DAVID KEANU SAI, PH.D.
Head, Royal Commission of Inquiry
P.O. Box 2194
Honolulu, HI 96805-2194
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/

May 28, 2019

William A. Schabas
Professor of international law
School of Law, Middlesex University
London, UK NW4 4BT
Email: W.Schabas@mdx.ac.uk

Re: Application of International Humanitarian Law to the Prolonged Occupation of the Hawaiian Kingdom

Aloha Professor Schabas:

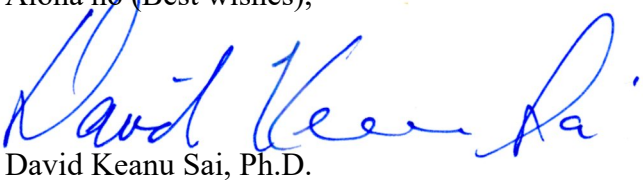
Thank you for the exchange of communications regarding a legal opinion on international humanitarian law and its application to the Hawaiian Kingdom's prolonged occupation by the United States. Your reference of Jewish kapos during the Second World War regarding a possible defense to war crimes as a result of denationalization in Hawai'i was quite illuminating. Unlike conventional occupations where denationalization can be one of many war crimes, war crimes committed in Hawai'i stem from the war crime of denationalization itself.

Under its mandate, the Royal Commission of Inquiry ("Commission") will put together a collection of contributions by experts in the legal, humanitarian, human rights, political and historical fields. In the legal field, Professor Matthew Craven from the University of London, SOAS, has already provided a legal opinion on the continuity of the Hawaiian Kingdom as a subject of international law, which I am enclosing. In the human rights field and the right of self-determination of a people in an existing State, Professor Federico Lenzerini from the University of Siena will provide a legal opinion. And I will be covering the political and historical fields of the Hawaiian Kingdom. Your legal opinion will fall under the humanitarian field. These expert opinions will form the basis of the Commission's report.

After conferring with Professor Lenzerini, deputy head of the Royal Commission of Inquiry, we would like to have a legal opinion addressing the applicable international law, main facts and their related assessment, allegations of war crimes, and defining the material elements of the war crimes in order to identify *mens rea* and *actus reus*. I have taken the liberty of enclosing some of the main facts of the occupation and a preliminary list of alleged war crimes for you to consider.

Please let me know if you are satisfied with the form and content of your legal opinion, after which we can discuss remuneration.

Aloha no (Best wishes),



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

enclosures

PROCLAMATION NO. 2019-1

By virtue of the prerogative of the Crown provisionally vested in us in accordance with Article 33 of the 1864 Constitution, and to ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom, it is hereby ordered as follows:

Article 1

Head of the Royal Commission of Inquiry and terms of the investigation

1. His Excellency David Keanu Sai, Ph.D., *Acting* Minister of the Interior and Chairman of the Council of Regency, because of his recognized expertise in international relations and public law, is hereby appointed head of the Royal Commission of Inquiry, hereinafter "Royal Commission," on the consequences of the belligerent occupation of the Hawaiian Kingdom by the United States of America since January 17, 1893.

2. The purpose of the Royal Commission shall be to investigate the consequences of the United States' belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission.

3. The results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report.

4. The head of the Royal Commission shall be responsible for the implementation of the inquiry. He shall determine, with complete independence, the procedures and working methods of the inquiry, and the content of the report referred to in paragraph 3.

5. The head of the Royal Commission shall take the following oath:

> "The undersigned, a Hawaiian subject, being duly sworn, upon his oath, declares that as head of the Royal Commission of Inquiry

duly constituted on April 15, 2019, I will act correctly, truly and faithfully, and without favor to or prejudice against anyone."

Article 2
Financing

1. All costs incurred by the Royal Commission shall be borne by the Hawaiian Government, by its Council of Regency, and that the latter has granted on this day $15,000.00 (USD) for initial expenditures of the Royal Commission.

2. The management of the expenditures of the Royal Commission shall be subject to contracts between the head of the Royal Commission and the *Acting* Minister of Finance.

3. The head of the Royal Commission shall be accountable to the *Acting* Minister of Finance for all expenditures.

Article 3
Composition of the Royal Commission of Inquiry

The composition of the Royal Commission shall be decided by the head and shall be comprised of recognized experts in various fields.

Article 4
Entry into effect and expiration

This decision shall take effect on the day of its adoption and shall expire on the day that the head is satisfied that the mandate of the Royal Commission has been completed.

[seal]

In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 17th day of April A.D. 2019.

[signed]
David Keanu Sai, Ph.D.
Chairman of the Council of Regency
Acting Minister of the Interior

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

[signed]
Kauʻi P. Sai-Dudoit,
Acting Minister of Finance

[signed]
Dexter Keʻeaumoku Kaʻiama, Esq.,
Acting Attorney General

CONTINUITY OF THE HAWAIIAN KINGDOM

by Dr. Matthew Craven

Reader in International Law
SOAS, University of London

Being a portion of a
Legal Brief provided for the
acting Council of Regency

http://www.HawaiianKingdom.org

July 12, 2002

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 territorial compass 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 essentially 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 such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another 'successor' state (to the extent provided by 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 implications of continuity in case of Hawai'i are several:

a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.

b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.

c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibus* or impossibility of performance.

d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian kingdom incurred prior to its occupation.

2.3 Bearing in mind the consequences elucidated in c) and d) above, it might be said that a claim of state continuity on the part of Hawai'i has to be opposed as against a claim by the US 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. Whilst State continuity certainly denies the applicability of principles of succession and holds otherwise that rights and obligations remain intact save insofar as they may be affected by the principles *rebus sic stantibus* or impossibility of performance, there is room in theory at least for a principle of universal succession to operate such as to produce exactly the same result (under the theory of universal succession).[1] The continuity of legal rights and obligations, in other words, does not necessarily suppose the continuity of the State as a distinct person in international law, as it is equally consistent with discontinuity followed by universal succession. Even if such a thesis remains largely theoretical, it is apparent that a distinction has to be maintained between continuity of personality on the one hand, and continuity of specific legal rights and obligations on the other. The maintenance in force of a treaty, for example, in relation to a particular territory may be evidence of State continuity, but it is far from determinative in itself.

2.4 Even if it is relatively clear as to when States may be said to come into being for purposes of international law (in many cases predicated upon recognition or admission into the United Nations),[2] the converse is far from being the case.[3] Beyond the theoretical circumstance in which a body politic has dissolved (for example 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.[4] The problem, in part, is the lack of any institution by which such an event may be marked: governments do not generally withdraw recognition even if circumstances might so warrant,[5] and there is no mechanism by which membership in international organisations may be terminated by reason of extinction. 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.

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[1] Cf. article 34 Vienna Convention on State Succession in Respect of Treaties (1978).

[2] See on this point Crawford J., *The Creation of States in International Law* (1979); Dugard J., *Recognition and the United Nations* (1987).

[3] Ibid, p.417.

[4] See generally, Marek K., *The Identity and Continuity of States in Public International Law* (2nd ed. 1968). For early recognition of this principle see Phillimore P., *Commentaries upon International Law* (1879) p. 202.

[5] See, Guggenheim P., *Traité de droit international public* (1953) p. 194. Lauterpacht notes that '[W]ithdrawal of recognition from a State is often obscured by the fact that, having regard to the circumstances, it does not take place through an express declaration announcing the withdrawal but through the act of recognition, express or implied, of the new authority.' Lauterpacht H., *Recognition in International Law*, (1947) pp. 350-351.

2.5 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.[6] First that the continuity of the State is not affected by changes in government even if of a revolutionary nature.[7] Secondly, that continuity is not affected by territorial acquisition or loss,[8] and finally that it is not affected by belligerent occupation (understood in its technical sense).[9] Each of these principles reflects upon one of the key incidents of statehood – territory, government 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

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[6] Further principles have also been suggested, such as: i) the state does not cease to exist by reason of its entry into a personal union, Pradier-Fodéré, *Traité de droit international public Européen et Americain* (1885) s.148, p.253; ii) that the state does not expire by reason of becoming economically or politically weak, *ibid*, s. 148, p.254; iii) that the state does not cease to exist by reason of changes in its population, *ibid* p. 252; iv) that the state is not affected by changes in the social or economic system, Verzijl, *International Law in Historical Perspective*, p. 118; v) that the State is not affected by being reduced to a State of semi-sovereignty, Phillimore, supra, n. 4, p. 202. According to Vattel, the key to sovereignty was 'internal independence and sovereign authority' (Vattel E., *The Law of Nations or the Principles of Natural Law* (1758, trans Fenwick C., 1916) Bk.1, s.8)- if a state maintained these, it would not lose its sovereignty by the conclusion of unequal treaties or tributary agreements or the payment of homage. Sovereign states could be subject to the same prince and yet remain sovereign e.g Prussia and Neufchatel (*ibid,* Bk.1, s.9). The formation of confederative republic of states did not destroy sovereignty because 'the obligation to fulfill agreements one has voluntarily made does not detract from one's liberty and independence' (*ibid*, bk.1, s.10) e.g. the United Provinces of Holland and the members of the Swiss Confederation.

[7] For early versions of this principle see, Grotius, *De Iure Belli ac Pacis* Bk. II, c. xvi, p. 418. See also, Pufendorf S., *De Jure Naturae et Gentium Libri Octo* (1688, trans Oldfather C. and Oldfather W., 1934) B. VIII, c. xii, s.1, p. 1360; Rivier, *Principes du Droit des Gens*, (1896) I, p. 62; De Martens F., *Traité de Droit International* (1883) 362; Westlake J., *International Law* (1904) I, 58; Wright Q., 'The Status of Germany and the Peace Proclamation', 46 A.J.I.L. (1952) 299, p. 307; McNair A., 'Aspects of State Sovereignty' B.Y.I.L. (1949) p. 8. Jennings and Watts (Oppenheim's Inernational Law (9th ed. 1996), p. 146) declare that:

> 'Mere territorial changes, whether by increase or by dimunution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties.... Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired'.

See also, *US v. Curtiss Wright Export Corp. et al* 299 US (1936) 304, p. 316 (J. Sutherland): 'Rulers come and go; governments end and forms of government change; but sovereignty survives.'.

[8] Westlake, supra, n. 7, p. 59; Pradier-Fodéré, supra, n. 6, s. 148, p. 252; Hall W., *A Treatise on International Law* (4th ed. 1895) p. 23; Phillimore, supra, n. 4, I, pp. 202-3; Rivier, supra, n. 7, I, pp. 63-4; Marek, supra, n. 4, pp. 15-24 Article 26 Harvard Research Draft Convention on the Law of Treaties 1935, 29 AJIL (1935) Supp. 655. See also, *Katz and Klump v. Yugoslavia* [1925-1926] A. D. 3 (No. 24); *Ottoman Debt Arbitration* [1925-26] A. D. 3; *Roselius and Co. v. Dr Karsten and the Turkish Republic intervening*, [1925-6] A. D. (No. 26); *In re Ungarishche kriegsprodukien Aktiengesellschaft*, [1919-22] A.D. (No. 45); *Lazard Brothers and Co v. Midland Bank*, [1931-32] A.D. (No. 69). For State practice see e.g. Great Britain remained the same despite the loss of the American Colonies; France, after the loss of territory in 1814-15 and 1871; Austria after the cession of Lombardy in 1859 and Venice in 1866; Prussia after the Franco-Prussian Peace Treaty at Tilsit, 1807. See generally, Moore, J., *A Digest of International Law*, (1906), p. 248.

[9] See below, paras. .

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.[10] 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.'[11]

The only exception to this general principle, perhaps, is to be found in case of multiple changes of a less than total nature, such as where a revolutionary change in government is accompanied by a broad change in the territorial delimitation of the State.[12]

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. 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 recognised 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 occupation 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 ineffectiveness of present or past US 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 recognised 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' (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*:

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[10] Crawford points out that 'the presumption – in practice a strong one – is in favour of the continuance, and against the extinction, of an established state', Crawford, *supra*, n. 2, p. 417.

[11] Hall, *supra*, n. 8, p. 22.

[12] See e.g. Marek, *supra*, n. 4.

> '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.'[13]

Thus, whilst '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 Whilst the Montevideo critieria[14] (or versions of) are now regarded as the definitive determinants of statehood, the criteria governing the 'creation' of states in international law in the 19th Century were somewhat less clear.[15] The rise of positivism and its rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many to posit international law less in terms of a 'universal' law of nations and more in terms of an international public law of European (and North American) States.[16] According to this view, international law was gradually extended to other portions of the globe primarily in virtue of imperialist ambition and colonial practice - much of the remainder was regarded as simply beyond the purview of international law and frequently as a result of the application of a highly suspect 'standard of civilisation'. It was not the case, therefore, that all territories governed in a stable and effective manner would necessarily be regarded as subjects of international law and much would apparently depend upon the formal act of recognition, which signalled their 'admittance into the family of nations'.[17] Thus, on the one hand commentators frequently provided

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[13] *Island of Palmas Case (Netherlands v. United States)* 2 R.I.A.A. 829.

[14] Montevideo Convention on the Rights and Duties of States, Dec. 26th 1933, article 1:
'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

[15] Doctrine towards the end of the 19th Century began to articulate those criteria. Rivier, for example, described the 'essential elements of the state' as being evidenced by 'an independent community, organised in a permanent manner on a certain territory' (Rivier, *supra*, n. 7). Hall similarly speaks about the 'marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.' *Supra*, n. 8, p. 18.

[16] See e.g., Lawrence T., *Principles of International Law* (4th ed. 1913) p. 83; Pradier-Fodéré, *Traité de droit international public Européen et Americain* (1885).

[17] Hall comments, for example, that 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired. Hall, *supra,* n. 8, p. 87.

impressively detailed 'definitions' of the State. Phillimore, for example, noted that 'for all purposes of international law, a state… may be defined to be a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe'.[18] These definitions, however, were not always intended to be prescriptive. Hall maintained, for example, that whilst States were subjected to international law 'from the moment… at which they acquire the marks of a state'[19] he later added the qualification that States 'outside European civilisation… must formally enter into the circle of law-governed countries'.[20] In such circumstances recognition was apparently critical. Given the trend to which this gave rise, Oppenheim was later to conclude in 1905, that 'a State is and becomes an international person through recognition only and exclusively'.[21]

3.2 Whatever the general position, there is little doubt that the Hawaiian Kingdom fulfilled all requisite criteria. The Kingdom was established as an identifiable, and independent, political community at some point in the early 19th Century (the precise date at which this occurred is perhaps of little importance). During the next half-Century it was formally recognised by a number of Western powers including Belgium, Great Britain,[22] France,[23] and the United States,[24] and received and dispatched diplomatic agents to more than 15 States (including Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden and Norway and the United States). Secretary of State Webster declared, for example, in a letter to Hawaiian agents in 1842 that:

> 'the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the Islands as a conquest or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.'[25]

This point was reiterated subsequently by President Tyler in a message to Congress.[26] In similar vein, Britain and France declared in a joint declaration in 1843 that they considered 'the Sandwich Islands as an independent State' and vowed 'never to take

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[18] Phillimore, *supra,* n. 4, I, p. 81.

[19] Hall, supra, n. 8, p. 21.

[20] *Ibid*, pp. 43-44.

[21] *International Law: A Treatise* (1905) I, p. 109.

[22] Declaration of Great Britain and France relative to the Independence of the Sandwich Islands, London, Nov. 28th, 1843.

[23] Ibid.

[24] Message from the President of the United States respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government, Dec. 19th 1842. The Apology Resolution of 1993, however, maintains that the US 'recognised the independence of the Hawaiian Kingdom, extended full and complete diplomatic recognition to the Hawaiian Government 'from 1826 until 1893'.

[25] Letter of Dec. 19th 1842, Moore's Digest, *supra*, n. 8, I, p. 476.

[26] Message of President Tyler, Dec. 30th 1842, Moore's Digest, *supra*, n. 8, I, pp. 476-7.

possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed'.[27] When later in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions 'incompatible with any just regard for the Hawaiian Government as an independent State' and calling upon France to 'desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands'.[28]

3.3 In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd 1826, Dec. 20th 1849, May 4th 1870, Jan. 30th 1875, Sept. 11th 1883, and Dec. 6th 1884), Britain (Nov. 16th 1836 and July 10th 1851), the Free Cities of Bremen (Aug. 7th 1851) and Hamburg (Jan. 8th 1848), France (July 17th 1839), Austria-Hungary (June 18th 1875), Belgium (Oct. 4th 1862), Denmark (Oct. 19th 1846), Germany (March 25th 1879), France (Oct. 29th 1857), Japan (Aug. 19th 1871), Portugal (May 5th 1882), Italy (July 22nd 1863), the Netherlands (Oct. 16th 1862), Russia (June 19th 1869), Samoa (March 20th 1887), Switzerland (July 20th 1864), Spain (Oct. 29th 1863), and Sweden and Norway (July 1st 1852). The Hawaiian Kingdom, furthermore, became a full member of the Universal Postal Union on January 1st 1882.

3.4 There is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893, the moment of the first occupation of the Island(s) by American troops.[29] Indeed, this point was explicitly accepted in the *Larsen v. Hawaiian Kingdom* Arbitral Award.[30]

3.5 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, amongst 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.[31] 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 wrong-doing. Although intervention was not absolutely prohibited in this regard, it was generally confined as regards the specified justifications. As Hall remarked,

[27] For. Rel. 1894, App. II, p. 64.
[28] Letter of June 19th 1851, For. Rel. 1894, App. II, p. 97.
[29] For confirmation of this fact see e.g. Rivier, *supra,* n. 7, I, p. 54.
[30] *Larsen v. Hawaiian Kingdom*, P.C.A. Arbitral Award, Feb. 5th 2001, para. 7.4.
[31] Phillimore, supra, n. 4, I, p. 216.

> '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.'[32]

A desire for simple aggrandisement 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.[33] In any case, the right of independence was regarded as so fundamental that any action against it 'must be looked upon with disfavour'.[34]

4. *RECOGNISED 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 recognises that a state may cease to exist in one of two scenarios: by means of that State's integration with another in some form of union (such as the GDR's accession to the FRG), or by its dismemberment (such as in case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia).[35] 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 characterisation was one of annexation (whether by cession or conquest).

4.2 The general view today is that, whilst annexation was historically a permissible mode of acquiring title to territory (as was 'discovery'), it is now regarded as illegitimate and primarily as a consequence of the general prohibition on the use of force as expressed in article 2(4) of the UN Charter. This point has since been underscored in various forms since 1945. General Assembly Resolution 2625 on Friendly Relations, for example, provides that:

> 'The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.' [36]

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness[37] (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the

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[32] Hall, supra, n. 8, p. 298.

[33] See e.g. Lawrence, *supra,* n. 14, p. 134.

[34] Hall, *supra*, n. 8, p. 298.

[35] Jennings and Watts add one further category: when a State breaks up into parts all of which become part of other states (such as Poland in 1795), *supra*, n. 8, p. 204.

[36] Declaration of Principles of International Law, GA Resn. 2625. See Whiteman, *Digest of International Law* (1965), V, pp. 874-965.

[37] See, Crawford, *supra*, n. 2, p. 418.

prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.[38] It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.[39]

4.3 Even if the annexation of the Hawaiian Islands would be regarded as unlawful according to accepted standards today, it does not necessarily follow that US claims to sovereignty are unfounded. It is generally maintained that the legality of any act should be determined in accordance with the law of the time when it was done, and not by reference to law as it might have become at a later date. This principle finds its expression in case of territorial title, as Arbitrator Huber pointed out in the *Island of Palmas* case,[40] in the doctrine of inter-temporal law. As far as Huber was concerned, there were two elements to this doctrine – the first of which is relatively uncontroversial, the second of which has attracted a certain amount of criticism. The first, uncontroversial, element is simply that 'a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled'.[41] In the present context, therefore, the extension of US sovereignty over Hawai'i should be analysed in terms of the terms of international law, as they existed at the relevant point(s) in time. This much cannot be disputed. The second element outlined by Huber, however, is that, notwithstanding the legitimate origins of an act creating title, the continued existence of that title – its continued manifestation – 'shall follow the conditions required by the evolution of law'. The issue in consideration, here, is whether title based upon historical discovery, or conquest, could itself survive irrespective of the fact that neither is regarded as a legitimate mode of acquisition today. Whilst some have regarded this element as a dangerous extension of the basic principle,[42] its practical effects are likely to be limited to those cases in which the State originally claiming sovereignty has failed to reinforce that title by means of effective occupation (acquisitive prescription). This was evident in case of the Island of Palmas, but is unlikely to be so in other cases – particularly in light of Huber's comment that sovereignty will inevitably have its discontinuities. In any case, it is apparent that, as Huber stressed, any defect in original title is capable of being remedied by means of a continuous and peaceful exercise of territorial sovereignty and that original title, whether defective or perfect, does not itself provide a definitive conclusion to the question.

4.4 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:

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[38] Such a principle has been recognised in e.g., *Free Zones of Upper Savoy and the District of Gex* (2nd Phase), 1930, PCIJ, Series A, No. 24; *South-Eastern Territory of Greenland*, 1932, PCIJ, Series A/B, No. 48, p. 285; *Jurisdiction of the Courts of Danzig*, 1933, PCIJ, Series B, No. 15, p. 26; *Legal Status of Eastern Greenland*, 1933, PCIJ, Series A/B, No. 53, pp. 75, 95.

[39] Article 52 Vienna Convention on the Law of Treaties 1969.

[40] *Island of Palmas (Netherlands v. United States)* 2 R.I.A.A. (1928) 829

[41] *Ibid*.

[42] Jessup, 22 A.J.I.L. (1928) 735.

a) By the destruction of its territory or by the extinction, dispersal or emigration of its population (a theoretical disposition).

b) By the dissolution of the corpus of the State (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).

c) By the State's incorporation, union, or submission to another (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).[43]

4.5 Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently 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).[44] It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory[45] and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

4.6 Although annexation was regarded as a legitimate means of acquiring territory, it was recognised as taking a variety of forms.[46] It was apparent, to begin with, that a distinction was typically drawn between those cases in which the annexation was implemented by Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part of the annexing power. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.[47] Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,[48] title acquired in virtue of a peace treaty was considered to be essentially derivative (i.e. being transferred from one state to another).[49] 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]

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[43] See e.g. Pradier-Fodere, *supra*, n. 7, I, p. 251; Phillimore, *supra*, n. 4, I, p. 201; de Martens *Traite de Droit International* (1883) I, pp. 367-370.

[44] See e.g., Westlake J., 'The Nature and Extent of the Title by Conquest', 17 L.Q.R. (1901) 392.

[45] Oppenheim (*supra*, n. 31, I, p. 288) 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'.

[46] Halleck H., *International Law* (1861) p. 811; Wheaton H., *Elements of International Law* (1866, 8th ed.) II, c. iv, s. 165.

[47] See e.g. Lawrence, *supra*, n. 14, p. 165-6 ('Title by conquest arises only when no formal international document transfers the territory to its new possessor'.)

[48] Cf now article 52 Vienna Convention on the Law of Treaties 1969.

[49] See e.g. Rivier, *supra,* n. 7, p. 176.

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'.[50] 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.[51]

4.7 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 particular importance for possessions held in foreign territory).[52] 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.[53] 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[54]), and concluded in consequence that the conqueror 'becomes, as it were, the heir or universal successor of the defunct or extinguished State'.[55] Much depended, in such circumstances, as to how the successor came to acquire title.

4.8 It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization[56] 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 recognised as admissible under American public law'. 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' (the 'Stimpson Doctrine') 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 US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

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[50] Baker S., *Halleck's International Law* (3rd ed. 1893) p. 468.

[51] This point was of considerable importance following the Allied occupation of Germany in 1945.

[52] For an early version of this idea see de Vattel E., *supra,* n. 7, bk III, ss. 193-201; Bynkershoek C., *Quaestionum Juris Publici Libri Duo* (1737, trans Frank T., 1930) Bk. I, pp. 32-46.

[53] Rivier, *supra,* n. 7, p. 182.

[54] Phillimore, *supra,* n. 4, I, p. 328.

[55] Baker, *supra,* n. 50, p. 495.

[56] '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.'

5. *US ACQUISITION OF THE ISLANDS*

5.1 As pointed out above, the continuity of the Kingdom of Hawaii as an independent state for purposes of international law is theoretically independent of the legitimacy of claims to sovereignty over its territory on the part of other states. By the same token, the fact that the entirety of the Hawaiian Islands have been occupied, administered, and claimed as US territory for a considerable period of time, means that attention must be given to the legitimacy of the US claims as part of the process of determining Hawaiian continuity. US claims to sovereignty over the Islands would appear to be premised upon one of three grounds: a) by the original acquisition of the Islands in 1898 (by means of 'annexation' or perhaps 'cession'); b) by the confirmation of the exercise of that sovereignty by plebiscite in 1959; and c) by the continuous and effective display of sovereignty since 1898 to the present day (acquisitive prescription in the form of adverse possession). Each of these claims will be considered in turn.

5.2 *Acquisition of the Islands in 1898*

5.2.1 The facts giving rise to the subsequent occupation and control of the Hawaiian Kingdom by the US government are, no doubt, susceptible to various interpretations. It is relatively clear, however, that US intervention in the Islands first took place in 1893 under the guise of the protection of the US legation and consulate and 'to secure the safety of American life and property'.[57] US troops landed on the Island of O'ahu on 16th January and a Provisional Government was established by a group of insurgents under their protection. On the following day, and once Queen Lili'uokolani had abdicated her authority in favour of the United States, US minister Stevens formally recognised *de facto* the Provisional Government of Hawai'i. The Provisional Government then proceeded to draft and sign a 'treaty of annexation' on February 14th 1893 and dispatch it to Washington D.C. for ratification by the US Senate.

5.2.2 According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy 'was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili'uokalani which put in serious peril not only the large and preponderating interests of the United States in the Islands, but all foreign interests'.[58] It was further emphasised in a report of Mr Foster to the President that the US marines had taken 'no part whatever toward influencing the course of events'[59] and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of

[57] Order of Jan. 16th 1893.
[58] For. Rel. 1894, App. II, 198.
[59] Report of Mr Foster, Sec. of State, For. Rel. 1894, App. II, 198-205.

government. This version of events was to be contradicted in several important respects shortly after.

5.2.3 Following receipt of a letter of protest sent by Queen Lili'uokalani, newly incumbent President Cleveland withdrew the Treaty of Annexation from the Senate and dispatched US Special Commissioner James Blount to Hawai'i to investigate. The investigations of Mr Blount revealed that the presence of American troops, who had landed without permission of the existing government, were 'used for the purpose of inducing the surrender of the Queen, who abdicated under protest [to the United States and not the provisional government] with the understanding that her case would be submitted to the President of the United States.'[60] It was apparent, furthermore, that the Provisional Government had been recognised when it had little other than a paper existence, and 'when the legitimate government was in full possession and control of the palace, the barracks, and the police station'.[61] On December 18th 1893, President Cleveland addressed Congress on the findings of Commissioner Blount. He emphasised that the Provisional Government did not have 'the sanction of either popular revolution or suffrage' and that it had been recognised by the US minister pursuant to prior agreement at a time when it was 'neither a government de facto nor de jure'.[62] He concluded as follows:

> 'Hawai'i was taken possession of by United States forces without the consent or wish of the Government of the Islands, or of anybody else so far as shown, except the United States Minister. Therefore, the military occupation of Honolulu by the United States… was wholly without justification, either of an occupation by consent or as an occupation necessitated by dangers threatening American life or property'.

Given the 'substantial wrong' that had been committed, he concluded that 'the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods'.

5.2.4 It is fairly clear then, that the position of the US government in December 1893 was that its intervention in Hawai'i was an aberration which could not be justified either by reference to US law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands 'as being neither a government *de facto* nor *de iure'*. At this stage there was an implicit acknowledgement of the fact that the US intervention not only conflicted with specific US commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that '[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors') but also

[60] Moore's Digest, *supra,* n . 8, I, p. 499.
[61] Ibid, pp. 498-99.
[62] Moore's Digest, *supra,* n. 8, p. 501.

with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.[63]

5.2.5 This latter interpretation of events has since been confirmed by the US government. In its Apology Resolution of 23rd November 1993 the US Congress and Senate admitted that the US Minister (John Stevens) had 'conspired with a small group of non-Hawaiian residents of the Hawaiian Kingdom, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawai'i', and that in pursuance of that conspiracy had 'caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16th 1893'. Furthermore, it is admitted that recognition was accorded to the Provisional government without the consent of the Hawaiian people, and 'in violation of treaties between the two nations and of international law', and that the insurrection would not have succeeded without US diplomatic and military intervention.

5.2.6 Despite admitting the unlawful nature of its original intervention, the US, however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili-uokolani to the throne even though she had acceded to the US proposals in that regard. Rather it left control of Hawai'i in the hands of the insurgents it had effectively put in place and who clearly did not enjoy the popular support of the Hawaiian people.[64] Following a proclamation establishing the Republic of Hawai'i by the insurgents in 1894 – the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United States[65] - *de facto* recognition of the Republic was affirmed by the US[66] and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili'uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai'i.[67] A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai'i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

> 'by that resolution the Republic of Hawai'i as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions veseted in the United States…'.[68]

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[63] Brownlie, International Law and the Use of Force by States (1963) pp. 46-7.
[64] See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992)
[65] Article 32 Constitution of the Republic of Hawai'i.
[66] For. Rel. 1894, pp. 358-360.
[67] XC B.F.S.P. 1897-8 (1901) 1248.
[68] President McKinley, Third Annual Message, Dec. 5th 1899, Moore's Digest, *supra,* n. 8, I, p. 511.

Although the Japanese minister in Washington had raised certain concerns in 1897 as regards the position of Japanese labourers emigrating to the Islands under the Hawaiian-Japanese Convention of 1888, and had insisted that 'the maintenance of the status quo' was essential to the 'good understanding of the powers having interests in the Pacific', it subsequently withdrew its opposition to annexation subject to assurances as regards the treatment of Japanese subjects.[69] No other state objected to the fact of annexation.

5.2.7 It is evident that there is a certain element of confusion as to how the US came to acquire the Islands of Hawai'i during this period of time. Effectively, two forms of justification seem to offer themselves: a) that the Islands were ceded by the legitimate government of Hawai'i to the United States in virtue of the treaty of annexation; or b) that the Islands were forcibly annexed by the United States in absence of agreement.

5.2.8 *The Cession of Hawai'i to the United States*

5.2.8.1 The joint resolution itself speaks of the government of the Republic of Hawai'i having signified its consent 'to cede absolutely and without reserve to the United States of American all rights of sovereignty of whatsoever kind', suggesting, as some commentators have later accepted, that the process was one of voluntary merger.[70] Hawai'i brought about, according to this thesis, its own demise by means of voluntary submission to the sovereignty of the United States.[71] This interpretation was bolstered by the fact that the government of the Republic had exercised *de facto* control over the Islands since 1893 – as President McKinley was to put it: 'four years having abundantly sufficed to establish the right and the ability of the Republic of Hawai'i to enter, as a sovereign contractant, upon a conventional union with the United States'.[72] Furthermore, even if it had not been formally recognised as the *de jure* government of Hawai'i by other nations,[73] it was effectively the only government in place (the government of Queen Lili'uokolani being forced into internal exile).

5.2.8.2 Such a thesis overlooks two facts. First of all, whilst the Republic of Hawai'i had certainly sponsored the adoption of a treaty of cession, the failure by the US to ratify that instrument meant that no legally binding commitments in that regard were ever created. This is not to say that the US actions in this regard were therefore to be regarded as unlawful for purposes of international law. Even if doubts exist as to the constitutional competence of US Congress to extend the jurisdiction of the United States in the manner prescribed by the Resolution,[74] this in itself does not prevent the acts in question from being effective for purposes of

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[69] See, Moore's Digest, *supra,* n. 8, I, pp. 504-9.
[70] See e.g. Verzijl, *supra,* n. 6.
[71] *Ibid*, I, p. 129.
[72] Message of President McKinley to the Senate, June 16th 1987, Moore's Digest, *supra*, n. 8, I, p. 503.
[73] Some type of recognition was provided by Great Britain in 1894, however.
[74] See, Willoughby W., *The Constitutional Law of the United States* (2nd ed. 1929) I, p. 427.

international law.[75] Indeed, as suggested above it was widely recognised that, for purposes of international law, annexation need not be accomplished by means of a treaty of peace and could equally take the form of a unilateral declaration of annexation. The significance of the failure to ratify, however, does suggest that the acquisition was achieved, if at all, by unilateral act on the part of the United States rather than being governed by the terms of the bilateral agreement. Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sahib v.Chief Commissioner Pondicherry*[76] in which it was held that Pondicherry was not to be considered as part of India, despite India's administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.[77]

5.2.8.3 Doubts as to the validity of the voluntary merger/ cession thesis are also evident when consideration is given to the role played by US troops in installing and maintaining in power the Republican government in face of continued opposition on the part of the ousted monarchy. If, as was admitted by the US in 1893, intervention was unjustified and therefore undoubtedly in violation of its international obligations owed in respect of Hawai'i, it seems barely credible to suggest that it should be able to rely upon the result of that intervention (namely the installation of what was to become the Republican government) by way of justifying its claim that annexation was essentially consensual.

5.2.8.4 Central to the US thesis, in this respect, is the view that the government of the self-proclaimed Republic enjoyed the necessary competence to determine the future of Hawai'i. Notwithstanding the fact that the Republic was itself maintained in power by means of US military presence, and notwithstanding its recognition of the legitimate claims on the part of the Kingdom, the US recognised the former as a *de facto* government with which it could deal. This, despite the fact that US recognition policy during this period was 'based predominantly on the principle of effectiveness evidenced by an adequate expression of popular consent'.[78] As Secretary Seward was to indicate in 1868, revolutions 'ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanence.'[79] The US refusal, therefore, to recognise the Rivas

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[75] Article 7 of the ILC Articles on State Responsibility (2001) provides, for example, that '[t]he conduct of an organ of a State… shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

[76] I.L.R. (1969) 49

[77] *Iloilo Claims Arbitration* (1925) 6 R.I.A.A. 158. To similar effect see *Forest of Central Rhodope Arbitration* (Merits, 1933) 3 R.I.A.A. 1405; *British Claims in Spanish Morocco* (1924) 2 R.I.A.A. 627.

[78] Lauterpacht, *Recognition in International Law* (1947) p. 124.

[79] US Diplomatic Correspondence, 1866, II, p. 630.

Government in Nicaragua in 1855 on the basis that '[i]t appears to be no more than a violent usurpation of power, brought about by an irregular self-organised military force, as yet unsanctioned by the will or acquiescence of the people',[80] stands in marked contrast to its willingness to offer such recognition to the government of the Republic of Hawai'i in remarkably similar circumstances. Given the precipitous recognition of the government of the Republic – itself an act of unlawful intervention - it seems unlikely that the US could legitimately rely upon the fact of its own recognition as a basis for claiming that its acquisition of sovereignty over Hawai'i issued from a valid expression of consent.

5.2.9 *The Annexation of Hawai'i by the United States*

5.2.9.1 If there is some doubt as to the validity of the voluntary merger thesis, an alternative interpretation of events might be to suggest that the US came to acquire the Islands by way of what was effectively conquest and subjugation. It could plausibly be maintained that annexation of the Islands came about following the installation of a puppet government intent upon committing the future of the Islands to the US and which was visibly supported by US armed forces. According to this interpretation of events, the initial act of intervention in 1893 would simply be the beginning of an extended process of *de facto* annexation which culminated in the extension of US laws to Hawai'i in 1898. Whether or not the Republican government was the legitimate government of Hawai'i mattered little, and the apparent lack of consent of the former Hawaiian government largely irrelevant. According to this thesis the unlawful nature of the initial intervention would ultimately be wiped out by the subsequent annexation of the territory and the extinction of the Hawaiian Kingdom as an independent State (just as Britain's precipitous annexation of the Boer Republics in 1901 was subsequently rendered moot by its perfection of title under the Peace Treaty of 1902). Support for this interpretation of events comes from the fact that the Queen initially abdicated in favour of the United States, and not the Provisional Government of 1893 (although she did eventually give an oath of allegiance to the Republic in 1895) and from the persistent presence of US forces which, no doubt, reinforced the authority of the Provisional Government and subsequently the Government of the Republic.

5.2.9.2 The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.[81] Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai'i.[82] It could not easily be construed, in other words, merely as an instrument of US

[80] Mr Buchanan to Mr Rush. Moore's Digest, *supra*, n. 8, I, p. 124.
[81] See, Hackworth G., *Digest of International Law*, (1940) I, pp. 333-338.
[82] Moore's Digest, *supra*, n. 8, I, p. 500.

government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

> 'unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal. It makes no difference that the territory involved may already be under the firm control of the State declaring the annexation.'[83]

The reason for this, no doubt, was the tendency to view international law as being comprised of two independent sets of rules applicable respectively in peacetime and in war (a differentiation which is no longer as sharp as it once was). A State of war had several effects at the time including not merely the activation of the laws and customs of war, but also the invalidation or suspension of existing treaty obligations.[84] This meant, in particular, that in absence of armed conflict, in other words, the US would be unable to avoid its commitments under the 1849 Treaty with Hawai'i, and would therefore be effectively prohibited from annexing the Islands by unilateral act. This, no doubt, informed President Cleveland's unwillingness to support the treaty of annexation in 1893, and meant that the only legitimate basis for pursuing annexation in the circumstances would have been by treaty of cession.

5.2.9.3 Ultimately, one might conclude that there are certain doubts, albeit not necessarily overwhelming, as to the legitimacy of the US acquisition of Hawai'i in 1898 under the terms of international law as it existed at that time. It neither possessed the hallmarks of a genuine 'cession' of territory, nor that of forcible annexation (conquest). If, however, the US neither came to acquire the Islands by way of treaty of cession, nor by way of conquest, the question then remains as to whether the sovereignty of the Hawaiian Kingdom was maintained intact. The closest parallel, in this regard, is to be found in the law governing belligerent occupation.

5.2.10 *Belligerent Occupation and Occupation Pacifica*

5.2.10.1 From the time of Vattel onwards it was frequently been held that the mere occupation of foreign territory did not lead to the acquisition of title of any kind until the termination of hostilities.[85] During the course of the 19th Century, however, this became not merely a doctrinal assertion, but a firmly maintained axiom of international law.[86] Up until the point at which hostilities were at an end, the control exercised over territory was regarded as a 'belligerent

[83] Bindschedler R., 'Annexation', in *Encylopedia of Public International Law*, III, 19, p. 20.
[84] Brownlie, *supra*, n. , pp. 26-40.
[85] See e.g. de Vattel *supra*, n. 6, III, s. 196.
[86] Graber believes this was the case following the Franco-Prussian war. Graber D., *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (1968) 40-41.

occupation' subject to the terms of the laws of war. The hallmark of belligerent occupation being that the occupant enjoyed *de facto* authority over the territory in question, but that sovereignty (and territorial title) remained in the hands of the displaced government. As President Polk noted in his annual message of 1846 'by the law of nations a conquered territory is subject to be governed by the conqueror during his military possession and until there is either a treaty of peace, or he shall voluntarily withdraw from it.'[87] In such a case '[t]he sovereignty of the enemy is in such case "suspended", and his laws can "no longer be rightfully enforced" over the occupied territory and that "[b]y the surrender, the inhabitants pass under a temporary allegiance to the conqueror."[88] The suspensory, and provisional, character of belligerent occupation was further confirmed in US case law of the time,[89] in academic doctrine [90] and in various Manuals on the Laws of War.[91] The general idea was subsequently recognised in Conventional form in article 43 of the 1907 Hague Regulations,[92] and in the US Military Manual of 1914.[93]

5.2.10.2 In essence, the doctrine of belligerent occupation placed certain limits on the capacity of the occupying power to acquire or dispose of territory *durante bello*. By inference, sovereignty remained in the hands of the occupied power and, as a consequence it was generally assumed that until hostilities were terminated, title to territory would not pass and the extinction of the state would not be complete. This doctrine was subsequently elaborated during the course of the First and Second World Wars to the effect that States would not be regarded as having been lawfully annexed even when the entirety of the territory was occupied and the government forced into exile, so long as the condition of war persisted, albeit on the part of allied States. The general prohibition on the threat or use of armed force in the Charter era since 1945 has further reinforced this regime to the point at which it might be said that 'effective control by foreign military force can never bring about by itself a valid transfer of sovereignty'.[94]

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[87] President Polk's Second Annual Message, 1846, Moore's Digest, *supra*, n. 8, I, p. 46.

[88] President Polk's Special Message, July 24th, 1848. Moore's Digest, *supra,* n. 8, I, pp. 46-7.

[89] *US v. Rice*, US Supreme Court, 1819, 4 Wheat. 246 (1819)

[90] Heffter, *Das europäische Völkerrecht de Gengenwart* (1844) pp. 287-9; Bluntschli, *Das Moderne Volkerrecht* (3rd ed. 1878) pp. 303-7.

[91] The Oxford Manual on the Laws of War on Land, 1880 provided (article 6): 'No invaded territory is regarded as conquered until the end of war; until that time the occupant exercises, in such territory, only a *de facto* power, essentially provisional in character.' See also, article 2 Brussells Code of 1874.

[92] Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907. The Brussels Declaration of 1874 provided similarly (article 2) that 'The authority of the legitimate power being suspended and 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'.

[93] Rules of Land Warfare, 1914, pp. 105-6: ' Miliatary occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty of the occupatnt, but simply the authority or power to exercise some of the rights of sovereignty'.

[94] Benvenisti E., *The International Law of Occupation* (1993) p. 5.

5.2.10.3 Until the adoption of common article 2 of the 1949 Geneva Conventions,[95] however, the doctrine of belligerent occupation applied primarily to time of war or armed conflict where military intervention met armed resistance. Indeed, the absence of resistance would not infrequently be construed either as an implicit acceptance of the fact of occupation, or as a signal that the original sovereign had been effectively extinguished in virtue of *debellatio*. It is evident, however, that by the turn of the century a notion of peacetime occupation (*occupatio pacifica*) was coming to be recognised.[96] This concept encompassed not merely occupation following the conclusion of an agreement between the parties, but also non-consensual occupation occurring outside armed conflict (but normally following the threatened use of force).[97] Practice in the early 20th Century suggests that even though the Hague Regulations were themselves limited to occupations *pendente bello*, their provisions should apply to peacetime occupations such as the British occupation of Egypt in 1914-18,[98] the Franco-Belgian occupation of the Ruhr in 1923-5[99] and the occupation of Bohemia and Moravia by Germany in 1939.[100] Indeed, the Arbitral Tribunal in the *Coenca Brothers v. Germany Arbitration Case*[101] took the view that the Allied occupation of Greece in 1915 was governed by the terms of the law of belligerent occupation notwithstanding the fact that Greece was not a belligerent at that time, but had merely invited occupation of Salonika in order to protect the Serbian State. Similarly, in the *Chevreau Case* the Arbitrator intimated that

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[95] Common Article 2 of the 1949 Geneva Conventions 75 U.N.T.S. 31 reads:
'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

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.'

It would seem that the purpose of this 'extension' of the regime of military occupation was to take account of the peculiar facts surrounding the German occupation of Czechoslovakia in 1939 and Denmark in 1940.

[96] See, Robin, *Des Occupations militaries en dehors des occupations de guerre* (1913).

[97] Llewellyn Jones F., 'Military Occupation of Alien Territory in Time of Peace', 9 Transactions of Grotius Soc. (1924) 150; Roberts A., 'What is a Military Occupation?', 55 B.Y.I.L. (1984) 249, p. 273; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) 116.

[98] Leban and Others v. Alexandria Water Co. Ltd. and Others Egypt, Mixed Court of Appeal, 25 March 1929, A.D. 1929/30, Case No. 286.

[99] See *In re Thyssen and Others* and *In re Krupp and Others* , 2 A.D. (1923-4) Case No. 191, pp. 327-8.

[100] See Judgment of Nurnberg Tribunal, p. 125 ; *Anglo-Czechoslovak and Prague Credit Bank v. Janssen* 12 A.D. (1943-5) Case No. 11, p. 47.

[101] 7 M.A.T., 1929, p. 683.

the laws of belligerent occupation would apply to the British forces occupying Persia under agreement with the latter in 1914.[102]

5.2.10.4 If the general terms of the Hague Regulations are to apply to peacetime occupations, it would seem to follow that the same limitations apply as regards the authority of the occupying State. In fact it is arguable that the rights of the pacific occupant are somewhat less extensive than those of the belligerent occupant. As Llewellyn Jones notes:

> '[i]n the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation…'.[103]

Whether or not this has significance in the present context, it is apparent that the US could not, as an occupying power, take steps to acquire sovereignty over the Hawaiian Islands. Nor could it be justified in attempting to avoid the strictures of the occupation regime by way of installing a sympathetic government bent on ceding Hawaiian sovereignty to it. This point has now been made perfectly clear in article 47 of the 1949 Geneva Convention IV which states that protected persons shall not be deprived of the benefits of the Convention 'by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory'.

5.2.10.5 It may certainly be maintained that there are serious doubts as to the United States' claim to have acquired sovereignty over the Hawaiian Islands in 1898 and that the emerging law at the time would suggest that, as an occupant, such a possibility was largely excluded. To the extent, furthermore, that US claims to sovereignty were essentially defective, one might conclude that the sovereignty of the Hawaiian Kingdom as an independent state was maintained intact. The importance of such a conclusion is of course dependent upon the validity and strength of subsequent bases for the claim to sovereignty on the part of the US.

5.3 *Acquisition of the Islands in virtue of the Plebiscite of 1959*

5.3.1 An alternative basis for the acquisition of title on the part of the US government (and hence the conclusion that the Hawaiian Kingdom has ceased to exist as a State) is the Plebiscite of 1959 exercised in pursuit of article 73 of Chapter XI of the United Nations Charter. In 1945 Hawai'i was listed as a Non-Self-Governing Territory administered by the United States together with its other overseas territories including Puerto Rico, Guam, the Philippines, American Samoa and Alaska. Article 73 of the Charter provides that:

[102] Chevreau Case (France v. Great Britain) 27 A.J.I.L. (1931) 159, pp. 159-60.
[103] Supra, n. , p. 159.

> 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a) to ensure, with due respect for culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement…
>
> d) to transmit regularly to the Secretary-General for information purposes… statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.'

Central to this provision is the 'advancement of the peoples concerned' and the development of their 'self-government'. Unlike the United Nations Trusteeship System elaborated in Chapters XII and XIII of the UN Charter, however, Chapter XI does not stipulate clearly the criteria by which it may be determined whether a people has achieved the status of self-government or whether the competence to determine that issue lies with the organs of the United Nations or with the administering State. The United Nations General Assembly, however, declared in Resolution 334(IV) that the task of determining the scope of application of Chapter XI falls 'within the responsibility of the General Assembly'.

5.3.2 The General Assembly was to develop its policy in this respect during the subsequent decades through the adoption of the UN List of Factors in 1953 (Res. 742 (VIII)), the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 (Res. 1514 (XV)), supplemented by Resolutions 1541 (XV) (1960) and 2625 (XXV) in 1970. Central to this policy development was its elaboration of the meaning of self-determination in accordance with article 1(2) UN Charter (which provided that the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' was one of the Purposes and Principles of the United Nations). According to the General Assembly, colonial peoples must be able to 'freely determine their political status and freely pursue their economic, social and cultural development' (Resn. 1514 (XV), and Resn. 2625 (XXV)), and primarily by way of choosing between one of three alternatives: emergence as a sovereign independent State; free association with an independent State; and integration with an independent State (Resn. 1514 (XV) and Resn. 1541 (XV) principles II, VI). The most common mode of self-determination was recognised to be full independence involving the transfer of all powers to the people of the territories 'without any conditions or reservations' (Resn. 1514 (XV) principles VII, VIII and IX). In case of integration with another state, it was maintained that the people of the territory should act 'with full knowledge of the change in their status… expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage' (Resn. 1541 (XV), principle IX).

A higher level of scrutiny was generally exercised in case of integration than in respect of other forms of self-determination. Until the time in which self-determination is exercised, furthermore, 'the territory of a… Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State' (Resn. 2625 (XXV) para. VI).[104] As the ICJ subsequently noted in its Advisory Opinion in the *Namibia case*, the 'development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them'.[105] It emphasised, furthermore, in the *Western Sahara case* that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[106]

5.3.3 An initial point in question here is whether Hawai'i should have been listed as a Non-Self-Governing Territory at all for such purposes. Article 73 of the Charter refers to peoples 'who have not yet attained a full measure of self-government' – a point which is curiously inapplicable in case of Hawai'i. That being said, the regime imposed was designed, primarily, to foster decolonisation after 1945 and it was only with some reluctance that the United States agreed to include Hawai'i on the list at all. The alternative would have been for Hawai'i to remain under the control of the United States and deprived of any obvious means by which it might re-obtain its independence. The UN Charter may be seen, in that respect, as having created a general but exclusive system of entitlements whereby only those non-State entities regarded as either Non-Self-Governing or Trust Territories would be entitled to independence by way of self-determination absent the consent of the occupying power.[107] It may be emphasised, furthermore, that to regard Hawai'i as being a territory entitled to self-determination was not entirely inconsistent with its claims to be the continuing State. The substance of self-determination in its external form as a right to political independence may be precisely that which may be claimed by a State under occupation. Indeed, the General Assembly Declaration on Friendly Relations (Resn. 2625) makes clear that the right is applicable not simply in case of colonialism, but also in relation to the 'subjection of peoples to alien subjugation, domination and exploitation'. Crawford points out, furthermore, that self-determination applies with equal force to existing states taking 'the well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government'.[108] The international community's subsequent recognition of the applicability of self-determination in case of the Baltic States, Kuwait and Afghanistan, for example, would appear merely to emphasise this point.[109] One may tolerate, in other words, the placing of Hawai'i on the list of non-self-governing territories governed by article 73 only

[104] This follows by implication from the terms of article 74 UN Charter.
[105] ICJ Rep. (1971), 31, para. 51.
[106] ICJ Rep (1975) 12, p. 32.
[107] For a review of the practice in this regard see Crawford J., 'State Practice and International Law in Relation to Secession', 69 B.Y.I.L (1998) 85.
[108] Crawford, *supra*, n. 2, p. 100.
[109] See Cassese A., *Self-Determination of Peoples: A Legal Reappraisal* (1995) pp. 94-5.

to the extent that the entitlement to self-determination under that article was entirely consonant with the general entitlements to 'equal rights and self-determination' in articles 1(2) and 55 of the Charter.

5.3.4 Notwithstanding doubts as to the legality of US occupation/ annexation of Hawai'i, it would seem evident that any outstanding problems would be effectively disposed of by way of a valid exercise of self-determination. In general, the principle of self-determination may be said to have three effects upon legal title. First of all it envisages a temporary legal regime that may, in effect, lead to the extinction of legal title on the part of the Metropolitan State.[110] Secondly, it may nullify claims to title in cases where such claims are inconsistent with the principle. Finally, and most importantly in present circumstances, it may give rise to a valid basis for title including cases where it has resulted in free integration with another State. In this third scenario, if following a valid exercise of self-determination on the part of the Hawaiian people it was decided that Hawai'i should seek integration into the United States, this would effectively bring to a close any claims that might remain as to the continuity of the Hawaiian Kingdom.

5.3.5 Turning then to the question whether the Hawaiian people can be said to have exercised self-determination following the holding of a plebiscite on June 27th 1959. The facts themselves are not in dispute. On March 18th 1959 the United States Congress established an *Act to Provide for the admission of the State of Hawai'i into the Union* setting down, in section 7(b) the terms by which this should take place. This specified that:

> 'At an election designated by proclamation of the Governor of Hawai'i … there shall be submitted to the electors, qualified to vote in said election, for adoption or rejection, the following propositions:
>
> 1. Shall Hawai'i immediately be admitted into the Union as a State?…

An election was held on June 27th 1959 in accordance with this Act and a majority of residents voted in favour of admission into the United States. Hawai'i was formally admitted into the Union by Presidential Proclamation on August 21st 1959. A communication was then sent to the Secretary-General of the United Nations informing him that Hawai'i had, in virtue of the plebiscite and proclamation, achieved self-governance. The General Assembly then decided in Resolution 1469(XIV) that the US would no longer be required to report under the terms of article 73 UN Charter as to the situation of Hawai'i.

5.3.6 Two particular concerns may be raised in this context. First, the plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them. This was certainly an extraordinary situation when compared with other cases with which the UN was dealing at the time, and has parallels with one other notoriously difficult case, namely the Falkland Islands/ Malvinas (in

[110] Crawford, *supra,* n. 2, pp. 363-4; Shaw, *Title to Territory in Africa*, pp. 149 ff.

which the entire population is of settler origin). There is certainly nothing in the concept of self-determination as it is known today to require an administering power to differentiate between two categories of residents in this respect, and indeed in many cases it might be treated as illegitimate.[111] By the same token, in some cases a failure to do so may well disqualify a vote where there is evidence that the administering state had encouraged settlement as a way of manipulating the subsequent result.[112] This latter point seems to be even more clear in a case such as Hawai'i in which the holders of the entitlement to self-determination had presumptively been established in advance by the fact of its (prior or continued) existence as an independent State. In that case, one might suggest that it was only those who were entitled to regard themselves as nationals of the Kingdom of Hawaii (in accordance with Hawaiian law prior to 1898), who were entitled to vote in exercise of the right to self-determination.

5.3.6 A second, worrying feature of the plebiscite concerns the nature of the choice being presented to the Hawaiian people. As GA Resn. 1514 makes clear, a decision in case of integration should be made 'with full knowledge of the change in their status… expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage'. It is far from clear that much, if any, information was provided as regards the 'change in status' that would occur with integration, and there is no evidence that the alternative of full independence was presented as an option. Judged in terms of the later resolutions of the General Assembly on the issue, then, it would seem that the plebiscite falls considerably short of that which would be required for purposes of a valid exercise of self-determination.[113]

5.3.7 An important point, here, as is evident from the discussion above, is that most of the salient resolutions by which the General Assembly 'developed' the law relating to decolonisation post-dated the plebiscite in Hawai'i, and the organisation's practice in that respect changed quite radically following the establishment of the Committee of Twenty-Four in 1961 (Resn. 1700 (XVI)). Up until that point, many took the view that Non-Self-Governing Territories were merely entitled to 'self-government' rather than full political independence, and that self-determination was little more than a political principle being, at best, *de lege farenda*.[114] There was, in other words, no clear obligation as far as UN practice at the time was concerned, for the decision made in 1959 to conform to the requirements later spelled out in relation to other territories – practice was merely crystallising at that date. The US made clear, in fact, that it did not regard UN supervision as necessary for purposes of dealing with its Non-Self-Governing Territories such as Puerto Rico, Alaska or Hawai'i.[115] Whilst such a view was, perhaps, defensible at the time given the paucity of UN practice, it does not itself dispose of the self-determination issue. It might be said, to begin with, that in

[111] See, Hannum H., 'Rethinking Self-Determination', 34 Va.J.I.L. (1993) 1, p. 37.
[112] Cf. the case of Israeli settlements in the Occupied Territories, Cassese, *supra,* n. 97, p. 242.
[113] Similar points have been made as regards the disputed integration of West Irian into Indonesia.
[114] See, Jennings R., *The Acquisition of Territory in International Law* (1963) pp. 69-87.
[115] US Department of State Bulletin, (1952) p. 270.

light of the subsequent development of the principle, it is not possible to maintain that the people of Hawai'i had in reality exercised their right of self-determination (as opposed to having merely been granted a measure of self-government within the Union). Such a conclusion, however, is debatable given the doctrine of inter-temporal law. More significant, however, is the fact that pre-1960 practice did not appear to be consistent with the type of claim to self-determination that would attach to independent, but occupied, States (in which one would suppose that the choice of full political independence would be the operative presumption, rebuttable only by an affirmative choice otherwise). As a consequence, there are strong arguments to suggest that the US cannot rely upon the fact of the plebiscite alone for purposes of perfecting its title to the territory of Hawai'i.

5.4 *Acquisition of Title by Reason of Effective Occupation / Acquisitive Prescription*

5.4.1 As pointed out above, it cannot definitively be supposed that the US did acquire valid title to the Hawaiian Islands in 1898, and even if it did so, the basis for that title may now be regarded as suspect given the current prohibition on the annexation of territory by use of force. In case of the latter, the second element of the doctrine of inter-temporal law as expounded by Arbitrator Huber in the *Island of Palmas case* may well be relevant. Huber distinguishes in that case between the acquisition of rights on the one hand (which must be founded in the law applicable at the relevant date) and their existence or continuance at a later point in time which must 'follow the conditions required by the evolution of the law'. One interpretation of this would be to suggest that title may be lost if a later rule of international law were to arise by reference to which the original title would no longer be lawful. Thus, it might be said that since annexation is no longer a legitimate means by which title may be established, US annexation of Hawai'i (if it took place at all) would no longer be regarded as well founded. Apart from the obvious question as to who may be entitled to claim sovereignty in absence of the United States, it is apparent that Huber's *dictum* primarily requires that 'a State must continue to maintain a title, validly won, in an effective manner – no more no less.'[116] The US, 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 annexation. The strongest type of claim in this respect is the 'continuous and peaceful display of territorial sovereignty'.

5.4.2 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 which was effectively *terra nullius*. It is apparent, however, and in line with the approach of the ICJ in the *Western Sahara Case*,[117] that the Islands of Hawai'i cannot be regarded as

[116] Higgins R., 'Time and the Law: International Perspectives on an Old Problem', 46 I.C.L.Q. (1997) 501, p. 516.
[117] Supra n. 94.

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'.[118] As Hall maintained, '[t]itle 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.'[119] 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 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…) 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.'[120]

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,[121] and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case[122] 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 emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,[123] the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*[124] and in the *Island of Palmas Arbitration*.[125]

5.4.3 If a claim as to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indica* 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. As Jennings and Watts confirm, 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'.[126] As regards the temporal element, the

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[118] For a discussion of the various approaches to this issue see Jennings and Watts, *supra,* n. 8, pp. 705-6.

[119] Hall W., *A Treatise on International Law* (Pearce Higgins, 8th ed 1924) p. 143.

[120] Johnson, 27 B.Y.I.L. (1950) 332, pp. 353-4.

[121] Prescription may be said to have been recognised in the *Chamizal Arbitration*, 5 A.J.I.L. (1911) 785; the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*, supra n. 13.

[122] ICJ Rep. 1960, p. 6.

[123] ICJ Rep. 1953 47

[124] ICJ Rep. 1951 116.

[125] *Supra*, n. 13.

[126] *Supra*, n. , p. 706.

US 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,[127] 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 US 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 (for example, in relation to the policing of territorial waters or airspace, the levying of customs duties, or the extension of treaty rights and obligations to that territory). 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'.[128]

5.4.4 More difficult, in this regard, is the issue of acquiescence/ protest. In the *Chamizal Arbitration*[129] it was held that the US 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.'[130]

It would seem, in other words, that protesting in any way that might be 'reasonably required' should effectively defeat a claim of prescription.

5.4.5 The difficulty of applying such considerations in the current circumstances is evident. Although the Hawaiian Kingdom (the Queen) protested vociferously at the time, and on several separate occasions, and although this protest resulted in the refusal of the US Senate to ratify the treaty of cession, from 1898 onwards no further action was taken in this regard. The reason, of course, is not hard to find. The government of the Kingdom had been effectively removed from power and the US had *de facto*, if not *de jure*, annexed the Islands. The Queen herself survived only until 1917 and did so before a successor could be confirmed in accordance with article 22 of the 1864 Constitution. This was not a case, moreover, of the occupation of merely part of the territory of Hawai'i in which case one might have expected protests to be maintained on a continuous basis by

[127] The arbitrators were instructed by their treaty terms of reference to allow title if based upon 'adverse holding or prescription during a period of 50 years'. 92 BFSP (1899-1900) 160.

[128] Jennings, *supra,* n. 102, p. 39.

[129] US v. Mexico (1911), 5 A.J.I.L. (1911) 782.

[130] Ibid.

the remaining State. In the circumstances, therefore, it is entirely understandable that the Queen or her government failed to pursue the matter further when it appeared exceedingly unlikely that any movement in the position of the US government would be achieved. This is not to say, of course, that the government of the Kingdom subsequently acquiesced in the US occupation of the Islands, which of course raises the question whether a claim of acquisitive prescription may be sustained. In the view of Jennings, in cases of acquisitive prescription, 'an acquiescence on the part of the State prescribed against is of the essence of the process'.[131] If, as he suggests, some positive indication of acquiescence is to be found, there is remarkably little evidence for it. Indeed, of significance in this respect is the admission of the United States in the 'Apology Resolution' of 1993 in which it noted that 'the indigenous Hawaiian people never directly relinquished their claims to the inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum'. By the same token, the weight of evidence in favour of prescription should not be underplayed. As Jennings and Watts point out:

> 'When, to give an example, a state which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another state, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among states that the present condition of things is in conformity with international order.'[132]

The significant issue, however, is whether such considerations apply with equal ease in cases where the occupation concerned comprises the entirety of the State concerned, and where the possibilities of protest are hampered by the fact of occupation itself. It is certainly arguable that if a presumption of continuity exists, different considerations must come into play.

[131] *Supra*, n. 102, p. 39.
[132] *Supra*, n. 8, p. 707.

FACTS NECESSARY TO UNDERSTAND THE HAWAIIAN SITUATION

Fundamental to deciphering the Hawaiian situation is to discern between a state of peace and a state of war. This bifurcation provides the proper context by which 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 126 years by the positive rules of international law, notwithstanding the absence of effectiveness, which is required during a state of peace.[1]

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 have since risen to a level of *jus cogens*. At the same time, the obligations have *erga omnes* characteristics—flowing to all States. The international community's failure to intercede, as a matter of *obligatio erga omnes*, is 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,"[2] 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]."[3]

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 threat.[4] 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."[5] The Hawaiian Kingdom, a neutral and independent State, has been subject to an illegal war with the United States for the past 126 years without a peace treaty, and thus, the United States must begin to comply with the rules of *jus in bello*.

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[1] James Crawford, The Creation of States in International Law 34 (2nd ed., 2007); Krystyna Marek, Identity and Continuity of States in Public International Law 102 (2nd ed., 1968).
[2] *Articles of Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001,* vol. II, Article 41(2) (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.
[3] *Id.*, Article 41(1).
[4] Choe Sang-Hun, *North Korea Calls Hawaii and U.S. Mainland Targets*, New York Times (26 March 2013) (online at http://www.nytimes.com/2013/03/27/world/asia/north-korea-calls-hawaii-and-us-mainland-targets.html). 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.
[5] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck (ed.), *The Handbook of the International Law of Military Operations* 45 (2nd ed., 2008).

The first allegations of war crimes, committed in Hawai'i, being unfair trial, unlawful confinement and pillaging,[6] were made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian Kingdom* at the Permanent Court of Arbitration ("PCA").[7] Oral hearings were held at the PCA on December 7, 8 and 11, 2000. As an intergovernmental organization, the PCA must possess institutional jurisdiction, before it can form *ad hoc* tribunals, in order to ensure that the dispute is international. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties.

International 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.[8] The PCA accepted the case as a dispute between a State and a private party, and acknowledged the Hawaiian Kingdom to be a non-Contracting Power under Article 47 of the HC I.[9] 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 American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.[10]

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[6] 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," (online 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).

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

[8] United Nations, United Nations Conference on Trade and Development: Dispute Settlement 15 (United Nations, 2003).

[9] PCA Annual Report, Annex 2, 51, n. 2. (2011) (online at https://pca-cpa.org/wp-content/uploads/sites/6/2015/12/PCA-annual-report-2011.pdf).

[10] *Larsen v. Hawaiian Kingdom*, Cases, Permanent Court of Arbitration (online at https://pca-cpa.org/en/cases/35/).

From a State of Peace to a State of War

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."[11] As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.[12] 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."[13]

To preserve its political independence, should war break out in the Pacific Ocean, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. Hence, provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway (1852),[14]

[11] *Larsen v. Hawaiian Kingdom,* 119 Int'l L. Reports 566, 581 (2001) (hereafter "Larsen case").
[12] The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate States), 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 & Luxembourg, October 16, 1862 (William III was also Grand Duke of Luxembourg); 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, and December 6, 1884.
[13] John Westlake, *Chapters on the Principles of International Law*, 81 (1894). 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 46, and today there are 197.
[14] Article XV states, "All vessels bearing the flag of Sweden and Norway in time of war shall receive every possible protection, short of actual hostility, within the ports and waters of His Majesty the King of the Hawaiian Islands; and His Majesty the King of Sweden and Norway engages to respect in time of war the neutral rights of the Hawaiian Kingdom, and to use his good offices with all other powers, having treaties with His Majesty the King of the Hawaiian Islands, to induce them to adopt the same policy towards the Hawaiian Kingdom." (online at http://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf).

Spain (1863)[15] and Germany (1879).[16] "A nation that wishes to secure her own peace," says Vattel, "cannot more successfully attain that object than by concluding treaties [of] neutrality."[17]

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 (36 Stat. 2310), 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."[18] As such, the Hawaiian Kingdom's territory could not be trespassed or dishonored, and its neutrality "constituted a guaranty of independence and peaceful existence."[19]

"Traditional international law was based upon a rigid distinction between the state of peace and the state of war," says Judge Greenwood.[20] "Countries were either in a state of peace or a state of war; there was no intermediate state."[21] This distinction is also reflected by the renowned jurist of international law, Lassa Oppenheim, who 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 if 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."[22]

The Hawaiian Kingdom enjoyed a state of peace with all States. This state of peace, however, was violently interrupted January 16, 1893 when United States troops invaded the Hawaiian Kingdom. This invasion transformed the state of peace into a state of war. The following day, Queen Lili'uokalani, as the executive monarch of a constitutional government, in response to military action taken against the Hawaiian government, made the following protest and a conditional surrender of her authority to the United States. 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

[15] Article XXVI states, "All vessels bearing the flag of Spain shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, in time of war the neutrality of the Hawaiian Islands, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands." (online at http://hawaiiankingdom.org/pdf/Spanish_Treaty.pdf).
[16] Article VIII states, "All vessels bearing the flag of Germany or Hawaii shall in times of war receive every possible protection, short of actual hostility, within the ports and waters of the two countries, and each of the High Contracting Parties engages to respect under all circumstances the neutral rights of the flag and the dominions of the other." (online at http://hawaiiankingdom.org/pdf/German_Treaty.pdf).
[17] Emerich De Vattel, *The Law of Nations* 333 (6th ed., 1844).
[18] Nicolas Politis, *Neutrality and Peace* 27 (1935).
[19] *Id.*, at 31.
[20] Greenwood, at 45.
[21] *Id*.
[22] Vattel, at 301.

> 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.[23]

Under international law, the landing of United States troops, without the consent of the Hawaiian government, was an act of war. For an act of war, not to transform the state of affairs to a state of war, that 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."[24] The quintessential question then 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?

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-defense, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity."[25] The United States had no dispute with the Hawaiian Kingdom, a neutral and independent State, that would have warranted an invasion and overthrow of the Hawaiian government.

In 1993, the United States Congress enacted a joint resolution offering an apology for the overthrow that occurred 100 years prior.[26] 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

[23] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 586 (1895) (hereafter "Executive Documents").
[24] Quincy Wright, "Changes in the Concept of War," 18 Am. J. Int'l. L. 755, 756 (1924).
[25] Ian Brownlie, International Law and the Use of Force by States 41 (1963).
[26] 107 Stat. 1510 (1993).

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."[27]

At first read of this preamble, it would appear that the "conspirators" were the subjects that committed the "act of war," but that is misleading because, 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 can 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 surprise 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 dated December 27, 1893, its leadership, comprised of Hawaiian statesmen and lawyers, clearly articulated the difference between a "*coup de main"* and a "revolution." The petition read:

> Last 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.[28]

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. Cleveland stated to the Congress:

> And so it happened 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. This military demonstration upon the soil of Honolulu was of itself an *act of war* (emphasis added).[29]

As part of this plan, the U.S. diplomat, John Stevens, would prematurely recognize the small group of insurgents on January 17, 1893 as if the insurgents were successful revolutionaries thereby

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[27] *Id.,* at 1511.
[28] Executive Documents, at 1295. Petition of the Hawaiian Patriotic League (online at http://hawaiiankingdom.org/pdf/HPL_Petition_12_27_1893.pdf).
[29] *Id*., at 451. Cleveland's Message (online at http://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).

giving them a veil of *de facto* status. In a private note to Sanford Dole, head of the insurgency, however, and written under the letterhead of the United States legation on January 17, 1893, Stevens penned, "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."[30] For the insurgents not to be in "possession of the police station" admits they are not a government through a successful revolution, but rather a puppet government of the U.S. diplomat. This is intervention, which is prohibited under international law.

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."[31]

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 January 28, 1893: "Your 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."[32] The United States policy at the time was that recognition of successful revolutionaries must include the assent of the people. According to President Cleveland:

> While naturally sympathizing with every effort to establish a republican form of government, it has been settled policy of the United States to concede to people of foreign countries the same freedom and independence in the management of their domestic affairs that we have always claimed for ourselves; and it has been our practice to recognize revolutionary governments as soon as it became apparent that they were supported by the people. For illustration of this rule I need only to refer to the revolution in 1889 when our Minister was directed to recognize the new government "if it was accepted by the people"; and to the revolution in Venezuela in 1892, when our recognition was accorded on condition that the new government was "fully established, in possession of the power of the nation, and accepted by the people."[33]

[30] Letter from United States Minister, John L. Stevens, to Sanford B. Dole, January 17, 1893, W. O. Smith Collection, HEA Archives, HMCS, Honolulu, (online at http://hmha.missionhouses.org/items/show/889).
[31] Marek, at 114.
[32] Executive Documents, at 1179.
[33] *Id*., at 455.

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."[34] With full knowledge of what constituted a successful revolution, Cleveland provided a blistering indictment in his message to the Congress:

> When 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.[35]
>
> I believe that a candid and thorough examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States. Fair-minded people with the evidence before them will hardly claim that the Hawaiian Government was overthrown by the people of the islands or that the provisional government had ever existed with their consent.[36]

"Premature recognition is a tortious act against the lawful government," explains Lauterpacht, which "is a breach of international law."[37] 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."[38] 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."[39]

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

> Nevertheless, 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

[34] E. Lauterpacht, Recognition in International Law 93 (1947).
[35] Executive Documents, at 453.
[36] *Id*., at 454.
[37] E. Lauterpacht, at 95.
[38] Ellery C. Stowell, *Intervention in International Law* 349, n. 75 (1921).
[39] Augustus Granville Stapleton, *Intervention and Non-Intervention* 6 (1866). It appears that Stapleton uses all capitals in his use of the word 'forcibly' to draw attention to the reader.

> 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.[40]

The President's finding that the United States embarked upon a war with the Hawaiian Kingdom, in violation of international law, unequivocally acknowledged that a state of war in fact exists since January 16, 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."[41] 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:

> The 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.[42]

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."[43] 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."[44] 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

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[40] Executive Documents, at 453.
[41] H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 Brit. Y.B. Int'l L. 206 (1953).
[42] *USA v. William List et al.* (Case No. 7), Trials of War Criminals before the Nuremburg Military Tribunals (hereafter "Hostages Trial"), Vol. XI, p. 1247 (1950).
[43] *Id*.
[44] Wright, at 758.

a situation regarded by one or both parties to a conflict as constituting a 'state of war.'"[45] Thus, Cleveland's determination 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,"[46] means the action was not justified, but a state of war nevertheless ensued.

What is significant is that Cleveland referred to the Hawaiian people as "friendly and confiding," not "hostile." This is a clear case of where the United States President admits to an illegal war. According to United States constitutional law, the President is the sole representative of the United States in foreign relations—not the Congress or the courts. In the words of U.S. Justice Marshall, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[47] 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 thus 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."[48] 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."[49]

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."[50] 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, had accepted the conditions for settlement in order to return the state of affairs to a state of peace. The executive mediation began on November 13, 1893 between the Queen and U.S. diplomat Albert Willis and an agreement was reached on December 18, 1893.[51] The President was not aware of this agreement until after he

[45] Brownlie, at 38.
[46] Executive Documents, at 456.
[47] 10 Annals of Cong. 613 (1800).
[48] Marek, at 102.
[49] *Id*.
[50] Executive Documents, at 458.
[51] 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 J. L. & Soc. Challenges (2008) 68, at 119-127.

delivered his message.[52] 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 the Hawaiian government.

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."[53] 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."[54] A state of war "automatically brings about the full operation of all the rules of war and neutrality."[55] 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."[56] "For the laws of war," according to Koman, "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."[57]

In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia 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."[58] 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.[59] An attempt to transform the state of war to a state of peace was made by executive agreement on December 18, 1893. President Cleveland, however, was unable to carry out his duties and obligations under this agreement to restore the

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[52] Executive Documents, 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.
[53] Greenwood, at 45.
[54] *Id.*, at 46.
[55] Myers S. McDougal and Florentino P. Feliciano, "The Initiation of Coercion: A Multi-temporal Analysis," 52 Am. J. Int'l. L. 241, 247 (1958).
[56] 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* 52 (2015).
[57] Sharon Koman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice 224 (1996).
[58] ICTY, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), § 70 (2 October 1995).
[59] 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).

situation, that existed before the unlawful landing of American troops, due to political wrangling in the Congress.[60] 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 any less a war."[61] 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."[62] 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 December 7, 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."[63] 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,"[64] 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 January 16, 1893, was the same as the "political determination" by President Roosevelt regarding actions taken by the military forces of Japan on December 7, 1941. 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."[65] 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."[66] 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

[60] Sai, A Slippery Path, at 125-127.
[61] Lord McNair and A.D. Watts, *The Legal Effects of War* 7 (1966).
[62] Brownlie, at 40.
[63] *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (C.C.A. 10th, 1946), 41(3) Am. J. Int'l L. 680, 682 (1947).
[64] Executive Documents, at 456.
[65] Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) Am. J. Int'l L. 299, 307 (Apr. 1952).
[66] Sheldon M. Cohen, Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century 17 (1989).

is … no effective, government."[67] Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[68]

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."[69] 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 committing such a violation," e.g. to deny recognition of a puppet regime unlawfully created by an act of war.[70]

Twenty States violated their obligation of neutrality by recognizing the so-called Republic of Hawai'i and consequently became parties to the war on the side of the United States.[71] These States include: Austria-Hungary (January 1 1895);[72] Belgium (October 17 1894);[73] Brazil (September 29, 1894);[74] Chile (September 26, 1894);[75] China (October 22, 1894);[76] France (August 31,1894);[77] Germany (October 4, 1894);[78] Guatemala (September 30, 1894);[79] Italy (September

[67] Crawford, 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.
[68] *Id*. 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." *Id*, n. 157.
[69] L. Oppenheim, *International Law*, vol. II—War and Neutrality 401 (3rd ed., 1921).
[70] *Id.*, at 496.
[71] Greenwood, at 45.
[72] Austria-Hungary's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-austro-hungary/).
[73] Belgium's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-belgium/).
[74] Brazil's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-brazil/).
[75] Chile's recognition of the Republic of Hawai'i (online at: https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-chile/).
[76] China's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-china/).
[77] France's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-france/).
[78] Germany's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-germanyprussia/).
[79] Guatemala's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-guatemala/).

23, 1894);[80] Japan (April 6, 1897);[81] Mexico (August 8, 1894);[82] Netherlands (November 2, 1894);[83] Norway-Sweden (December 17, 1894);[84] Peru (September 10, 1894);[85] Portugal (December 17, 1894);[86] Russia (August 26, 1894);[87] Spain (November 26, 1894);[88] Switzerland (September 18, 1894);[89] and the United Kingdom (September 19, 1894).[90]

"If a neutral [State] 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."[91] The recognition of the so-called Republic of Hawai'i did not create any legality or lawfulness of the puppet regime, but rather serves as the indisputable evidence that these States violated their obligation to be neutral during a state of war. Diplomatic recognition of governments occurs during a state of peace and not during a state of war, unless for 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.

Obligation of the United States to Administer Hawaiian Kingdom laws

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* calls 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

[80] Italy's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-italy/).
[81] Japan's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/05/27/recognition-of-the-republic-of-hawaii-japan/).
[82] Mexico's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-mexico/).
[83] The Netherlands' recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-netherlands/).
[84] Norway-Sweden's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-swedennorway/).
[85] Peru's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-peru/).
[86] Portugal's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-portugal/).
[87] Russia's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-russia/).
[88] Spain's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-spain/).
[89] Switzerland's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-switzerland/).
[90] The United Kingdom's recognition of the Republic of Hawai'i (online at https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-britain/).
[91] Oppenheim, at 497.

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 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." Thus, effectiveness is at the core of belligerent occupation.

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."[92] Graber also states, that "nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code."[93] The United States government also recognizes that this principle is customary international law that predates the Hague Conventions.

> The Hague Convention clearly enunciated the principle that the laws applicable in an occupied territory remain in effect during the occupation, subject to change by the military authorities within the limits of the Convention. Article 43: … This declaration of the Hague Convention amounts only to a reaffirmation of the recognized international law prior to that time.[94]

The administration of occupied territory is set forth in the Hague Regulations, being Section III of the HC IV. According to Schwarzenberger, "Section III of the Hague Regulations … was declaratory of international customary law."[95] 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."[96] Many other authorities also viewed the Hague Regulations (HC IV) as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and subsequent occupation.[97] Commenting on the occupation of the Hawaiian Kingdom, Dumberry states,

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[92] Eyal Benvenisti, The International Law of Occupation 8 (1993).
[93] Doris Graber, The Development of the Law of Belligerent Occupation: 1863-1914 143 (1949).
[94] Opinion on the Legality of the Issuance of AMG (Allied Military Government) Currency in Sicily, Sept. 23, 1943, reprinted in Occupation Currency Transactions: Hearings Before the Committees on Appropriations Armed Services and Banking and Currency, U.S. Senate, 80th Congress, First Session, 73, 75 (Jun. 17-18, 1947).
[95] Georg Schwarzenberger, "The Law of Belligerent Occupation: Basic Issues," 30 Nordisk Tidsskrift Int'l Ret 11 (1960).
[96] Munroe Smith, "Record of Political Events," 13(4) Pol. Sci. Q. 745, 748 (1898).
[97] Gerhard von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation 95 (1957); David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories 57 (2002); Ludwig von Kohler, The Administration of the Occupied Territories, vol. I, 2 (1942); United

> [T]he 1907 Hague Convention protects the international personality of the occupied [s]tate, even in the absence of effectiveness. Furthermore, the legal order of the occupied [s]tate 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.[98]

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, this puppet regime 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. Furthermore, under the rules of *jus in bello*, the occupant does not possess the sovereignty of the occupied State and therefore cannot compel allegiance.[99] To do so would imply that the occupied State, as the subject of international law and 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 does not apply to the Hawaiian situation because President Cleveland determined that the overthrow of the Hawaiian government was unlawful and, therefore, this determination does not meet the test of *jus ad bellum*. As an illegal 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."[100] Furthermore, as Craven states:

> It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization 56 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 recognised as admissible under American public law'. It had,

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States Judge Advocate General's School Tex No. 11, Law of Belligerent Occupation 2 (1944), (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").

[98] Dumberry, at 682.

[99] 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 January 24, 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 (1894-98) And Its Struggle to Win Annexation* 71 (1992)). 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.

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

> 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' (the 'Stimpson Doctrine') 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 US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.[101]

When United States troops were removed from Hawaiian territory on April 1, 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."[102]

After the President determined the illegality of the situation and entered into an agreement with Queen Lili'uokalani 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 Hawaiian situation remained a state of war and the rules of *jus in bello* continued to apply.

When the provisional government was formed, through intervention, it only replaced the executive monarch and her cabinet with insurgents calling themselves an executive and advisory councils. With the oversight of United States troops, all Hawaiian government officials remained in place and were coerced into signing oaths of allegiance to the new regime.[103] This continued when the American puppet changed its name to the so-called Republic of Hawai'i on July 4, 1894 with alien mercenaries replacing American troops.

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

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[101] Matthew Craven, *Continuity of the Hawaiian Kingdom* 12 (2002) (online at https://hawaiiankingdom.org/pdf/Continuity_Hawn_Kingdom.pdf).
[102] Executive Documents, at 1296.
[103] *Id.*, 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."

day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States."[104] Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and "they protested annexation occurring without the consent of the governed."[105]

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."[106] 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."[107] Then 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*."[108]

Extraterritorial Application of United States Municipal Laws

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*.[109] These Congressional laws, which have no extraterritorial effect, did not 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 customary international law in 1893, the 1907 HC IV, and the GC IV. The governmental infrastructure of the Hawaiian Kingdom continued as the governmental infrastructure of the State of Hawai'i.

It is also 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, falsely 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."[110] This extraterritorial application

[104] Territory of Hawai'i v. Mankichi, 190 U.S. 197, 212 (1903).
[105] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* 322 (2016). 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.
[106] Marek, at 110.
[107] Douglas Kmiec, "Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 Op. O.L.C. 238, 262 (1988).
[108] 31 Stat. 141 (1900).
[109] 73 Stat. 4 (1959).
[110] United Nations, *Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America*, Document no. A/4226, Annex 1, p. 2 (24 September 1959).

of American laws is not only in violation of *The Lotus* case principle,[111] but is also prohibited by the rules of *jus in bello*. This subject is fully treated by Benvenisti, who states:

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[112]

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 an 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."[113] "By military government," according to Winthrop, "is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof." In his dissenting opinion in *Ex parte Miligan*, U.S. Supreme Court Chief Justice Chase explained:

> There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during a rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. … the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President.[114]

Since 1893, there has been 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. This was a theft of an independent State's self-government.

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[111] *Lotus*, 1927 PCIJ Series A, No. 10, p. 18.
[112] Benvenisti, at 19.
[113] United States Army Field Manual 27-10, sec. 362 (1956).
[114] *Ex parte Miligan*, 71 U.S. 2, 141-142 (1866).

Denationalization through Americanization

In 1906, 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. Under the policy titled "Programme for Patriotic Exercises in the Public Schools," the national language of Hawaiian was banned and replaced with the American language of English.[115] Young students who spoke the Hawaiian language in school were severely disciplined. 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:

> As 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 population that needed that kind of teaching, perhaps, more than the mainland children do [emphasis added].[116]

It is important here to draw attention to 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 in 1907, he 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 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!"[117]

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[115] *Programme for Patriotic Exercises in the Public Schools*, Territory of Hawai'i, adopted by the Department of Public (1906) (online a: http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf).
[116] *Patriotic Program for School Observance*, Hawaiian Gazette 5 (3 Apr. 1906) (online at http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf).
[117] 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 (16 Feb. 1907).

Dismantling Universal Health Care

On July 31, 1901 an article was published in *The Pacific Commercial Advertiser* in Honolulu.[118] It is a window into a time of colliding legal systems and the Queen's Hospital would soon become the first Hawaiian health institution to fall victim to the unlawful imposition of American laws. The *Advertiser* reported:

> The Queen's Hospital was founded in 1859 by their Majesties Kamehameha IV and his consort Emma Kaleleonalani. The hospital is organized as a corporation and by the terms of its charter the board of trustees is composed ten members elected by the society and ten members nominated by the Government, of which the President of the Republic (now Governor of the Territory) shall be the presiding officer. The charter also provides for the "establishing and putting in operation a permanent hospital in Honolulu, with a dispensary and all necessary furniture and appurtenances for the reception, accommodation and treatment of indigent sick and disabled Hawaiians, as well as such foreigners and other who may choose to avail themselves of the same."
>
> Under this construction all native Hawaiians have been cared for without charge, while for others a charge has been made of from $1 to $3 per day. The bill making the appropriation for the hospital by the Government provides that no distinction shall be made as to race; and the Queen's Hospital trustees are evidently up against a serious proposition.

Queen's Hospital was established as the national hospital for the Hawaiian Kingdom and that health care services for Hawaiian subjects of aboriginal blood was at no charge. The Hawaiian head of state would serve as the *ex officio* President of the Board together with twenty trustees, ten of whom were from the Hawaiian government.

Since the hospital's establishment in 1859 the legislature of the Hawaiian Kingdom subsidized the hospital along with monies from the Queen Emma Trust. With the unlawful imposition of the 1900 Organic Act that formed the Territory of Hawai'i, American law did not allow public monies to be used for the benefit of a particular race. 1909 was the last year Queen's Hospital received public funding and it was also the same year that the charter was unlawfully amended to replace the Hawaiian head of state with an elected president from the private sector and reduced the number of trustees from twenty to seven, which did not include government officers.

These changes to a Hawaiian quasi-public institution is a direct violation of the laws of occupation, whereby the United States was and continues to be obligated to administer the laws of the occupied

[118] Hawaiian Kingdom Blog, *Queen's Hospital First Hawaiian Health Institution to Fall Victim to the Unlawful Occupation* (9 Sep. 2018) (online at https://hawaiiankingdom.org/blog/queens-hospital-first-hawaiian-health-institution-to-fall-victim-to-the-unlawful-occupation/).

State—the Hawaiian Kingdom. This requirement comes under Article 43 of the 1907 Hague Convention, IV, and Article 64 of the 1949 Geneva Convention, IV.

Article 55 of the Hague Convention provides, "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the [occupied] State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." The term "usufruct" is to administer the property or institution of another without impairing or damaging it.

Despite these unlawful changes, aboriginal Hawaiian subjects, whether pure or part, are to receive health care at Queen's Hospital free of charge. This did not change, but through denationalization there was an attempt of erasure. Aboriginal Hawaiian subjects are protected persons as defined under international law, and as such, the prevention of health care by Queen's Hospital constitutes war crimes. Furthermore, there is a direct nexus of deaths of aboriginal Hawaiians as "the single racial group with the highest health risk in the State of Hawai'i [that] stems from…late or lack of access to health care" to crime of genocide.

The State of Hawai'i is a Private Armed Force

When the United States assumed control of its installed regime, under the new heading of the 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."[119] The legislation of every State, including the United States by 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 the contrary—it may not exercise its power in any form in the territory of another State."[120] According to Judge Crawford, derogation of this principle will not be presumed.[121]

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."[122] 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."[123] Therefore, the State of Hawai'i cannot claim to

[119] Benvenisti, at 19.
[120] See *Lotus*.
[121] Crawford, at 41.
[122] *United States v. Curtiss Wright Export Corp.,* 299 U.S. 304, 318 (1936).
[123] *The Apollon*, 22 U.S. 362, 370 (1824).

be a government because its only claim to authority derives from Congressional legislation that has no extraterritorial effect. As such, *jus in bello* defines the State of Hawai‘i as an organized armed group acting for and on behalf of the United States.[124]

“[O]rganized armed groups … are under a command responsible to that party for the conduct of its subordinates.”[125] 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,”[126] 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.”[127] Article 1 of the 1907 HC IV, provides:

> The 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 appeared before the courts of this armed group, have begun to deny the courts’ jurisdiction. 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 criminal prosecution because the defense proved the existence of the Hawaiian Kingdom and the illegitimacy of the State of Hawai‘i government,[128] with “*whatever may be said regarding the lawfulness” of its origins, “the State of Hawai‘i … is now, a lawful government* [emphasis added].”[129] Unable to rebut the factual evidence being presented by defendants, the highest court of the State of Hawai‘i could only resort to fiat and not juridical facts.

This fiat of the highest court of the State of Hawai‘i has since been continuously invoked by prosecutors in criminal cases and plaintiffs in civil cases to avoid the undisputed and insurmountable factual and legal conclusions as to the continued existence of the Hawaiian Kingdom, as a subject of international law, and the illegitimacy of the State of Hawai‘i government. On this note, Marek explains that an occupier without title or sovereignty “must rely heavily, if not exclusively, on full and complete effectiveness.”[130]

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[124] Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.
[125] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, 14 (2009).
[126] *Id.*, at 5.
[127] *Id*.
[128] State of Hawai‘i v. Dennis Kaulia, 128 Hawai‘i 479, 486 (2013).
[129] *Id.*, at 487.
[130] Marek, at 102.

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."[131] According to Ferraro, "occupation—as a species of international armed conflict—must be determined solely on the basis of the prevailing facts."[132]

The Restoration of the Hawaiian Kingdom Government

On December 10, 1995, David Keanu Sai ("Sai") and Donald A. Lewis ("Lewis"), both being Hawaiian subjects, formed a general partnership in compliance with an *Act to Provide for the Registration of Co-partnership Firms* (1880).[133] This partnership was named the Perfect Title Company ("PTC") and functioned as a land title abstracting company.[134] According to Hawaiian law, co-partnerships were required to register their articles of agreement with the Interior Department's Bureau of Conveyances, and for the Minister of the Interior, it was his duty to ensure that co-partnerships maintain their compliance with the statute. However, due to the failure of the United States to administer Hawaiian Kingdom law, there was no government, whether established by the United States President or a restored Hawaiian Kingdom government *de jure*, to ensure the company's compliance to the co-partnership statute.

The partners of PTC intended to establish a legitimate co-partnership in accordance with Hawaiian Kingdom law and in order for the title company to exist as a legal co-partnership firm, the Hawaiian Kingdom government had to be reestablished in an acting capacity. 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."[135] Hawaiian law did not assume that the entire Hawaiian government would be made vacant, and, consequently, the law did not formalize provisions for the reactivation of the government in extraordinary circumstances. Therefore, notwithstanding the prolonged occupation of the Hawaiian Kingdom since January 17, 1893, a deliberate course of action was taken to re-activate the Hawaiian government by and through its executive branch, as officers *de facto,* under the common law doctrine of necessity.

The Hawaiian Kingdom's 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances, which is within the Ministry of the Interior. This same Bureau of Conveyances is now under the State of Hawai'i's Department of Land and Natural Resources, which was formerly the Interior Department of the Hawaiian Kingdom. The Minister of the Interior holds a seat of government as a member of the Cabinet

[131] 1907 Hague Convention, IV, Article 42.
[132] Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law," 94 (885) Int'l Rev. Red Cross 133, 134 (Spring 2012).
[133] Co-partnership Act (1880) (online at http://hawaiiankingdom.org/pdf/1880_Co-Partnership_Act.pdf).
[134] PTC's articles of agreement (Dec. 10, 1995) (online at http://hawaiiankingdom.org/pdf/PTC_(12.10.1995).pdf).
[135] Black's Law Dictionary 26 (1990).

Council, together with the other Cabinet Ministers. Article 43 of the 1864 Hawaiian constitution, as amended, 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 for the partners of this registered co-partnership to assume the office of the Registrar of the Bureau of Conveyances in the absence of the same; then assume the office of the Minister of Interior in the absence of the same; then assume the office of the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General; and, finally assume the office constitutionally vested in the Cabinet as a Regency, in accordance with Article 33 of the 1864 Hawaiian constitution, as amended.[136] A regency is a person or body of persons "intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the [monarch]."[137]

On December 15, 1995, with the specific intent of assuming the "seat of Government," the partners of PTC formed a second partnership called the Hawaiian Kingdom Trust Company ("HKTC").[138] The partners intended that this registered partnership would serve as a provisional surrogate for the Council of Regency. Therefore, and in light of the aforementioned ascension process, HKTC would serve, by necessity, as officers *de facto,* in an acting capacity, for the Registrar of the Bureau of Conveyances, the Minister of Interior, the Cabinet Council, and ultimately for the Council of Regency. Article 33 of the 1864 Constitution, as amended, provides, "should a Sovereign decease…and having made no last Will and Testament, the Cabinet Council…shall be a Council of Regency."

The purpose of the HKTC was twofold; first, to ensure PTC complies with the co-partnership statute, and, second, to provisionally serve as an acting government of the Hawaiian Kingdom. What became apparent was the 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 those 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 a *de facto* officer of the Hawaiian government. Since HKTC assumed to represent the interests of the Hawaiian government in an acting capacity, the trustees would make the appointment.

The assumption by Hawaiian subjects, through the offices of constitutional authority in government, to the office of Regent, as enumerated under Article 33 of the Hawaiian Constitution, was a *de facto* process born out of necessity. Cooley defines an officer *de facto* "to be one who has

[136] 1864 constitution (online at http://hawaiiankingdom.org/pdf/1864_Constitution.pdf).
[137] Black's Law, at 1282.
[138] HKTC articles of agreement (Dec. 15, 1995) (online at http://hawaiiankingdom.org/pdf/HKTC_(12.15.1995).pdf).

the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," but rather "comes in by claim and color of right."[139] In *Carpenter v. Clark*, the Michigan Court stated 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."[140]

In a meeting of the HKTC, it was agreed that Sai would be appointed to serve as *acting* Regent but could not retain an interest in either of the two companies prior to the appointment because of a conflict of interest. In that meeting, it was also decided, and agreed upon, that Nai'a-Ulumaimalu, a Hawaiian subject, would replace Sai as trustee of HKTC and partner of PTC. This plan was to maintain the standing of the two partnerships under the 1880 Co-partnership Act, and not have either partnership lapse into sole-proprietorships.

To accomplish this, Sai would relinquish, by a deed of conveyance in both companies, his entire one-half (50%) interest to Lewis, after which, Lewis would convey a redistribution of interest to Nai'a-Ulumaimalu, then 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 took place on the same day but did not take effect until the following day, on February 28, 1996.[141] On March 1, 1996, the Trustees of HKTC appointed David Keanu Sai as *acting* Regent.[142]

On the same day, Sai, as *acting* Regent, proclaimed himself, as the successor of the HKTC to the aforementioned covenant of agreement, for carrying out the quieting of all land titles in the Hawaiian Islands.[143] As a *de facto* officer, representing the original warrantor of all lands in fee-simple—the Hawaiian Kingdom government, the *acting* Regent was empowered, to remedy rejected claims to title that have been properly investigated by PTC, in accordance with the aforementioned covenant of agreement.

On May 15, 1996, the Trustees conveyed by deed, all of its right, title and interest acquired by thirty-eight deeds of trust, to Sai, then as *acting* Regent, and stipulated that the company would be

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[139] Thomas Cooley, A Treatise on the Law of Taxation 185 (1876).
[140] *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).
[141] Deed from David Keanu Sai to Donald A. Lewis (Feb. 27, 1996) (online at http://hawaiiankingdom.org/pdf/Sai_to_Lewis_Deed.pdf), Deed of Donald A. Lewis to Nai'a-Ulumaimalu's (Feb. 27, 1996) (online at http://hawaiiankingdom.org/pdf/Nai%E2%80%98a_to_Lewis_Deed.pdf).
[142] Notice of appointment of Regent by HKTC (Mar. 1, 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Appt_Regent.pdf).
[143] HKTC notice of proclamation no. 1 by the Regent (Mar. 1, 1996) (online at http://hawaiiankingdom.org/pdf/Proc_(3.1.1996).pdf).

dissolved in accordance with the provisions of its deed of general partnership on or about June 30, 1996.[144]

On February 28, 1997, a Proclamation by the *acting* Regent announcing the restoration of the provisional Hawaiian government was printed in the Honolulu Sunday Advertiser on March 9, 1997.[145] The international law of occupation allows for an occupied State's government and the military government of an occupying State to co-exist within the same territory. According to Marek, "it is always the legal order of the [s]tate 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 [occupying] [s]tate nor any rule of international law other than the one safeguarding the continuity of an occupied [s]tate. The relation between the legal order of the [occupying] [s]tate and that of the occupied [s]tate…is not one of delegation, but of co-existence."[146]

Notwithstanding the prolonged occupation of the Hawaiian Kingdom since January 17, 1893, the establishment of an *acting* Regent—an officer *de facto*, was a political act of self-preservation, not revolution, and was grounded upon the legal doctrine of limited necessity. Under British common law, deviations from a State's constitutional order "can be justified on grounds of necessity."[147] De Smith also states, that "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."[148] According to Oppenheimer, "a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country."[149] In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated 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."[150]

On September 7, 1999, the *acting* Regent, commissioned Mr. Peter Umialiloa Sai, a Hawaiian subject, as *acting* Minister of the Interior, and Mrs. Kau'i P. Goodhue, later to be known as Mrs.

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[144] Deed from HKTC to Regent (May 15, 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Deed_to_Regent.pdf).
[145] Proclamation by the Regent, Honolulu Advertiser newspaper (Feb. 28, 1997) (online at http://hawaiiankingdom.org/pdf/Proc_(2.28.1997).pdf).
[146] Marek, at 91.
[147] Stanley A. de Smith, Constitutional and Administrative Law 80 (1986).
[148] *Id*.
[149] F.W. Oppenheimer, "Governments and Authorities in Exile," 36 Am. J. Int'l. L. 568, 581 (1942).
[150] See Madzimbamuto v. Lardner-Burke, 1 A.C. 645, 732 (1969). See also Mitchell v. Director of Public Prosecutions, L.R.C. (Const) 35, 88–89 (1986); and Chandrika Persaud v. Republic of Fiji (Nov. 16, 2000); and Mokotso v. HM King Moshoeshoe II, LRC (Const) 24, 132 (1989).

Kau‘i P. Sai-Dudoit, a Hawaiian subject, as *acting* Minister of Finance.[151] On September 9, 1999, the *acting* Regent commissioned Mr. Gary Victor Dubin, Esquire, a Hawaiian denizen, as *acting* Attorney General.[152] Dubin resigned on July 21, 2013, and was replaced Mr. Dexter Ka‘iama, Esquire, on August 11, 2013.[153]

On September 26, 1999, the *acting* Regent, the *acting* Minister of Foreign Affairs, the *acting* Minister of Finance, and the *acting* Attorney General, in Privy Council, passed a resolution establishing an *acting* Council of Regency, whereby the *acting* Regent would resume the office of *acting* Minister of the Interior and serve as Chairman of the Council ("Chairman Sai").[154]

The *acting* Council of Regency ("Hawaiian government"), serving as the provisional government of the Hawaiian Kingdom, was established *in situ* and not *in exile*. The Hawaiian government 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 the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley,

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[155]

During the Second World War, like other governments formed during foreign occupations of their territory, the Hawaiian government did not receive its mandate from the Hawaiian legislature, but rather by virtue of Hawaiian constitutional law as it applies to the Cabinet Council.[156] Although Article 33 provides that Cabinet Council "shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately [and] 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

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[151] Hawaiian Minister of Foreign Affairs commission—Peter Umialiloa Sai (Sep. 5, 1999) (online at http://hawaiiankingdom.org/pdf/Umi_Sai_Min_Foreign_Affairs.pdf), and the Hawaiian Minister of Finance commission—Kau‘i P. Goodhue (Sep. 5, 1999) (online at http://hawaiiankingdom.org/pdf/Kaui_Min_of_Finance.pdf).
[152] Hawaiian Attorney General commission—Gary V. Dubin (Sep. 9, 1999) (online at http://hawaiiankingdom.org/pdf/Dubin_Att_General.pdf).
[153] Hawaiian Attorney General commission—Dexter Ke‘eaumoku Ka‘iama (Aug. 11, 2013) (online at https://www.hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf).
[154] Privy Council Resolution establishing a Council of Regency (Sep. 26, 1999) (online at http://hawaiiankingdom.org/pdf/Council_of_Regency_Resolution.pdf).
[155] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," The Forum, 389, 390 (1893).
[156] 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.

all the Powers which are constitutionally vested in the King," the convening of the Legislative Assembly was not possible in light of the prolonged occupation. The impossibility of convening the Legislative Assembly during the occupation did not prevent the Cabinet from becoming the Council of Regency because of the operative word "shall," but only prevents the Legislature from electing a Regent or Regency.

Therefore, the Council was established in similar fashion to the Belgian Council of Regency after King Leopold was captured by the Germans during World War II. As the Belgian Council was established under Article 82 of its 1821 Constitution, as amended, in exile, the Hawaiian Council was established under Article 33 of its 1864 Constitution, as amended, not in exile but rather in situ.[157] As Oppenheimer explained:

> 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.[158]

The existence of the restored government *in situ* was not dependent upon diplomatic recognition by foreign States, but rather operated on the presumption of recognition these foreign States already afforded to the Hawaiian government as of 1893. The Council of Regency was not a new government like the Czech government established in exile in London during World War II, but rather the successor of the same government of 1893 formed under and by virtue of its constitutional provisions.

Lance Larsen v. Hawaiian Kingdom—Permanent Court of Arbitration

In 2001, Bederman and Hilbert reported in the *American Journal of International Law*,

> At 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 responsibility, Larsen

[157] David Keanu Sai, *The Continuity of the Hawaiian State and the Legitimacy of the acting Government of the Hawaiian Kingdom*, para. 8.1-8.17 (2013) (online at https://hawaiiankingdom.org/pdf/Continuity_Brief.pdf).
[158] F.E. Oppenheimer, "Governments and Authorities in Exile," 36 Am. J. Int'l L. 569 (1942).

> submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States had committed against him.[159]

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

> It 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 [s]tate when its judgment would imply an evaluation of the lawfulness of the conduct of another [s]tate which is not a party to the case."[160]

The Tribunal, however, acknowledged that the parties 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."[161] 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."[162] 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."[163]

Meeting with the Rwandan Government in Brussels

After the last day of the *Larsen* hearings were held at the Permanent Court of Arbitration ("PCA") on December 11, 2000, the Council was called to an urgent meeting by Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium. Ambassador Bihozagara had been attending a hearing before the International Court of Justice on December 8, 2000, (*Democratic Republic of the Congo v. Belgium*),[164] where he became aware of the Hawaiian arbitration case taking place in the hearing room of the PCA.

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[159] Bederman & Hibert, at 928.
[160] Larsen case, at 596.
[161] *Id.*, at 597.
[162] *Id*.
[163] *Id.*, at n. 28.
[164] *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.

The following day, the Council, which included Chairman Sai as 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, met with Ambassador Bihozagara in Brussels.[165] In that meeting, he explained that since he accessed the pleadings and records of the *Larsen* case on December 8 from the PCA's secretariat, he had been in communication with his government. This prompted our meeting where he conveyed to Chairman Sai, as Chairman of the Council and agent in the *Larsen* case, 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 and to place our situation on the agenda. Chairman Sai requested a short break of the meeting in order to consult with the other members of the Council who were present.

After careful deliberation, the Council decided that it could not, in good conscience, accept this offer. It felt the timing was premature because Hawai'i's population remained ignorant of Hawai'i's profound legal position due to institutionalized denationalization—*Americanization* by the United States since the early twentieth century. On behalf of the Council, Chairman Sai graciously thanked Ambassador Bihozagara for his government's offer, but stated that the Council first needed to address over a century of denationalization. After exchanging salutations, the meeting ended, and the Council returned that afternoon to The Hague.

Exposure of the Hawaiian Kingdom through the Medium of Academic Research

The decision by the Council to forego Rwanda's invitation was made in line with section 495—*Remedies of Injured Belligerent*, United States Army FM-27-10, which states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: *a.* Publication of the facts, with a view to influencing public opinion against the offending belligerent."[166] After the *Larsen* case, the policy of the Council would be 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 United States' belligerent occupation rests squarely within the regime of the law of occupation in international humanitarian law. The application of the regime of occupation law "does not depend on a decision taken by an international authority",[167] and "the existence of an armed conflict

[165] David Keanu Sai, *A Slippery Path towards Hawaiian Indigeneity*, 10 J. L. & Soc. Challenges 69, 130-131 (2008).
[166] "United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare), though not a source of law like a statute, prerogative order or decision of a court, is a very authoritative publication." *Trial of Sergeant-Major Shigeru Ohashi and Six Others,* 5 Law Reports of Trials of Law Criminals (United Nations War Crime Commission) 27 (1949).
[167] C. Ryngaert and R. Fransen, "EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts," [2018] 2(*1*): 7. *Europe and the World: A law review* [20], p. 8. (online at https://www.scienceopen.com/document_file/e5cc1ac6-41ee-40de-bbe9-25c9df97ab1e/ScienceOpen/EWLR-2-7.pdf).

is an objective test and not a national 'decision.'"[168] According to Article 42 of the 1907 Hague Regulations, a State's territory is considered occupied when it is "actually placed under the authority of the hostile army."

Article 42 has three requisite elements: (1) the presence of a foreign State's forces; (2) the exercise of authority over the occupied territories by the foreign State or its proxy; and (3) the non-consent by the occupied State. U.S. President Grover Cleveland's manifesto to the Congress, which is Annexure 1 in the *Larsen v. Hawaiian Kingdom* Award,[169] and the continued U.S. presence today without a treaty of peace firmly meets all three elements of Article 42. Hawai'i's people, however, have become denationalized and the history of the Hawaiian Kingdom has been, for all intents and purposes, obliterated within three generations since the United States' takeover.

The Council deemed it their duty to explain to Hawai'i's people that before the PCA could facilitate the formation of the *Larsen* tribunal, it had to ensure that it possessed "institutional jurisdiction." This jurisdiction required that the Hawaiian Kingdom be a "State."[170] This finding authorized the Hawaiian Kingdom's access to the PCA pursuant to Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, as a non-Contracting Power to the convention. The PCA accepted the *Larsen* case as a dispute between a State and private entity,[171] and, in its annual reports from 2001 to 2011,[172] acknowledged the Hawaiian Kingdom as a non-Contracting Power under Article 47 of the 1907 Hague Convention, I. This acknowledgement is significant on two levels, first, the Hawaiian Kingdom had to exist as a State under international law, otherwise the PCA would not have accepted the dispute to be settled through international arbitration, and, second, the PCA explicitly recognized the Council as the governing body of the Hawaiian Kingdom.

History of the illegal overthrow and purported annexation of the Hawaiian Islands is provided not only in the pleadings of the *Larsen* case,[173] but also in a 2002 legal brief by Dr. Matthew Craven, Professor of Law from the University of London, SOAS, titled *Continuity of the Hawaiian Kingdom*. Professor Craven wrote the brief for the Council of Regency as part of the latter's focus on exposure of the Hawaiian Kingdom's legal status under international law through academic research after returning from The Hague in 2000. Professor Craven's memo was also referenced

[168] Stuart Casey-Maslen (ed.), *The War Report* 2012 ix (2013).
[169] U.S. President Grover Cleveland's Message to Congress (Dec. 18, 1893) (online at https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf); see also Larsen v. Hawaiian Kingdom, 119 *International Law Reports* (2001) 566, at 598-610.
[170] United Nations, *United Nations Conference on Trade and Development, Dispute Settlement—Permanent Court of Arbitration* 15 (2003) (online at https://unctad.org/en/Docs/edmmisc232add26_en.pdf).
[171] *Lance Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, Case Repository (online at https://pca-cpa.org/en/cases/35/).
[172] *Annual Reports of the PCA* (online at https://pca-cpa.org/en/about/annual-reports/).
[173] *Larsen v. Hawaiian Kingdom* Arbitration Log Sheet (available at http://www.alohaquest.com/arbitration/log.htm).

in Judge Crawford's seminal book, *The Creation of States in International Law* (2nd ed.). Judge Crawford wrote, "Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States."[174] In his brief, Professor Craven cited implications regarding the continuity of the Hawaiian Kingdom:

> The implications of continuity in case of Hawai'i are several:
>
> a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.
>
> b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.
>
> c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibu* or impossibility of performance.
>
> d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian Kingdom incurred prior to its occupation.[175]

In order to carry into effect the Council's policy, it was decided that since Chairman Sai already had a B.A. degree from the University of Hawai'i at Manoa and familiar with what they have been instructing on Hawai'i's history, he would enter the University of Hawai'i at Manoa political science department and secure an M.A. degree specializing in international relations, and then a Ph.D. with focus on the continuity of the Hawaiian Kingdom as an independent and sovereign State that has been under a prolonged occupation. Chairman Sai received his M.A. degree in 2004, and his Ph.D. degree in 2008. He is currently a faculty member of the University of Hawai'i where he teaches undergraduate and graduate courses on the Hawaiian Kingdom. Through the Council's policy, it has been able to effectively shift the discourse to belligerent occupation.

The Council's objective was to engage over a century of denationalization through the medium of academic research and publications, both peer review and law review. As a result, awareness of

[174] James Crawford, *The Creation of States in International Law*, 2nd ed., 623, n. 83 (2006).
[175] Craven, at 2.

the Hawaiian Kingdom's political status has grown exponentially with multiple master's theses, doctoral dissertations, and publications being written on the subject. What the world knew, before the *Larsen* case was held from 1999-2001, was drastically transformed to now. This transformation was the result of academic research in spite of the continued American occupation.

This scholarship prompted a well-known historian in Hawai'i, Tom Coffman, to change the subtitle of his book in 2009, which Duke University republished in 2016, from *The Story of America's Annexation of the Nation of Hawai'i* to *The History of the American Occupation of Hawai'i*. Coffman explained:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with 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 definition of international law there was no annexation, we are left 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.[176]

Furthermore, in 2016, Japan's Seijo University's Center for Glocal Studies published an article by Dennis Riches titled *This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation*.[177] At the center of this article was the continuity of the Hawaiian Kingdom, the Council of Regency, and the commission war crimes. Riches, who is Canadian, wrote:

> [The history of the Baltic States] is a close analog of Hawai'i because the occupation by a superpower lasted over several decades through much of the same period of history. The restoration of the Baltic States illustrates that one cannot say too much time has passed, too much has changed, or a nation is gone forever once a stronger nation annexes it. The passage of time doesn't erase sovereignty, but it does extend the time which the occupying power has to neglect its duties and commit a growing list of war crimes.

[176] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* xvi (2016).
[177] Dennis Riches, *This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation,* Center for Glocal Studies, Seijo University 81-131, 89 (2016).

Additionally, school teachers, throughout the Hawaiian Islands, have also been made aware of the American occupation through course work at the University of Hawai'i and they are teaching this material in the middle schools and the high schools. This exposure led the Hawai'i State Teachers Association ("HSTA"), which represents public school teachers throughout Hawai'i, to introduce a resolution—New Business Item 37, on July 4, 2017, at the annual assembly of the National Education Association ("NEA") in Boston, Massachusetts. The NEA represents 3.2 million public school teachers, administrators, and faculty and administrators of universities throughout the United States. The resolution stated:

> The NEA will publish an article that documents the illegal overthrow of the Hawaiian Monarchy in 1893, the prolonged illegal occupation of the United States in the Hawaiian Kingdom, and the harmful effects that this occupation has had on the Hawaiian people and resources of the land.[178]

When the HSTA delegates in attendance returned to Hawai'i, they asked me to write three articles for the NEA to publish: first, *The Illegal Overthrow of the Hawaiian Kingdom Government* (April 2, 2018);[179] second, *The U.S. Occupation of the Hawaiian Kingdom* (October 1, 2018);[180] and, third, *The Impact of the U.S. Occupation on the Hawaiian People* (October 13, 2018).[181] Awareness of the Hawaiian Kingdom's situation has reached countless classrooms across the United States. These publications by the NEA was the Council's crowning jewel for its policy to engage denationalization through *Americanization*.

Russian Government Acknowledges Illegal Annexation by the United States

This exposure also prompted the Russian government, on October 4, 2018, to admit that Hawai'i was illegally annexed by the United States. This acknowledgement occurred at a seminar entitled "Russian America: Hawaiian Pages 200 Years After" held at the PIR-CENTER, Institute of Contemporary International Studies, Diplomatic Academy of the Russian Foreign Ministry, in Moscow. The topic of the seminar was the restoration of Fort Elizabeth, a Russian fort built on the island of Kaua'i in 1817. Professor Niklaus Schweizer, who is also the Hawaiian Kingdom's Envoy Extraordinary and Minister Plenipotentiary, was invited to participate in the seminar. Dr. Schweizer is a former Swiss Consul and professor at the University of Hawai'i at Manoa. His task was to provide the history of Fort Elizabeth from a Hawaiian and Pacific point of view.

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[178] NEA New Business Item 37 (2017) (online at https://ra.nea.org/business-item/2017-nbi-037/).
[179] Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NEA Today (Apr. 2, 2018) (online at http://neatoday.org/2018/04/02/the-illegal-overthrow-of-the-hawaiian-kingdom-government/).
[180] Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom,* NEA Today (Oct. 1, 2018) (online at http://neatoday.org/2018/10/01/the-u-s-occupation-of-the-hawaiian-kingdom/).
[181] Keanu Sai, *The Impact of the U.S. Occupation on the Hawaiian People* NEA Today (Oct. 13, 2018) (online at http://neatoday.org/2018/10/13/us-occupation-of-hawaii/).

Leading the seminar was Dr. Vladimir Orlov, director of the PIR-CENTER. Notable participants included Deputy Foreign Minister Sergej Ryabkov, Head of the Department of European Co-operation and specialist on nuclear and other disarmament negotiations, and Russian Ambassador to the United States, Anatoly Antonov. In his report to the Hawaiian Minister of Foreign Relations, H.E. Peter Umialiloa Sai, dated October 12, 2018, Dr. Schweizer wrote, "In his concluding remarks Dr. Orlov, who incidentally referred to the military installations at Barking Sands, mentioned as an aside and in a relatively low voice: 'The annexation of Hawai'i by the US was of course illegal and everyone knows it.'"

United Nations Independent Expert Dr. Alfred deZayas on Hawai'i

This educational exposure also prompted United Nations Independent Expert, Dr. Alfred M. deZayas, to send a communication, dated February 25, 2018, to members of the State of Hawai'i Judiciary stating that the Hawaiian Kingdom is an occupied State and that the 1907 Hague Convention, IV, and the 1949 Geneva Convention, IV, must be complied with.[182] In that communication, Dr. deZayas stated:

> As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, *The United Nations Human Rights Committee Case Law 1977-2008*, and currently serving as the UN Independent Expert on the promotion of a democratic and equitable international order, I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The Independent Expert clearly stated the application of "the Hague and Geneva Conventions" requires the administration of Hawaiian Kingdom law, not United States law, in Hawaiian territory. The United States' noncompliance to international humanitarian law has created the façade of an incorporated territory of the United States called the State of Hawai'i. The State of Hawai'i is a *de facto* proxy for the United States and maintains effective control over Hawaiian territory. *The War Report 2017* refers to such entities as an armed non-state actor (ANSA) "operating in another state when that support is so significant that the foreign state is deemed to have 'overall control' over the actions of the ANSA."[183]

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[182] *Letter from U.N. Independent Expert Dr. deZayas to Members of the Judiciary of the State of Hawai'i* (Feb. 25, 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).
[183] *The War Report 2017*, 22.

Furthermore, from 1893 to 1898, the Hawaiian Kingdom was occupied by an American puppet of insurgents. There is no treaty of peace between the Hawaiian Kingdom and the United States except for the unilateral annexation of the Hawaiian Islands by a joint resolution of Congress. Whether by proxy or not, the United States is the occupying State and "as the right of an occupant in occupied territory is merely a right of administration, he may [not] annex it, while the war continues."[184]

The ICRC Commentary on Article 47 also emphasize, "It will be well to note that the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty."[185] The "Occupying Power cannot…annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in a peace treaty. This is a universally-recognized rule and is endorsed by jurists and confirmed by numerous rulings of international and national courts."[186] Therefore, according to the ICRC, "an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims to have annexed all or part of an occupied territory."[187] As there is no treaty of peace between the Hawaiian Kingdom and the United States, this international armed conflict continues to date.

To understand what the UN Independent Expert called a "fraudulent annexation," attention is drawn to the floor of the United States Senate on July 4, 1898, where Senator William Allen of Nebraska stated:

> "The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein."[188]

Two years later, on February 28, 1900, during a debate on senate bill no. 222 that proposed the establishment of a U.S. government to be called the Territory of Hawai'i, Senator Allen reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void."[189] In response, Senator John Spooner of Wisconsin, a constitutional lawyer, dismissively remarked, "that is a political question, not subject to review by the courts."[190] Senator Spooner explained, "The Hawaiian Islands were annexed to

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[184] Oppenheim, *International Law*, vol. II, 6th ed., 237 (1921).
[185] International Committee of Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 276 (1958).
[186] *Id*., 275.
[187] *Id*., 276.
[188] 31 Cong. Rec. 6635 (1898).
[189] 33 Cong. Rec. 2391 (1900).
[190] *Id*.

the United States by a joint resolution passed by Congress. I reassert…that that was a political question and it will never be reviewed by the Supreme Court or any other judicial tribunal."[191] Senator Spooner never argued that congressional laws have extra-territorial effect. Instead, he said this issue would never see the light of day because United States courts would not review it due to the *political question* doctrine. This exchange between the two Senators is troubling, but it acknowledges the limitation of congressional laws and the political means by which to conceal an internationally wrongful act. The Territory of Hawai'i is the predecessor of the State of Hawai'i.

It would take another ninety years before the U.S. Department of Justice addressed this issue. In a 1988 legal opinion, the Office of Legal Counsel examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored this opinion for Abraham D. Sofaer, legal advisor to the U.S. Department of State. After covering the limitation of congressional authority, which, in effect, confirmed the statements made by Senator Allen, Assistant Attorney General Kmiec concluded:

> "Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. … It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[192]

State of Hawai'i Official Reports War Crimes

On August 21, 2018, State of Hawai'i County of Maui Councilmember Jennifer Ruggles ("Ms. Ruggles") requested a legal opinion from the government's attorney whether she has incurred criminal liability for committing war crimes.[193] In her letter she requested "the Office of Corporation Counsel to assure her that she is not incurring criminal liability under international humanitarian law and United States Federal law as a Council member for:

1. Participating in legislation of the Hawai'i County Council that would appear to be in violation of Article 43 of the Hague Regulations and Article 64 of the Geneva Convention which require that the laws of the Hawaiian Kingdom be administered instead of the laws of the United States;

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[191] *Id*.
[192] Douglas W. Kmiec, *Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea*, 12 Opinions of the Office of Legal Counsel 238, 252 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).
[193] Letter from Stephen Laudig, attorney for Jennifer Ruggles, Hawai'i County Council member, State of Hawai'i, to Hawai'i County Corporation Counsel Joe Kamelamela (Aug. 21, 2018) (online at https://jenruggles.com/wp-content/uploads/Stephen-Laudigs-Letter-to-Corporation-Counsel-8-21-18.pdf).

2. Being complicit in the collection of taxes, or fines, from protected persons that stem from legislation enacted by the Hawai‘i County Council, appear to be in violation of Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging;
3. Being complicit in the foreclosures of properties of protected persons for delinquent property taxes that stem from legislation enacted by the Hawai‘i County Council, which would appear to violate Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging, as well as in violation of Article 46 of the Hague Regulations and Articles 50 and 53 of the Geneva Convention where private property is not to be confiscated; and
4. Being complicit in the prosecution of protected persons for committing misdemeanors, or felonies, that stem from legislation enacted by the Hawai‘i County Council, which would appear to violate Article 147 of the Geneva Convention where protected persons cannot be unlawfully confined, or denied a fair and regular trial by a tribunal with competent jurisdiction.

In his letter to Ms. Ruggles dated August 22, 2018, Corporation Counsel Joe Kamelamela stated:

> At the Council Committee meeting held on Monday, August 21, 2018 at the West Hawai‘i Civic Center, you announced that you "will be refraining from participating in the proposing and enacting of legislation" until county lawyers will assure you in writing that you will not incur "criminal liability under international humanitarian law and U.S. law.
>
> In response to your inquiry, we opine that you will not incur any criminal liability under state, federal and international law. See Article VI, Constitution of the United States of America (international law cannot violate federal law).[194]

According to Ms. Ruggles, Corporation Counsel's response was unacceptable. In a letter, by her attorney, dated August 28, 2018, it concluded:

> Until you provide Council member Ruggles with a proper legal opinion responding to the statement of facts in that she has not incurred criminal liability for violating the 1907 Hague Regulations and the 1949 Geneva Convention, IV, I have advised my client that she must continue to refrain from legislating. For your reference, I am attaching the aforementioned legal opinions by Deputy Assistant Attorney General John Yoo and your office.[195]

[194] Letter from Hawai‘i County Corporation Counsel Joe Kamelamela to Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to (Aug. 22, 2018) (online at http://jenruggles.com/wp-content/uploads/Kamelamela-Response-Letter-2018-08-22.pdf).
[195] Letter from Stephen Laudig, attorney for Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to Hawai‘i County Corporation Counsel Joe Kamelamela (Aug. 28, 2018) (online at http://jenruggles.com/wp-content/uploads/Laudig_Ltr_to_Corp_Counsel_8.28.2018-.pdf).

Corporation Counsel refused to respond to this letter, which prompted Ms. Ruggles to become a whistle blower. She began sending notices to perpetrators of war crimes throughout the State of Hawai‘i.

Under United States federal law, war crimes are defined as violations of the 1907 Hague Regulations and the 1949 Geneva Conventions—18 U.S.C. §2441. Her story was broadcasted on television by KGMB news,[196] Big Island Video News,[197] and published by the British news outlet *The Guardian*.[198] Ms. Ruggles reported war crimes committed by the Queen's Hospital, in violation of 18 U.S.C. §2441 and §1091, and war crimes committed by thirty-two Circuit Judges of the State of Hawai‘i, in violation of 18 U.S.C. §2441.[199] She also reported additional war crimes of pillaging committed by State of Hawai‘i tax collectors, in violation of §2441,[200] the war crime of unlawful appropriation of property by the President of the United States and the Internal Revenue Service, in violation of §2441,[201] and the war crime of destruction of property by the State of Hawai‘i on the summit of Mauna Kea, in violation of §2441.[202]

These actions taken by Ms. Ruggles prompted the International Committee of the National Lawyers Guild to form the Hawaiian Kingdom Subcommittee.[203] Established in 1937, the National Lawyers Guild is equal in standing with the American Bar Association. According to the Guild's International Committee website:

> The Hawaiian Kingdom Subcommittee provides legal support to the movement demanding that the U.S., as the occupier, comply with international humanitarian and human rights law within Hawaiian Kingdom territory, the occupied. This support includes organizing delegations and working with the United Nations, the International Committee of the Red

[196] KGMB News (Sep. 24, 2018) (online at https://www.youtube.com/watch?v=-YiXpiwVHr0).
[197] Big Island Video News (Sep. 25, 2018) (online at http://www.bigislandvideonews.com/2018/09/25/video-jen-ruggles-holds-community-meeting-on-war-crimes/).
[198] Breena Kerr, *Hawaii politician stops voting, claiming islands are 'occupied sovereign country,'* The Guardian (Nov. 30, 2018) (online at https://www.theguardian.com/us-news/2018/nov/29/hawaii-politician-jennifer-ruggles-sovereign-country).
[199] Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to Sean Kaul, FBI Special Agent in Charge (Oct. 11, 2018) (online at https://jenruggles.com/wp-content/uploads/Reporting_to_FBI_10.11.18.pdf).
[200] Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to State of Hawai‘i officials regarding unlawful collection of taxes (Nov. 15, 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr-to-State-of-HI-re-Taxes.pdf).
[201] Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to U.S. President Trump regarding unlawful appropriation of property (Nov. 28, 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr_to_President_Trump.pdf).
[202] Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to State of Hawai‘i Governor Ige and Supreme Court Justices regarding unlawful destruction of property on the summit of Mauna Kea (Dec. 3, 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr-to-Gov.-and-Sup.-Ct.pdf).
[203] NLG launches new Hawaiian Kingdom Subcommittee, NLG International Committee (online at https://nlginternational.org/2019/04/nlg-launches-new-hawaiian-kingdom-subcommittee/).

> Cross, and NGOs addressing U.S. violations of international law and the rights of Hawaiian nationals and other Protected Persons.[204]

Recognition De Facto of the Restored Hawaiian Government

In March of 2000, the United States government, through its Department of State ("State Department"), explicitly recognized the Hawaiian government by exchange of *notes verbales*. This recognition stemmed from *Larsen v. Hawaiian Kingdom* international arbitration proceedings.[205] *Notes verbales* are official communications between governments of states and international organizations.

Before the *Larsen ad hoc* tribunal was formed on June 9, 2000, Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with Chairman Sai, as agent for the Hawaiian Kingdom, over the telephone and recommended that the Hawaiian government provide an invitation to the United States to join in the arbitration. The Hawaiian government consented, which resulted in a conference call meeting on March 3, 2000 in Washington, D.C., between the Chairman Sai, Larsen's counsel, Mrs. Ninia Parks, and Mr. John Crook from the State Department. The meeting was reduced to a formal note and mailed to Mr. Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Hawaiian government to the PCA Registry for record that the United States was invited to join in the arbitral proceedings.[206] The note was signed off by Chairman Sai as "Acting Minister of Interior and Agent for the Hawaiian Kingdom."

Under international law, this note served as an offering instrument that contained the text of the proposal.

> "[T]he reason for our visit was the offer by the…Hawaiian Kingdom, by consent of the Claimant [Mr. Larsen], 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. … [T]he 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…, 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

[204] Hawaiian Kingdom Subcommittee, National Lawyers Guild International Committee (online at https://nlginternational.org/hawaiian-kingdom-subcommittee/).
[205] Larsen case, at 581. The *notes verbales* are part of the arbitral records at the Registry of the Permanent Court of Arbitration.
[206] A true and correct copy of the note (online at http://hawaiiankingdom.org/pdf/State_Dpt_Ltr_(3.3.2000).pdf).

> International Bureau of the Permanent Court of Arbitration for the record, and you acknowledged."

Thereafter, the PCA's Deputy Secretary General, Mrs. Phyllis Hamilton, informed Sai, as agent for the Hawaiian government, by telephone, that the United States, through its embassy in The Hague, notified the PCA, by *note verbale*, that the United States would not accept the invitation to join the arbitral proceedings. Instead, the United States, through its embassy in The Hague, requested permission from the Hawaiian government to have access to the pleadings and records of the case. The Hawaiian government consented to this request. Thus, the PCA, represented by Deputy Secretary General Hamilton, served as an intermediary to secure an agreement between the Hawaiian Kingdom and the United States.

> Legally there is no difference between a formal note, a *note verbale* and a memorandum. They are all communications which become legally operative upon the arrival at the addressee. The legal effects depend on the substance of the note, which may relate to any field of international relations.[207]

> As a rule, the recipient of a note answers in the same form. However, an acknowledgment of receipt or provisional answer can always be given in the shape of a *note verbale*, even if the initial note was of a formal nature.[208]

The offer by the Secretary General to have the Hawaiian government provide the United States an invitation to join in the arbitral proceedings, and the Hawaiian government's acceptance of this offer, constitutes an international agreement by exchange of *notes verbales* between the PCA and the Hawaiian Kingdom. "[T]he growth of international organizations and the recognition of their legal personality has resulted in agreements being concluded by an exchange of notes between such organizations and states."[209]

The United States' request to have access of the arbitral records, in lieu of the invitation to join in the arbitration, and the Hawaiian government's consent to that request constitutes an international agreement by exchange of *notes verbales*. According to Corten & Klein, "the exchange of two *notes verbales* constituting an agreement satisfies the definition of the term 'treaty' as provided by Article 2(1)(a) of the Vienna Convention."[210] Altogether, the exchange of *notes verbales* on this subject matter, between the Hawaiian Kingdom, the PCA, and the United States of America, constitutes a multilateral treaty of the *de facto* recognition of the restored Hawaiian government.

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[207] Johst Wilmanns, "Note," in 9 *Encyclopedia of Public International Law* 287 (1986).
[208] *Id*.
[209] J.L. Weinstein, "Exchange of Notes," 20 Brit. Y.B. Int'l L. 205, 207 (1952).
[210] The Vienna Conventions on the Law of Treaties, A Commentary, Vol. I, Corten & Klein, eds. (2011), p. 261.

Moreover, the United States has entered into other treaties by exchange of *notes verbales*. In 1946, the United States and Italy entered into a treaty by exchange of *notes verbales* at Rome regarding an *Agreement relating to internment of American military personnel in Italy*.[211] In 1949, the United States and Italy entered into another treaty by exchange of *notes verbales* at Rome regarding an *Agreement between the United States of America and Italy, interpreting the agreement of August 14, 1947, respecting financial and economic relations*.[212] Both of these bi-lateral treaties remain in force as of January 1, 2017.[213]

Since the United States' *de facto* recognition, the following States and an international organization have also provided *de facto* recognition of the Hawaiian government. On December 12, 2000, Rwanda recognized the Hawaiian government. This recognition occurred in a meeting in Brussels, called by His Excellency Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium, with Chairman Sai, Agent for the Hawaiian Kingdom, the Minister of Foreign Affairs, His Excellency Mr. Peter Umialiloa Sai, First Deputy Agent for the Hawaiian Kingdom, and the Minister of Finance, Her Excellency Mrs. Kauʻi Sai-Dudoit, Third Deputy Agent.[214]

On July 5, 2001, China, as President of the United Nations Security Council, recognized the Hawaiian government when China accepted the Hawaiian government's complaint submitted by Sai, as agent for the Hawaiian Kingdom, in accordance with Article 35(2) of the United Nations Charter.[215] Article 35(2) 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 purpose of the dispute, the obligations of pacific settlement provided in the present Charter."

By exchange of *notes*, through email, Cuba also recognized the Hawaiian government when on November 10, 2017, the Cuban government received Chairman Sai, as Ambassador-at-large for the Hawaiian Kingdom, at the Cuban embassy in The Hague, Netherlands.[216] Also, by exchange of *notes*, through email, the Universal Postal Union in Bern, Switzerland, recognized the Hawaiian government.[217] The Universal Postal Union is a specialized agency of the United Nations. The Hawaiian Kingdom has been a member State of the Universal Postal Union since January 1, 1882.

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[211] 61 Stat. 3750.
[212] 63 Stat. 2415.
[213] United States Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2017, 218.
[214] Sai, A Slippery Path, at 130-131.
[215] David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 Haw. J.L. & Pol. 74 (2004).
[216] Email notes between the Hawaiian Ambassador-at-large and the Cuban Embassy in The Hague (Nov. 2017) (online at http://hawaiiankingdom.org/pdf/Cuban_Embassy_Corresp.pdf).
[217] Email notes with the Universal Postal Union (Feb. 2018) (online at http://hawaiiankingdom.org/pdf/UPU_Communication.pdf).

Sai v. Trump—Petition for Writ of Mandamus

On June 25, 2019, Chairman Sai filed, on behalf of the Council, an emergency petition for a writ of mandamus against President Donald Trump with the United States District Court of the District of Columbia.[218] The petition sought an order from the Court to:

> a. Grant immediate mandamus relief enjoining Respondent Trump from acting in derogation of the [Hague Convention] IV, the [Geneva Convention] IV, international humanitarian laws, and customary international laws;
> b. Award Petitioner such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of Protected Persons' injuries during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, temporary and preliminary injunctions; and
> c. Enter a permanent injunction to prevent future violations of the HC IV, the GC IV, international humanitarian laws, and customary international laws by Respondent Trump.

The factual allegations of the petition were stated in paragraphs 79 through 205 under the headings *From a State of Peace to a State of War*, *The Duty of Neutrality by Third States*, *Obligation of the United States to Administer Hawaiian Kingdom laws*, *Denationalization through Americanization*, *The State of Hawai'i is a Private Armed Force*, *The Restoration of the Hawaiian Kingdom Government*, *Recognition De Facto of the Restored Hawaiian Government*, *War Crimes: 1907 Hague Convention, IV*, and *War Crimes: 1949 Geneva Convention, IV*.

On September 11, 2018, Judge Chutkan issued an order, *sua sponte,* dismissing the case as a political question.[219] On the very same day the U.S. Attorney for the District of Columbia filed a "Motion for Extension of Time to Answer in light of the order dismissing this action," but it was denied by minute order.[220] Judge Chutkan stated, "Because Sai's claims involve a political question, this court is without jurisdiction to review his claims and the court will therefore DISMISS the Petition."

When the federal court declined to hear the case because of the political question doctrine it wasn't because the case was frivolous but rather "refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not

[218] *Sai v. Trump*, Petition for Writ of Mandamus, case no. 1:18-cv-01500 (June 25, 2001) (online at https://hawaiiankingdom.org/pdf/Petition_for_Mandamus.pdf).
[219] *Sai v. Trump*, Order (Sep. 11, 2018) (online at: https://hawaiiankingdom.org/pdf/Order_Mandamus.pdf).
[220] *Sai v. Trump*, Minute Order (Sep. 11, 2018) (online at https://hawaiiankingdom.org/pdf/Minute_Order_Mandamus.pdf).

hear the issue."[221] If the petition was without merit it would have been dismissed for "failure to state a claim upon which relief can be granted" under rule 12(b)(6) of the Federal Rules of Civil Procedure. Political questions, however, are dismissed under rule 12(1) regarding subject matter jurisdiction.

In 2008, the same United States District Court for the District of Columbia, dismissed a case concerning Taiwan as a political question under Rule 12(b)(1) in *Lin v. United States*.[222] The federal court in its order stated that it "must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)." When this case went on appeal, the D.C. Appellate Court underlined the modern doctrine of the political question, "We do not disagree with Appellants' assertion that we could resolve this case through treaty analysis and statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task."[223]

What is significant in the Hawaiian Kingdom case is that the federal court accepted the allegations of facts in the petition as true but that subject matter jurisdiction lies in another branch of the United States government that being the executive branch. From an international law perspective, the facts of the prolonged occupation are not in dispute and the petition sought to address the violations of the rights of protected persons under international humanitarian law.

The dismissal of the petition under the political question doctrine would satisfy the requirement to exhaust local remedies, which is a "'principle of general international law' supported by judicial decisions, State practice, treaties and the writings of jurists."[224] Under this principle, the International Court of Justice in the *ELSI* case stated that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."[225] In the Hawaiian situation, this strict requirement must be balanced by the exception to the rule where the local remedies are "obviously futile," "offer no reasonable prospect of success," or "provide no reasonable possibility of effective redress."[226]

Royal Commission of Inquiry

On January 19, 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

[221] Cornell Law School, Legal Information Institute, *Political Question Doctrine* (online at https://www.law.cornell.edu/wex/political_question_doctrine).
[222] *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008)
[223] *Lin v. United States*, 561 F.3d 506 (2009).
[224] Text of the Draft Articles on Diplomatic Protection (2006) 2 Y.B. Int'l L. Comm'n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 1.
[225] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59.
[226] *Id*., art. 15, cmt. 2.

Parties agreed to the rules provided under Part III—*International Commissions of Inquiry* (Articles 9-36), 1907 HC I. According to Article III of the Special Agreement:

> The 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.[227]

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. That dispute stemmed from an 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."[228]

In what appears to be obstruction by the PCA's Secretary General, a complaint was filed in 2017 by the Hawaiian government with one of the member States of the PCA's Administrative Council at its embassy in The Hague, Netherlands.[229] The name of the State is being kept confidential at its request.

The unfortunate circumstances of the PCA proceedings stemming from the *Larsen* case prompted the Council to exercise its prerogative of the Crown and established a Royal Commission of Inquiry ("Commission") on April 17, 2019. Its mandate is to investigate the consequences of the prolonged occupation. The Commission was established by "virtue of the prerogative of the Crown provisionally vested in [the Council of Regency] in accordance with Article 33 of the 1864 Constitution, and to ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom."

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[227] Special Agreement (Jan. 19, 2017) (online at http://hawaiiankingdom.org/pdf/ICI_Agmt_1_19_17(amended).pdf).
[228] *Island of Palmas* arbitration case (Netherlands and the United States of America), R.I.A.A., vol. II, 829 (1949).
[229] A true and correct copy of the complaint (online at http://hawaiiankingdom.org/pdf/Hawaiian_Complaint_PCA_Admin_Council.pdf).

Chairman Sai has been designated as Head of the Commission, and Professor Federico Lenzerini has been appointed as Deputy Head. Pursuant to Article 3—*Composition of the Royal Commission*, Dr. Sai has been authorized to seek "recognized experts in various fields." According to Article 1:

> 2. The purpose of the Royal Commission shall be to investigate the consequences of the United States' belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission.
>
> 3. The results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report.

PRELIMINARY LIST OF ALLEGED WAR CRIMES

War Crimes: 1907 Hague Convention, IV

Article 43—The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The United States failed in its duty to administer the laws of the Hawaiian Kingdom as it stood prior to the unlawful overthrow of the Hawaiian Kingdom government on January 17, 1893. Instead, through its puppet regime, the United States unlawfully maintained the continued presence and administration of law it established through intervention. The puppet regime was originally called the provisional government, which was later changed in name only to the Republic of Hawai'i on July 4, 1894. The provisional government was neither a government *de facto* nor *de jure*, but self-proclaimed as concluded by President Cleveland in his message to the Congress on December 18, 1893, and the Republic of Hawai'i was acknowledged as *self-declared* by the Congress in a joint resolution apologizing on the one hundredth anniversary of the illegal overthrow of the Hawaiian Kingdom government on November 23, 1993.

Since April 30, 1900, the United States had imposed its national laws over the territory of the Hawaiian Kingdom in violation of international law and the laws of occupation. By virtue of congressional legislation, the so-called Republic of Hawai'i was subsumed. Through *An Act to provide a government for the Territory of Hawai'i*, "the phrase 'laws of Hawaii,' as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii in force on the twelfth day of August, eighteen hundred and ninety-eight."[1] When the Territory of Hawai'i was succeeded by the State of Hawai'i on March 18, 1959 through United States legislation, the Congressional Act provided that all "laws in force in the Territory of Hawaii at the time of admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii."[2] Furthermore:

> [T]he term "Territorial law" includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii

[1] 31 Stat. 141.
[2] 73 Stat. 11.

> at the time of its admission into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provision of this Act.[3]

In addition, Article 43 does not transfer sovereignty to the occupying power.[4] Section 358, United States Army Field Manual 27-10, declares, "[b]eing 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." Sassòli further elaborates, "The occupant may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation."[5]

Therefore, the United States' failure to comply with the 1893 executive agreements to reinstate the Queen and her cabinet, and its failure to comply with the law of occupation to administer Hawaiian Kingdom law, as it stood prior to the unlawful overthrow of the Hawaiian government on January 17, 1893, rendered all administrative and legislative acts of the provisional government, the Republic of Hawai'i, the Territory of Hawai'i and currently the State of Hawai'i illegal and void because these acts stem from governments that are neither *de facto* nor *de jure*, but self-declared. As the United States is a government that is both *de facto* and *de jure*, its legislation has no extraterritorial effect except under the principles of active and passive personality jurisdiction. In particular, this fact has rendered all conveyances of real property and mortgages to be defective since January 17, 1893, because of the absence of a competent notary public under Hawaiian Kingdom law. Since January 17, 1893, all notaries public stemmed from unlawful entities.

Article 45—It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the [Occupying] Power.

When the provisional government was established through the support and protection of U.S. troops on January 17, 1893, it proclaimed that it would provisionally "exist until terms of union with the United States of America have been negotiated and agreed upon."[6] The provisional government was not a new government, but rather a small group of insurgents installed through intervention. With the backing of U.S. troops these insurgents further proclaimed, "[a]ll 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 persons:

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[3] *Id.*
[4] Eyal Benvenisti, *The International Law of Occupation* 8 (1993); Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 95 (1957); Michael Bothe, "Occupation, Belligerent," in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law,* vol. 3, 765 (1997).
[5] Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century*, International Humanitarian Law Research Initiative 5 (2004) (online at http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf).
[6] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 210 (1895).

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."[7] All government officials were coerced and forced to sign oaths of allegiance,

> I ____, aged ___, a native of _____, residing at _____, in said district, do solemnly swear, in the presence of Almighty God, that I will support and bear true allegiance to the Provisional Government of the Hawaiian Islands, and faithfully perform the duties appertaining to the office or employment of ____.[8]

The compelling of inhabitants, serving in the Hawaiian Kingdom government, to swear allegiance to the occupying power, through its puppet regime, began on January 17, 1893, with oversight by United States troops, until April 1, 1893, when the troops were ordered to depart Hawaiian territory by U.S. Special Commissioner, James Blount, who had begun the presidential investigation into the overthrow. When Special Commissioner Blount arrived in the Hawaiian Kingdom on March 29, 1893, he reported to U.S. Secretary of State Walter Gresham, "[t]he troops from the *Boston* were doing military duty for the Provisional Government. The American flag was floating over the government building. Within it the Provisional Government conducted its business under an American protectorate, to be continued, according to the avowed purpose of the American minister, during negotiations with the United States for annexation."[9]

As a result of the deliberate failure of the United States to carry out the 1893 *executive agreements* to reinstate the Queen and her cabinet of officers, and with the employment of American mercenaries, the insurgents were allowed to maintain their unlawful control of the government. The provisional government was renamed the Republic of Hawai'i on July 4, 1894. In 1900, the Republic was renamed the Territory of Hawai'i. The United States then directly compelled the inhabitants of the Hawaiian Kingdom to swear allegiance to the United States when serving in the so-called Territory of Hawai'i and, beginning in 1959, allegiance to the State of Hawai'i. All this was in direct violation of Article 45 of the HC IV.

Section 19 of the Territorial Act provides, "every member of the legislature, and all officers of the government of the Territory of Hawaii, shall take the following oath: I do solemnly swear (or affirm), in the presence of Almighty God, that I will faithfully support the Constitution and laws of the United States, and conscientiously and impartially discharge my duties as a member of the legislature, or as an officer of the government of the Territory of Hawaii."[10] Section 4, Article XVI of the State of Hawai'i constitution provides, "All eligible public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation:

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[7] *Id*., at 211.
[8] *Id.,* at 1076.
[9] *Id*., at 568.
[10] 31 Stat. 145.

'I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as … to best of my ability.'"

Article 46—Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Beginning on July 20, 1899, President McKinley began to set aside portions of lands by executive orders for "installation of shore batteries and the construction of forts and barracks."[11] The first executive order set aside 15,000 acres for two Army military posts on the Island of O'ahu called Schofield Barracks and Fort Shafter. This soon followed the securing of lands for Pearl Harbor naval base in 1901 when the U.S. Congress appropriated funds for condemnation of seven hundred nineteen (719) acres of private lands surrounding Pearl River, which later came to be known as Pearl Harbor.[12] By 2012, the U.S. military has one hundred eighteen (118) military sites that span 230,929 acres of the Hawaiian Islands.[13]

Article 47—Pillage is formally forbidden.

Since January 17, 1893, there has been no lawful government exercising its authority in the Hawaiian Islands, *e.g.* provisional government (1893-1894), Republic of Hawai'i (1894-1900), Territory of Hawai'i (1900-1959) and the State of Hawai'i (1959-present). As these entities were neither governments *de facto* nor *de jure*, but self-proclaimed, and their collection of tax revenues and non-tax revenues, *e.g.* rent and purchases derived from real estate, were not for the benefit of a *bona fide* government in the exercise of its police power, these collections can only be considered as benefitting private individuals who are employed by the State of Hawai'i.

Pillage or plunder is "the forcible taking of private property by an invading or conquering army,"[14] which, according to the Elements of Crimes of the International Criminal Court, must be seized "for private or personal use."[15] As such, the prohibition of pillaging or plundering is a specific application of the general principle of law prohibiting theft.[16] The residents of the Hawaiians Islands have been the subject of pillaging and plundering since the establishment of the provisional

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[11] Robert H. Horwitz, Judith B. Finn, Louis A. Vargha, and James W. Ceaser, *Public Land Policy in Hawai'i: An Historical Analysis*, 20 (State of Hawai'i Legislative Reference Bureau Report No. 5, 1969).
[12] John D. VanBrackle, Pearl Harbor from the First Mention of 'Pearl Lochs' to Its Present Day Usage, 21-26 (undated manuscript on file in Hawaiian-Pacific Collection, Hamilton Library, University of Hawai'i at Manoa).
[13] U.S. Department of Defense's Base Structure Report (2012) (online at http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf).
[14] Black's Law Dictionary 1148 (1990).
[15] International Criminal Court, *Elements of a War Crime*, Article 8(2)(b)(xvi) and (e)(v)).
[16] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, 185 (2009).

government by the United States on January 17, 1893 and continues to date by its successor, the State of Hawai‘i.

Article 48—If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Unlike the State of Hawai‘i that claims to be a public entity, but in reality is private, the United States government is a public entity, but its exercising of authority in the Hawaiian Islands, in violation of international laws, is unlawful. Therefore, the United States cannot be construed to have committed the act of pillaging since it is a public entity, but it has appropriated private property through unlawful contributions, *e.g.* federal taxation, which is regulated by Article 48. And Article 49 provides, "If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question." Thus, the United States collection of federal taxes from the residents of the Hawaiian Islands is an unlawful contribution that is exacted for the sole purpose of supporting the United States federal government and not for "the needs of the army or of the administration of the territory."

Article 55—The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

With the backing of United States troops, the provisional government unlawfully seized control of all government property, both real and personal. In 1894, the provisional government's successor, the so-called Republic of Hawai‘i, seized the private property of Her Majesty Queen Lili‘uokalani, which was called Crown lands, and they called it public lands. According to Hawaiian Kingdom law, the Crown lands were distinct from the public lands of the Hawaiian government since 1848. Crown lands comprised roughly 1 million acres, and the government lands comprised roughly 1.5 million acres. The total acreage of the Hawaiian Islands comprised 4 million acres.

In a case before the Hawaiian Kingdom Supreme Court in 1864 that centered on Crown lands, the Court stated:

> In our opinion, while it was clearly the intention of Kamehameha III to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those

> lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of 7th June, 1848, as having secured both those objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III.[17]

In 1898, the United States seized control of all these lands and other property of the Hawaiian Kingdom government as evidenced by the joint resolution of annexation. The resolution stated, that the United States has acquired "the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining."[18]

Article 56—The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

In 1900, President McKinley signed into United States law *An Act To provide a government for the Territory of Hawai'i*,[19] 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." The policy of this program was to denationalize the children of the Hawaiian Islands on a massive scale, which included forbidding the children from speaking the Hawaiian national language, and allowing only English to be spoken. Its intent was to obliterate any memory of the national character of the Hawaiian Kingdom that the children may have had and replace this, through inculcation, 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.[20]

At the close of the Second World War, the United Nations War Commission's Committee III was asked to provide a report on war crime charges against four Italians accused of denationalization in the occupied state of Yugoslavia. The charge stated that, "the Italians started a policy, on a vast

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[17] *Estate of His Majesty Kamehameha IV*, 3 Haw. 715, 725 (1864).
[18] 30 Stat. 750.
[19] 31 Stat. 141.
[20] 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 (1920).

scale, of denationalization. As a part of such policy, they started a system of 're-education' of Yugoslav children. This re-education consisted of forbidding children to use the Serbo-Croat language, to sing Yugoslav songs and forcing them to salute in a fascist way."[21] The question before Committee III was whether or not "denationalization" constituted a war crime that called for prosecution or merely a violation of international law. In concluding that denationalization is a war crime, the Committee reported:

> It is the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the country (Art. 43 of the Hague Regulations). Inter alia, family honour and rights and individual life must be respected (Art. 46). The right of a child to be educated in his own native language falls certainly within the rights protected by Article 46 ('individual life'). Under Art. 56, the property of institutions dedicated to education is privileged. If the Hague Regulations afford particular protection to school buildings, it is certainly not too much to say that they thereby also imply protection for what is going to be done within those protected buildings. It would certainly be a mistaken interpretation of the Hague Regulations to suppose that while the use of Yugoslav school buildings for Yugoslav children is safe-guarded, it should be left to the unfettered discretion of the occupant to replace Yugoslav education by Italian education.[22]

War Crimes: 1949 Geneva Convention, IV

Article 64—The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention

The failure of the United States to administer the laws of the Hawaiian Kingdom has caused extrajudicial proceedings that have led to unlawful confinements, sentencing and executions.

Article 147—Extensive […] appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

In 2013, the United States Internal Revenue Service ("IRS") illegally appropriated $7.1 million dollars from the residents of the Hawaiian Islands.[23] During this same year, the State of Hawai'i

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[21] E. Schwelb, Note on the Criminality of "Attempts to Denationalize the Inhabitants of Occupied Territory" (Appendix to Doc, C, 1. No. XII) – Question Referred to Committee III by Committee I, United Nations War Crime Commission, Doc. III/15, 1 (Sep. 10, 1945) (online at http://hawaiiankingdom.org/pdf/Committee_III_Report_on_Denationalization.pdf).
[22] *Id*., at 6.
[23] IRS, *Gross Collections, by Type of Tax and State and Fiscal Year, 1998-2012* (online at http://www.irs.gov/uac/SOI-Tax-Stats-Gross-Collections,-by-Type-of-Tax-and-State,-Fiscal-Year-IRS-Data-Book-Table-5).

additionally appropriated $6.5 billion dollars illegally.[24] The IRS is an agency of the United States and cannot appropriate money from the inhabitants of an occupied state without violating international law. The State of Hawai‘i is a political subdivision of the United States, established by an Act of Congress in 1959, and being an entity without any extraterritorial effect, so it is precluded from appropriating money from the inhabitants of an occupied state without violating the international laws of occupation.

According to the laws of the Hawaiian Kingdom, taxes upon the inhabitants of the Hawaiian Islands include: an annual poll tax of $1 dollar to be paid by every male inhabitant between the ages of seventeen and sixty years; an annual tax of $2 dollars for the support of public schools to be paid by every male inhabitant between the ages of twenty and sixty years; an annual tax of $1 dollar for every dog owned; an annual road tax of $2 dollars to be paid by every male inhabitant between the ages of seventeen and fifty; and an annual tax of ¾ of 1% upon the value of both real and personal property.[25]

The *Merchant Marine Act* of June 5, 1920,[26] hereinafter referred to as the *Jones Act,* is a restraint of trade and commerce and is also a violation of international law and treaties between the Hawaiian Kingdom and other foreign states. According to the *Jones Act*, all goods, which includes tourists on cruise ships, whether originating from Hawai‘i or being shipped to Hawai‘i, must be shipped on vessels built in the United States that are wholly owned and crewed by United States citizens. Should a foreign flag ship attempt to unload foreign goods and merchandise in the Hawaiian Islands, the person transporting the merchandise would have to forfeit its cargo to the U.S. Government, or forfeit an amount equal to the value of the merchandise, or the cost of transportation.

As a result of the *Jones Act,* there is no free trade in the Hawaiian Islands. Ninety percent of Hawai‘i’s food is imported from the United States, which has created a dependency on outside food. The three major American ship carriers for the Hawaiian Islands are Matson, Horizon Lines, and Pasha Hawai‘i Transport Services, as well as several low cost barge alternatives. Under the *Jones Act*, these American carriers travel 2,400 miles to ports on the west coast of the United States in order to reload goods and merchandise, delivered from Pacific countries on foreign carriers, which would have otherwise come directly to Hawai‘i ports. The cost of fuel and the lack of competition drive up the cost of shipping and contributes to Hawai‘i’s high cost of living, and according to the USDA Food Cost, Hawai‘i residents in January 2012 paid an extra $417 per month

[24] State of Hawai‘i Department of Taxation Annual Reports (2013) (online at http://files.hawaii.gov/tax/stats/stats/annual/13annrpt.pdf).
[25] Civil Code of the Hawaiian Islands, *To Consolidate and Amend the Law Relating to Internal Taxes* (Act of 1882), 117-120 (online at http://www.hawaiiankingdom.org/civilcode/pdf/CL_Title_2.pdf).
[26] 41 Stat. 988.

for food on a thrifty plan than families who are on a thrifty plan in the United States.[27] Therefore, appropriating monies directly through taxation and appropriating monies indirectly as a result of the *Jones Act* to benefit American ship carriers and businesses are war crimes.

Article 147—Compelling a […] protected person to serve in the forces of an [Occupying] Power

The United States Selective Service System is an agency of the United States government that maintains information on those potentially subject to military conscription. Under the *Military Selective Service Act*, "it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."[28] Conscription of the inhabitants of the Hawaiian Kingdom, unlawfully inducted into the United States Armed Forces through the Selective Service System, occurred during World War I (September 1917-November 1918), World War II (November 1940-October 1946), Korean War (June 1950-June 1953), and the Vietnam War (August 1964-February 1973).

Although induction into the United States Armed Forces has not taken place since February 1973, the requirements to have residents of the Hawaiian Island, who reach the age of 18, to register with the Selective Service System for possible induction, is a war crime.

Article 147—Willfully depriving a […] protected person of the rights of fair and regular trial

Since January 17, 1893, there have been no lawfully constituted courts in the Hawaiian Islands whether it be Hawaiian Kingdom courts or military commissions established by order of the Commander of the United States Indo-Pacific Command in conformity with the HC IV, GC IV, and the international laws of occupation. All Federal and State of Hawai'i Courts in the Hawaiian Islands derive their authority from the United States Constitution and the laws enacted in pursuance thereof. As such, these Courts cannot claim to have authority in the territory of a foreign state and therefore are not properly constituted to give defendant(s) a fair and regular trial.

[27] United States Department of Agriculture Center for Nutrition Policy and Promotion, *Cost of Food at Home* (online at http://www.cnpp.usda.gov/USDAFoodCost-Home.htm#AK%20and%20HI).
[28] 50 U.S.C. App. 453.

Article 147—Unlawful deportation or transfer or unlawful confinement

According to the United States Department of Justice, the prison population in the Hawaiian Islands in 2009 was at 5,891.[29] Of this population there were 286 aliens.[30] Thus, two paramount issues arise—first, prisoners were sentenced by courts that were not properly constituted under Hawaiian Kingdom law and/or the international laws of occupation and therefore were unlawfully confined, which is a war crime under this court's jurisdiction; second, the alien prisoners were not advised of their rights in an occupied state by their state of nationality in accordance with the 1963 *Vienna Convention on Consular Relations*.[31] Compounding the violation of alien prisoners rights under the *Vienna Convention*, Consulates located in the Hawaiian Islands were wrongly granted exequaturs by the government of the United States by virtue of United States treaties and not by treaties between the Hawaiian Kingdom and these foreign states.

In 2003, the State of Hawai'i Legislature allocated funding to transfer up to 1,500 prisoners to private corrections institutions in the United States.[32] By June of 2004, there were 1,579 Hawai'i inmates in these facilities. Although the transfer was justified as a result of overcrowding, the government of the State of Hawai'i did not possess authority to transfer, let alone to prosecute these prisoners in the first place. Therefore, the unlawful confinement and transfer of inmates are war crimes.

Article 147—The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

Once a state is occupied, international law preserves the *status quo* of the occupied state to what it was before the occupation began. To preserve the nationality of the occupied state from being manipulated by the occupying state to its advantage, international law only allows individuals born within the territory of the occupied state to acquire the nationality of their parents—*jus sanguinis*. To preserve the *status quo*, Article 49 of the GC IV mandates that the "Occupying Power shall not […] transfer parts of its own civilian population into the territory it occupies." For individuals, who were born within Hawaiian territory during the occupation, to be a Hawaiian subject, they must be a direct descendant of a person or persons who were Hawaiian subjects prior to January 17, 1893. All other individuals, born after January 17, 1893 to the present, are aliens who can only

[29] United States Department of Justice's Bureau of Justice Statistics, *Prisoners in 2011* (online at http://www.bjs.gov/content/pub/pdf/p11.pdf).
[30] United States Government Accountability Office, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs* (March 2011) (online at http://www.gao.gov/new.items/d11187.pdf).
[31] *LaGrand* (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466.
[32] State of Hawai'i, Department of Public Safety, Response to Act 200, Part III, Section 58, Session Laws of Hawai'i 2003 As Amended by Act 41, Part II, Section 35, Session Laws of Hawai'i 2004 (January 2005) (online at http://lrbhawaii.info/reports/legrpts/psd/2005/act200_58_slh03_05.pdf).

acquire the nationality of their parents. According to von Glahn, "children born in territory under enemy occupation possess the nationality of their parents."[33]

According to the 1890 government census, Hawaiian subjects numbered 48,107, with the aboriginal Hawaiian, both pure and part, numbering 40,622, being 84% of the national population, and the non-aboriginal Hawaiians numbering 7,485, being 16%. Despite the massive and illegal migrations of foreigners to the Hawaiian Islands since 1898, which, according to the State of Hawai'i numbered 1,302,939 in 2009,[34] the *status quo* of the national population of the Hawaiian Kingdom is maintained. Therefore, under the international laws of occupation, the aboriginal Hawaiian population of 322,812 in 2009 would continue to be 84% of the Hawaiian national population, and the non-aboriginal Hawaiian population of 61,488 would continue to be 16%. The balance of the population in 2009, being 918,639, would be aliens who were illegally transferred, either directly or indirectly, by the United States as the occupying Power, and therefore these transferes are war crimes.

Article 147—Destroying or seizing the [Occupied State's] property unless such destruction or seizure be imperatively demanded by the necessities of war

On August 12, 1898, the United States seized approximately 1.8 million acres of land that belonged to the Government of the Hawaiian Kingdom and to the office of the Monarch. These lands were called Government lands and Crown lands, respectively, whereby the former being public lands and the latter private lands.[35] These combined lands constituted nearly half of the entire territory of the Hawaiian Kingdom.

Military training locations include Pacific Missile Range Facility, Barking Sands Tactical Underwater Range, and Barking Sands Underwater Range Expansion on the Island of Kaua'i; the entire Islands of Ni'ihau and Ka'ula; Pearl Harbor, Lima Landing, Pu'uloa Underwater Range—Pearl Harbor, Barbers Point Underwater Range, Coast Guard AS Barbers Point/Kalaeloa Airport, Marine Corps Base Hawai'i, Marine Corps Training Area Bellows, Hickam Air Force Base, Kahuku Training Area, Makua Military Reservation, Dillingham Military Reservation, Wheeler

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[33] Gerhard von Glahn, *Law Among Nations* 780 (6th ed. 1992).
[34] State of Hawai'i. Department of Health, Hawai'i Health Survey (2009) (online at http://www.ohadatabook.com/F01-05-11u.pdf); *see* also David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 Haw. J.L. & Pol. 63-65 (2004).
[35] Public lands were under the supervision of the Minister of the Interior under Article I, Chapter VII, Title 2—*Of The Administration of Government*, Civil Code, §§ 39-48 (1884), and Crown lands were under the supervision of the Commissioners of Crown Lands under *An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable*, Civil Code, Appendix, pp. 523-525 (1884). Crown lands are private lands that "descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property," *In the Matter of the Estate of His Majesty Kamehameha IV., late deceased*, 2 Haw.715, 725 (1864), subject to *An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable*.

Army Airfield, and Schofield Barracks on the Island of O‘ahu; and Bradshaw Army Airfield and Pohakuloa Training Area on the Island of Hawai‘i.

The United States Navy’s Pacific Fleet headquartered at Pearl Harbor hosts the Rim of the Pacific Exercise (“RIMPAC”), every other even numbered year, and is the largest international maritime warfare exercise in the world. RIMPAC is a multinational, sea control and power projection exercise that collectively consists of activity by the U.S. Army, Air Force, Marine Corps, and Naval forces, as well as military forces from other foreign states. During the month long exercise, RIMPAC training events and live fire exercises occur in the open-ocean and at the military training locations throughout the Hawaiian Islands.

Moreover, in 2006, the United States Army disclosed to the public that depleted uranium (“DU”) was found on the firing ranges at Schofield Barracks on the Island of O‘ahu.[36] The army subsequently confirmed that DU was also found at Pohakuloa Training Area on the Island of Hawai‘i and suspect that DU is also at Makua Military Reservation on the Island of O‘ahu.[37] These ranges have yet to be cleared of DU and are still used for live fire. This brings the inhabitants, who live down wind from these ranges, into harms way because when the DU ignites or explodes from the live fire, it creates tiny particles of hazardous aerosolized DU oxide that can travel by wind. And if the DU gets into the drinking water or into oceans it would have a devastating effect across the islands.

The Hawaiian Kingdom has never consented to the establishment of military installations throughout its territory and these installations and war-gaming exercises stand in direct violation of Articles 1, 2, 3 and 4, of HC V, HC IV, and GC IV, and therefore are war crimes.

[36] U.S. Army Garrison-Hawai‘i, Depleted Uranium on Hawai‘i’s Army Ranges (online at http://www.garrison.hawaii.army.mil/du/).
[37] *Id.*