfully established in the administration of the same. The company is to commence on the 15th day of December, A.D. 1995, and shall remain in existence until the absentee government is re-established and fully operational, upon which all records and monies of the same will be transferred and conveyed over to the office of the Minister of Interior, to have and to hold under the authority and jurisdiction of the Hawaiian Kingdom.”

Thirty-eight deeds of trusts conveyed by Hawaiian subjects to HKTC acknowledged the trust as a company “acting for and on behalf of the Hawaiian Kingdom government” and outlined the role of the trust company and its fiduciary duty it had to its beneficiaries.<sup>131</sup> HKTC was not only competent to serve as the *acting* Cabinet Council, but also possessed a fiduciary duty toward its beneficiaries to serve in that capacity until the government is re-established *de jure* in accordance with the terms of the 1893 *Restoration agreement*. According to Pomeroy:

“Active or special trusts are those in which, either from the express direction of the language creating the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the *cestui que trustent* [beneficiary of a trust]. They may, except when restricted by

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<sup>130</sup> HKTC partnership agreement can be accessed online at:

<http://hawaiiankingdom.org/pdf/Annex%2027.pdf>.

<sup>131</sup> See Deeds of Trust to the Hawaiian Kingdom Trust Company, a general partnership, Doc. no.'s 96-004246, 96-006277, 96-014116, 96-026387, 96-026388, 96-028714, 96-024845, 96-032930, 96-044551, 96-044550, 96-047382, 96-047380, 96-047379, 96-047381, 96-056981, 96-052727, 96-060519, 96-032728, 96-057667, 96-057668, 96-060520, 96-061209, 96-061207, 96-056980, 96-052729, 96-063384, 96-063385, 96-063382, 96-057664, 96-019923, 96-046712, 96-063386, 96-063382, 96-063383, 96-066996, 96-061208 and 96-046711, State of Hawai'i Bureau of Conveyances. One the deeds of trust (document no. 96-014116) can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2028.pdf>.

statute, be created for every purpose not unlawful, and, as a general rule, may extend to every kind of property, real and personal.”<sup>132</sup>

The purpose of HKTC was two fold; first, to ensure PTC complies with the co-partnership statute, and, second, provisionally serve as the government of the Hawaiian Kingdom. What became apparent was the seeming impression of a conflict of interest, whereby the duty to comply and the duty to ensure compliance was vested in the same two partners of the two companies. Therefore, in order to avoid this apparent conflict of interest, the partners of both PTC and HKTC, reasoned that an *acting* Regent, having no interests in either company, should be appointed to serve as representative of the Hawaiian government. Since HKTC assumed to represent the interests of the Hawaiian government in an acting capacity, the trustees would therefore make the appointment. The trustees looked to Article XXXI, Chapter XI, Title 3 of the Hawaiian Civil Code, whereby the *acting* Regency would be constitutionally authorized to direct the executive branch of the government in the formation and execution of the reconvening of the Legislative Assembly, so that the government could procedurally move from provisional to *de jure*.<sup>133</sup>

- 8.6. It was agreed that David Keanu Sai, now the present Ambassador-at-large of the *acting* government and author of this Brief, would be appointed to serve as *acting* Regent, but could not retain an interest in the two companies prior to the appointment. In that meeting, it was agreed upon and decided that Ms. Nai’a-Ulumaimalu would replace the author as trustee of HKTC and partner of PTC. The plan was to maintain the standing of the two partnerships under the co-partnership statute, and not have them lapse into sole-proprietorships. To accomplish this, the author would relinquish his entire fifty percent (50%) interest by deed of conveyance in both companies to Lewis;<sup>134</sup> after which Lewis would convey a redistribution of interest to Ms. Nai’a-Ulumaimalu,<sup>135</sup> whereby the former would hold a ninety-nine percent (99%) interest in the two companies and the latter a one percent (1%) interest in the same. In order to have these two transactions take place simultaneously without affecting the standing of the two partnerships, both deeds of conveyance would happen on the same day but won’t take effect until the following day, February 28, 1996. These conveyances were registered in the Bureau of Conveyances in conformity with the 1880 Co-partnership Act. With the transactions completed, the Trustees then appointed the author as *acting* Regent on March 1, 1996, and thereafter filed a notice of this appointment with the Bureau of

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<sup>132</sup> JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA, 553 (1907).

<sup>133</sup> See COMPILED LAWS, at 214-234.

<sup>134</sup> The Sai to Lewis deed can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2030.pdf>.

<sup>135</sup> The Lewis to Nai’a-Ulumaimalu deed can be accessed online at: <http://hawaiiankingdom.org/pdf/Annex%2031.pdf>.

Conveyances.<sup>136</sup> Thereafter, HKTC resumed its role as a general partnership within the meaning of the 1880 Co-partnership Act, and no longer served as “a company *acting* for and on behalf of the Hawaiian Kingdom government” and prepared for the dissolution of the company. On May 15, 1996, the Trustees conveyed by deed all of its right, title and interest acquired by thirty-eight deeds of trust to the *acting* Regent, and stipulated that the company would be dissolved in accordance with the provisions of its deed of general partnership on June 30, 1996.<sup>137</sup>

- 8.7. The transfer and subsequent dissolution, was made in accordance with section 3 of the 1880 Co-partnership Act, which provides that “whenever any change shall take place in the constitution of any such firm...a statement of such change or dissolution shall also be filed in the said office of the Minister of the Interior, within one month from such...dissolution.”<sup>138</sup> On February 28, 1997, a Proclamation by the *acting* Regent announcing the restoration of the Hawaiian government was printed in the March 9, 1997 issue of the Honolulu Sunday Advertiser newspaper. The proclamation stated, in part, that the:

“Hawaiian Monarchical system of Government is hereby re-established, [and the] Civil Code of the Hawaiian Islands as noted in the Compiled Laws of 1884, together with the session laws of 1884 and 1886 and the Hawaiian Penal Code are in full force. All Hawaiian Laws and Constitutional principles not consistent herewith are void and without effect.”<sup>139</sup>

Since the appointment of the *acting* Regent, there have been twenty-six commissions that filled vacancies of the executive and judicial departments. These governmental positions, as statutorily provided, comprise officers *de facto* of the Hawaiian government while under American occupation. Governmental positions that are necessary for the reconvening of the Legislative Assembly in accordance with Title III of the Civil Code would be filled by commissioned officers *de facto*.<sup>140</sup>

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<sup>136</sup> HKTC’s notice of appointment can be accessed online at:

<http://hawaiiankingdom.org/pdf/Annex%2032.pdf>.

<sup>137</sup> HKTC’s deed to acting Regent can be accessed online at:

<http://hawaiiankingdom.org/pdf/Annex%2033.pdf>.

<sup>138</sup> See Partnership Act.

<sup>139</sup> Proclamation of *Acting* Regent declaring the Hawaiian Monarchical form of Government is re-established, February 28, 1997, published in the March 9, 1997 issue of the Honolulu Sunday Advertiser. Also recorded in its entirety in the Bureau of Conveyances as document no. 97-027541.

<sup>140</sup> In September 1999, the *acting* Regent commissioned Peter Umialiloa Sai as *acting* Minister of Foreign Affairs, Kau‘i P. Sai-Dudoit, formerly known as Kau‘i P. Goodhue, as *acting* Minister of Finance, and Gary V. Dubin, Esquire, as *acting* Attorney General. At a meeting of the Cabinet Council on 10 September 1999, it was determined by resolution “that the office of the Minister of Interior shall be resumed by David Keanu Sai, thereby absolving the office of the Regent, *pro tempore*, and the same to be replaced by the Cabinet Council as a Council of Regency, *pro tempore*, within the meaning of Article 33 of the Constitution of the Country.” The Agent serves as Prime Minister and chairman of the *acting* Council of Regency.

- 8.8. The Hawaiian government did not foresee the possibility of its territory subjected to an illegal and prolonged occupation, where indoctrination and the manipulation of its political history affected the psyche of its national population. Therefore, it did not provide a process for reinstating the government, being the organ of the State, either in exile or within its own territory. But at the same time, it did not place any constitutional or statutory limitations upon the restoration of its government that could serve as a bar to its reinstatement—save for the legal parameters of *necessity*. The legal basis for the reassertion of Hawaiian governance, by and through a Hawaiian general partnership statute, is clearly extraordinary, but the exigencies of the time demanded it. In the absence of any Hawaiian subjects adhering to the statutory laws of the country as provided for by the country’s constitutional limitations, the abovementioned process was established for the establishment of an *acting* Regency, pending the reconvening of the Legislative Assembly to elect by ballot a Regent or Regency *de jure* as provided for under Article 22 of the Constitution. Wolff states, “in so far as conditions provided for in the constitutional law cannot be complied with owing to the occupation of the country by the enemy, a dispossessed government can act without being compelled to fulfill those conditions.”<sup>141</sup> Also commenting on exiled governments, Marek explains that, “while the requirement of internal legality must in principle be fulfilled for an exiled government to possess the character of a State organ, minor flaws in such legality are easily cured by the overriding principle of its actual uninterrupted continuity.”<sup>142</sup> Oppenheimer also explains “such government is the only *de jure* sovereign power of the country the territory of which is under belligerent occupation.”<sup>143</sup> It follows, *a fortiori*, that when an “occupant fails to share power with the lawful government under the auspices of international law, the latter is not precluded from taking whatever countermeasures it can in order to protect its interests during and after the occupation.”<sup>144</sup> Bateman states the “duty correlative of the right of political existence, is obviously that of political self-preservation; a duty the performance of which consists in constant efforts to preserve the principles of the political constitution.”<sup>145</sup> Political self-preservation is adherence to the legal order of the State, whereas national self-preservation is where the principles of the constitution are no longer acknowledged, *i.e.* revolution.<sup>146</sup>
- 8.9. The establishment of an *acting* Regent—an officer *de facto*, would be a political act of self-preservation, not revolution, and be grounded upon the legal doctrine of “limited necessity.” According to de Smith, deviations from

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<sup>141</sup> Ernst Wolff, *The International Position of Dispossessed Governments at Present in England*, 6 MOD. L. REV. 215 (1942-1943).

<sup>142</sup> See MAREK, at 98.

<sup>143</sup> See Oppenheimer, at 568.

<sup>144</sup> EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 212 (1993).

<sup>145</sup> William O. Bateman, *Political and Constitutional Law of the United States of America* (G.I. Jones and Company, 1876), 22.

<sup>146</sup> *Id.*

a State's constitutional order "can be justified on grounds of necessity."<sup>147</sup> He continues to explain, "State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution."<sup>148</sup> Lord Pearce also states that there are certain limitations to the principle of necessity, "namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful... Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign."<sup>149</sup> Judge Gates took up the matter of the legal doctrine of necessity in *Chandrika Persaud v. Republic of Fiji*, and drew from the decision in the *Mitchell case*,<sup>150</sup> which provided that the requisite conditions for the principle of necessity consists of:

1. An imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the State;
2. There must be no other course of action reasonably available;
3. Any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
4. It must not impair the just rights of citizens under the Constitution; and,
5. It must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

Brookfield summarized the principle of necessity as the "power of a Head of State under a written Constitution extends by implication to executive acts, and also legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them."<sup>151</sup> Brookfield also explains "such powers are not dependent on the words of a particular Constitution, except in so far as that Constitution designates the authority in whom the implied powers would be found to reside."<sup>152</sup>

- 8.10. The assumption by private citizens up the chain of constitutional authority in government to the office of Regent, as enumerated under Article 33 of the Constitution, is a *de facto* process born out of necessity. Judge Cooley defines an officer *de facto* "to be one who has the reputation of being the officer he

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<sup>147</sup> STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW, 80 (1986).

<sup>148</sup> *Id.*

<sup>149</sup> *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 732 (1969).

<sup>150</sup> *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const.) 35, 88–89 (1986).

<sup>151</sup> F.M. Brookefield, *The Fiji Revolutions of 1987*, NEW ZEALAND L.J. 250, 251 (July 1988).

<sup>152</sup> *Id.*

assumes to be, and yet is not a good officer in point of law,” but rather “comes in by claim and color of right.”<sup>153</sup> According to Chief Justice Steere, the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned.”<sup>154</sup> “Officers *de facto*” are distinguished from a “*de facto* government.” The former is born out of a *de jure* government under and by virtue of the principle of necessity, while the latter is born out of revolution.

- 8.11. As a result of the continuity of the Hawaiian State under the terms of international law, it would normally be supposed that a government established in accordance with its constitution and laws would be competent to represent it internationally. Marek emphasizes that:

“it is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the territorial State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the territorial State and that of the occupied State...is not one of delegation, but of co-existence.”<sup>155</sup>

The actual exercise of that competence, however, will depend upon other States agreeing to enter into diplomatic relations with such a government. This was, in the past at least, conditioned upon recognition, but many states in recent years have moved away from the practice of recognizing governments, preferring any such recognition to be inferred from their acts. The normal conditions for recognition are that the government concerned should be either legitimately constituted under the laws of the State concerned, or that it should be in effective control of the territory. Ideally, it should possess both attributes. Ineffective, but, lawful, governments normally only maintain their status as recognized entities during military occupation, or while there remains the possibility of their returning to power.

- 8.12. While Hawai‘i was not at war with the United States, but rather a neutral State since the Spanish-American War, the international laws of occupation would still apply. With specific regard to occupying neutral territory, the Arbitral Tribunal, in its 1927 case, *Coenca Brothers vs. Germany*, concluded that “the occupation of Salonika by the armed forces of the Allies constitutes a

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<sup>153</sup> THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, 185 (1876).

<sup>154</sup> *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

<sup>155</sup> See MAREK, at 91.

violation of the neutrality of that country.”<sup>156</sup> Later, in the 1931 case, *In the matter of the Claim Madame Chevreau against the United Kingdom*, the Arbitrator concluded that the status of the British forces while occupying Persia (Iran)—a neutral State in the First World War—was analogous to “belligerent forces occupying enemy territory.”<sup>157</sup> Oppenheim observes that an occupant State on neutral territory “does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory.”<sup>158</sup> Article 2 of the Fourth Geneva Convention (1949) states:

“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

- 8.13. On the face of the Hague Regulations it appears to apply only to territory belonging to an enemy, but Feilchenfeld states, “it is nevertheless, usually held that the rules of belligerent occupation will also apply where a belligerent, in the course of the war, occupied neutral territory, even if the neutral power should have failed to protest against the occupation.”<sup>159</sup> The law of occupation is not only applied with equal force and effect, but the occupier is also greatly shorn of its belligerent rights in Hawaiian territory as a result of the Islands’ neutrality. Therefore, the United States cannot impose its own domestic laws without violating international law. This principle is clearly laid out in Article 43 of the 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 civil life, while respecting, unless absolutely prevented, the laws in force in the country.” Referring to the American occupation of Hawai‘i, Dumberry states:

“...the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV

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<sup>156</sup> *Coenca Brothers v. Germany*, Greco-German Mixed Arbitral Tribunal, Case No. 389 (1927), reprinted in ANN. DIG. PUB. INT’L. L. CASES, YEARS 1927 AND 1928 570, 571 (1931).

<sup>157</sup> *In the Matter of the Claim Madame Chevreau Against the United Kingdom*, 27 AM. J. INT’L. L. 153, 160 (1933).

<sup>158</sup> LASSA OPPENHEIM, INTERNATIONAL LAW 241 (7<sup>th</sup> ed. 1948-52).

<sup>159</sup> ERNST FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 8 (1942).

provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.”<sup>160</sup>

- 8.14. According to Glahn, there are three distinct systems of law that exist in an occupied territory: “the indigenous law of the legitimate sovereign, to the extent that it has not been necessary to suspend it; the laws (legislation, orders, decrees, proclamations, and regulations) of the occupant, which are gradually introduced; and the applicable rules of customary and conventional international law.”<sup>161</sup> Hawai‘i’s sovereignty is maintained and protected as a subject of international law, in spite of the absence of an effective government since 1893. In other words, the United States should have administered Hawaiian Kingdom law as defined by its constitution and statutory laws, similar to the U.S. military’s administration of Iraqi law in Iraq with portions of the law suspended due to military necessity.<sup>162</sup> A United States Army regulation on the law of occupation recognizes not only the sovereignty of the occupied State, but also bars annexation of the territory during hostilities because of the continuity of the invaded State’s sovereignty. In fact, United States Army regulations on the laws of occupation not only recognize the continued existence of the sovereignty of the occupied State, but,

“...confers upon the invading force the means of exercising control for the period of occupation. It does not transfer sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.”<sup>163</sup>

- 8.15. It is abundantly clear that the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain, as well as fortifying the Islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed on January 17, 1893. According to the United States Supreme Court, “Though the [annexation] resolution was passed July 7, [1898] the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States.”<sup>164</sup> Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and “they protested

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<sup>160</sup> Patrick Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law*, 2(1) CHINESE J. INT’L L. 655, 682 (2002).

<sup>161</sup> See VON GLAHN, at 774.

<sup>162</sup> David J. Scheffer, *Beyond Occupation Law*, 97(4) AM. J. INT’L L. 842-860 (Oct. 2003).

<sup>163</sup> “The Law of Land Warfare,” *U.S. Army Field Manual 27-10* §358 (July 1956).

<sup>164</sup> *Territory of Hawai‘i v. Mankichi*, 190 U.S. 197, 212 (1903).

annexation occurring without the consent of the governed.”<sup>165</sup> The “power exercising effective control within another’s sovereign territory has only temporary managerial powers,” and, during “that limited period, the occupant administers the territory on behalf of the sovereign.”<sup>166</sup> The actions taken by the McKinley administration, with the consent of the Congress by joint resolution, clearly intended to mask the violation of international law as if the annexation took place by a voluntary treaty thereby giving the appearance of cession. As Marek states, “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”<sup>167</sup> Although the United States signed and ratified both the 1899 and the 1907 Hague Regulations, which post-date the occupation of the Hawaiian Islands, the “text of Article 43,” according to Benvenisti, “was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law.”<sup>168</sup> Graber also states, that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”<sup>169</sup> Consistent with this understanding of the international law of occupation during the Spanish-American War, Smith reported that the “military governments established in the territories occupied by the armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials.”<sup>170</sup> In light of this instruction to apply the local laws of the occupied State, the disguised annexation during the Spanish-American War, together with its ceremony on August 12, 1898 on the grounds of ‘Iolani Palace, would appear to show clear intent to conceal an illegal occupation.

- 8.16. The case of the *acting* government is unique in several respects. While it claims to be regarded as the “legitimate” government of Hawai‘i, its existence

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<sup>165</sup> TOM COFFMAN, *NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI‘I* 322 (2<sup>nd</sup> ed. 2009). Coffman initially published this book in 1998 titled *Nation Within: The Story of the American Annexation of the Nation of Hawai‘i*. In his second edition published in 2009 he explains the change. Coffman explains:

“I am compelled to add the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with its 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 Hawai‘i, the might of the United States does not make it right.”

<sup>166</sup> See BENVENISTI, at 6.

<sup>167</sup> See MAREK, at 110.

<sup>168</sup> See BENVENISTI, at 8.

<sup>169</sup> DORIS GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION: 1863-1914*, 143 (1949).

<sup>170</sup> Munroe Smith, *Record of Political Events*, 13(4) POL. SCI. Q. 745, 748 (Dec. 1898).

is not only dependent upon the issue of State continuity, but also its existence is dependent upon exercising governmental control. Governmental control, however, is nearly non-existent within the Hawaiian Islands as a result of a prolonged and illegal occupation, but governmental control can be effectively exercised outside of the Hawaiian Islands. After all, the nature of belligerent occupation is such as to preserve the original competence of indigenous institutions in occupied territories. The *acting* government, as officers *de facto*, is an extension of the original *de jure* government of the Hawaiian Kingdom as it stood in 1893. Therefore, in such circumstances, recognition of the authority of the *acting* government could be achieved by other States through *de facto* recognition under the “doctrine of acquiescence,” and not *de facto* recognition of a “new” government or State that comes about through a successful revolution. Recognition of a *de facto* government is political and acts of pure policy by States, because they attempt to change or alter the legal order of an already established and recognized personality—whereas, recognition of *de facto* officers does not affect the legal order of a State that has been the subject of prolonged occupation. It is within these parameters that the *acting* government, as *de facto* officers by necessity, cannot claim to represent the people *de jure*, but only, at this time, represent the legal order of the Hawaiian State as a result of the limitations imposed upon it by the laws of occupation and the duality of two legal orders existing in one in the same territory—that of the occupier and the occupied.

- 8.17. The *acting* government has restored the executive and the judicial branches of government. Heading the executive branch of the *acting* government is the Council of Regency, which is comprised of the author of this Brief, as *acting* Minister of the Interior and Chairman of the Council, as well as *acting* Ambassador-at-large, His Excellency Peter Umialiloa Sai as *acting* Minister of Foreign Affairs and Vice-Chairman of the Council, Her Excellency Kau‘i P. Sai-Dudoit as *acting* Minister of Finance, and His Excellency Dexter Ke‘eaumoku Ka‘iama, *Esq.*, as *acting* Attorney General. Heading the Judicial branch of the *acting* government is the Supreme Court, which is comprised of Alvin K. Nishimura, *Esq.*, as *acting* Chief Justice and Chancellor of the Kingdom, and Allen K. Hoe, *Esq.*, as *acting* First Associate Justice.

## 9. DE FACTO RECOGNITION OF THE ACTING GOVERNMENT

- 9.1. Under international law, MacGibbon states the “function of acquiescence may be equated with that of consent,” whereby “it constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation.”<sup>171</sup> He explains the “primary purpose of acquiescence is evidential; but its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion

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<sup>171</sup> I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y. B. INT’L L. 143, 145 (1954).

which is both objective and practical.”<sup>172</sup> According to Brownlie, “There is a tendency among writers to refer to any representation or conduct having legal significance as creating estoppel, precluding the author from denying the ‘truth’ of the representation, express or implied.”<sup>173</sup> State practice has also acknowledged not only the function of acquiescence, but also the consequence of acquiescence. Lauterpacht explains:

“The absence of protest, may, in addition, in itself become a source of legal right inasmuch as it is related to—or forms a constituent element of—estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states.”<sup>174</sup>

In a memorandum by Walter Murray, the United States Chief of the Division of Near Eastern Affairs, regarding the attitude of the United States toward Italy’s unilateral annexation of Ethiopia, Murray stated, “It may be argued, therefore, that our failure to protest the recent decree extending Italian jurisdiction over American nationals (and other foreigners in Ethiopia) or its application to American nationals would *not* constitute *de jure* recognition of the Italian annexation of Ethiopia. However, our failure to protest might be interpreted as a recognition of the *de facto* conditions in Ethiopia.”<sup>175</sup> In other words, the United States’ failure to protest provided *tacit* acquiescence, and, therefore, *de facto* recognition of the conditions in Ethiopia.

- 9.2. Between 1999 and 2001, the *acting* government represented the Hawaiian Kingdom in arbitral proceedings before the Permanent Court of Arbitration.<sup>176</sup> “In *Larsen v. the Hawaiian Kingdom*, Lance Paul Larsen, a resident of the state of Hawaii, sought redress from the Hawaiian Kingdom for its failure to protect him from the United States and the State of Hawai‘i.”<sup>177</sup> The Arbitral Tribunal comprised of Professor James Crawford, SC, Presiding Arbitrator,

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<sup>172</sup> *Id.*

<sup>173</sup> See BROWNLIE, at 640.

<sup>174</sup> H. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y. B. INT’L L. 376, 395 (1950).

<sup>175</sup> United States Department of State, *Foreign Relations of the United States*, vol. III, 241 (1936).

<sup>176</sup> *Larsen v. Hawaiian Kingdom*, 119 INT’L L. REP. 566 (2001), available at [http://hawaiiankingdom.org/pdf/Arbitral\\_Award\\_Larsen\\_v\\_HK\\_2\\_5\\_01.pdf](http://hawaiiankingdom.org/pdf/Arbitral_Award_Larsen_v_HK_2_5_01.pdf); see also the website of the Permanent Court of Arbitration, available at <https://pcacases.com/web/sendAttach/123>.

<sup>177</sup> Bederman & Hilbert, *Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawai‘i*, 95 AM. J. INT’L L. 927 (2001); see also David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAW. J. L. & POL. 46 (Summer 2004); and Dumberry.

who at the time of the proceedings was a member of the United Nations International Law Commission and *Special Rapporteur* on State Responsibility (1997-2001); Professor Christopher Greenwood, QC, Associate Arbitrator, who now serves as a Judge on the International Court of Justice since February 6, 2009; and Gavan Griffith, QC, Associate Arbitrator, who served as former Solicitor General for Australia. Early in the proceedings, the *acting* government, by telephone conversation with Secretary-General van den Hout of the Permanent Court of Arbitration, was requested to provide a formal invitation to the United States to join in the arbitration. Here follows the letter documenting the formal invitation done in Washington, D.C., on March 3, 2000, and later filed with the registry of the Permanent Court of Arbitration.<sup>178</sup>

Mr. John Crook  
Assistant Legal Adviser for United Nations Affairs  
Office of the Legal Adviser  
United States Department of State  
2201 C Street,  
N.W. Room 3422 NS  
Washington, D.C. 20520

Re: Letter confirming telephone conversation of March 3, 2000 relating to arbitral proceedings at the Permanent Court of Arbitration, Lance Paul Larsen vs. The Hawaiian Kingdom

Sir,

This letter is to confirm our telephone conversation today at Washington, D.C. The day before our conversation Ms. Ninia Parks, esquire, Attorney for the Claimant, Mr. Lance Larsen, and myself, Agent for the Respondent, Hawaiian Kingdom, met with Sonia Lattimore, Office Assistant, L/EX, at 10:30 a.m. on the ground floor of the Department of State. I presented her with two (2) binders, the first comprised of an Arbitration Log Sheet, Lance Paul Larsen vs. The Hawaiian Kingdom, with accompanying documents on record before the Permanent Court of Arbitration at The Hague, Netherlands. The second binder comprised of divers documents of the Acting Council of Regency as well as diplomatic correspondence with treaty partners of the Hawaiian Kingdom.

I stated to Ms. Lattimore that the purpose of our visit was to provide these documents to the Legal Department of the U.S. Department of State in order for the U.S. Government to be apprised of the arbitral proceedings already in train and that the Hawaiian Kingdom, by consent of the Claimant, extends an opportunity for the United States to join in the arbitration as a party. She assured me that the package will be given to Mr. Bob McKenna for review and assignment to

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<sup>178</sup> *Acting Government of the Hawaiian Kingdom, Letter confirming telephone conversation with U.S. State Department relating to arbitral proceedings at the Permanent Court of Arbitration, March 3, 2000*, 1 HAW. J. L. & POL. 241 (Summer 2004).

someone within the Legal Department. I told her that we will be in Washington, D.C., until close of business on Friday, and she assured me that she will give me a call on my cellular phone at (808) 383-6100 by the close of business that day with a status report.

At 4:45 p.m., Ms. Lattimore contacted myself by phone and stated that the package had been sent to yourself as the Assistant Legal Adviser for United Nations Affairs. She stated that you will be contacting myself on Friday (March 3, 2000), but I could give you a call in the morning if I desired.

Today, at 11:00 a.m., I telephoned you and inquired about the receipt of the package. You had stated that you did not have ample time to critically review the package, but will get to it. I stated that the reason for our visit was the offer by the Respondent Hawaiian Kingdom, by consent of the Claimant, by his attorney, Ms. Ninia Parks, for the United States Government to join in the arbitral proceedings presently instituted under the auspices of the Permanent Court of Arbitration at The Hague, Netherlands. You stated that litigation in the court system is handled by the Justice Department and not the State Department, and that you felt they (Justice Dept.) would be very reluctant to join in the present arbitral proceedings.

I responded by assuring that the State Department should review the package in detail and can get back to the Acting Council of Regency by phone for continued dialogue. I gave you our office's phone number at (808) 239-5347, of which you acknowledged. I assured you that we did not need an immediate answer, but out of international courtesy the offer is still open, notwithstanding arbitral proceedings already in motion. I also advised you that Secretary-General van den Hout of the Permanent Court of Arbitration was aware of our travel to Washington, D.C. and the offer to join in the arbitration. As I stated in our conversation he requested that the dialogue be reduced to writing and filed with the International Bureau of the Permanent Court of Arbitration for the record, and you acknowledged. The conversation then came to a close.

I have taken the liberty of enclosing Hawaiian diplomatic protests lodged by my former countrymen and women in the U.S. Department of State in the summer of 1897, on record at your National Archives, in order for you to understand the gravity of the situation. I have also enclosed two (2) recent protests by myself as an officer of the Hawaiian Government against the State of Hawai'i for instituting unwarranted criminal proceedings against myself and other Hawaiian subjects and a resident of the Hawaiian Islands under the guise of American municipal laws within the territorial dominion of the Hawaiian Kingdom.

If after a thorough investigation into the facts presented to your office, and following zealous deliberations as to the considerations herein offered, the Government of the United States shall resolve to

decline our offer to enter the arbitration as a Party, the present arbitral proceedings shall continue without affect pursuant to the Hague Conventions IV and V, 1907, and the UNCITRAL Rules of arbitration.

With Sentiments of the Highest Regard,  
[signed] David Keanu Sai,  
Acting Minister of Interior and Agent for the Hawaiian Kingdom

- 9.3. This action would elicit one of two responses that would be crucial to not only the proceedings regarding the continuity of the Hawaiian State, but also to the status of the *acting* government. Firstly, if the United States had legal sovereignty over the Hawaiian Islands, it could demand that the Permanent Court of Arbitration terminate these proceedings citing the Court is intervening in the internal affairs of the United States without its consent.<sup>179</sup> This would have set in motion a separate hearing by the Permanent Court of Arbitration in order to decide upon the claim,<sup>180</sup> where the *acting* government would be able respond. Secondly, if the United States chose not to intervene, this non-action would indicate to the Court that it doesn't have a presumption of sovereignty or "interest of a legal nature" over the Hawaiian Islands, and, therefore, by its *tacit* acquiescence, would also acknowledge the *acting* government as legitimate in its claim to be the government of the Hawaiian Kingdom. In an article published in the *American Journal of International Law*, Bederman and Hilbert state:

"At the center of the PCA proceeding was the argument that Hawaiians never directly relinquished to the United States their claim of inherent sovereignty either as a people or over their national lands, and accordingly that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' 'unlawful imposition [over him] of [its] municipal laws' through its political subdivision, the State of Hawaii. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international

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<sup>179</sup> See Article 62 of the Statute of the International Court of Justice, which provides: "1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request." The Permanent Court of Arbitration in the *Larsen case* relied upon decisions of the International Court of Justice to guide them concerning justiciability of third States, to wit, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and the United States)* (1953-1954), *East Timor (Portugal v. Australia)* (1991-1995), and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*. In the event that the United States chose to intervene to prevent the Larsen case from going further because it had an interest of a legal nature which may be affected by the decision," it is plausible that the Permanent Court of Arbitration would look to Article 62 of the Statute for guidance.

<sup>180</sup> *Id.*

law violations that the United States committed against him.”<sup>181</sup>

- 9.4. The *acting* government was notified by the Permanent Court of Arbitration’s Deputy Secretary General Phyllis Hamilton, that the United States notified the Court that they will not join the arbitral proceedings nor intervene, but had requested permission from the arbitral parties to have access to the pleadings and transcripts of the case. Both the *acting* government and the claimant, Lance Larsen, through counsel, consented. The United States was fully aware of the circumstances of the arbitration whereby the dispute was premised upon the continuity of the Hawaiian State, with the *acting* government serving as its organ during a prolonged and illegal occupation by the United States. The United States did not protest nor did it intervene, and therefore under the doctrine of acquiescence, whose primary function is evidential, the United States recognized *de facto* the conditions of the international arbitration and the continuity of the Hawaiian State. In other words, the United States has provided, not only by acquiescence with full knowledge *de facto* recognition of the *acting* government and the continuity of the Hawaiian State during an illegal and prolonged occupation, but also by direct acknowledgment of the *de facto* authority of the *acting* government when it requested permission from the *acting* government to access the arbitration records.
- 9.5. After the Permanent Court of Arbitration satisfied its institutional jurisdiction that the Hawaiian Kingdom continues to exist as a State in a dispute with the private entity—Larsen, it took deliberate steps to form an *ad hoc* tribunal. By April 2000, the Tribunal was formed, which comprised of Professor James Crawford as President, with Professor Christopher Greenwood and Dr. Gavan Griffith as Associate Arbitrators. Memorials were filed with the Tribunal by Larsen on May 22, 2000,<sup>182</sup> and the Hawaiian Government on May 25, 2000.<sup>183</sup> The Hawaiian Government then filed its Counter-Memorial on June 22, 2000,<sup>184</sup> and Larsen its Counter-Memorial on June 23, 2000.<sup>185</sup>
- 9.6. After the pleadings were submitted, the Tribunal issued Procedural Order no. 3 on July 17, 2000.<sup>186</sup> In the Procedural Order, the Tribunal articulated the dispute from the pleadings in the following statement.

“As further defined in the pleadings of the parties, especially the Counter-Memorials, the plaintiff has requested the Tribunal to

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<sup>181</sup> See Bederman & Hilbert, at 928.

<sup>182</sup> Memorial of Lance Paul Larsen, available at [http://www.alohaquest.com/arbitration/pdf/Memorial\\_Larsen.pdf](http://www.alohaquest.com/arbitration/pdf/Memorial_Larsen.pdf).

<sup>183</sup> Memorial of the Hawaiian Kingdom, available at [http://www.alohaquest.com/arbitration/pdf/Memorial\\_Government.pdf](http://www.alohaquest.com/arbitration/pdf/Memorial_Government.pdf).

<sup>184</sup> Counter-Memorial of the Hawaiian Kingdom, available at [http://www.alohaquest.com/arbitration/pdf/Counter-Memorial\\_Government.pdf](http://www.alohaquest.com/arbitration/pdf/Counter-Memorial_Government.pdf).

<sup>185</sup> Counter-Memorial of Lance Paul Larsen, available at [http://www.alohaquest.com/arbitration/pdf/Counter-Memorial\\_Larsen.pdf](http://www.alohaquest.com/arbitration/pdf/Counter-Memorial_Larsen.pdf).

<sup>186</sup> Procedural Order no. 3, available at [http://www.alohaquest.com/arbitration/procedural\\_order\\_3.htm](http://www.alohaquest.com/arbitration/procedural_order_3.htm).

adjudge and declare (1) that his rights as a Hawaiian subject are being violated under international law as a result of the prolonged occupation of the Hawaiian Islands by the United States of America”, and (2) that the plaintiff “does have redress against the Respondent Government” in relation to these violations (Plaintiff’s Counter-Memorial, para. 3). The defendant “agrees that it was the actions of the United States that violated Claimant’s rights, however denies that it failed to intervene” (Defendant’s Counter-Memorial, para. 2). Accordingly the parties agree on the first of the two issues identified by the Claimant as in dispute, but disagree on the second. The second issue only arises once it is established, or validly agreed, that the first issue is to be decided in the affirmative.”

The Tribunal further stated in its Procedural Order that it “is concerned whether the first issue does in fact raise a dispute between the parties, or, rather, a dispute between each of the parties and the United States over the treatment of the plaintiff by the United States. If it is the latter, that would appear to be a dispute which the Tribunal cannot determine, inter alia because the United States is not a party to the agreement to arbitrate.” The Tribunal, therefore, stated that it could not get to the merits of the case regarding “redress against the Respondent Government” as the second issue, until it address the first issue that Larsen’s “rights as a Hawaiian subject are being violated...by the United States of America.” This first issue that the Tribunal was asked to determine is what caused the Tribunal to raise the principle of an “indispensable third party” that stemmed from the *Monetary Gold* case. In other words, could the Tribunal proceed to rule on the lawfulness of the conduct of the Hawaiian Government when its judgment would imply an evaluation of the lawfulness of the conduct of the United States, which is not a party to the proceedings? To address these concerns, the Tribunal scheduled oral hearings to be held at the Permanent Court of Arbitration for December 7, 8 and 11, 2000.<sup>187</sup>

- 9.7. On December 12, 2000, the day after oral hearings were held at the Permanent Court of Arbitration, a meeting took place in Brussels between Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium, and the author, who was Agent, and two Deputy Agents, Peter Umialiloa Sai, *acting* Minister of Foreign Affairs, and Mrs. Kau’i P. Sai-Dudoit, formerly known as Kau’i P. Goodhue, *acting* Minister of Finance, representing the *acting* government in the *Larsen case*.<sup>188</sup> Ambassador Bihozagara attended a hearing before the International Court of Justice on December 8, 2000,

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<sup>187</sup> Video of the oral hearings in *Larsen v. Hawaiian Kingdom* (Dec. 7, 8, 11, 2000), available at <https://vimeo.com/17007826>.

<sup>188</sup> David Keanu Sai, *A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai’i today*, 10 J. L. & SOC. CHALLENGES 69, 130-131 (Fall 2008).

(*Democratic Republic of the Congo v. Belgium*),<sup>189</sup> where he was made aware of the Hawaiian arbitration case that was also taking place across the hall in the Peace Palace. After inquiring into the case, he called for the meeting and wished to convey that his government was prepared to bring to the attention of the United Nations General Assembly the prolonged occupation of the Hawaiian Kingdom by the United States. In that meeting, the *acting* government decided it could not, in good conscience, accept the offer and place Rwanda in a position of reintroducing Hawaiian State continuity before the United Nations, when Hawai‘i’s community, itself, remained ignorant of Hawai‘i’s profound legal position as a result of institutionalized indoctrination. The *acting* government thanked Ambassador Bihozagara for his government’s offer, but the timing was premature. The *acting* government conveyed to the Ambassador that it would need to first focus its attention on continued exposure and education regarding the American occupation both in the Islands and abroad. Although the Rwandan government took no action before the United Nations General Assembly, the offer itself, exhibited Rwanda’s *de facto* recognition of the *acting* government and the continuity of the Hawaiian State.

- 9.8. The arbitration award was filed with the PCA on 5 February 2001, and concluded that in order for Larsen to maintain his allegation of negligence on the part of the Hawaiian government, he needed the participation of the United States in the arbitration, as a necessary third party, pursuant to the principle set by the International Court of Justice in *the Case concerning Monetary Gold Removed from Rome, ICJ Reports 1954* (21 ILR 399), *the Case concerning Certain Phosphate Lands on Nauru, ICJ Reports 1992* (97 ILR 1), and *the Case concerning East Timor, ICJ Reports 1995* (105 ILR 226). The Tribunal concluded the United States to be a necessary third party and therefore the arbitral proceedings could not be maintained.<sup>190</sup>
- 9.9. In its 2001 annual report to the Permanent Court of Arbitration’s Administrative Council, the Secretary General reported the *Larsen v. Hawaiian Kingdom* arbitration was the thirty-fourth case to have come before the Court pursuant to Article 47 of the 1907 Hague Convention, I (Article 26 of the 1899, Hague Convention, I).<sup>191</sup> Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, provides, “The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.” Under Article 47, only full

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<sup>189</sup> *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Rep. 2000, at 182.

<sup>190</sup> See *Larsen case*, at 598.

<sup>191</sup> Annex 2—*Cases Submitted to Arbitration before the Permanent Court of Arbitration, or Conducted with the Cooperation of the International Bureau*, PCA Annual Report (2001), at 44, available at [http://www.pca-cpa.org/Annex%202\(3\)f4c4.pdf?fil\\_id=505](http://www.pca-cpa.org/Annex%202(3)f4c4.pdf?fil_id=505).

sovereign States can be Contracting Powers or non-Contracting Powers because the 1907 Hague Convention, I, is a treaty under international law. In the Court's new case database, the Hawaiian Kingdom is explicitly recognized as a "State."<sup>192</sup>

- 9.10. The *acting* government also filed a Complaint against the United States of America with the United Nations Security Council on July 5, 2001<sup>193</sup> and a Protest & Demand with United Nations General Assembly against 173 member States for violations of treaties with the Hawaiian Kingdom on August 12, 2012.<sup>194</sup> Both the Complaint and Protest & Demand were filed pursuant to Article 35(2) of the United Nations Charter, which provides that "A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter." The Complaint was accepted by China, who served as the Security Council's President for the month of July of 2001, and the Protest & Demand was accepted by Qatar, who served as the President of the General Assembly's 66<sup>th</sup> Session. Following the filing of the Protest & Demand, the *acting* government also submitted its instrument of accession to the Rome Statute with the United Nations Secretary General on December 10, 2012 in New York City,<sup>195</sup> and its instrument of accession to the 1949 Fourth Geneva Convention with the General Secretariat of the Swiss Federal Department of Foreign Affairs in Berne.<sup>196</sup> At no time has any of the 173 States, whose permanent missions received the protest & demand, objected to the *acting* government's claim of treaty violations by the principal States that have treaties with the Hawaiian Kingdom or their successor States that are successors to those treaties. Article 28 of the *Vienna Convention on Succession of States in respect of Treaties*, provides:

"A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when: ... (b) by reason of their conduct they are to be considered as having so agreed."

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<sup>192</sup> Permanent Court of Arbitration Case Repository, Case View, *Lance Paul Larsen v. The Hawaiian Kingdom* (1999-2001), available at <http://www.pcacases.com/web/view/35>.

<sup>193</sup> The complaint and exhibits can be accessed online at: <http://hawaiiakingdom.org/united-nations.shtml>; see also Dumberry, at 671-672.

<sup>194</sup> The protest and demand can be accessed online at: [http://hawaiiakingdom.org/pdf/UN\\_Protest.pdf](http://hawaiiakingdom.org/pdf/UN_Protest.pdf).

<sup>195</sup> The ICC's instrument of accession can be accessed online at: [http://hawaiiakingdom.org/pdf/Inst\\_Accession.pdf](http://hawaiiakingdom.org/pdf/Inst_Accession.pdf).

<sup>196</sup> The Fourth Geneva Convention's instrument of accession can be accessed online at: [http://hawaiiakingdom.org/pdf/GC\\_Accession.pdf](http://hawaiiakingdom.org/pdf/GC_Accession.pdf).

All 173 States have been made fully aware of the conditions of the Hawaiian Kingdom and by their silence have agreed, by acquiescence, like the United States, to the continuity of the Hawaiian State, the existence of the treaties with the principal States and their successor States, together with their corresponding duties and obligations, and the *de facto* authority of the *acting* government under those treaties.

- 9.11. The *acting* government, through time, established special prescriptive rights, by virtue of acquiescence and fully informed acknowledgment through action, as against the United States, and later as against other States, with regard to its exercising of governmental control in international affairs as officers *de facto* of the *de jure* government of the Hawaiian Kingdom as it stood in 1893. Furthermore, the *acting* government has based its actions as officers *de facto* on its interpretation of their treaties, to include the 1893 executive agreements—*Lili'uokalani assignment* and the *Agreement of restoration*, and the corresponding obligations and duties that stem from these treaties and agreements. The United States, as a party to the executive agreements and other treaties with the Hawaiian Kingdom, has not protested against acts taken by the *acting* government on these matters before the Permanent Court of Arbitration, and the United Nations' Security Council and General Assembly, and, therefore, has acquiesced with full knowledge as to the rights and duties of both the Hawaiian Kingdom and the United States under the agreements, which are treaties.

“Evidence of the subsequent actions of the parties to a treaty may be admissible in order to clarify the meaning of vague or ambiguous terms. Similarly, evidence of the inaction of a party, although not conclusive, may be of considerable probative value. It has been said that ‘[the] primary value of acquiescence is its value as a means of interpretation.’ The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.”<sup>197</sup>

According to Fitzmaurice, special rights, may be built up by a State “leading to the emergence of a usage or customary...right in favour of such State,” and “that the element of consent, that is to say, acquiescence with full knowledge, on the part of other States is not only present, but necessary to the formation of the right.”<sup>198</sup> A State's special right derives from customary rights and obligations under international law, and MacGibbon explains that as “with all types of customary rules, the process of formation is similar, namely, the assertion of a right, on the one hand, and consent to or acquiescence in that

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<sup>197</sup> See MacGibbon, at 146.

<sup>198</sup> Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y. B. INT'L L. 68 (1953).

assertion, on the other.”<sup>199</sup> Specifically, the absence of protest on the part of the United States against the *acting* government’s claims as the legitimate government of the Hawaiian Kingdom signified the United States’ acceptance of the validity of such claims, and cannot now deny it. In the *Alaskan Boundary Dispute*, Counsel for the United States, Mr. Taylor, distinguished between “prescription” and “acquiescence.” He argued that the writings of Publicists, which is a source of international law, have “built up alongside of prescription a new doctrine which they called acquiescence, and the great cardinal characteristic of acquiescence is that it does not require any particular length of time to perfect it; it depends in each particular case upon all the circumstances of the case.”<sup>200</sup> Lauterpracht concludes, “The absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to—or forms a constituent element of—estoppel.”<sup>201</sup> Every action taken by the *acting* government under international law has directly challenged the United States claim to sovereignty over the Hawaiian Islands on substantive grounds and it has prevailed. It has, therefore, established a specific legal right, as against the United States, of its claim to be the legitimate government of the Hawaiian Kingdom exercising governmental control outside of the Hawaiian Islands while under an illegal and prolonged occupation. The United States and other States, therefore, are estopped from denying this specific legal right of the *acting* government by its own admission and acceptance of the right.

## 10. TRANSITIONAL PLAN OF THE ACTING GOVERNMENT

- 10.1. What faced the *acting* Government was the prolonged nature of the occupation, the United States violation of the laws and customs of war during occupation, its devastating effect on Hawai‘i’s political economy, and the violation of international humanitarian law. The exigency of this situation is what prompted the *acting* Government to exercise its legislative authority as a matter of necessity. On October 10, 2014, the *acting* Council of Regency decreed, by Proclamation, the provisional laws for the Kingdom, and subject to ratification by the Legislative Assembly when called into session. This was done to provide the proper legal foundation for the administration of Hawaiian Kingdom laws and be in compliance with the law and customs of war during occupation. The Proclamation decreed,

“that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the

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<sup>199</sup> I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y. B. INT’L L. 115, 117 (1957).

<sup>200</sup> United States Senate, 58<sup>th</sup> Cong., 2d Sess., Doc. no. 162, *Proceedings of the Alaskan Boundary Tribunal*, vol. vii, 619 (1904).

<sup>201</sup> See Lauterpacht, at 395.

Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void.”<sup>202</sup>

The Proclamation also called upon

“all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the military government may issue during the present military occupation of the Hawaiian Kingdom so long as these proclamations, rules, regulations and orders are in compliance with the laws and provisional laws of the Hawaiian Kingdom, the international laws of occupation and international humanitarian law.”<sup>203</sup>

- 10.2. Although, Hawaiian law prohibits the enactment of retrospective laws,<sup>204</sup> the proclamation of provisional laws are not retrospective because there has been no legislative body convened under Hawaiian law since January 17, 1893. Furthermore, the doctrine of necessity would allow for the provisional laws in extraordinary circumstances. According to Sassòli, “The expression ‘laws in force in the country’ in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders, provided that the ‘norms’ in question are general and abstract.”<sup>205</sup> This Proclamation is part of the “laws in force in the country” as a “decree” of the *acting* Government that must be administered in accordance with Article 43.
- 10.3. In decision theory, a negative-sum game is where everyone loses. Any decision from a loss can only have the effect of a loss—a lose-lose situation. The State of Hawai‘i is presently operating from a position of no lawful authority, and everything that it has done or that it will do, is unlawful. There is no edible fruit from a poisonous tree. The rapidly growing knowledge and awareness of the prolonged occupation of Hawai‘i has caused the State of Hawai‘i to swiftly descend and crash. The State of Hawai‘i has found itself in a mammoth negative-sum game. In order to stave off the inevitable, the *acting*

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<sup>202</sup> Proclamation (October 10, 2014), available at [http://hawaiiankingdom.org/pdf/Proc\\_Provisional\\_Laws.pdf](http://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf). Appendix II.

<sup>203</sup> *Id.*

<sup>204</sup> Hawaiian Kingdom Constitution (1864), Article 16—“No Retrospective Laws shall ever be enacted;” see also Hawaiian Kingdom Civil Code, §5—“No law shall have any retrospective operation.”

<sup>205</sup> Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century*, 6 (Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004).

Government and the State of Hawai‘i must cooperate so that positive-sums are realized. The laws and customs of war during occupation provide the legal basis for the State of Hawai‘i to realize these positive-sums. The *acting* Government has been adhering to these laws and customs since its inception in 1996.

- 10.4. Critical to the administration of Hawaiian law is the establishment of a Military government, which is “defined as the supreme authority exercised by an armed occupying force over the lands, properties, and inhabitants of an enemy, allied, or domestic territory.”<sup>206</sup> The establishment of a Military government is not limited to the U.S. military, but to any armed force of the occupying State that is in effective control of occupied territory. U.S. Army Field Manual FM 27-5 provides that an “armed force in territory other than that of [the occupied state] has the duty of establishing CA/MG [civil affairs/military government] when the government of such territory is absent or unable to function properly.”<sup>207</sup> What distinguishes the U.S. military stationed in the Hawaiian Islands from the State of Hawai‘i, in light of the laws and customs of war during occupation, is that the State of Hawai‘i, as an armed force, is in effective control of the majority of Hawaiian territory. There are 118 U.S. military sites occupying 230,929 acres of the Hawaiian Islands, which is 6% of the total acreage of Hawaiian territory.<sup>208</sup>
- 10.5. As an armed force, whose allegiance is to the occupier, the State of Hawai‘i has no choice but to establish itself as a Military government. This is allowable under the laws and customs of war during occupation. To do so, would prevent the collapse of the State of Hawai‘i that would no doubt lead to an economic catastrophe with devastating effects on the U.S. market and the global economy. A military government is empowered, under the laws and customs of war during occupation, to provisionally serve as the administrator of the “laws in force in the country,” which includes the “decree” of the *acting* Government in accordance with Article 43. Without the decree of the *acting* Government, all commercial entities created by the State of Hawai‘i, *e.g.* corporations and partnerships, and all conveyances of real estate, would simply evaporate. Therefore, it is crucial for the Military government to work in tandem with the *acting* Government to ensure the lawfulness of its actions, in the present and in the future, to maintain Hawai‘i’s economy.
- 10.6. The proclamation for the establishment of a Military government would be done similar to the declaration of martial law for the Hawaiian Islands from December 7, 1941 to April 4, 1943. Governor Joseph Poindexter and

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<sup>206</sup> United States Army and Navy Manual of Civil Affairs Military Government, Army Field Manual FM 27-5, Navy Manual OPNAV P22-1115, 2-3 (October 1947), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/FM-27-5-1947.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/FM-27-5-1947.pdf). Appendix VI.

<sup>207</sup> *Id.*, at 4.

<sup>208</sup> *See* U.S. Department of Defense’s Base Structure Report (2012), *available at* <http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf>.

Lieutenant General Walter Short relied on section 67 of the 1900 Territorial Act (48 U.S.C. §532) as the basis to declare martial law under a Military government headed by General Short as the Military governor, being appointed by Poindexter.<sup>209</sup> This Proclamation, however, required the prior approval of President Franklin D. Roosevelt, since the Governor of the Territory of Hawai‘i was a Presidential appointment. When the armed force was transformed from Territory to the State of Hawai‘i in 1959, section 67 was superseded by Article V, section 5 of the State of Hawai‘i Constitution, which gives the Governor full and complete authorization to declare martial law without the prior approval of the President. Section 5 provides, “The governor shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion.”

- 10.7. The fundamental difference between Martial law and Military government is that Martial law is instituted within domestic territory when the military supersedes the civil authority on the grounds of self-preservation during a foreign invasion, while a Military Government is instituted in foreign territory when the occupied state’s government ceases to operate as a result of an armed conflict. Military government “derives its authority from the customs of war, and not the municipal law.”<sup>210</sup> Its functions, however, are the same except for the venue.

“Military government is exercised when an armed force has occupied such territory, whether by force or agreement, and has substituted its authority for that of the sovereign or previous government. The right of control passes to the occupying force limited only by the rules of international law and established customs of war.”<sup>211</sup>

- 10.8. In order to transform the State of Hawai‘i into a Military government, the Governor will need to decree, by Proclamation, the establishment of a Military government in accordance with section 28 of FM 27-5. Central to this proclamation is the administration of Hawaiian Kingdom law in accordance with Article 43 to include the October 10, 2014 decree of the *acting* Government. Additionally, this proclamation will decree that all State of Hawai‘i judicial and executive officers and employees remain in operation with the exception of the State Legislature and County Councils. This

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<sup>209</sup> §67. Enforcement of law—That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

<sup>210</sup> WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 53 (3rd ed. 1914).

<sup>211</sup> See FM 27-5, at 3.

reasoning is because “since supreme legislative power is vested in the military governor, existing legislative bodies will usually be suspended.”<sup>212</sup> The Military government will have to conform to the laws and customs of war during occupation, international humanitarian law, and FM 27-5—*United States Army and Navy Manual of Civil Affairs Military Government*.

- 10.9. This proclamation, however, would not have the effect of absolving criminal responsibility by State of Hawai‘i officials for war crimes, but it will mitigate them. The commission of war crimes prior to the Proclamation can be dealt with through restitution and reparations made to the victims. After the Proclamation, however, the Military government has the duty to prevent and to prosecute war crimes under the laws and customs of war during occupation.

## 11. CONCLUSION

- 11.1. As hereinbefore explained, the continuity of the Hawaiian State is undisputed, and the *acting* government has acquired a customary right to represent the Hawaiian State before international bodies by virtue of the doctrine of acquiescence, as well as explicit acknowledgment by States of the government’s *de facto* authority. Because the Hawaiian Kingdom was an independent State in the nineteenth century, as acknowledged by the Permanent Court of Arbitration in 2001 by *dictum*,<sup>213</sup> international law provides for a presumption of the Hawaiian State’s continuity, which “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.” Furthermore, the Permanent Court of Arbitration explicitly acknowledged the continuity of the Hawaiian Kingdom as a State when arbitration was initiated on November 8, 1999. Therefore, any United States government agency operating within the territory of the Hawaiian State that was established by the Congress, *i.e.* Federal agencies, the State of Hawai‘i, and County governments, is “illegal” because Congressional authority is limited to the territory of the United States.
- 11.2. After firmly establishing there is no “valid demonstration of legal title, or sovereignty,” on the part of the United States over the Hawaiian Islands, and therefore the Hawaiian State continues to exist, it next became necessary to ascertain the legitimacy of the *acting* government to represent the Hawaiian State before international bodies. The first international body to be accessed by the *acting* government was the Permanent Court of Arbitration in 1999, followed by the United Nations Security Council in 2001, the United Nations General Assembly in 2012, the United Nations Secretary General as the

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<sup>212</sup> See FM 27-5, at 11.

<sup>213</sup> The Court acknowledged: “...in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.” *Larsen v. Hawaiian Kingdom*, 119 INT’L L. REP. 566, 581 (2001).

depository for the International Criminal Court in 2012, and the Swiss Government as the depository for the 1949 Geneva Conventions in 2013. Access to these international bodies was accomplished as a State, which is not a member of the United Nations. The *de facto* authority of the *acting* government was acquired through time since the arbitral proceedings were held at the Permanent Court of Arbitration, by acquiescence, in the absence of any protest, and, in some cases, by direct acknowledgment from States, *i.e.* United States, when it requested permission from the *acting* government to access the arbitral records; Rwanda, when it provided notice to the *acting* government of its intention to report the prolonged occupation of the Hawaiian Kingdom to the General Assembly; China, when it accepted the Complaint as a non-member State of the United Nations from the *acting* government while it served as President of the United Nations Security Council; Qatar, when it accepted the Protest and Demand as a non-member State of the United Nations from the *acting* government while it served as President of the General Assembly's 66<sup>th</sup> Session; and Switzerland, when it accepted the Instrument of Accession from the *acting* government as a State while it served as the repository for the 1949 Geneva Conventions.

- 11.3. The *acting* government, as nationals of an occupied State, took the necessary and extraordinary steps, by necessity and according to the laws of our country and international law, to reestablish the Hawaiian government in an *acting* capacity in order to exercise our country's preeminent right to "self-preservation" that was deprived through fraud and deceit; and for the past 13 years the *acting* government has acquired a customary right under international law in representing the Hawaiian State during this prolonged and illegal occupation.

A handwritten signature in black ink, appearing to read "David Keanu Sai". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping tail.

David Keanu Sai, Ph.D.