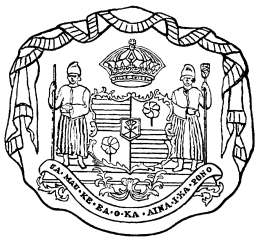

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HAWAIIAN AMBASSADOR-AT-LARGE

The *Larsen v. Hawaiian Kingdom* Case at the Permanent Court of Arbitration and Why There Is An Ongoing Illegal State of War with the United States of America Since 16 January 1893

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Abstract

When the *South China Sea* Tribunal cited in its award on jurisdiction the *Larsen v. Hawaiian Kingdom* case held at the Permanent Court of Arbitration, it should have garnered international attention, especially after the Court acknowledged the Hawaiian Kingdom as a state and Larsen a private entity. The *Larsen* case was a dispute between a Hawaiian national and his government, who he alleged was negligent for allowing the unlawful imposition of American laws over Hawaiian territory that led to the alleged war crimes of unfair trial, unlawful confinement and pillaging. Larsen sought to have the Tribunal adjudge that the United States of America violated his rights, after which he sought the Tribunal to adjudge that the Hawaiian government was liable for those violations. Although the United States was formally invited it chose not to join in the arbitration thus raising the indispensable third party rule for Larsen to overcome. What is almost completely unknown today is Hawai‘i’s international status as an independent and sovereign state, called the Hawaiian Kingdom, that has been in an illegal state of war with the United States of America since 16 January 1893. The purpose of this article will be to make manifest, in the light of international law, the current illegal state of war that has gone on for well over a century and its profound impact on the international community today.

Contents

Introduction—The emergence of the case of the United States illegal occupation of Hawai‘i in the Permanent Court of Arbitration

The first allegations of war crimes committed in Hawai‘i, being unfair trial, unlawful confinement and pillaging,[1] were made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian Kingdom* at the Permanent Court of Arbitration (hereafter "PCA").[2] Oral hearings were held at the PCA on 7, 8 and 11 December 2000. As an intergovernmental organization, the PCA must possess institutional jurisdiction before it can form *ad hoc* tribunals. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal over the dispute between the parties. Disputes capable of being accepted under the PCA's institutional jurisdiction include disputes between: any two or more states; a state and an international organization (i.e. an intergovernmental organization); two or more international organizations; a state and a private party; and an international organization and a private entity.[3] The PCA accepted the case as a dispute between a state and a private party, and acknowledged the Hawaiian Kingdom as a non-Contracting Power under Article 47 of the 1907 Hague Convention, I (hereafter "1907 HC I").[4] As stated on the PCA's website:

> "Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of

[1] Memorial of Lance Paul Larsen (May 22, 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, at para. 62-64, "Despite Mr. Larsen's efforts to assert his nationality and to protest the prolonged occupation of his nation, [on] 4 October 1999, Mr. Larsen was illegally imprisoned for his refusal to abide by the laws of the State of Hawaii by State of Hawaii. At this point, Mr. Larsen became a political prisoner, imprisoned for standing up for his rights as a Hawaiian subject against the United States of America, the occupying power in the prolonged occupation of the Hawaiian islands.… While in prison, Mr. Larsen did continue to assert his nationality as a Hawaiian subject, and to protest the unlawful imposition of American laws over his person by filing a Writ of Habeus [sic] Corpus with the Circuit Court of the Third Circuit, Hilo Division, State of Hawaii.… Upon release from incarceration, Mr. Larsen was forced to pay additional fines to the State of Hawaii in order to avoid further imprisonment for asserting his rights as a Hawaiian subject," available at http://www.alohaquest.com/arbitration/memorial_larsen.htm. Article 33, 1949 Geneva Convention, IV, "Pillage is prohibited. Reprisals against protected persons and their property are prohibited;" Article 147, 1949 Geneva Convention, IV, "Grave breaches […] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: …unlawful confinement of a protected person,… wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention;" see also International Criminal Court, *Elements of War Crimes* (2011), at 16 (Article 8 (2) (a) (vi)—War crime of denying a fair trial), 17 (Article 8 (2) (a) (vii)-2—War Crime of unlawful confinement), and 26 (Article 8 (2) (b) (xvi)—War Crime of pillaging).

[2] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, available at https://pca-cpa.org/en/cases/35/.

[3] United Nations, *United Nations Conference on Trade and Development: Dispute Settlement* (United Nations New York and Geneva, 2003), at 15.

[4] PCA Annual Report, Annex 2 (2011), at 51, n. 2.

> American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom."[5]

The Government of the Hawaiian Kingdom, as it stood on 17 January 1893, was restored in 1995, *in situ* and not *in exile*.[6] An *acting* Council of Regency comprised of four Ministers—Interior, Foreign Affairs, Finance and the Attorney General—was established in accordance with the Hawaiian constitution and the doctrine of necessity to serve in the absence of the executive monarch. By virtue of this process a provisional government, (hereafter "Hawaiian government"), comprised of officers *de facto,* was established.[7] According to U.S. constitutional scholar Thomas Cooley,

> "A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity."[8]

Like other governments formed in exile during foreign occupations, the Hawaiian government did not receive its mandate from the Hawaiian citizenry, but rather by virtue of Hawaiian constitutional law, and therefore represents the Hawaiian state.[9] As in 2001, Bederman and Hilbert reported in the *American Journal of International Law*,

> "[a]t the center of the PCA proceedings was … 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

[5] *Larsen v. Hawaiian Kingdom*, Cases, Permanent Court of Arbitration, available at https://pca-cpa.org/en/cases/35/ (last visited 16 October 2017).
[6] David Keanu Sai, *Brief—The Continuity of the Hawaiian State and the Legitimacy of the acting Government of the Hawaiian Kingdom*, 25-51 (4 August 2013), *available at* http://hawaiiankingdom.org/pdf/Continuity_Brief.pdf (last visited 16 October 2017).
[7] *Id*., at 40-48. On 3 April 2014, the Directorate of International Law, Swiss Federal Department of Foreign Affairs, in Bern, accepted the *acting* Government's letter of credence for its Envoy whose mission was to initiate negotiations with the Swiss Confederation to serve as a Protecting Power in accordance with the 1949 Geneva Convention, IV. The negotiations are ongoing.
[8] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum* (1893), 389, at 390.
[9] The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and, third, prepare for an effective transition to a de jure government when the occupation ends. The Strategic Plan of the Hawaiian government is available at http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf (last visited 16 October 2017).

> responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States had committed against him."[10]

The Tribunal concluded that it did not possess subject matter jurisdiction in the case because of the indispensible third party rule. The Tribunal explained:

> "[i]t follows that the Tribunal cannot determine whether the respondent [the Hawaiian Kingdom] has failed to discharge its obligations towards the claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the *Monetary Gold* principle precludes the Tribunal from doing. As the International Court of Justice explained in the *East Timor* case, "the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.'"[11]

The Tribunal, however, acknowledged that the parties to the arbitration could pursue fact-finding. The Tribunal stated, "[a]t one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for fact-finding, both as between States and otherwise."[12] The Tribunal noted "that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts."[13] The Tribunal pointed out that "Part III of each of the Hague Conventions of 1899 and 1907 provide for International Commissions of Inquiry. The PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry."[14]

To date, there have only been five international commissions of inquiry held under the auspices of the PCA—the first in 1905, *The Dogger Bank Case* (Great Britain – Russia), and the last in 1962, *"Red Crusader" Incident* (Great Britain – Denmark). These commissions of inquiry have been employed in cases "in which 'honor' and 'essential interests' were unquestionably involved, for the determination of legal as well as factual issues, and by tribunals whose composition and proceedings more closely resembled courts than commission of inquiry as originally conceived [under the 1907 HC I]."[15]

[10] David Bederman & Kurt Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensible third parties—legal status of Hawaii," 95 *American Journal of International Law* (2001) 927, at 928.
[11] Larsen v. Hawaiian Kingdom, 119 *International Law Reports* (2001) 566, at 596 (hereafter "Larsen case").
[12] *Id.*, at 597.
[13] *Id*.
[14] *Id.*, at n. 28.
[15] J.G. Merrills, *International Dispute Settlement* (4th ed., 2005), at 59.

On 19 January 2017, the Hawaiian government and Lance Larsen entered into a Special Agreement to form an international commission of inquiry. As proposed by the Tribunal, both Parties agreed to the rules provided under Part III—*International Commissions of Inquiry* (Articles 9-36), 1907 HC I. After the Commission is formed they will select a Secretary General to serve as a registry and the location for its sitting.[16] According to Article III of the Special Agreement:

> "[t]he Commission is requested to determine: *First*, what is the function and role of the Government of the Hawaiian Kingdom in accordance with the basic norms and framework of international humanitarian law; *Second*, what are the duties and obligations of the Government of the Hawaiian Kingdom toward Lance Paul Larsen, and, by extension, toward all Hawaiian subjects domiciled in Hawaiian territory and abroad in accordance with the basic norms and framework of international humanitarian law; and, *Third*, what are the duties and obligations of the Government of the Hawaiian Kingdom toward Protected Persons who are domiciled in Hawaiian territory and those Protected Persons who are transient in accordance with the basic norms and framework of international humanitarian law."[17]

Since humanitarian law is a set of rules that seek to limit the effects of war on persons who are not participating in the armed conflict, such as civilians of an occupied state, the *Larsen* case and the fact-finding proceedings must stem from an actual state of war—a war not in theory but a war in fact. More importantly, the application of the principle of *intertemporal law* is critical to understanding the arbitral dispute between Larsen and the Hawaiian Kingdom. The dispute stemmed from the illegal state of war with the United States that began in 1893. Judge Huber famously stated that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[18]

The Hawaiian Kingdom as a Subject of International Law

To quote the *dictum* of the *Larsen v. Hawaiian Kingdom* Tribunal, "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."[19] As an independent state, the Hawaiian Kingdom entered into extensive treaty relations with a variety of states establishing diplomatic

[16] Amendment to Special Agreement (26 March 2017), available at http://hawaiiankingdom.org/pdf/Amend_Agmt_3_26_17.pdf (last visited 16 October 2017).
[17] Special Agreement (January 19, 2017), available at http://hawaiiankingdom.org/pdf/ICI_Agmt_1_19_17(amended).pdf (last visited 16 October 2017).
[18] *Island of Palmas* arbitration case (Netherlands and the United States of America), R.I.A.A., vol. II, 829 (1949).
[19] Larsen case, *supra* note 11, at 581.

relations and trade agreements.[20] According to Westlake in 1894, the *Family of Nations* comprised, "First, all European States.… Secondly, all American States.… Thirdly, a few Christian States in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State."[21]

To preserve its political independence should there be war, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. Provisions recognizing Hawaiian neutrality were incorporated in the treaties with Sweden-Norway, Spain and Germany. "A nation that wishes to secure her own peace," says Vattel, "cannot more successfully attain that object than by concluding treaties [of] neutrality."[22]

Under customary international law in force in the nineteenth century, the territory of a neutral State could not be violated. This principle was codified by Article 1 of the 1907 Hague Convention, V, stating that the "territory of neutral Powers is inviolable." According to Politis, "[t]he law of neutrality, fashioned as it had been by custom and a closely woven network of contractual agreements, was to a great extent codified by the beginning of the [20th] century."[23] As such, the Hawaiian Kingdom's territory could not be trespassed or dishonored, and its neutrality "constituted a guaranty of independence and peaceful existence."[24]

From a State of Peace to an Unjust State of War

"Traditional international law was based upon a rigid distinction between the state of peace and the state of war," says Judge Greenwood.[25] "Countries were either in a state of peace or a state of

[20] The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate states), 18 June 1875; Belgium, 4 October 1862; Bremen (succeeded by Germany), 27 March 1854; Denmark, 19 October 1846; France, 8 September 1858; French Tahiti, 24 November 1853; Germany, 25 March 1879; New South Wales (now Australia), 10 March 1874; Hamburg (succeeded by Germany), 8 January 1848); Italy, 22 July 1863; Japan, 19 August 1871, 28 January 1886; Netherlands & Luxembourg, 16 October 1862 (William III was also Grand Duke of Luxembourg); Portugal, 5 May 1882; Russia, 19 June 1869; Samoa, 20 March 1887; Spain, 9 October 1863; Sweden-Norway (now separate states), 5 April 1855; and Switzerland, 20 July 1864; the United Kingdom of Great Britain and Northern Ireland) 26 March 1846; and the United States of America, 20 December 1849, 13 January 1875, 11 September 1883, and 6 December 1884.

[21] John Westlake, *Chapters on the Principles of International Law* (1894), at 81. In 1893, there were 44 other independent and sovereign states in the *Family of Nations*: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chili, Colombia, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Hawaiian Kingdom, Haiti, Honduras, Italy, Liberia, Liechtenstein, Luxembourg, Netherlands, Mexico, Monaco, Montenegro, Nicaragua, Orange Free State that was later annexed by Great Britain in 1900, Paraguay, Peru, Portugal, Romania, Russia, San Domingo, San Salvador, Serbia, Spain, Sweden-Norway, Switzerland, Turkey, United States of America, Uruguay, and Venezuela. In 1945, there were 45, and today there are 193.

[22] Emerich De Vattel, *The Law of Nations* (6th ed., 1844), at 333.

[23] Nicolas Politis, *Neutrality and Peace* (1935), at 27.

[24] *Id.*, at 31.

[25] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck (ed.), *The Handbook of the International Law of Military Operations* (2nd ed., 2008), at 45.

war; there was no intermediate state."[26] This is also reflected by the fact that the renowned jurist of international law, Lassa Oppenheim, separated his treatise on *International Law* into two volumes, Vol. I—*Peace,* and Vol. II—*War and Neutrality*. In the nineteenth century, war was recognized as lawful, but it had to be justified under *jus ad bellum*. War could only be waged to redress a State's injury. As Vattel stated, "[w]hatever strikes at [a sovereign state's] rights is an injury, and a just cause of war."[27]

The Hawaiian Kingdom enjoyed a state of peace with all states. This state of affairs, however, was violently interrupted by the United States when the state of peace was transformed to a state of war that began on 16 January 1893 when United States troops invaded the kingdom. The following day, Queen Lili'uokalani, as the executive monarch of a constitutional government, made the following protest and a conditional surrender of her authority to the United States in response to military action taken against the Hawaiian government. The Queen's 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."[28]

Under international law, the landing of United States troops without the consent of the Hawaiian government was an act of war. But in order for an act of war not to transform the state of affairs to a state of war, the act must be justified or lawful under international law, e.g. the necessity of landing troops to secure the protection of the lives and property of United States citizens in the Hawaiian Kingdom. According to Wright, "[a]n act of war is an invasion of territory … and so normally illegal. Such an act if not followed by war gives grounds for a claim which can be legally avoided only by proof of some special treaty or necessity justifying the act."[29] The quintessential question is whether or not the United States troops were landed to protect American lives or were they landed to wage war against the Hawaiian Kingdom.

[26] *Id*.
[27] Vattel, *supra* note 22, at 301.
[28] Larsen case, Annexure 2, *supra* note 10, at 612.
[29] Quincy Wright, "Changes in the Concept of War," 18 *American Journal of International Law* (1924) 755, at 756.

According to Brownlie, "[t]he right of war, as an aspect of sovereignty, which existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights, was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defence, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity."[30] The United States had no dispute with the Hawaiian Kingdom that would have warranted an invasion and overthrow of the Hawaiian government of a neutral and independent state.

In 1993, the United States Congress enacted a joint resolution offering an apology for the overthrow.[31] Of significance in the resolution was a particular preamble clause, which stated: "[w]hereas, in a message to Congress on December 18, 1893, President Grover Cleveland reportedly fully and accurately on the illegal acts of the conspirators, described such acts as an 'act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress,' and acknowledged that by such acts the government of a peaceful and friendly people was overthrown."[32] At first read, however, it would appear that the "conspirators" were the subjects that committed the "act of war," but this is misleading. First, under international law, only a state can commit an "act of war," whether through its military and/or its diplomat; and, second, conspirators within a country could only commit the high crime of treason, not "acts of war." These two concepts are reflected in the terms coup *de main* and *coup d'état*. The former is a successful invasion by a foreign state's military force, while the latter is a successful internal revolt, which was also referred to in the nineteenth century as a revolution.

In a petition to President Cleveland from the Hawaiian Patriotic League, its leadership, comprised of Hawaiian statesmen and lawyers, clearly articulated the difference between a "*coup de main"* and a "revolution." The petition read:

> "[l]ast January [1893], a political crime was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole of the Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government. This was done by a *coup de main* of U.S. Minister Stevens, in collusion with a cabal of conspirators, mainly faithless sons of missionaries and local politicians angered by continuous political defeat, who, as revenge for being a hopeless minority in the country, resolved to "rule or ruin" through foreign help. The facts of this "revolution," as it is improperly called, are now a matter of history."[33]

[30] Ian Brownlie, *International Law and the Use of Force by States* (1963), at 41.
[31] Larsen case, Annexure 2, *supra* note 11, at 611-15.
[32] *Id.,* at 612.
[33] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, (Government Printing Office 1895), 1295, (hereafter "Executive Documents"), available at http://hawaiiankingdom.org/pdf/HPL_Petition_12_27_1893.pdf (last visited 16 October 2017).

Whether by chance or design, the 1993 Congressional apology resolution did not accurately reflect what President Cleveland stated in his message to the Congress in 1893. When Cleveland stated the "military demonstration upon the soil of Honolulu was of itself an act of war," he was referring to United States armed forces and not to any of the conspirators.[34] Cleveland noted "that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[35] This *act of war* was the initial stage of a *coup de main*.

As part of the plan, the U.S. diplomat, John Stevens, would prematurely recognize the small group of insurgents on January 17th as if they were successful revolutionaries thereby giving it a veil of *de facto* status. In a private note to Sanford Dole, head of the insurgency, and written under the letterhead of the United States legation on 17 January 1893, Stevens wrote: "Judge Dole: I would advise not to make known of my recognition of the de facto Provisional Government until said Government is in possession of the police station."[36] A government created through intervention is a puppet regime of the intervening State, and, as such, has no lawful authority. "Puppet governments," according to Marek, "are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements [because] such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant."[37]

Customary international law recognizes a successful revolution when insurgents secure complete control of all governmental machinery and have the acquiescence of the population. U.S. Secretary of State Foster acknowledged this rule in a dispatch to Stevens on 28 January 1893: "[y]our course in recognizing an unopposed *de facto* government appears to have been discreet and in accordance with the facts. The rule of this government has uniformly been to recognize and enter into relation with any actual government in full possession of effective power with the assent of the people."[38] According to Lauterpacht, "[s]o long as the revolution has not been successful, and so long as the lawful government … remains within national territory and asserts its authority, it is presumed to represent the State as a whole."[39] With full knowledge of what constituted a successful revolution, Cleveland provided a blistering indictment in his message to the Congress:

[34] Larsen case, Annexure 1, *supra* note 11, at 604.
[35] *Id*.
[36] Letter from United States Minister, John L. Stevens, to Sanford B. Dole, 17 January 1893, W. O. Smith Collection, HEA Archives, HMCS, Honolulu, available at http://hmha.missionhouses.org/items/show/889.
[37] Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd ed., 1968), at 114.
[38] Executive Documents, *supra* note 33, at 1179.
[39] E. Lauterpacht, *Recognition in International Law* (1947), at 93.

> "[w]hen our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety … declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister's recognition of the provisional government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen's troops were quartered), though the same had been demanded of the Queen's officers in charge."[40]

"Premature recognition is a tortious act against the lawful government," explains Lauterpacht, which "is a breach of international law."[41] And according to Stowell, a "foreign state which intervenes in support of [insurgents] commits an act of war against the state to which it belongs, and steps outside the law of nations in time of peace."[42] Furthermore, Stapleton concludes, "[o]f all the principles in the code of international law, the most important—the one which the independent existence of all weaker States must depend—is this: no State has a right FORCIBLY to interfere in the internal concerns of another State."[43]

Cleveland then explained to the Congress the egregious effects of war that led to the Queen's conditional surrender to the United States:

> "[n]evertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal.… In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice."[44]

The President's finding that the United States embarked upon a war with the Hawaiian Kingdom in violation of the law unequivocally acknowledged a state of war in fact existed since 16

[40] Larsen case, Annexure 1, *supra* note 11, at 605.
[41] E. Lauterpacht, *supra* note 39, at 95.
[42] Ellery C. Stowell, *Intervention in International Law* (1921) at 349, n. 75.
[43] Augustus Granville Stapleton, *Intervention and Non-Intervention* (1866), at 6. It appears that Stapleton uses all capitals in his use of the word 'forcibly' to draw attention to the reader.
[44] Larsen case, Annexure 1, *supra* note 11, at 606.

January 1893. According to Lauterpact, an illegal war is "a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy."[45] However, despite the President's admittance that the acts of war were not in compliance with *jus ad bellum*—justifying war—the United States was still obligated to comply with *jus in bello*—the rules of war—when it occupied Hawaiian territory. In the *Hostages Trial* (the case of *Wilhelm List and Others*), the Tribunal rejected the prosecutor's view that, since the German occupation arose out of an unlawful use of force, Germany could not invoke the rules of belligerent occupation. The Tribunal explained:

> "[t]he Prosecution advances the contention that since Germany's war against Yugoslavia and Greece were aggressive wars, the German occupant troops were there unlawfully and gained no rights whatever as an occupant.… [W]e accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime.… At the outset, we desire to point out that international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in the occupied territory."[46]

As such, the United States remained obligated to comply with the laws of occupation despite it being an illegal war. As the Tribunal further stated, "whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, [and what] may be done."[47] According to Wright, "[w]ar begins when any state of the world manifests its intention to make war by some overt act, which may take the form of an act of war."[48] In his review of customary international law in the nineteenth century, Brownlie found "that in so far a 'state of war' had any generally accepted meaning it was a situation regarded by one or both parties to a conflict as constituting a 'state of war'".[49] Cleveland's determination that by an "act of war … the Government of a feeble but friendly and confiding people has been overthrown," the action was not justified.[50]

What is of particular significance is that Cleveland referred to the Hawaiian people as "friendly and confiding," not "hostile." This is a classical case of where the United States President admits an unjust war not justified by *jus ad bellum*, but a state of war nevertheless for international law purposes. According to United States constitutional law, the President is the sole representative of the United States in foreign relations. In the words of U.S. Justice Marshall, "[t]he President is

[45] H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 *British Yearbook of International Law* (1953) 206.
[46] *USA v. William List et al.* (Case No. 7), Trials of War Criminals before the Nuremburg Military Tribunals (hereafter 'Hostages Trial'), Vol. XI (1950), 1247.
[47] *Id*.
[48] Quincy Wright, "Changes in the Concept of War," 18 *American Journal of International Law* (1924) 755, at 758.
[49] Brownlie, *supra* note 30, at 38.
[50] Larsen case, Annexure 1, *supra* note 11, at 608.

the sole organ of the nation in its external relations, and its sole representative with foreign nations."[51] Therefore, the President's political determination that by an act of war the government of a friendly and confiding people was unlawfully overthrown would not have only produced resonance with the members of the Congress, but to the international community as well, and the duty of third states to invoke neutrality.

Furthermore, in a state of war, the principle of effectiveness that you would otherwise have during a state of peace is reversed because of the existence of two legal orders in one and the same territory. Marek explains, "[i]n the first place: of these two legal orders, that of the occupied State is regular and 'normal,' while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."[52] Therefore, "[b]elligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[53]

Cleveland told the Congress that he initiated negotiations with the Queen "to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned."[54] What Cleveland did not know at the time of his message to the Congress was that the Queen, on the very same day in Honolulu, accepted the conditions for settlement in an attempt to return the state of affairs to a state of peace. The executive mediation began on 13 November 1893 between the Queen and U.S. diplomat Albert Willis and an agreement was reached on 18 December.[55] The President was not aware of the agreement until after he delivered his message.[56] Despite being unaware, President Cleveland's political determination in his message to the Congress was nonetheless conclusive that the United States was in a state of war with the Hawaiian Kingdom and was directly responsible for the unlawful overthrow of its government. Oppenheim defines war as "a contention between States for the purpose of overpowering each other."[57]

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[51] 10 Annals of Cong. 613 (1800).
[52] Marek, *supra* note 37, at 102.
[53] *Id*.
[54] Larsen case, Annexure 1, *supra* note 11, at 610.
[55] 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 Today," 10 *Journal of Law & Social Challenges* (2008) 68, at 119-127.
[56] Executive Documents, *supra* note 33, at 1283. In this dispatch to U.S. Diplomat Albert Willis from Secretary of State Gresham on January 12, 1894, he stated, "Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President's decision. The matter now being in the hands of the Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you." The state of war ensued.
[57] L. Oppenheim, *International Law*, vol. II—War and Neutrality (3rd ed., 1921), at 74.

Once a state of war ensued between the Hawaiian Kingdom and the United States, "the law of peace ceased to apply between them and their relations with one another became subject to the laws of war, while their relations with other states not party to the conflict became governed by the law of neutrality."[58] This outbreak of a state of war between the Hawaiian Kingdom and the United States would "lead to many rules of the ordinary law of peace being superseded…by rules of humanitarian law," e.g. acquisitive prescription.[59] A state of war "automatically brings about the full operation of all the rules of war and neutrality."[60] And, according to Venturini, "[i]f an armed conflict occurs, the law of armed conflict must be applied from the beginning until the end, when the law of peace resumes in full effect."[61] "For the laws of war … continue to apply in the occupied territory even after the achievement of military victory, until either the occupant withdraws or a treaty of peace is concluded which transfers sovereignty to the occupant."[62] In the *Tadić* case, the ICTY indicated that the laws of war—international humanitarian law—applies from "the initiation of … armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached."[63] Only by an agreement between the Hawaiian Kingdom and the United States could a state of peace be restored, without which a state of war ensues.[64] An attempt to transform the state of war to a state of peace was made by executive agreement on 18 December 1893. Cleveland, however, was unable to carry out his duties and obligations under the agreement to restore the situation that existed before the unlawful landing of American troops due to political wrangling in the Congress.[65] Hence, the state of war continued.

International law distinguishes between a "declaration of war" and a "state of war." According to McNair and Watts, "the absence of a declaration … will not of itself render the ensuing conflict

[58] Greenwood, *supra* note 25, at 45.
[59] *Id.*, at 46. As opposed to belligerent occupation during a state of war, peaceful occupation during a state of peace over territory of another state could rise to a title of sovereignty under acquisitive prescription if there was a continuous and peaceful display of territorial sovereignty by the encroaching state without any objection by the encroached state. In this regard, effectiveness in the display of sovereign authority over territory of another state must be peaceful and not belligerent. *Jus in bello* proscribes acquisitive prescription.
[60] Myers S. McDougal and Florentino P. Feliciano, "The Initiation of Coercion: A Multi-temporal Analysis," 52 *American Journal of International Law* (1958) 241, at 247.
[61] Gabriella Venturini, "The Temporal Scope of Application of the Conventions," in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015), at 52.
[62] Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996), at 224.
[63] ICTY, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, at §70.
[64] Under United States municipal laws, there are two procedures by which an international agreement can bind the United States. The first is by a treaty whose entry into force can only take place after two-thirds of the United States Senate has given its advice and consent under Article II, section 2, Clause 2 of the U.S. Constitution. The second is by way of an executive agreement entered into by the President that does not require ratification by the Senate. *See United States v. Belmont*, 301 U.S. 324, 326 (1937); *United States v. Pink,* 315 U.S. 203, 223 (1942); *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003).
[65] Sai, Slippery Path, *supra* note 55, at 125-127.

any less a war."[66] In other words, since a state of war is based upon concrete facts of military action, there is no requirement for a formal declaration of war to be made other than providing formal notice of a State's "intention either in relation to existing hostilities or as a warning of imminent hostilities."[67] In 1946, a United States Court had to determine whether a naval captain's life insurance policy, which excluded coverage if death came about as a result of war, covered his demise during the Japanese attack of Pearl Harbor on 7 December 1941. It was argued that the United States was not at war at the time of his death because the Congress did not formally declare war against Japan until the following day.

The Court denied this argument and explained that "the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor."[68] Therefore, the conclusion reached by President Cleveland that by "an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown,"[69] was a "political determination of the existence of a state of war," and that a formal declaration of war by the Congress was not essential. The "political determination" by President Cleveland, regarding the actions taken by the military forces of the United States since 16 January 1893, was the same as the "political determination" by President Roosevelt regarding actions taken by the military forces of Japan on 7 December 1945. Both political determinations of acts of war by these Presidents created a state of war for the United States under international law.

Foremost, the overthrow of the Hawaiian government did not affect, in the least, the continuity of the Hawaiian state, being the subject of international law. Wright asserts that "international law distinguishes between a government and the state it governs."[70] Cohen also posits that "[t]he state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law."[71] As Judge Crawford explains, "[t]here is a presumption that the State continues to exist, with its rights and obligations … despite a period in which there is … no effective, government."[72] He further concludes that "[b]elligerent

[66] Lord McNair and A.D. Watts, *The Legal Effects of War* (1966), at 7.
[67] Brownlie, *supra* note 30, at 40.
[68] *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (C.C.A. 10th, 1946), 41(3) *American Journal of International Law* (1947) 680, at 682.
[69] Larsen case, Annexure 1, *supra* note 11, at 608.
[70] Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) *American Journal of International Law* (Apr. 1952) 299, at 307.
[71] Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* (1989), at 17.
[72] James Crawford, *The Creation of States in International Law* (2nd ed., 2006), at 34. 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.

occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[73] Commenting on the occupation of the Hawaiian Kingdom, 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 provides for the co-existence of two distinct legal orders, that of the occupier and the occupied."[74]

The Beginning of the Prolonged Occupation

What was the Hawaiian Kingdom's status after the unlawful overthrow of its government for international law purposes? In the absence of an agreement that would have transformed the state of affairs back to a state of peace, the state of war prevails over what *jus in bello* would call belligerent occupation. Article 41 of the 1880 Institute of International Law's *Manual on the Laws of War on Land* declared that a "territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there." This definition was later codified under Article 42 of the 1899 Hague Convention, II, and then superseded by Article 42 of the 1907 Hague Convention, IV (hereafter "HC IV"), which provides that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Effectiveness is at the core of belligerent occupation.

The hostile army, in this case, included not only United States armed forces, but also its puppet regime that was disguising itself as a "provisional government." As an entity created through intervention it existed as an armed militia that worked in tandem with the United States armed forces under the direction of the U.S. diplomat John Stevens. Under the rules of *jus in bello*, the occupant does not possess the sovereignty of the occupied state and therefore cannot compel allegiance.[75] To do so would imply that the occupied state, as the subject of international law and

[73] *Ibid*. Crawford also stated, 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 restore." *Ibid*, n. 157.

[74] 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 Journal of International Law (2002) 655, at 682.

[75] Article 45, 1899 Hague Convention, II, "Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited;" see also Article 45, 1907 Hague Convention, IV, "It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power." On 24 January 1895, the puppet regime calling itself the Republic of Hawai'i coerced Queen Lili'uokalani to abdicate the throne and to sign her allegiance to the regime in order to "save many Royalists from being shot" (William Adam Russ, Jr., *The Hawaiian Republic*

whom allegiance is owed, was cancelled and its territory unilaterally annexed into the territory of the occupying state. International law would allow this under the doctrine of *debellatio*. *Debellatio*, however, could not apply to the Hawaiian situation as a result of the President's determination that the overthrow of the Hawaiian government was unlawful and, therefore, did not meet the test of *jus ad bellum*. As an unjust war, the doctrine of *debellatio* was precluded from arising. That is to say, *debellatio* is conditioned on a legal war. According to Schwarzenberger, "[i]f, as a result of legal, as distinct from illegal, war, the international personality of one of the belligerents is totally destroyed, victorious Powers may … annex the territory of the defeated State or hand over portions of it to other States."[76]

After United States troops were removed from Hawaiian territory on 1 April 1893, by order of President Cleveland's special investigator, James Blount, he was not aware that the provisional government was a puppet regime. As such, they remained in full power where, according to the Hawaiian Patriotic League, the "public funds have been outrageously squandered for the maintenance of an unnecessary large army, fed in luxury, and composed *entirely* of aliens, mainly recruited from the most disreputable classes of San Francisco."[77] After the President determined the illegality of the situation and entered into an agreement to reinstate the executive monarch, the puppet regime refused to give up its power. Despite the President's failure to carry out the agreement of reinstatement and to ultimately transform the state of affairs to a state of peace, the situation remained a state of war and the rules of *jus in bello* continued to apply to the Hawaiian situation.

When the provisional government was formed through intervention, it merely replaced the executive monarch and her cabinet with insurgents calling themselves an executive and advisory councils. All Hawaiian government officials remained in place and were coerced into signing oaths of allegiance to the new regime with the oversight of United States troops.[78] This continued when the American puppet changed its name to the so-called republic of Hawai'i on 4 July 1894 with alien mercenaries replacing American troops.

Under the guise of a Congressional joint resolution of annexation, United States armed forces physically reoccupied the Hawaiian Kingdom on 12 August 1898, during the Spanish-American

(1894-98) And Its Struggle to Win Annexation (1992), at 71). As the rule of *jus in bello* prohibits inhabitants of occupied territory to swear allegiance to the hostile Power, the Queen's oath of allegiance is therefore unlawful and void.

[76] Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*. Vol. II: The Law of Armed Conflict (1968), at 167.

[77] Executive Documents, *supra* note 33, at 1296.

[78] *Ibid*, at 211, "All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named person: Queen Liliuokalani, Charles B. Wilson, Marshal, Samuel Parker, Minister of Foreign Affairs, W.H. Cornwell, Minister of Finance, John F. Colburn, Minister of the Interior, Arthur P. Peterson, Attorney-General, who are hereby removed from office. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils."

War. According to the United States Supreme Court, "[t]hough 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."[79] Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and "they protested annexation occurring without the consent of the governed."[80] Marek asserts that, "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."[81] Even the U.S. Department of Justice in 1988, opined, it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."[82]

In 1900, the Congress renamed the republic of Hawai'i to the Territory of Hawai'i under *An Act To provide a government for the Territory of Hawai'i*,[83] commonly known as the "Organic Act." Shortly thereafter, the Territory of Hawai'i intentionally sought to "Americanize" the school children throughout the Hawaiian Islands. To accomplish this, they instituted a policy of denationalization in 1906, titled "Programme for Patriotic Exercises in the Public Schools," where the national language of Hawaiian was banned and replaced with the American language of English.[84] One of the leading newspapers for the insurgents, who were now officials in the territorial regime, printed a story on the plan of denationalization. The Hawaiian Gazette reported:

> "[a]s a means of *inculcating* patriotism in the schools, the Board of Education [of the territorial government] has agreed upon a plan of patriotic observance to be followed in the celebration of notable days in American history, this plan being a composite drawn from the several submitted by teachers in the department for the consideration of the Board. It will be remembered that at the time of the celebration of the birthday of Benjamin Franklin, an agitation was begun looking to a better observance of these notable national days in the schools, as tending to inculcate patriotism in a school

[79] *Territory of Hawai'i v. Mankichi*, 190 U.S. 197, 212 (1903).
[80] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2016), at 322. Coffman initially published this book in 1998 titled *Nation Within: The Story of the American Annexation of the Nation of Hawai'i*. Coffman explained, "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*," at xvi.
[81] Marek, *supra* note 37, at 110.
[82] Douglas Kmiec, Department of Justice, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* (1988) 238, at 262.
[83] 31 U.S. Stat. 141.
[84] Programme for Patriotic Exercises in the Public Schools, Territory of Hawai'i, adopted by the Department of Public (1906), available at http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf (last visited 16 October 2017).

> population that needed that kind of teaching, perhaps, more than the mainland children do [emphasis added].”[85]

It is important here to draw attention to the use of the word “inculcate.” As a verb, the term imports force such as to convince, implant, and indoctrinate. Brainwashing is its colloquial term. When a reporter from the American news magazine, *Harper’s Weekly,* visited the Ka‘iulani Public School in Honolulu, he reported:

> “[a]t 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 above 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!’”[86]

Further usurping Hawaiian sovereignty, the Congress, in 1959, renamed the Territory of Hawai‘i to the State of Hawai‘i under *An Act To provide for the admission of the State of Hawai‘i into the Union*.[87] These Congressional laws, which have no extraterritorial effect, did not, in the least, transform the puppet regime into a military government recognizable under the rules of *jus in bello*. The maintenance of the puppet also stands in direct violation of the customary international law in 1893, the 1907 HC IV, and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, IV (hereafter “1949 GC IV”). It is important to note for the purposes of *jus in bello* that the United States never made an international claim to the Hawaiian Islands through *debellatio*. Instead, the United States in 1959 reported to the United Nations Secretary General that “Hawaii has been administered by the United States since 1898. As early as 1900, Congress passed an Organic Act, establishing Hawaii as an incorporated territory in which the Constitution and laws of the United States, which were not locally inapplicable, would have full force and effect.”[88] This extraterritorial application of American

[85] Patriotic Program for School Observance, *Hawaiian Gazette* (3 Apr. 1906), at 5, available at http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf (last visited 16 October 2017).
[86] 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 (16 Feb. 1907), at 227.
[87] 73 U.S. Stat. 4.
[88] United Nations, “Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America” (24 September 1959), Document no. A/4226, Annex 1, at 2.

laws are not only in violation of *The Lotus* case principle,[89] but is prohibited by the rules of *jus in bello*.

As an occupying state, the United States was obligated to establish a military government, whose purpose would be to provisionally administer the laws of the occupied state—the Hawaiian Kingdom—until a treaty of peace or agreement to terminate the occupation has been done. "Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory."[90] The administration of occupied territory is set forth in the Hague Regulations, being Section III of the 1907 HC IV. According to Schwarzenberger, "Section III of the Hague Regulations … was declaratory of international customary law."[91] Also, consistent with what was generally considered the international law of occupation in force at the time of the Spanish-American War, 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."[92] Many other authorities also viewed the Hague Regulations as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and subsequent occupation.[93]

Since 1893, there was no military government established by the United States under the rules of *jus in bello* to administer the laws of the Hawaiian Kingdom as it stood prior to the overthrow. Instead, what occurred was the unlawful seizure of the apparatus of Hawaiian governance, its infrastructure, and its properties—both real and personal. It was a theft of an independent state's self-government.

The Duty of Neutrality by Third States

When the state of peace was transformed to a state of war, all other states were under a duty of neutrality. "Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further such injuries to the one as benefit the other."[94] The duty of a neutral state, not a party to the conflict, "obliges him, in the first instance, to prevent with the means at his disposal the belligerent concerned from

[89] *Lotus*, 1927 PCIJ Series A, No. 10, at 18.
[90] United States Army Field Manual 27-10 (1956), at sec. 362.
[91] Georg Schwarzenberger, "The Law of Belligerent Occupation: Basic Issues," 30 *Nordisk Tidsskrift Int'l Ret* (1960), 11.
[92] Munroe Smith, "Record of Political Events," 13(4) *Political Science Quarterly* (1898), 745, at 748.
[93] Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957), 95; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), 57; Ludwig von Kohler, *The Administration of the Occupied Territories*, vol. I, (1942) 2; United States Judge Advocate General's School Tex No. 11, Law of Belligerent Occupation (1944), 2 (stating that "Section III of the Hague Regulations is in substance a codification of customary law and its principles are binding signatories and non-signatories alike").
[94] Oppenheim, *supra* note 57, at 401.

committing such a violation," e.g. to deny recognition of a puppet regime unlawfully created by an act of war.[95]

Twenty states violated their obligation of impartiality by recognizing the so-called republic of Hawai'i and consequently became parties to the conflict.[96] These states include: Austria-Hungary (1 January 1895);[97] Belgium (17 October 1894);[98] Brazil (29 September 1894);[99] Chile (26 September 1894);[100] China (22 October 1894);[101] France (31 August 1894);[102] Germany (4 October 1894);[103] Guatemala (30 September 1894);[104] Italy (23 September 1894);[105] Japan (6 April 1897);[106] Mexico (8 August 1894);[107] Netherlands (2 November 1894);[108] Norway-Sweden (17 December 1894);[109] Peru (10 September 1894);[110] Portugal (17 December

[95] *Id.*, at 496.
[96] Greenwood, *supra* note 25, at 45.
[97] Austria-Hungary's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-austro-hungary/ (last visited 16 October 2017).
[98] Belgium's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-belgium/ (last visited 16 October 2017).
[99] Brazil's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-brazil/ (last visited 16 October 2017).
[100] Chile's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-chile/ (last visited 16 October 2017).
[101] China's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-china/ (last visited 16 October 2017).
[102] France's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-france/ (last visited 16 October 2017).
[103] Germany's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-germanyprussia/ (last visited 16 October 2017).
[104] Guatemala's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-guatemala/ (last visited 16 October 2017).
[105] Italy's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-italy/ (last visited 16 October 2017).
[106] Japan's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/05/27/recognition-of-the-republic-of-hawaii-japan/ (last visited 16 October 2017).
[107] Mexico's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-mexico/ (last visited 16 October 2017).
[108] The Netherlands' recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-netherlands/ (last visited 16 October 2017).
[109] Norway-Sweden's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-swedennorway/ (last visited 16 October 2017).

1894);[111] Russia (26 August 1894);[112] Spain (26 November 1894);[113] Switzerland (18 September 1894);[114] and the United Kingdom (19 September 1894).[115]

"If a neutral neglects this obligation," states Oppenheim, "he himself thereby commits a violation of neutrality, for which he may be made responsible by a belligerent who has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by him."[116] The recognition of the so-called republic of Hawai'i did not create any legality or lawfulness of the puppet regime, but rather is the indisputable evidence that these states' violated their obligation to be neutral. Diplomatic recognition of governments occurs during a state of peace and not during a state of war, unless providing recognition of belligerent status. These recognitions were not recognizing the republic as a belligerent in a civil war with the Hawaiian Kingdom, but rather under the false pretense that the republic succeeded in a so-called revolution and therefore was the new government of Hawai'i during a state of peace.

The State of Hawai'i: Not a Government but a Private Armed Force

When the United States assumed control of its installed puppet regime under the new heading of Territory of Hawai'i in 1900, and later the State of Hawai'i in 1959, it surpassed "its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts."[117] The legislation of every state, including the United States of America and its Congress, are not sources of international law. In *The Lotus* case, the Permanent Court of International Justice stated that "[n]ow the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to

[110] Peru's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-peru/ (last visited 16 October 2017).
[111] Portugal's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-portugal/ (last visited 16 October 2017).
[112] Russia's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-russia/ (last visited 16 October 2017).
[113] Spain's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-spain/ (last visited 16 October 2017).
[114] Switzerland's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-switzerland/ (last visited 16 October 2017).
[115] The United Kingdom's recognition of the Republic of Hawai'i, available at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-britain/ (last visited 16 October 2017).
[116] Oppenheim, *supra* note 57, at 497.
[117] Eyal Benvenisti, *The International Law of Occupation* (1993), at 19.

the contrary—it may not exercise its power in any form in the territory of another State."[118] According to Judge Crawford, derogation of this principle will not be presumed.[119]

Since Congressional legislation has no extraterritorial effect, it cannot unilaterally establish governments in the territory of a foreign state. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[120] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[121] Therefore, the State of Hawai'i cannot claim to be a government as its only claim to authority derives from Congressional legislation that has no extraterritorial effect. As such, *jus in bello* defines it as an organized armed group.[122]

"[O]rganized armed groups … are under a command responsible to that party for the conduct of its subordinates."[123] According to Henckaerts and Doswald-Beck, "this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command,"[124] and that this "definition of armed forces builds upon earlier definitions contained in the Hague Regulations and the Third Geneva Convention which sought to determine who are combatants entitled to prisoner-of-war status."[125] Article 1 of the 1907 HC IV, provides that

> "[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."

Since the *Larsen* case, defendants that have come before courts of this armed group have begun to deny the courts' jurisdiction based on the narrative in this article. In a contemptible attempt to quash this defense, the Supreme Court of the State of Hawai'i in 2013 responded to a defendant who "contends that the courts of the State of Hawai'i lacked subject matter jurisdiction over his

[118] *Lotus, supra* note 89.
[119] Crawford, *supra* note 72, at 41.
[120] United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).
[121] The Apollon, 22 U.S. 362, 370 (1824).
[122] Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.
[123] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (2009), at 14.
[124] *Id.*, at 15.
[125] *Id*.

criminal prosecution because the defense proved the existence of the Hawaiian Kingdom and the illegitimacy of the State of Hawai'i government,[126] with "*whatever may be said regarding the lawfulness" of its origins, "the State of Hawai'i ... is now, a lawful government* [emphasis added]."[127] Unable to rebut the factual evidence being presented by defendants, the highest so-called court of the State of Hawai'i could only resort to power and not legal reason, whose decision has been used to allow prosecutors and plaintiffs to dispense with these legal arguments. On this note, Marek explains that an occupier without title or sovereignty "must rely heavily, if not exclusively, on full and complete effectiveness."[128]

The laws and customs of war during occupation applies only to territories that come under the authority of either the occupier's military and/or an occupier's armed force such as the State of Hawai'i, and that the "occupation extends only to the territory where such authority has been established and can be exercised."[129] According to Ferraro, "occupation—as a species of international armed conflict—must be determined solely on the basis of the prevailing facts."[130]

Commission of War Crimes in the Hawaiian Kingdom

The Rome Statute of the International Criminal Court defines war crimes as "serious violations of the laws and customs applicable in international armed conflict."[131] The United States Army Field Manual 27-10 expands the definition of a war crime, which is applied in armed conflicts that involve United States troops, to be "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[132] In the *Larsen* case, the alleged war crimes included deliberate acts as well as omissions. The latter include the failure to administer the laws of the occupied state (Article 43, 1907 HC IV), while the former were actions denying a fair and regular trial, unlawful confinement (Article 147, 1949 GC IV), and pillaging (Article 47, 1907 HC IV, and Article 33, 1907 GC IV).

International case law indicates that there must be a mental element of intent for the prosecution of war crimes, whereby war crimes must be committed willfully, either intentionally—*dolus directus*, or recklessly—*dolus eventualis*. According to Article 30(1) of the Rome Statute, an alleged war criminal is "criminally responsible and liable for punishment … only if the material elements [of the war crime] are committed with intent and knowledge." Therefore, in order for prosecution of the responsible person(s) to be possible there must be a mental element that

[126] *State of Hawai'i v. Dennis Kaulia*, 128 Hawai'i 479, 486 (2013).
[127] *Id.*, at 487.
[128] Marek, *supra* note 37, at 102.
[129] 1907 Hague Convention, IV, Article 42.
[130] Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law," 94 (885) *International Review of the Red Cross* (Spring 2012) 133, at 134.
[131] International Criminal Court, *Elements of a War Crime*, Article 8(2)(b).
[132] U.S. Army Field Manual 27-10, sec. 499 (July 1956).

includes a volitional component (intent) as well as a cognitive component (knowledge). Article 30(2) further clarifies that "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." Furthermore, the International Criminal Court's *Elements of a War Crime*, states that "[t]here is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict."[133]

Is there a particular time or event that could serve as a definitive point of knowledge for purposes of prosecution? In other words, where can there be "awareness that a circumstance exists or a consequence will occur in the ordinary course of events" stemming from the illegality of the overthrow of the Hawaiian government on 17 January 1893? For the United States and other foreign governments in existence in 1893, that definitive point would be 18 December 1893, when President Cleveland notified the Congress of the illegality of the overthrow of the Hawaiian government.

For the private sector and foreign governments that were not in existence in 1893, however, the United States' 1993 apology for the illegal overthrow of the Hawaiian government should be considered as serving as that definitive point of knowledge. In the form of a Congressional joint resolution enacted into United States law, the law specifically states that the Congress "on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i on January 17, 1893 acknowledges the historical significance of this event."[134] Additionally, the Congress urged "the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i."[135]

Despite the mistake of facts and law riddled throughout the apology resolution, it nevertheless serves as a specific point of knowledge and the ramifications that stem from that knowledge. Evidence that the United States knew of such ramifications was clearly displayed in the apology law's disclaimer, "[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."[136] It is a presumption that everyone knows the law, which stems from the legal maxim *ignorantia legis neminem excusat*—ignorance of the law excuses no one. Unlike the United States government, being a public body, the State of Hawai'i cannot claim to be a government at all, and therefore is merely a private organization. Therefore, awareness and knowledge for members of the State of Hawai'i would have begun with the enactment of the apology resolution in 1993.

[133] ICC Elements of a War Crime, Article 8.
[134] Larsen case, Annexure 2, *supra* note 11, at 614.
[135] *Id.*, at 615
[136] *Id*.

International law today criminalizes an unjust war as a "crime of aggression." Under Article 8 *bis* of the Rome Statute, a war is criminal if a state aggressively utilizes its military force "against the sovereignty, territorial integrity or political independence of another State."[137] There can be no doubt that the American invasion and overthrow of the government of a "friendly and confiding people" was an aggressive war waged with malicious intent that violated the Hawaiian Kingdom's right of self-determination—duty of non-intervention, its territorial integrity and political independence.

The installation of the puppet regime also violated the rights of the Hawaiian people. The installed puppet in 1893, together with their organs, according to the Hawaiian Patriotic League, "have repeatedly threatened murder, violence, and deportation against all those not in sympathy with the present state of things, and the police being in their control, intimidation is a common weapon, under various forms, even that of nocturnal searches in the residences of peaceful citizens."[138] These criminal acts would not have occurred if the United States complied with the law of occupation. Customary international law at the time mandated an occupying state to provisionally administer the laws of the occupied state. Article 43 of the 1907 HC IV provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." 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."[139] Graber also states, that "nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code."[140]

In similar fashion to the Hawaiian situation, Germany, when it occupied Croatia during the Second World War, established a puppet regime in violation of international law to serve as its surrogate. On this matter, the Nuremberg Tribunal, in the *Hostages Trial*, pronounced:

> "[o]ther than the rights of occupation conferred by international law, no lawful authority could be exercised by the Germans. Hence, they had no legal right to create an independent sovereign state during the progress of the war. They could set up such a provisional [military] government as was necessary to accomplish the purposes of the occupation but further than that they could not legally go. We are of the view that Croatia was at all times here involved an occupied country and that all acts performed by it were those for which [Germany] the occupying power was responsible."[141]

[137] Rome Statute, art. 8 *bis* (2).
[138] Executive Documents, *supra* note 33, at 1297.
[139] Benvenisti, *supra* note 117, at 8.
[140] Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914* (1949), at 143.
[141] Hostages Trial, *supra* note 46, at 1302.

The United States failure to form a military government throughout the duration of the prolonged occupation since 17 January 1893 has rendered all acts by the puppet regimes—provisional government (1893 – 94), republic of Hawai'i (1894 – 1900), Territory of Hawai'i (1900 – 1959), and the State of Hawai'i (1959 – present)—which would have otherwise emanated from a *bona fide* military government, unlawful and void. As the occupying power, the United States is responsible for the acts of the State of Hawai'i just as the Germans were responsible for the acts of the so-called State of Croatia during the Second World War, which, in these proceedings of an international commission of inquiry, includes the alleged war crimes committed against Lance Larsen.[142]

Conclusion

Fundamental to deciphering the Hawaiian situation is to discern between a state of peace and a state of war. This parting of the seas provides the proper context by which the application of certain rules of international law would or would not apply. The laws of war—*jus in bello*, otherwise known today as international humanitarian law, are not applicable in a state of peace. Inherent in the rules of *jus in bello* is the co-existence of two legal orders, being that of the occupying state and that of the occupied state. As an occupied state, the continuity of the Hawaiian Kingdom has been maintained for the past 124 years by the positive rules of international law, notwithstanding the absence of effectiveness that would otherwise be required during a state of peace.[143]

The failure of the United States to comply with international humanitarian law for over a century has created a humanitarian crisis of unimaginable proportions where war crimes has since risen to a level of *jus cogens*—compelling law. At the same time, the obligations, in point, have *erga omnes* characteristics—flowing to all states. The international community's failure to intercede, as a matter of *obligatio erga omnes,* can only be explained by the United States deceptive portrayal of Hawai'i as an incorporated territory. As an international wrongful act, states have an obligation to not "recognize as lawful a situation created by a serious breach … nor render aid or assistance in maintaining that situation,"[144] and states "shall cooperate to bring to an end through lawful means any serious breach [by a state of an obligation arising under a peremptory norm of general international law]."[145]

The gravity of the Hawaiian situation has been heightened by North Korea's announcement that "all of its strategic rocket and long range artillery units 'are assigned to strike bases of the U.S. imperialist aggressor troops in the U.S. mainland and on Hawaii," which is an existential

[142] Memorial of Lance Paul Larsen, *supra* note 1.
[143] Crawford, *supra* note 72, at 34; Marek, *supra* note 37, at 102.
[144] Responsibility of States for International Wrongful Acts (2001), Article 41(2).
[145] *Id.*, Article 41(1).

threat.[146] The United States crime of aggression since 1893 is in fact *a priori,* and underscores Judge Greenwood's statement, "[c]ountries were either in a state of peace or a state of war; there was no intermediate state."[147] The Hawaiian Kingdom, a neutral and independent state, has been in an illegal war with the United States for the past 124 years without a peace treaty, and must begin to comply with the rules of *jus in bello*.

[146] Choe Sang-Hun, North Korea Calls Hawaii and U.S. Mainland Targets, New York Times (26 March 2013), available at http://www.nytimes.com/2013/03/27/world/asia/north-korea-calls-hawaii-and-us-mainland-targets.html (last visited 16 October 2017). Legally speaking, the armistice agreement of 27 July 1953 did not bring the state of war to an end between North Korea and South Korea because a peace treaty is still pending. The significance of North Korea's declaration of war of March 30, 2013, however, has specifically drawn the Hawaiian Islands into the region of war because it has been targeted as a result of the United States prolonged occupation.

[147] Greenwood, *supra* note 25.