Hawaiian Neutrality:
From the Crimean Conflict through the Spanish-American War

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ABSTRACT

Only a decade since the Anglo-French proclamation of November 28, 1843, recognizing the Hawaiian Islands as an independent and sovereign state, the Hawaiian Kingdom would find itself a participant state, during the Crimean conflict, in the abolishment of privateering and the formation of international rules protecting neutral goods. This set the stage for Hawaiian authorities to secure international recognition of its neutrality. Unlike states that were neutralized by agreement between third states, *e.g.* Luxembourg and Belgium, the Hawaiian Kingdom took a proactive approach to secure its neutrality through diplomacy and treaty provisions by making full use of its global location. These actions had double-edged consequences. On the one hand, Hawai'i was a beneficial asylum, being neutral territory, for all states at war in the Pacific Ocean, but on the other hand, it was coveted by the United States for its military and strategic importance. This would be revealed during the Spanish-American War when the United States deliberately violates the neutrality of the Hawaiian Islands and occupies its territory in order to conduct military campaigns in the Spanish colonies of Guam and Philippines. This was similar to Germany's occupation of Luxembourg and the violation of Luxembourg neutrality when Germany launched attacks into France during the First World War. The difference, however, is that Germany withdrew after four years of occupation, whereas the United States remained in Hawai'i and implemented a policy of *denationalization* in order to conceal the prolonged occupation of an independent and sovereign state. This paper challenges the commonly held belief that Hawai'i lost its independence and was incorporated into the United States during the Spanish-American War. Rather, Hawai'i remains a state by virtue of the same positive rules that preserved the independence of the occupied states of Europe during the First and Second World Wars.

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> "Oh, honest Americans, as Christians hear me for my down-trodden people! Their form of government is as dear to them as yours is precious to you. Quite as warmly as you love your country, so they love theirs. With all your goodly possessions, covering a territory so immense that there yet remain parts unexplored, possessing islands that, although near at hand, had to be neutral ground in time of war, do not covet the little vineyard of Naboth's, so far from your shores, lest the punishment of Ahab fall upon you, if not in your day, in that of your children, for 'be not deceived, God is not mocked.' –Lili'uokalani, Queen of the Hawaiian Kingdom (1898)[1]

INTRODUCTION

Unlike other non-European states, the Hawaiian Kingdom, as a recognized neutral state, enjoyed equal treaties with European powers, including the United States, and full independence of its laws over its territory. In his speech at the opening of the 1855 Hawaiian Legislative Assembly, King Kamehameha IV, reported, "It is gratifying to me, on commencing my reign, to be able to inform you, that my relations with all the great Powers, between whom and myself exist treaties of amity, are of the most satisfactory nature. I have received from all of them, assurances that leave no room to doubt that my rights and sovereignty will be respected."[2]

The Hawaiian Kingdom entered into treaties of amity with Austria-Hungary on June 18, 1875; Belgium on October 4, 1862; Bremen (succeeded by Germany) on March 27, 1854; Denmark on October 19, 1846; France on September 8, 1858; Germany on March 25, 1879; Hamburg (succeeded by Germany) on January 8, 1848; Italy on July 22, 1863; Japan on August 19, 1871; the Netherlands on October 16, 1862; Portugal on May 5, 1882; Russia on June 19, 1869; Spain on October 9, 1863; Sweden-Norway on April 5, 1855; Switzerland on July 20, 1864; Great Britain on March 26, 1846; and the United States of America on December 20, 1849.

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[1] LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 373 (Lothrop, Lee & Shepard Co. 1898). International Standard Bible Encyclopedia (Naboth's Vineyard)—"The owner of a vineyard contiguous to the palace of King Ahab. The king desired, by purchase or exchange, to add the vineyard to his own grounds. Naboth, however, refused to part on any terms with his paternal inheritance. This refusal made Ahab 'heavy and displeased' (I Kings 21:4). Jezebel, the king's wife, then took the matter in hand, and by false accusation on an irrelevant charge procured the death of Naboth by stoning (I Kings 21:7-14). As Ahab was on his way to take possession of the vineyard he met Elijah the prophet, who denounced his vile act and pronounced judgment on king and royal house. A temporary respite was given to Ahab because of a repentant mood (I Kings 21:27-29); but later the blow fell, first upon himself in a conflict with Syria (I Kings 22:34-40); then upon his house through a conspiracy of Jehu, in which Jehoram, Ahab's son, and Jezebel, his wife, were slain (II Kings 9:25-26, II Kings 9:30 ff.). In both cases the circumstances recalled the foul treatment of Naboth."

[2] ROBERT C. LYDECKER, ROSTER LEGISLATURES OF HAWAII 57 (1918).

By 1893, the Hawaiian Kingdom maintained diplomatic representatives accredited to foreign states and consulates. Hawaiian Legations were established in Washington, D.C., London, Paris, and Tokyo, while diplomatic representatives accredited to the Hawaiian Court in Honolulu were from the United States, Portugal, Great Britain, France and Japan. There were thirty-three Hawaiian consulates in Great Britain and her colonies; five in France and her colonies; five in Germany; one in Austria; eight in Spain and her colonies; five in Portugal and her colonies; three in Italy; two in the Netherlands; four in Belgium; four in Sweden and Norway; one in Denmark; and two in Japan.[3] Foreign Consulates in the Hawaiian Kingdom were from the United States, Italy, Chile, Germany, Sweden and Norway, Denmark, Peru, Belgium, the Netherlands, Spain, Austria and Hungary, Russia, Great Britain, Mexico, Japan, and China.[4]

From a legal standpoint, the Hawaiian Kingdom was no doubt firmly established as a subject and co-equal sovereign under international law, but it still had to navigate through the political waters of power and expansionism in the Pacific exhibited by the United States in the latter part of the nineteenth century. The untold political and legal history of the Hawaiian Kingdom presents a fascinating story of agency on the part of Hawaiians as they were forced to engage the United States' new vision of world prominence and naval supremacy. In the end, Hawaiians were able to prevent American expansionists from acquiring the sovereignty and independence of the island kingdom under international law, but they could not hold back the unbridled power of the United States in seizing and occupying the islands for military purposes during the Spanish-American War, in similar fashion, to Germany's occupation of Luxembourg during the First World War.

Since the occupation began on August 12, 1898, the world has been led to believe, through intentional manipulation of historical facts, that the United States acquired the independence and sovereignty of the Hawaiian Kingdom. In a 1901 United States government publication titled *History of the Department of State of the United States*, William Henry Michael, Chief Clerk of the Department of State, wrote, that under the McKinley administration, "a treaty was ratified by both parties, and annexation was consummated…which effected the absorption of the Sandwich [Hawaiian] Islands into the domain of the United States."[5] There was never a treaty, but rather, a Congressional statute called a joint resolution purporting to have annexed the Hawaiian state.

It would be ninety years later when Acting Assistant United States Attorney General, Douglas W. Kmiec, would stumble over this American dilemma in a memorandum opinion written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three mile limit to twelve.[6] After concluding that only the President and not the Congress

[3] THOMAS THRUM, *Hawaiian Register and Directory for 1893, in* BY HAWAIIAN ALMANAC AND ANNUAL, 140-141 (1892).
[4] *Id*.
[5] WM. H. MICHAEL, HISTORY OF THE DEPARTMENT OF STATE OF THE UNITED STATES 38 (Government Printing Office 1901).
[6] Douglas Kmiec, Department of Justice, *Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, *in* 12 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 238 (1988).

possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States,"[7] Kmiec also concluded that it was "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."[8]

Kmiec cited United States constitutional scholar Westel Woodbury Willoughby, who wrote in 1929, "The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[9] In 1910, Willoughby wrote, "The incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is…essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[10]

KINGDOM OF HAWAI'I JOINS THE BRITISH EMPIRE

In the latter part of the eighteenth century, in what was formerly called the Sandwich Islands, there existed four distinct island kingdoms—Hawai'i, Maui, O'ahu and Kaua'i. The Kingdom of O'ahu was eventually consolidated under Maui rule, and an alliance was made between the leeward Kingdoms of Maui and Kaua'i. These kingdoms were highly organized and "evolved to become the most stratified of Polynesian societies,"[11] and its system of land tenure "was entirely different from that of *tribal* ownership prevailing in New Zealand, and from the village or *communal* system of Samoa, but bore a remarkable resemblance to the feudal system that prevailed in Europe during the Middle Ages."[12] In each of the kingdoms, government was centralized through a feudal system called, by its native term, *ali'i'ana* (administration by chiefs), whereby the King "routinely delegated political power through at least five layers of chiefs serving as line officers in a stratified hierarchical bureaucracy that implemented polity-wide tasks including tax collection, public work projects, and the waging of war."[13]

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[7] *Id*., at 242.
[8] *Id*., at 262.
[9] *Id*., 252, citing BY WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES VOL. 1, §239, 427 (2d ed. 1929).
[10] WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES VOL. 1, §154, 345 (Baker, Voorhis & Company 1910).
[11] LORENZ GONSCHOR, *Ka Hoku o Osiania: Promoting the Hawaiian Kingdom as a Model for Political Transformation in Nineteenth-Century Oceania*, in AGENTS OF TRANSCULTURATION: BORDER-CROSSERS, MEDIATORS, GO-BETWEENS 160 (Sebastian Jobs and Gesa Mackenthun ed., 2013).
[12] W.D. Alexander, *A Brief History of Land Titles in the Hawaiian Kingdom (1882)*, 2 THE HAW. J.L. & POL. 175 (Summer 2006).
[13] ROBERT J. HOMMON, THE ANCIENT HAWAIIAN STATE: ORIGINS OF A POLITICAL SOCIETY 134 (Oxford University Press 2013).

The largest of these kingdoms was Hawai'i, which "encompassed over 400 local communities of Hawai'i Island's six districts and Maui's Hana and Kipahulu districts, with a land area totaling more than 10,000 km. Its estimated population was greater than 250,000, comparable to medium-sized primary and archaic states in other regions of the world."[14] Prior to Western contact, these kingdoms evolved into primary states that were comparable to Mesopotamia, Egypt, the Indus Valley, China, Mesoamerica, and Andean South America. Kirch states,

> "While Hawaiian societies were originally organized around Ancestral Polynesian concepts of chiefship, by the time of their initial engagement with the West they had crossed a threshold marked by the emergence of divine kingship, and by the sundering of ancient principles of lineage and land rights based on kinship, and their replacement with a strictly territorial system."[15]

Governing authority was consolidated in the person of the King, who controlled life and death and could unilaterally change the form of government at will. Religion constituted the organic law of the country while, administratively, governance resided solely with the King and his chiefs. Hawaiian Justice Walter Frear noted,

> "The system of government was of a feudal nature, with the King as lord paramount, the chief as mesne lord and the common man as tenant paravail—generally three or four and sometimes six or seven degrees. Each held land of his immediate superior in return for military and other services and the payment of taxes and rent. Under this system all functions of government, executive, legislative and judicial, were united in the same persons and were exercised with almost absolute power by each functionary over all under him, subject only to his own superiors, each function being exercised not consciously as different in kind from the others but merely as a portion of the general powers possessed by a lord over his own."[16]

Just three years after the tragic demise of Captain James Cook, on the shores of the royal residence of Kalaniopu'u, King of Hawai'i, on February 14, 1779, civil war broke out, after the elderly king died in January of 1782. While the civil war lasted nine years, it set in motion a chain of events that would facilitate the rise of the celebrated chief Kamehameha to be King of Hawai'i in the summer of 1791. Just the three years later, Kamehameha joined the British Empire under an agreement with Captain George Vancouver on February 25, 1794. According to Kauai, "Kamehameha's foresight in forming strategic international relations helped to protect and maintain Hawaiian autonomy amidst the rise of European exploration in the Pacific."[17]

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[14] *Id*., 130.

[15] PATRICK VINTON KIRCH, HOW CHIEFS BECAME KINGS: DIVINE KINGSHIP AND THE RISE OF ARCHAIC STATES IN HAWAI'I 72 (University of California Press 2010).

[16] WALTER FREAR, THE EVOLUTION OF THE HAWAIIAN JUDICIARY 1 (Papers of the Hawaiian Historical Society, June 29, 1894).

[17] Willy Daniel Kaipo Kauai, The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai'i 55 (2014) (unpublished Ph.D. dissertation, University of Hawai'i at Manoa) (on file with author). The author served as a member of Kauai's doctoral committee.

The agreement provided that the British government would not interfere with the kingdom's religion, government and economy—"the chiefs and priests, were to continue as usual to officiate with the same authority as before in their respective stations."[18] Kamehameha and his Chiefs acknowledged they were British and subjects of King George III. Knowing that the religion would eventually have to conform to British custom, Kamehameha also "requested of Vancouver that on his return to England he would procure religious instructors to be sent to them from the country of which they now considered themselves subjects."[19] After the ceremony, the British ships fired a salute and delivered a copper plaque, which was placed at the royal residence of Kamehameha. The plaque read,

> "On the 25th of February, 1794, Tamaahmaah [Kamehameha], king of Owhyhee [Hawai'i], in council with the principal chiefs of the island assembled on board His Britannic Majesty's sloop Discovery in Karakakooa [Kealakekua] bay, and in the presence of George Vancouver, commander of the said sloop; Lieutenant Peter Puget, commander of his said Majesty's armed tender the Chatham; and the other officers of the Discovery; after due consideration, and unanimously ceded the said island of Owhyhee [Hawai'i] to His Britannic Majesty, and acknowledged themselves to be subjects of Great Britain."[20]

In April of 1795, Kamehameha conquered the Kingdom of Maui and acquired the islands of Maui, Lana'i, Moloka'i and O'ahu. By April of 1810, the Kingdom of Kaua'i capitulated and Kaumuali'i ceded his kingdom and its dependent island of Ni'ihau to Kamehameha, thereby becoming a vassal state, which the Kaua'i King paid a tribute to Kamehameha annually.[21] Thus, the entire Hawaiian archipelago had been consolidated by the Kingdom of Hawai'i, but the kingdom was renamed the Kingdom of the Sandwich Islands with Kamehameha as its King.

With the Leeward Islands under his rule, Kamehameha incorporated and modified aspects of English governance including the establishment of the office of Prime Minister and Governors over the former kingdoms of Hawai'i, Maui and O'ahu.[22] The governors served as viceroys over the lands of the former kingdom "with legislative and other powers almost extensive as those kings whose places they took."[23] *Kālaimoku* (carver of lands) was the native term given to a King's chief counselor, and became the native equivalent to the title Prime Minister. Kamehameha appointed Kalanimoku as his Prime Minister and he thereafter took on the name of his title—Kālaimoku. Foreigners also commonly referred to him as Billy Pitt, the namesake of the younger William Pitt, who

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[18] GEORGE VANCOUVER, VOYAGE OF DISCOVERY TO THE NORTH PACIFIC OCEAN AND THE ROUND THE WORLD, VOL. 3, 56 (Da Capo Press 1967).
[19] MANLEY HOPKINS, HAWAII: THE PAST, PRESENT AND FUTURE OF ITS ISLAND KINGDOM 478 (Kegan Paul 2003).
[20] *See* VANCOUVER, at 56.
[21] This vassalage, however, was terminated in 1821 by Kamehameha's successor and son, Kamehameha II, when he removed Kaumuali'i to the island of O'ahu and replaced him with a governor named Ke'eaumoku.
[22] WALTER FREAR, HAWAIIAN STATUTE LAW (Thirteenth Annual Report of the Hawaiian Historical Society 1906). Frear mistakenly states Kamehameha established four earldoms that included the Kingdom of Kaua'i. Kaumuali'i was not a governor, but remained a King until 1821.
[23] *Id*.

served as Britain's Prime Minister under King George III. Kālaimoku's duty was to manage day-to-day operations of the national government, as well as to be the commander-in-chief of all the military, and head of the kingdom's treasury. Samuel Kamakau, a Hawaiian historian, explained,

> "By this appointment Kamehameha waived the privilege of giving anything away without the consent of the treasurer. Should that officer fail to confirm a gift it would not be binding. Kamehameha could not give any of the revenues of food or fish on his own account in the absence of this officer. If he were staying, not in Kailua but in Kawaihae or Honaunau, the treasurer had to be sent for, and only upon his arrival could things be given away to chiefs, lesser chiefs, soldiers, to the chief's men, or to any others. The laws determining life or death were in the hands of the treasurer; he had charge of everything. Kamehameha's brothers, the chiefs, the favorites, the lesser chiefs, the soldiers, and all who were fed by the chief, anyone to whom Kamehameha gave a gift, could secure it to himself only by informing the chief treasurer."[24]

After the death of Kamehameha I in 1819, the Kingdom of the Sandwich Islands would continue its transformation as a self-governing member of the British realm. As Gonschor writes, "When Kamehameha [learned] of King George and styled his government a 'kingdom' on the British model, it was in fact merely a new designation and hybridization of an already existing political system," and the "process of hybridization was further continued by Kamehameha's sons Liholiho (Kamehameha II) and Kauikeaouli (Kamehameha III) throughout the 1820s, 1830s, and 1840s, culminating in the Constitution of 1840."[25] By 1829, the Hawaiian authorities took steps to change the name from Sandwich Islands to Hawaiian Islands. Captain William Finch of the *USS Vincennes*, visiting the islands in 1829, explains,

> "The Government and Natives generally have dropped or do not admit the designation of the Sandwich Islands as applied to their possessions; but adopt and use that of Hawaiian; in allusion to the fact of the whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was Chief of the principal Island of Owhyhee, or more modernly Hawaii."[26]

Since then the Kingdom of Hawai'i was called the Hawaiian Kingdom or the Kingdom of the Hawaiian Islands by Hawaiian authorities. Other states, however, still referred to the territory of the Hawaiian Kingdom as the Sandwich Islands.

HAWAIIAN INDEPENDENCE

On June 7, 1839, Kamehameha III proclaimed an expanded uniform code of laws preceded by a "Declaration of Rights" that formally acknowledged and vowed to protect the *natural rights* of life, limb, and liberty for both chiefs and people. The code provided

[24] SAMUEL KAMAKAU, RULING CHIEFS 175 (Kamehameha Schools Press 1992).
[25] *See* GONSCHOR, at 161.
[26] "Capt. Finch's Cruise in the U.S.S. Vincennes," U.S. Navy Department Archives.

that "no chief has any authority over any man, any farther than it is given him by specific enactment, and no tax can be levied, other than that which is specified in the printed law, and no chief can act as a judge in a case where he is personally interested, and no man can be dispossessed of land which he has put under cultivation except for crimes specified in the law."[27] On October 8, 1840, Kamehameha III approved the first constitution incorporating the Declaration of Rights as its preamble. Marquardt acknowledges that Hawai'i's transformation into a constitutional monarchy even precedes that of Prussia.[28]

The purpose of a written constitution was "to lay down the general features of a system of government and to define to a greater or less extent the powers of such government, in relation to the rights of persons on the one hand, and on the other…in relation to certain other political entities which are incorporated in the system."[29] The first constitution did not provide for separation of powers (e.g. executive, legislative and judicial). The King's duty was to execute the laws of the land, serve as chief judge of the Supreme Court, and sit as a member of the House of Nobles that would enact laws together with representatives chosen from the people. The first constitution was not a limitation of power, but a sharing of power. Kamehameha III declared and established the equality of all his subjects before the law and voluntarily divested himself of his power as an absolute Ruler.[30] According to the Hawaiian Supreme Court:

> "King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed."[31]

After French troops temporarily occupied the Hawaiian Kingdom in 1839, under the command of Captain Laplace, Lord Ingestre, a member of the British House of Commons, called upon the Secretary of State for Foreign Affairs, Viscount Palmerston, to provide an official response. He also "desired to be informed whether those islands which, in the year 1794, and subsequently in 1824, …had been declared to be under the protection of the British Government, were still considered…to remain in the same position."[32] Viscount Palmerston reported he knew very little of the situation with the

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[27] WILLIAM RICHARDS, TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 68 (Lahaina 1842).
[28] BERND MARQUARDT, UNIVERSALGESCHICHTE DES STAATES: VON DER VORSTAATLICHEN GESELLSCHAFT ZUM STAAT DER INDUSTRIEGESELLSCHAFT 478 (Lit Verlag 2009).
[29] Edward S. Corwin, *Constitution v. Constitutional Theory*, 19(2) AM. POL. SCI. REV. 290-304, 291 (1925).
[30] *In the Matter of the Estate of His Majesty Kamehameha IV*, 3 Hawai'i Reports 715, 720 (1864).
[31] *Rex v. Joseph Booth*, 3 Hawai'i Reports 616, 630 (1863).
[32] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: 1778-1854, FOUNDATION AND TRANSFORMATION VOL. 1 185 (University of Hawai'i Press 1938).

French, and with regard to the protectorate status of the Islands "he was non-committal and seemed to indicate that he knew very little about the subject."[33]

In the eyes of the Hawaiian government, Viscount Palmerston's report quelled the notion of British dependency and acknowledged Hawaiian independence.[34] Two years later, a clearer British policy toward the Hawaiian Islands, by Viscount Palmerston's successor, Lord Aberdeen, reinforced the position of the Hawaiian government. In a letter to the British Admiralty on October 4th 1842, Viscount Canning, on behalf of Lord Aberdeen, wrote:

> "Lord Aberdeen does not think it advantageous or politic, to seek to establish a paramount influence for Great Britain in those Islands, at the expense of that enjoyed by other Powers. All that appears to his Lordship to be required, is, that no other Power should exercise a greater degree of influence than that possessed by Great Britain."[35]

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent state under international law. He sought the formal recognition of Hawaiian independence from the three naval powers of the world at that time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys, Timoteo Ha'alilio, William Richards, who was still an American citizen, and Sir George Simpson, a British subject. Of all three powers, Great Britain had legal claim over the Hawaiian Islands through cession by Kamehameha I, but for political reasons, the British could not openly exert its claim over the other two naval powers. Due to the islands prime economic and strategic location in the middle of the north Pacific, the political interest of all three powers was to ensure that none would have a greater interest than the other. This caused Kamehameha III "considerable embarrassment in managing his foreign relations, and…awakened the very strong desire that his Kingdom shall be formally acknowledged by the civilized nations of the world as a sovereign and independent State."[36]

While the envoys were on their diplomatic mission, a British Naval ship, HBMS *Carysfort*, under the command of Lord Paulet, entered Honolulu harbor on February 10, 1843. Lord Paulet began making outrageous demands on the Hawaiian government. Basing his actions on complaints in letters from British Consul, Richard Charlton, who was absent from the kingdom at the time, Paulet seized control of the Hawaiian government on February 25, 1843, after threatening to level Honolulu with cannon fire.[37] Kamehameha III was forced to surrender the kingdom, but he did so under written protest, and pending the outcome of his diplomats' mission in Europe. News of Paulet's action reached Admiral Richard Thomas of the British Admiralty, who then sailed from

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[33] *Id*.
[34] Report of the Minister of Foreign Affairs, May 21, 1845, 7 (Polynesian Press 1845).
[35] Report of the Historical Commission of the Territory of Hawai'i for the two years ending December 31, 1924, 36 (Star-Bulletin, Ltd. 1925).
[36] United States House of Representatives, 53d Cong., Executive Documents on Affairs in Hawaii: 1894-95, 42 (Government Printing Office 1895) [hereinafter *Executive Documents*].
[37] *See* KUYKENDALL VOL. I, at 214.

the Chilean port of Valparaiso, and arriving in the islands on July 25, 1843. After a meeting with Kamehameha III, Admiral Thomas determined that Charlton's complaints did not warrant a British takeover and ordered the restoration of the Hawaiian government. This took place in a grand restoration ceremony on July 31, 1843.[38] At a thanksgiving service after the ceremony, Kamehameha III proclaimed, before a large crowd, *ua mau ke ea o ka 'āina i ka pono* (the life of the land is perpetuated in righteousness). The King's statement became the national motto.

The envoys succeeded in obtaining formal international recognition of the Hawaiian Islands "as a sovereign and independent State." Great Britain and France formally recognized Hawaiian sovereignty on November 28, 1843 by joint proclamation at the Court of London, and the United States followed on July 6, 1844 by a letter of Secretary of State John C. Calhoun.[39] The Hawaiian Islands became the first Polynesian nation to be recognized as an independent and sovereign state. The Anglo-French declaration proclaimed:

> "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich [Hawaiian] Islands as an Independent State, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed."[40]

As a recognized sovereign and independent state, Hawaiian Attorney General John Ricord established a diplomatic code for Kamehameha III and the Royal Court, which was based on the principles of the 1815 Vienna Conference.[41] The Hawaiian Kingdom maintained more that ninety Legations and Consulates throughout the world and entered into extensive diplomatic and treaty relations with other states that included Austria-Hungary, Belgium, Chile, China, Denmark, France, Germany, Great Britain, Guatemala, Italy, Japan, Mexico, Netherlands, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, the United States, and Uruguay.[42] The Hawaiian Kingdom also entered into four treaties with the United States: 1849 Treaty of Friendship, Commerce and Navigation;[43] 1875 Commercial Treaty of Reciprocity;[44] 1883 Postal Convention Concerning Money Orders;[45] and the 1884 Supplementary Convention to the 1875

[38] *Id*., 220.
[39] *See* Report of the Minister of Foreign Affairs, at 4.
[40] *See Executive Documents*, at 120. Reprinted in 1 HAW. J.L. POL. 114 (Summer 2004).
[41] "Besides prescribing rank orders, the mode of applying for royal audience, and the appropriate dress code, the new court etiquette set the Hawaiian standard for practically everything that constituted the royal symbolism" JURI MYKKANEN, INVENTING POLITICS: A NEW POLITICAL ANTHROPOLOGY OF THE HAWAIIAN KINGDOM 161 (University of Hawai'i Press 2003).
[42] Hawaiian Almanac and Annual for 1893, 140-141.
[43] 9 U.S. Stat. 977. Reprinted at 1 HAW. J.L. POL. 115-125 (Summer 2004).
[44] 19 U.S. Stat. 625. Reprinted at 1 HAW. J.L. POL. 126-128 (Summer 2004).
[45] 23 U.S. Stat. 736. Reprinted at 1 HAW. J.L. POL. 129-133 (Summer 2004).

Commercial Treaty of Reciprocity.[46] Hawai'i also became a full member of the Universal Postal Union on January 1, 1882.

As an independent state, the Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with the rapidly changing political, social and economic conditions. Under the Hawaiian constitution of 1864, the office of Prime Minister was repealed. This action established an executive Monarch. The separation of powers doctrine was also fully adopted in this Hawaiian constitution. Article 20 of the 1864 Constitution provides, that the "Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial; these shall always be preserved distinct."

On March 16th 1854, Robert Wyllie, Hawaiian Minister of Foreign Affairs, made the following announcement to the British, French and U.S. diplomats stationed in Honolulu.

> I have the honor to make known to you that that the following islands, &c., are within the domain of the Hawaiian Crown, viz: Hawaii, containing about, 4,000 square miles; Maui, 600 square miles; Oahu, 520 square miles; Kauai, 520 square miles; Molokai, 170 square miles; Lanai, 100 square miles; Niihau, 80 square miles; Kahoolawe, 60 square miles; Nihoa, known as Bird Island, Molokini, Lehua, Kaula, Islets, little more than barren rocks; and all Reefs, Banks and Rocks contiguous to either of the above, or within the compass of the whole.[47]

In its search for guano, the Hawaiian Kingdom annexed four uninhabited islands northwest of the main islands. Laysan Island was annexed by discovery of Captain John Paty on May 1, 1857.[48] Lisiansky Island also was annexed by discovery of Captain Paty on May 10, 1857.[49] Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on April 15th 1862, and proclaimed as Hawaiian Territory.[50] And Ocean Island, also called Kure atoll, was acquired September 20, 1886, by proclamation of Colonel J.H. Boyd.[51]

HAWAIIAN NEUTRALITY

Once independence was recognized, Kamehameha III sought to secure this status under international law and to ensure international recognition of Hawaiian neutrality. Unlike States that were neutralized by agreement of third states, *e.g.* Switzerland, Belgium and Luxembourg, the Hawaiian Kingdom took a proactive approach to secure its neutrality through diplomacy and treaty provisions. It made full use of its global location and became a beneficial asylum for all states who found themselves at war in the Pacific. Hawaiian Minister of Foreign Affairs, Robert C. Wyllie, was responsible for carrying out

[46] 25 U.S. Stat. 1399. Reprinted at 1 HAW. J.L. POL. 134-135 (Summer 2004).
[47] *Islands of the Hawaiian Domain*, prepared by A.P. Taylor, Librarian 5 (January 10, 1931).
[48] *Id.*, 7.
[49] *Id.*
[50] *Id.*
[51] *Id.*, 8.

this neutral policy. He secured equal and most favored nation treaties for the Hawaiian Kingdom, and wherever possible, included in the treaties, the recognition of Hawaiian neutrality. The first treaty provision securing the recognition of Hawaiian neutrality was with the unified kingdoms of Sweden and Norway in 1852. Article XV provided,

> "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."[52]

Similar provisions, recognizing Hawaiian neutrality, were also provided under Article XXVI of the 1863 treaty with Spain, and Article VIII of the 1879 treaty with Germany.

Prior to their impending involvement in the Crimean War, Great Britain and France each issued a formal Declaration, on March 28, 1854, and on March 29, 1854, that declared neutral ships and goods would not be captured. Prior to this, international law did not afford protection for neutral ships carrying goods headed for the ports of countries who were at war. Under international law at the time, these ships could be seized by either country's naval vessels, or by private ships, commissioned by a country at war, called "privateering", and such goods seized were called "prizes." The British and French diplomats that were posted in the Hawaiian Kingdom delivered both Declarations to the Hawaiian government.

Knowing of British and French naval forces engaging Russia's naval forces in the Pacific, Kamehameha III, on May 16, 1854 formally proclaimed the Hawaiian Kingdom's neutrality. This neutrality extended one marine league, that being three miles, from the coasts of each of its islands. The proclamation read,

> "BE IT KNOWN, to all whom it may concern, that We, Kamehameha III, King of the Hawaiian Islands, hereby proclaim Our entire Neutrality in the War now impending between the Great Maritime Powers of Europe; that Our neutrality is to be respected by all Belligerents, to the full extent of Our Jurisdiction, which by Our fundamental law is to the distance of one marine league, surrounding each of Our Islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau, commencing at low water mark on each of the respective coasts, of said Islands, and includes all the channels passing between and dividing said Islands, from Island to Island; that all captures and seizures made within Our said jurisdiction are unlawful; and that the protection and hospitality of Our Ports, Harbours and Roads, shall be equally extended to all the Belligerents, so long as they respect Our Neutrality.

[52] TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE HAWAIIAN KINGDOM AND OTHER POWERS 54 (Pacific Commercial Advertiser Print 1875).

> AND BE IT FURTHER KNOWN, to all whom it may concern, that We hereby strictly prohibit all Our subjects, and all who reside within Our Jurisdiction, from engaging either directly or indirectly in Privateering against the shipping or commerce of any of the Belligerents, under the penalty of being treated and punished as Pirates."[53]

On June 15, 1854, during a meeting of the Privy Council in Honolulu, the Hawaiian Committee on the National Rights delivered its report on "prizes". Foreign Minister Wyllie presented the committee report. Then the following resolution was passed and later made known to the countries engaged in the Crimean War.

> "Resolved: That in the Ports of this neutral Kingdom, the privilege of Asylum is extended equally and impartially to the armed national vessels and prizes made by such vessels of all the belligerents, but no authority can be delegated by any of the Belligerents to try and declare lawful and transfer the property of such prizes within the King's Jurisdiction; nor can the King's Tribunals exercise any such jurisdiction, except in cases where His Majesty's Neutral Jurisdiction and Sovereignty may have been violated by the Captain of any vessel within the bounds of that Jurisdiction."[54]

To broaden the scope and protection of neutral goods under international law, the United States approached Russia on the matter and entered into a Convention on July 22, 1854 in Washington, D.C., whereby both agreed to "recognize as permanent and immutable" the principles, "1st. That Free ships make free goods—that is to say, that the effects of goods belonging to subjects or citizens of a Power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war. 2nd. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war."[55]

On December 6, 1854, the U.S. diplomat assigned to the Hawaiian Kingdom, David L. Gregg, sent the following dispatch to the Hawaiian government regarding the recognition of neutral goods. Gregg stated,

> "I have the honor to transmit to you a project of a declaration in relation to neutral rights which my Government has instructed me to submit to the consideration of the Government of Hawaii, and respectfully to request its approval and adoption. As you will perceive it affirms the principles that free ships make free goods, and that the property of neutrals, not contraband of war, found on board of Enemies ships, is not confiscable. These two principles have been adopted by Great Britain and France as rules of conduct towards all neutrals in the present European war; and it is pronounced that neither nation will refuse to recognize them as rules of international law, and to conform to them in all time to come. The Emperor of Russia has lately concluded a convention with the

[53] British Foreign Office, British and Foreign State Papers, vol. LI, 933 (William Ridgway, 169, Piccadilly 1868).
[54] Privy Council Minutes (June 15, 1854), Hawai'i Archives.
[55] 11 U.S.T. 1214 (1968).

> United States, embracing these principles as permanent, and immutable, and to be scrupulously observed towards all powers which accede to the same."[56]

On January 12, 1855, U.S. diplomat Gregg sent another dispatch to the Hawaiian government that contained a copy of the July 22, 1854 Convention between the United States of America and Russia. This dispatch embraced certain principles in regard to neutral rights. After careful review of the U.S. President's request, King Kamehameha IV, in Privy Council, passed the following resolution on March 26, 1855.

> "Resolved: That the Declaration of accession to the principles of neutrality to which the President of the United States invites the King, is approved, and Mr. Wyllie is authorized to sign and seal the same and pass it officially to the Commissioner of the United States in reply to his dispatches of the 6th December and 12th January last."[57]

Following the Privy Council meeting on that same day, Robert C. Wyllie signed the Declaration of Accession to the Principles of Neutrality, as requested by the United States President, and delivered it to U.S. diplomat David L. Gregg. The Declaration provided,

> "And whereas His Majesty the King of the Hawaiian Islands, having considered the aforesaid invitation of the President of the United States, and the Rules established in the foregoing convention respecting the rights of neutrals during war, and having found such rules consistent with those proclaimed by Her Britannic Majesty in Her Declaration of the 28th March 1854, and by His Majesty the Emperor of the French in the Declaration of the 29th of the same month and year, as well as with Her Britannic Majesty's order in Council of the 15th April same year, and with the peaceful and strictly neutral policy of this Kingdom as proclaimed by His late Majesty King Kamehameha III on the 11th May 1854, amplified and explained by Resolutions of His Privy Council of State of the 15th June and 17th July same year, His Majesty, by and with the advice of His Cabinet and Privy Council, has authorized the undersigned to declare in His name, as the undersigned now does declare that His Majesty accedes to the humane principles of the foregoing convention, in the sense of its III Article."[58]

On April 7, 1855, King Kamehameha IV opened the Legislative Assembly. In his speech he reiterated the Kingdom's neutrality by stating:

> "My policy, as regards all foreign nations, being that of peace, impartiality and neutrality, in the spirit of the Proclamation by the late King, of the 16th May last, and of the Resolutions of the Privy Council of the 15th June and 17th July. I have given to the President of the United States, at his request, my solemn adhesion to the rule, and to the principles establishing the rights of neutrals during war,

[56] Gregg to Wyllie, FO & Ex, Foreign Officials in Hawai'i, no. 29 (Dec. 6, 1854), Hawai'i Archives.
[57] *See* Privy Council Minutes (March 26, 1855).
[58] 1855 Declaration of Accession, published in the Appendix to the Report of the Minister of Foreign Relations for 1855, 86-87, Hawai'i Archives.

> contained in the Convention between his Majesty the Emperor of all the Russias, and the United States, concluded in Washington on the 22nd July last."[59]

The actions taken by the governments of the Hawaiian Kingdom, Great Britain, France, Russia, and the United States of America, relating to the development of the principles of international law on neutrality, provided the necessary pretext for the leading European maritime powers to meet in Paris, after the Crimean War. There in Paris, on April 16, 1856, Great Britain, France, Sardinia-Piedmont, the Ottoman Empire, and Russia entered into a joint Declaration that provided the following four principles, "1. Privateering is, and remains, abolished. 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. 4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The United States, however, refrained from acceding to the Declaration of Paris because it still relied on "privateering" through the issuing of letters of marque in order to augment its limited and small naval force.

The Hawaiian Kingdom acceded to the Declaration of Paris by virtue of an additional article to its treaty with Italy of February 27, 1864. Kamehameha V ratified the additional article on May 3, 1867, and the Italian King Victor Emmanual II ratified it on April 17, 1864. The additional article was "considered as an integral part of the Treaty of Commerce and Navigation, concluded between the Kingdom of Italy and the Hawaiian Kingdom, at Paris, the 22d July, 1863."[60]

Just three months into the American Civil War, a report at the end of June, 1861, was being circulated in Honolulu that a Confederate privateer was in the Pacific.[61] Hawaiian authorities concluded that another proclamation of neutrality was in order, but Kamehameha IV, in consultation with one of his ministers, delayed the proclamation until August 26, 1861. This Proclamation was published in two Honolulu newspapers—the *Polynesian,* on September 14, 1861, and the *Pacific Commercial Advertiser,* on September 19, 1861, and repeated the same text embodied in the 1854 Proclamation and Privy Council resolutions passed during the Crimean War.

The Declarations, Accessions, and the 1854 Russo-American Convention, represented the first recognition of the right of neutral states to conduct free trade without any hindrance from war. Stricter guidelines for neutrality were later established in the 1871 Anglo-American Treaty, whereby both states agreed to the following rules.

> "*First*, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any

[59] *See* LYDECKER, at 57.
[60] *See* TREATIES AND CONVENTIONS, at 96-97.
[61] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: 1854-1874 TWENTY CRITICAL YEARS VOL. II 65 (University of Hawaii Press 1953).

> vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.
>
> *Second*, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. *Thirdly*, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."[62]

Newer and stricter rules for the conduct of neutral states were expounded upon in the 1874 Brussels Conference, and later these principles were codified in the Fifth and Thirteenth Hague Conventions of 1907, which governed the rights and duties of neutral states in Land and Maritime warfare.

HAWAIIAN RELATIONS WITH NON-EUROPEAN POWERS

Although the Hawaiian Kingdom was not a powerful state, it was looked upon by other nations in the Pacific as a beacon of hope that they too could achieve full recognition of their sovereignty by the European powers. Non-European nations were the subject of "unequal treaties" where the European powers imposed their laws within the territory of these nations throughout the nineteenth and early twentieth centuries. According to Henderson, "They were common between Europeans and indigenous peoples in the new world of the Americas, and established 'spheres of influence' over the Chinese, Persian and the Ottoman Turkish Empires."[63] Other notable non-European states subjected to unequal treaties included Siam (Thailand) under the British Bowring Treaty of 1855 and Japan under the 1858 Anglo-Japanese Treaty.

Since 1858, Japan had been forced to recognize the extraterritoriality of American, British, French, Dutch and Russian law operating within Japanese territory. Under Article VI of the American-Japanese treaty, it provided that "Americans committing offences against Japanese shall be tried in American consular courts, and when guilty shall be punished according to American law."[64] The Hawaiian Kingdom's 1871 treaty with Japan also had this provision, where it states under Article II that Hawaiian subjects in Japan shall enjoy "at all times the same privileges as may have been, or may hereafter be granted to the citizens or subjects of any other nation." This was a sore point for Japanese authorities who felt Japan's sovereignty should be fully recognized by these states.

During a meeting of the Cabinet Council on January 11, 1881, a decision was made for King Kalākaua to do a world tour, which was unprecedented at the time for any monarch to have done. His objectives were, "First, to recuperate his own health and second, to find

[62] CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 VOL. 12 173 (1974).
[63] CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW 68 (Wiley-Blackwell 2010).
[64] *Treaty of Amity between the United States and Japan* (July 29, 1858), U.S. Treaty Series 185, 365.

means for recuperating his people, the latter would be done by the introduction of foreign immigrants."[65] The Royal Delegation departed Honolulu harbor on the steamer *City of Sydney* on January 20, 1881 headed for San Francisco. From San Francisco, the Royal Delegation embarked for Japan on February 8. The world tour would last ten months and take the Hawaiian King to Japan, China, Hong Kong, Siam (Thailand), Singapore, Johor (Malaysia), India, Suez Canal, Egypt, Italy, France, Great Britain, Scotland, Belgium, Germany, Austria, Spain, and Portugal. All graciously received the King and he exchanged royal orders with these countries.[66] After he returned home, Kalākaua also exchanged royal orders with the Shah of Persia (Iran).[67] In his letter of July 13, 1886, Kalākaua wrote to the Shah:

> "We KALAKAUA I., by the Grace of God, of the Hawaiian Islands, King, to His Imperial Majesty Nasser Eddin-Shah-on-Shah of Persia.
>
> Great and Good Friend:—
>
> We have read with great pleasure the letter which your imperial Majesty has sent to Us in which, with so many kind expressions of friendship and good will, He accepts the Grand Cross of Our Royal Order of Kamehameha and tenders, as a mark of his sincerity and reciprocality of His statements, to Us, the high distinction of the decoration of the first class of the Lion and the Sun. We hasten to assure your Imperial Majesty of the high satisfaction with which We receive this token of His kindly feeling, toward Our Person and towards Our Country; feelings which We shall ever most heartily reciprocate."[68]

When Kalākaua visited Japan, Japan's Meiji Emperor "asked for Hawai'i to grant full recognition to Japan and thereby create a precedent for the Western powers to follow."[69] Hawaiian recognition of Japan's full sovereignty and repeal of the Hawaiian Kingdom's jurisdiction in Japan provided in the Hawaiian-Japanese Treaty of 1871, would not take place, however, until 1893 by executive agreement through exchange of notes. By direction of Her Majesty Queen Lili'uokalani, successor to King Kalākaua, R.W. Irwin, Hawaiian Minister to the Court of Japan in Tokyo sent a diplomatic note to Mutsu Munemitsu, Japanese Minister of Foreign Affairs. Irwin stated, "Her Majesty's Government reposing entire confidence in the laws of Japan and the administration of justice in the Empire, and desiring to testify anew their sentiments of cordial goodwill and friendship towards the Government of His Majesty the Emperor of Japan, have resolved to abandon the jurisdiction hitherto exercised by them in Japan. It therefore becomes my agreeable duty to announce to your Excellency, in pursuance of instructions from Her Majesty's Government, and I now have the honour formally to announce, that the Hawaiian Government do fully, completely, and finally abandon and relinquish the

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[65] *Hawaiian Gazette*, Jan. 19, 1881.
[66] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: 1874-1893, THE KALAKAUA DYNASTY, VOL. III 227-235 (University of Hawai'i Press 1967).
[67] *Persian Foreign Minister to Hawaiian Foreign Minister*, F.O. Ex. 1886 Misc. Foreign, July-September, Hawai'i Archives.
[68] *Hawaiian Foreign Minister to Persian Foreign Minister,* F.O. Ex. 1886 Misc. Foreign, July-September, Hawai'i Archives. The letter was in the Hawaiian language with an English translation.
[69] *See* GONSCHOR, at 163.

jurisdiction acquired by them in respect of Hawaiian subjects and property in Japan, under the Treaty of the 19th August, 1871."[70]

On April 10, 1894, Foreign Minister Munemitsu, responded, "The sentiments of goodwill and friendship which inspired the act of abandonment are highly appreciated by the Imperial Government, but circumstances which it is now unnecessary to recapitulate have prevented an earlier acknowledgment of you Excellency's note."[71] This dispels the commonly held belief among historians that Great Britain was the first to abandon its extraterritorial jurisdiction in Japan under the Anglo-Japanese Treaty of Commerce and Navigation, which was signed on July 16, 1894. This action taken by the Hawaiian Kingdom, being a non-European power, ushered Japan into the family of states with full and complete independence of its laws over Japanese territory, and did serve as "precedent for the Western powers to follow," as requested of the Hawaiian King by the Japanese Emperor in 1881.

Japan's request also serves as an acknowledgment of Hawai'i's international standing as a fully sovereign and independent state, despite the relatively small size of the island kingdom. This would not go unnoticed by Polynesian kings such as King George Tupou I of Tonga, King Cakobau of Fiji, and King Malietoa of Samoa. In 1892, Scottish author Robert Louis Stevenson wrote, "in the eyes of Polynesians the little kingdom occupies a place apart. It is here alone that men of their race enjoy most of the advantages and all the pomp of independence; news of Hawaii and descriptions of Honolulu are grateful topics in all parts of the South Seas; and there is no better introduction than a photograph in which the bearer shall be represented in company with Kalakaua."[72] As Gonschor points out, even modern China's founder, Dr. Sun Yat-sen, drew inspiration from the Hawaiian Kingdom where he graduated in 1882 from 'Iolani College in Honolulu. Dr. Sun later stated, "it was here [i.e., in Hawai'i] that I came to know what modern, civilized governments are like and what they mean."[73]

UNITED STATES OF AMERICA: FROM AGGRESSIVE NEUTRALITY TO BELLIGERENCY

Lawrence recognizes that the actions "of the United States from 1793 to 1818 mark an era in the development of the rights and obligations of neutral powers."[74] The foreign policy of the United States was to avoid being embroiled in the constant wars between European powers. This can be gleaned from Thomas Jefferson's October 24, 1823 letter to President Monroe. Jefferson wrote, "Our first and fundamental maxim should be,

[70] THE CONSOLIDATED TREATY SERIES, 1648-1919 126-7 (Clive Parry ed., 1969-1981). The author would like to acknowledge Lorenz Gonschor, a Ph.D. candidate in political science at the University of Hawai'i at Manoa, for providing the information, which is noted in his draft dissertation.
[71] *Id.*
[72] ROBERT LOUIS STEVENSON, A FOOTNOTE TO HISTORY: EIGHT YEARS OF TROUBLE IN SAMOA 33 (Serenity Publishers 2009).
[73] *See* GONSCHOR, at 163.
[74] *See* LAWRENCE, at 483.

never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle with cis-Atlantic affairs…our endeavor should surely be, to make our hemisphere that of freedom."[75]

To adhere to this maxim, the position of the United States would be one of absolute neutrality. This prompted American legal scholars to publish on the law of neutrality, which was often cited by American authorities in their dealings with other states.

> "It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it." –James Kent, *Commentaries on American law*, 12th ed., vol. 1, edited by O.W. Holmes, Jr. (Boston 1873), 124.
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> "No use of neutral territory, for the purposes of war, can be permitted." –Kent, vol. 1, 125.
>
> "No act of hostility is to be commenced on neutral ground. No measure is to be taken that will lead to immediate violence." –Kent, vol. 1, 126.
>
> "There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful." –Kent, vol. 1, 127.
>
> "The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows, that hostilities can not lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties." –Henry Wheaton, *Elements of International Law*, 8th ed., edited with notes by Richard Henry Dana (Boston 1866), 520.
>
> "There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful." –Wheaton, 254.
>
> "Neutrals have a right, 1. To insist that their territory shall be inviolate and untouched by the operations of war, and their rights of sovereignty uninvaded. And if violations of their rights are committed, they have a right to punish the offender on account of them, or to demand satisfaction from his government. They are in a manner bound to do this, because otherwise their neutrality is of no avail, and one of the belligerents enjoys the privilege of immunity." –Theodore Dwight Woolsey, *Introduction to the Study of International Law*, 6th ed. (New York 1908), 281.
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> "Every nation is bound to pass laws whereby the territory and other rights of neutrals shall be secured, and has a right to demand security for itself in the same manner." Woolsey, 283, 284.

[75] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, VOL. VII, 315-317 (H.A. Washington, ed., 1854).

> "Neutral land and neutral territorial waters are sacred. No acts of warfare may lawfully take place within them." –T.J. Lawrence, The Principles of International Law, 5th ed. (Boston 1913), 608.
>
> "No belligerent power can claim the right of passage through a neutral territory, unless founded upon a previous treaty." –Kent, vol. 1, 127.
>
> "By the common law of nations, the land forces of the combatants are not allowed to cross neutral frontier." –Lawrence, 622.
> "The definite prohibition in a great law-making document of the passage of troops through neutral territory puts an end to a controversy which has lasted from the days of Grotius, who upheld a right of passage, to recent times when the great majority of writers denied it." –Lawrence, 635.

While prominent historians have designated the United States during the nineteenth century as an isolationist, Major Frame, U.S. Army, calls this a misnomer. Frame posits that during the nineteenth century, the United States of America practiced "an aggressive policy of neutrality that often took advantage of European conflicts and machinations to further the interests of the United States."[76] The first aggressive foreign policy of the United States on this subject was the *Monroe Doctrine*, which was in response to overtures made by the Holy Alliance of reconquering South America. The Holy Alliance comprised of Russia, Prussia, Austria, Spain, and France. On December 2, 1823, President Monroe sent a message to the Congress advocating a principle,

> "in which the rights and interests of the United States are involved, that the American continents … are henceforth not to be considered as subjects for future colonization by any European power … With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have … acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States."[77]

The Monroe Doctrine was an aggressive policy of defense of the American continent from incursion by powerful European powers that framed American foreign policy throughout the nineteenth century. In the First Pan-American Conference of 1889 and 1890 the United States proposed a resolution to the effect that "the principle of conquest shall not…be recognized as admissible under American public law."[78] The United States, however, did not have a military force that was capable of preventing a physical conquest by a European power. As Grenville notes, until "the 1890's the American armed forces

[76] Arthur T. Frame, MAJ, USA, The U.S. Military Commission to the Crimean War, 1855-1856 2 (1983) (unpublished M.M.A.S thesis, U.S. Army Command and General Staff College) (on file with author).
[77] Annals of Congress, Senate, 18th Congress, 1st Session, 14, 22-23 (Dec. 1823).
[78] JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW, VOL. 1, 292 (1906).

were considered not so much as the country's first line of defense against outside aggression, but as a police force to subdue troublesome Indians and Mexicans."[79]

In 1890, Captain Alfred Mahan, a lecturer at the United States Naval War College, published his book, *Influence of Sea-Power upon History*, which would radically change the United States from a defender of the American continent to an aggressive expansionist.[80] Mahan was convinced that "the American continent was threatened both from the West and from the East. Germany with her expanding population and boundless energy…would sooner or later attempt to colonize South America, while the teeming millions of China and Japan might burst across the barrier of the Pacific Ocean."[81] Mahan's philosophy was a reaction to France's construction of a canal through Colombia's Panama province that would connect the Atlantic and Pacific Oceans. To Mahan, the United States needed to have in operation a large and dominant naval force before the canal was completed. If not, he warned, "the canal would prove a source of danger rather than of safety and welfare. The United States must therefore not rest content until she controlled the canal itself, and guarded the approaches to it with a powerful fleet of battleships."[82]

According to Mahan, "national security—and international greatness—could only be attained by building more and bigger ships and deploying them farther abroad."[83] Mahan's hyper-concerns drew attention from Americans interested in raising the prestige of the United States to be equaled to their European brethren. One of these persons, who would later rise to prominence and actually implement Mahan's vision, was Theodore Roosevelt, who, at the time of Mahan's publication, served on the United States Civil Service Commission in Washington, D.C. In his letter to Mahan dated May 12, 1890, Roosevelt wrote, "During the last two days I have spent half my time, busy as I am; in reading your book, and that I found it interesting is shown by the fact that having taken it up I have gone straight through and finished it. … It is very good book—admirable; and I am greatly in error if it does not become a naval classic."[84] Another person of prominence and influence was United States Representative Henry Cabot Lodge who was also good friends with Roosevelt. Lodge would eventually serve as United States Senator for Massachusetts from 1893-1924 and play an influential role in seizing the Hawaiian Islands during the Spanish-American War.

It was the United States of America, in its 1871 Anglo-American Treaty, that established rules preventing belligerent states from utilizing neutral territory or ports for warlike purposes such as outfitting vessels, recruiting troops, or basing military operations. It would be twenty-two years later that the United States and the Hawaiian Kingdom would

[79] J.A.S. GREENVILLE, DIPLOMACY AND WAR PLANS IN THE UNITED STATES, 1890-1917, TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY VOL. II 2 (1961).
[80] ALFRED MAHAN, INFLUENCE OF SEA-POWER UPON HISTORY, 1660-1783 (Little, Brown and Company 1890).
[81] PAUL M. KENNEDY, ED., THE WAR PLANS OF THE GREAT POWERS 1880-1914 24 (George Allen & Unwin, Ltd. 1979).
[82] *Id*.
[83] EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT 434 (Coward, McCann & Geoghegan 1979).
[84] THEODORE ROOSEVELT, THE SELECTED LETTERS OF THEODORE ROOSEVELT 72 (H.W. Brands, ed., 2001).

find themselves entangled in a web of deception and fraud, perpetuated by American expansionists, in gross violation of the sovereign and neutral rights of an independent and sovereign state.

FIRST ARMED CONFLICT: UNITED STATES INTERVENTION

On January 16, 1893, the United States intervened in the internal affairs of the kingdom when its diplomat—Minister John Stevens, ordered the landing of U.S. troops who actively participated in the treasonous take over of the Hawaiian government. The following day, U.S. troops forcibly removed the executive Monarch—Queen Lili'uokalani, and her Cabinet of four ministers. They were replaced with insurgents led by Hawai'i Supreme Court Judge Sanford Dole. The insurgents' proclamation of January 17, 1893 stated:

> "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."[85]

Once the regime change was effected, all government officers and employees were forced to sign oaths of allegiance or face termination or arrest.[86] This was done under the oversight of U.S. troops after Minister Stevens declared Hawai'i to be an American protectorate on February 1, 1893. The purpose of the regime change was for the provisional government to cede, by treaty, Hawai'i's sovereignty and territory to the United States.

Mahan's vision of deploying ships abroad relied on securing naval ports, and only three years after his book was published, he set his eyes on the Hawaiian Islands. On January 31, 1893, Mahan wrote a letter to the Editor of the *New York Times* where he advocated seizing the Hawaiian Islands. In his letter, he recognized the Hawaiian Islands, "with their geographical and military importance, [to be] unrivalled by that of any other position in the North Pacific."[87] Mahan used the Hawaiian situation to bolster his argument of building a large naval fleet. He warned that a maritime power could well seize the Hawaiian Islands, and that the United States should take that first step. He

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[85] *See* LYDECKER, at 188.

[86] Oath of Allegiance to Provisional Government. "I, _____ aged _____, a native of _____ residing at _____ in said District, do solemnly swear in the presence of Almighty God, that I will support the Provisional Government of the Hawaiian Islands, promulgated and proclaimed on the 17th day of January, 1893. Not hereby renouncing, but expressly reserving all allegiance to any foreign country now owing by me."

[87] CAPTAIN A.T. MAHAN, THE INTEREST OF AMERICA IN SEA POWER 31 (Little, Brown, and Company 1898).

wrote, "To hold [the Hawaiian Islands], whether in the supposed case or in war with a European state, implies a great extension of our naval power. Are we ready to undertake this?"[88] Mahan conveniently omits, in his doomsday scenarios, his own country's established neutrality, and the implication of customary international law and treaties prohibiting the infringement upon another country's neutrality—the Hawaiian Kingdom.

After being removed as the U.S. diplomat, Stevens tried to justify his role in the invasion. In an article published in the *North American Review* in December 1893, Stevens unapologetically stood as an American expansionist and Mahan follower. He wrote,

> "Consider that, in the opinion of all naval and commercial experts, Hawaii with its Pearl Harbor is the Key to the North Pacific, which is the waterway over which five hundred millions of people, at no distant day, will make their traffic. … It would be well if some of our public men would carefully study the remarkable work of Captain Mahan 'Sea Power. … I cherish the faith that the American people, the American statesmen, and the American government, thoughtful of America's great future, will settle the Hawaiian question wisely and well—will see to it that the flag of the United States floats unmolested over the Hawaiian Islands.'"[89]

On February 14, 1893, one month after the treaty of annexation was signed in Washington, D.C., under President Benjamin Harrison and submitted to the Senate for ratification, President Grover Cleveland, Harrison's successor, withdrew the treaty and initiated an investigation into the overthrow of the Hawaiian Government. President Cleveland concluded that the provisional government was neither *de facto* nor *de jure*, but self-declared,[90] and the U.S. "military demonstration upon the soil of Honolulu was itself an act of war."[91]

President Cleveland then notified Congress that he had begun executive mediation with Queen Lili'uokalani to reinstate her and her Cabinet of Ministers, on condition she would grant amnesty to the insurgents. The first of several meetings were held at the U.S. Legation in Honolulu on November 13, 1893.[92] An agreement was reached on December 18, 1893,[93] but President Cleveland was unable to get Congressional authorization for the use of force to redeploy U.S. troops to Hawai'i. Although the agreement was not carried out this agreement is recognized under international law and American public law as a treaty.[94]

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[88] *Id*., 32.
[89] Eugene Tyler Chamberlain, John L. Stevens and William M. Springer, *The Hawaiian Situation*, 157 (445) THE NORTH AMERICAN REVIEW 731, 744 & 745 (Dec., 1893).
[90] *See Executive Documents,* at 453.
[91] *Id*., at 451.
[92] *Id*., at 1241-43.
[93] *Id*., at 1269-73.
[94] See Dames & Moore v. Regan, 453 U. S. 654, 679, 682-683 (1981); United States v. Pink, 315 U. S. 203, 223, 230 (1942); United States v. Belmont, 301 U. S. 324, 330-331 (1937); *see* also L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 219, 496, n. 163 (2d ed. 1996) ("Presidents from Washington to Clinton have made many thousands of agreements ... on matters running the gamut of U. S. foreign relations").

On July 4, 1894, the insurgents declared the Provisional Government to be the Republic of Hawai'i, and they continued to have government officers and employees sign oaths of allegiance. These signings were coerced under threat from American mercenaries employed by the insurgents.[95] The proclamation of the insurgents stated,

> "it is hereby declared, enacted and proclaimed by the Executive and Advisory Councils of the Provisional Government and by the elected Delegates, constituting said Constitutional Convention, that on and after the Fourth day of July, A.D. 1894, the said Constitution shall be the Constitution of the Republic of Hawaii and the Supreme Law of the Hawaiian Islands."[96]

The Republic of Hawai'i and its predecessor, the Provisional Government, never intended to be an independent government, but rather were established with the sole purpose of ceding the sovereignty of the Hawaiian Islands to the United States. In its proclamation on January 17, 1893, the insurgents proclaimed a "Provisional Government…is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon."[97] Branded self-declared by U.S. President Cleveland, the puppet renamed themselves the Republic of Hawai'i, and empowered its so-called President, under Article 32 of its so-called constitution, "to make a Treaty of Political or Commercial Union between the Republic of Hawaii, and the United States of America, subject to the ratification of the Senate." Clearly this self-declared armed force remained a puppet, despite President Cleveland's severing of the puppeteer's strings, as these insurgents sought to reconnect with another Presidential administration.

The subsequent McKinley administration was already drawing up plans to seize the Hawaiian Islands for naval interests. As Assistant Secretary of the Navy, Theodore Roosevelt sent a private and confidential letter, on May 3, 1897, to Captain Mahan. Roosevelt wrote, "I need not tell you that as regards Hawaii I take your views absolutely, as indeed I do on foreign policy generally. If I had my way we would annex those island tomorrow."[98] Moreover, Roosevelt told Mahan that Cleveland's handling of the Hawaiian situation "a colossal crime, and we should be guilty of aiding him after the fact if we do not reverse what he did."[99] Roosevelt also assured Mahan "that Secretary [of the Navy] Long shares our views. He believes we should take the islands, and I have just been preparing some memoranda for him to use at the Cabinet meeting tomorrow."[100] In a follow up letter to Mahan, on June 9, Roosevelt wrote that he "urged immediate action by

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[95] Oath of Allegiance to Republic of Hawai'i. "I do solemnly swear (or affirm) in the presence of Almighty God: that I will support the Constitution, Laws and Government of the Republic of Hawaii; and will not, either directly or indirectly, encourage or assist in the restoration or establishment of a Monarchical form of Government in the Hawaiian Islands." In a 1993 joint resolution apologizing for the illegal overthrow of the government of the Hawaiian Kingdom, the U.S. Congress acknowledged that the Republic of Hawai'i was self-declared. 107 U.S. Stat. 1510, 1512 (1993).
[96] *See* LYDECKER, at 225.
[97] *Id*., at 187.
[98] See BRANDS, at 132.
[99] *Id*.
[100] *Id*., 133.

the President as regards Hawaii. Entirely between ourselves, I believe he will act very shortly. If we take Hawaii now, we shall avoid trouble with Japan."[101] Eight days later, on June 16, the McKinley administration enters into a treaty of annexation with the American puppet and signed it in Washington, D.C. On the following day, June 17, Queen Lili'uokalani submits a formal protest to the U.S. State Department. Her protest stated,

> "I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me."[102]

President McKinley ignored the protest and submitted the treaty for Senate ratification, which requires a minimum of 60 votes. The Senate, however, were not convening until December 6, 1897. These facts prompted two Hawaiian political organizations to mobilize signature petitions protesting annexation. According to Silva, the "strategy was to challenge the U.S. government to behave in accordance with its stated principles of justice and of government of the people, by the people, and for the people."[103] The Hawaiian Political Association (Hui Kalai'āina) gathered over 17,000 signatures, and the Hawaiian Patriotic League (Hui Aloha 'Āina) gathered 21,269 signatures.[104] The last official census, done in 1890, listed the entire Hawaiian Kingdom population at 89,990, with 48,107 as Hawaiian subjects and 41,873 as resident aliens.[105]

The petition of the Hawaiian Patriotic League was separated into men and women in order to be sure that not only the voters were against annexation, but also the women and children.[106] The men's petition read:

PETITION AGAINST ANNEXATION

> To His Excellency WILLIAM McKINLEY, President, and the Senate, of the United States of America.
>
> GREETING:—
>
> WHEREAS, there has been submitted to the Senate of the United States of America a Treaty for the Annexation of the Hawaiian Islands to the said United States of America, for consideration at its regular session in December, A.D. 1897; therefore,

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[101] *Id*., 141.
[102] *See* LILIUOKALANI, at 354; *available at* http://libweb.hawaii.edu/digicoll/annexation/protest/liliu5.html.
[103] NOENOE K. SILVA, ALOHA BETRAYED 146 (Duke University Press 2004).
[104] *Id*., at 151.
[105] David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAW. J.L. & POL. 46, 63 (Summer 2004).
[106] Hawaiian Patriotic League petitions available at: http://libweb.hawaii.edu/digicoll/annexation/petition.html

> WE, the undersigned, native Hawaiian citizens and residents of the District of _____, Island of _____, who are members of the HAWAIIAN PATRIOTIC LEAGUE OF THE HAWAIIAN ISLANDS, and others who are in sympathy with the said League, earnestly protest against the annexation of the said Hawaiian Islands to the said United States of America in any form or shape.

On its way to Washington, D.C., a Hawaiian commission of four men, representing the Hawaiian Patriotic League and the Hawaiian Political association, arrived in San Francisco. On November 28, 1897, they celebrated Hawaiian Independence Day, known as La Ku'oko'a, a national holiday celebrating Hawai'i's recognition by Great Britain and France as an independent state. On that same day, an article was published, in the *San Francisco Call* newspaper, interviewing the commission members. One of the commissioners, and President of the Hawaiian Patriotic League, James Kaulia, stated, "Nearly twenty-one thousand Hawaiians have signed the memorial we are taking to Washington. The men, the natives, who have refused to sign, tell us that it would hurt their business or jeopardize their positions if their names were added to our petition. But they are with us in feeling, and…if it comes to a vote, they will forget every other consideration, and remember only that their country is being taken from them."[107] He added, the "United States cannot…if it has any regard for justice, annex our country, after our protest."[108]

The Hawaiian commission arrived in Washington, D.C., on December 6, 1897, the same day the Senate opened its session, and were told there were 58 votes for annexation, just two shy of the 60 votes needed for ratification.[109] The next day, they met with Queen Lili'uokalani and chose her as chair of the Washington committee. In that meeting, "they decided to present only the petitions of Hui Aloha 'Aina because the substance of the two sets of petitions were different. Hui Aloha 'Āina's petition protested annexation, but the Hui Kalai'aina's petitions called for the monarchy to be restored. They agreed that they did not want to appear divided or as if they had different goals."[110] Senators Richard Pettigrew and George Hoar met with the delegates of the committee and said they would lead the opposition in the Senate. Senator Hoar promised the committee that he would introduce opposition into the Senate and also into the Senate Foreign Relations Committee. "On December 9, with the delegates present, Senator Hoar read the text of the petitions to the Senate and had them formally accepted."[111] In the days that followed, the committee would meet with many Senators urging them not to ratify the treaty. Two of the leading Senators for annexation were Senator Henry Cabot Lodge and Senator John Morgan, who were both strong believers in Captain Mahan's views on Hawai'i.

Unbeknownst to the Queen and the Hawai'i delegates, Senators began to inquire into the military importance of annexing the Hawaiian Islands. On this matter, Senator Kyle made a request, by letter, to Captain Mahan, on February 3, 1898, where he wrote, "Recent

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[107] *Hawaii's Last Struggle for Freedom*, SAN FRANCISCO CALL NEWSPAPER, Nov. 28, 1897, at 1.
[108] *Id.*
[109] See SILVA, at 158.
[110] *Id.*
[111] *Id.*, at 159.

discussions in the Senate brought prominently to the front the question of the strategic features of the Hawaiian Islands, and in this connection many quotations have been made from your valuable and highly interesting contribution to literature in regard to these islands."[112] Kyle then asked Mahan to answer four questions, which Mahan answered by letter the following day, and which was read while the Senate was in closed executive session. Those questions were:

> *Would the possession of Hawaii strengthen or weaken the United States from a military standpoint?*
>
> Mahan: From a military point of view the possession of Hawaii will strengthen the United States. Of course, as is constantly argued, every addition of territory is an additional exposed point; but Hawaii is now exposed to pass under foreign domination—notably Japan—by a peaceful process of overrunning and assimilation. This will inevitably involve its possession by a foreign power—a grave military danger to us—against which preoccupation by the United States is, in my judgment, the only security
>
> *In case of war, would it take a larger navy to defend the Pacific coast with or without the possession of Hawaii?*
>
> Mahan: In replying to the second question, I must guard myself from being understood to think our present Pacific fleet great enough for probable contingencies. With this reservation a greater navy would be needed for the defense of the Pacific coast than would be required with the islands unannexed. If we have the islands, and in the Pacific a fleet of proper force, the presence of the latter, or of an adequate detachment from it, at the Hawaiian Islands, will materially weaken, if not cripple any attempted invasion of the Pacific coast (except from British Columbia), and consequently will proportionately strengthen us. With a fleet of the same size and Hawaii unoccupied by either party, the enemy would at least be in a better position to attack us; while, if he succeeded in establishing himself in any of our coast anchorages, he would be far better off. For, in the latter case, the islands would not menace his communication with home; which they would if in our possession, because Hawaii flanks the communication.
>
> It is obvious, also, that if we do not hold island ourselves we can not expect the neutrals in the war to prevent the other belligerent from occupying them; nor can the inhabitants themselves prevent such occupation. The commercial value is not great enough to provoke neutral interposition. In short, in war we should need a larger navy to defend the Pacific coast, because we should not only to defend our own coast, but to

[112] House Committee on Foreign Affairs Report to accompany H. Res. 259, May 17, 1898, Appendix 3, 98 (House Report no. 1355, 55th Congress, 2d session).

> prevent, by naval force, an enemy from occupying the islands; whereas, if we had preoccupied them, fortifications could be preserve them to us.
>
> *Is it practicable for any trans-Pacific country to attack the Pacific coast without occupying Hawaii as a base?*
>
> Mahan: In my opinion, it is not practicable for any trans-Pacific country to invade our Pacific coast without occupying Hawaii as a base.
>
> *Could such attack be made by transporting coal in colliers and transferring coat at sea?*
>
> Mahan: Coal can be transported in colliers, but as yet it can not be transshipped at sea with either rapidity or certainty. Even if it be occasionally practicable to coal at sea, the process is slow and uncertain. Reliance upon such means only is, in my judgment, impossible. A base must be had, and, except ports of our own coast, there is none to be name alongside of Hawaii.

This was U.S. war rhetoric to justify the preemptive seizure of a neutral state for military necessity. It was precisely what Germany did in 1914 to justify its invasion and occupation of Luxembourg. Germany invaded Luxembourg before formally declaring war against France. German military commander, Herr von Jagow then stated, "to our great regret, the military measures which have been taken have become indispensable by the fact that we have received sure information that the French military were marching against Luxemburg. We were forced to take measures for the protection of our army and the security of our railway lines."[113] Herr von Jagow then issued a proclamation stating "all the efforts of our Emperor and King to maintain peace have failed. The enemy has forced Germany to draw the sword. France has violated the neutrality of Luxemburg and has commenced hostilities on the soil of Luxemburg against German troops, as has been established without a doubt."[114] The French protested against this German invasion and confirmed there were no French troops in Luxembourg. Thus, according to Garner, "The alleged intentions of France were merely a pretext, and the violation of Luxemburg was committed by Germany solely in her military interest and in no sense on the ground of military necessity."[115]

It appears the Senators were not swayed by Mahan's position because by the time the Hawaiian commission left Washington, D.C., on February 27, 1897, they had successfully chiseled the 58 Senators in support of annexation down to 46.[116] Unable to garner the necessary 60 votes, the so-called treaty was dead by March, yet war with Spain was looming over the horizon, and Hawai'i would have to face the belligerency of the

[113] JAMES WILFORD, INTERNATIONAL LAW AND THE WORLD WAR VOL. II 233 (Longmans, Green and Co. 1920).
[114] *Id*., at 234.
[115] *Id*., at 235.
[116] *Id*.

United States. American military interest would be the driving forces behind the occupation of Hawai'i, and Captain Mahan's philosophy, the guiding principles.

SECOND ARMED CONFLICT: UNITED STATES OCCUPATION

On April 25, 1897, one month after the treaty was killed, Congress declared war on Spain. President McKinley proclaimed, "that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."[117] The United States Supreme Court later explained that, "the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations."[118] The U.S. administration was clearly giving the impression that this war would be conducted in compliance with international law, yet they were already making plans to violate Hawai'i's sovereignty and seize the island kingdom.

The Spanish-American War was not waged in Spain, but rather in the Spanish colonies of Puerto Rico and Cuba in the Caribbean, and in the colonies of the Philippines and Guam in the Pacific. On May 1, 1898, Commodore George Dewey defeated the Spanish fleet at Manila Bay in the Philippines. Then on May 4, 1898, Congressman Francis Newlands submitted a joint resolution for the annexation of the Hawaiian Islands to the U.S. House Committee on Foreign Affairs.

On May 1, 1898, the U.S.S. Charleston, a protect cruiser, was commissioned. Then on May 5, it was ordered to lead a convoy of 2,500 troops to reinforce Dewey in the Philippines and Guam. In a move to deliberately violate the neutrality of Hawai'i, the convoy set a course to re-coal in Hawai'i and arrived in Honolulu harbor on June 1. This convoy took on 1,943 tons of coal before it left the islands on June 4. A second convoy of troops arrived in Honolulu harbor on June 23 and took on 1,667 tons of coal. On June 8, H. Renjes, the Spanish Vice-Counsel in Honolulu, lodged a formal protest. Renjes declared, "In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America."[119]

The U.S. gave formal notice to the other powers of the existence of war so that these powers could proclaim neutrality, yet the United States was also violating the neutrality of Hawai'i at that time. From Bailey's view, the position taken by the United States

> "was all the more reprehensible in that she was compelling a weak nation to violate the international law that had to a large degree been formulated by her own stand on the Alabama claims. Furthermore, in line with the precedent

[117] 30 U.S. Stat. 1770
[118] The Paquete Habana, 175 U.S. 712 (1900).
[119] U.S. Minister of Hawai'i Harold Sewall to U.S. Secretary of State William R. Day, No. 167 (June 4, 1898), Hawai'i Archives.

> established by the Geneva award, Hawaii would be liable for every cent of damage caused by her dereliction as a neutral, and for the United States to force her into this position was cowardly and ungrateful. At the end of the war, Spain or cooperating power would doubtless occupy Hawaii, indefinitely if not permanently, to insure payment of damages with the consequent jeopardizing of the defenses of the Pacific Coast."[120]

On May 17, the joint resolution was reported out of the committee without amendment and headed to the floor of the House of Representatives. The joint resolution's accompanying Report justified the congressional action to seize the Hawaiian Islands as a matter of military interest, which was advocated by Captain Mahan. The Report stated,

> "The leading nations—England, France, Germany, Japan, Spain, and the United States—have each a Pacific Squadron. Every one of these squadrons is stronger than ours save that of Spain, which is the weakest. Had the war in which we are now engaged been with any of the other powers they might have worsted our fleet and seized the Hawaiian Islands, which are not now defended by any fortification or cannon, thus exactly reversing our recent good fortune at Manila. They would then have had a convenient base for supplies, coal, and repairs, from which to actively harry and devastate our coast. But were we in complete possession of the Hawaiian Islands and they properly prepared for defense (which eminent officers of the Army and Navy stated to the committee could be done at a cost of $500,000), our fleet, even if pressed by a greatly superior sea power, would have an impregnable refuge at Pearl Harbor, backed by a friendly population and militia, with all the resources of the large city of Honolulu and a small but fruitful country. Holding this all important strategic point, the enemy could not remain in that part of the Pacific, thousands of miles from any base, without running out of coal sufficient to get back to their own possessions. The islands would secure both our fleet and our coast."[121]

The Congressional record clearly showed that when the joint resolution of Annexation reached the floor of the House of Representatives, the Congressmen there knew the limitations congressional laws had. On June 15, 1898, Congressman Thomas H. Ball (D-Texas) emphatically stated, "The annexation of Hawai'i by joint resolution is unconstitutional, unnecessary, and unwise. …Why, sir, the very presence of this measure here is the result of a deliberate attempt to do unlawfully that which can not be done lawfully." [122] When the resolution reached the Senate, Senator Augustus Bacon sarcastically remarked that, the "friends of annexation, seeing that it was not possible to make this treaty in the manner pointed out by the Constitution, attempted then nullify the provision of the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House." [123] Senator Bacon further explained, "That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject matter of a

[120] T.A. BAILEY, *The United States and Hawaii During the Spanish-American War*, 36(3) THE AMERICAN HISTORICAL REVIEW 557 (April 1931).
[121] *See* House Committee on Foreign Affairs Report, at 2.
[122] 31 Cong. Rec. 5975 (1898).
[123] 31 Cong. Rec. 6150 (1898).

treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution."[124]

Despite objections by Senators and Representatives that foreign territory can only be acquired by treaty and never by congressional statute, President McKinley still signed the joint resolution into law on July 7, 1898. The occupation of the Hawaiian Islands was about to begin the following month. Since the United States failed to carry out its obligation to reinstate the executive monarch and her cabinet, under the executive agreement concluded with the Cleveland administration, the McKinley administration took complete advantage of its puppet called the Republic of Hawai'i, and deliberately violated Hawaiian neutrality. This served as leverage to force the hand of Congress to pass this joint resolution purporting to annex a foreign state. Still more diabolical, while the Senate was in secret session, Senator Lodge argued that, the "Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity."[125]

"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, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself."[126] Choreographed like a carefully rehearsed play, the annexation ceremony on August 12, 1898, between the American puppet, the Republic of Hawai'i, and the United States, was scripted to appear in conformity with international law when the ratifications of a treaty were being exchanged. On a stage fronting 'Iolani Palace in Honolulu, the following exchange took place between American Minister Plenipotentiary, Harold Sewell, and Republic President, Sanford Dole.[127]

> Mr. SEWELL: Mr. President, I present to you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States." This joint resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii.
>
> Mr. DOLE: A treaty of political union having been made, and the cession formally consented to and approved by the Republic of Hawaii, having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the

[124] 31 Cong. Rec. 6148 (1898).
[125] *Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898*, 1 HAW. J.L. & POL. 230, 280 (2004).
[126] KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 114 (2d ed. 1968).
[127] LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 253 (The Hawaiian Gazette Co., Ltd. 1904).

> American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands.
>
> Mr. SEWELL: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government.

Many government officials and constitutional scholars could not explain how a U.S. joint resolution, being a Congressional statute, could have the extra-territorial force and effect in annexing Hawai'i, a foreign and sovereign state. During the 19th century, Born states, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction."[128] In 1824, the United Supreme Court illustrated this view by asserting that, "the legislation of every country is territorial," and that the "laws of no nation can justly extend beyond it own territory,"[129] for it would be "at variance with the independence and sovereignty of foreign nations."[130] The *Apollon* Court also explained that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction."[131]

The war with Spain came to an end on April 11, 1899, after documents of ratifications of the Treaty of Paris were exchanged. This was a bona fide exchange. As an occupying state, customary international law mandated the United States to establish a Military government to provisionally administer the laws of the occupied state, the Hawaiian Kingdom. These laws stood in force prior to the illegal regime change on January 17, 1893.

In violation of international law and the treaties with the Hawaiian Kingdom, the United States maintained the insurgents' control until the Congress could reorganize its puppet. By statute, the U.S. Congress changed the name of the Republic of Hawai'i to the Territory of Hawai'i on April 30, 1900. This Territorial Act provided, that "the laws of [the Republic of Hawai'i] not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force,"[132] and that "all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawai'i."[133] Later, on March 18, 1959, the U.S. Congress, again by statute, changed the name of the Territory of Hawai'i to the State of Hawai'i. This Statehood Act provided that all "Territorial laws in force in the Territory of Hawaii at the time of its 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."[134]

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[128] GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 493 (3d ed. 1996).
[129] Rose v. Himely, 8 U.S. 241, 279 (1808).
[130] The Apollon, 22 U.S. 362, 370 (1824).
[131] *Id.*
[132] 31 U.S. Stat. 141.
[133] *Id.*
[134] 73 U.S. Stat. 4.

When the United States assumed control of its installed puppet under the new title of Territory of Hawai'i in 1900 and later the State of Hawai'i in 1959, it surpassed "its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts."[135] The purpose of this extraterritorial prescription was to conceal the occupation of the Hawaiian Kingdom and bypass their duty to administer the laws of the occupied state in accordance with the 1899 Hague Convention, II, which the United States had ratified. Article 43, provides, "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The 1899 Hague Convention, II, was superseded by the 1907 Hague Convention, IV, and the text of Article 43 was slightly altered to read, "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' deliberate omission to do what was obligatory under the laws and customs of war would chart a course for the commission of war crimes on such a colossal scale unrivaled in the history of international relations. According to Benvinisti, "The occupations of Hawaii, [t]he Philippines, and Puerto Rico reflected the same unique US view on the unlimited authority of the occupant."[136]

DENATIONALIZATION THROUGH AMERICANIZATION

In 1906, the intentional policy and methodical plan of *Americanization* began. This plan intended to conceal the violation of Hawai'i's sovereignty and the international law of occupation. It sought to obliterate the national consciousness of the Hawaiian Kingdom in the minds of the children attending the public and private schools throughout the islands. This program was developed by the Territory of Hawai'i's Department of Public Instruction and called "Programme for Patriotic Exercises in the Public Schools." The purpose of this program was to inculcate American patriotism in the minds of Hawai'i's children and forced them to speak English and not Hawaiian.

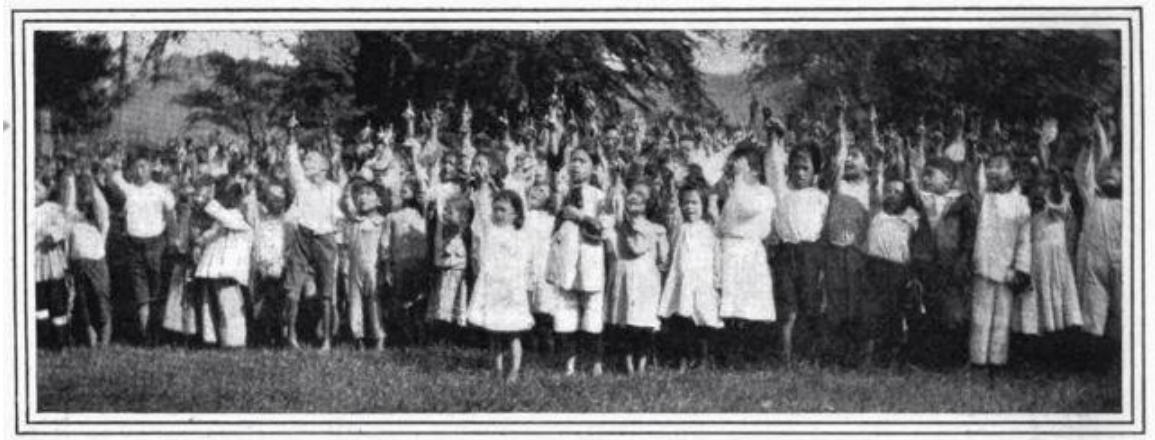
According to the Programme, "The teacher will call one of the pupils to come forward and stand at one side of the desk while the teacher stands at the other. The pupil shall hold an American flag in military style. At second signal all children shall rise, stand erect and salute the flag, concluding with the salutation, 'We give our heads and our hearts to God and our Country! One Country! One Language! One flag!'"[137]

In 1907, Harper's Weekly magazine covered this *Americanization* taking place at Ka'ahumanu and Ka'iulani Public Schools.[138] At the time, there were 154 public schools,

[135] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 19 (1993).
[136] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 37 (2d. ed. 2012).
[137] Territory of Hawai'i, Programme for Patriotic Exercises (1906), 4, *available at* http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf.
[138] William Inglis, *Hawaii's Lesson to Headstrong California*, HARPER'S WEEKLY, Feb. 16, 1907, at 228.

with 435 teachers, and 58 private schools, with 261 teachers. Harper's special correspondent, William Inglis, visited Ka'ahumanu and Ka'iulani public schools that ranged from grades 1-8, and Honolulu High School. While at Ka'iulani public school, he wrote,

> "At the suggestion of Mr. Babbit, the principal, Mrs. Fraser, gave an order, and within 10 seconds all of the 614 pupils of the school began to march out upon the great lawn which surrounds the building.
>
> ...Out upon the lawn marched the children, two by two, just as precise and orderly as you can find them at home. With the ease that comes from long practice the classes marched and countermarched 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. Surely this was the most curious, most diverse regiment every drawn up under that banner—tiny Hawaiians, Americans, Britons, Germans, Portuguese, Scandinavians, Japanese, Chinese, Porto-Ricans, and Heaven knows what else.
>
> 'Attention!' Mrs. Fraser commanded.
>
> The litter regiment stood fast, arms at sides, shoulders back, chests out, heads up, and every eye fixed upon the red, white, and blue emblem that waved 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: 'We give our heads and our hearts to God and our Country! One Country! One Language! One Flag!'
>
> The last six words were shot out with a force that was explosive. The tone, the gesture, the gaze fixed reverently upon the flag, told their story of loyal ferver."[139]



"We give our heads and our hearts to God and our country! One country, one language, one flag!"
THIS SCENE SHOWS THE SALUTE TO THE AMERICAN FLAG WHICH FLIES IN THE GROUNDS OF THE KAIUALANI PUBLIC SCHOOL WHICH HAS MANY JAPANESE PUPILS. THE DRILL IS CONSTANTLY HELD AS A MEANS OF INCULCATING PATRIOTISM IN THE HEARTS OF THE CHILDREN

[139] *Id*., at 227.

Under customary international law, *Americanization* is a war crime of attempting to denationalize the inhabitants of an occupied territory. Germans and Italians were prosecuted for the same war crime after World War II for implementing a systematic plan of *Germanization* and *Italianization* in occupied territories. According to the Nuremburg Indictment of Nazis,

> "In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially, and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists. This plan included economic domination, physical conquest, installation of puppet governments, purported de jury annexation and enforced conscription into the German Armed Forces. This was carried out in most of the occupied countries including: Norway, France, Luxembourg, the Soviet Union, Denmark, Belgium, and Holland."[140]

Since this Programme began, *Americanization* has become so pervasive and institutionalized throughout Hawai'i, that the national consciousness of the Hawaiian Kingdom was nearly obliterated. According to Kauai,

> "From one of the most progressive independent states in the world to one of the most forgotten. If not for the US, where would Hawai'i rank among the countries of the world today in regard to health care, political rights, civil rights, economy, and the environment? In the 19th century Hawai'i was a global leader in many ways, even despite its size."[141]

It took the institutional recovery of the Hawaiian language and the resurrection of diligent historical research to uncover the true status of the Hawaiian Kingdom as an independent state under an illegal and prolonged occupation. These revelations are reconnecting Hawai'i to the international community and to its treaty partners, and highlighting the violations of rights and war crimes committed against the citizens, and subjects of foreign states, who have visited, resided, or have done business in the Hawaiian Islands.

PRESUMPTION OF CONTINUITY OF THE HAWAIIAN STATE

On January 17, 1893, it was the Hawaiian government, not the Hawaiian state that was unlawfully overthrown. A state is a "body of people occupying a definite territory and politically organized"[142] under one government, being the "agency of the state,"[143] that

[140] Nuremberg Trial Proceedings, Indictment, Count 3, Article VIII (J), available at http://avalon.law.yale.edu/imt/count3.asp.
[141] *See* KAUAI, at 298.
[142] BLACK'S LAW DICTIONARY 1407 (6th ed. 1990).
[143] *Id*., at 695.

exercises sovereignty, which is the "supreme, absolute, and uncontrollable power by which an independent state is governed."[144] Bodin stressed the importance that "a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state."[145] Hoffman also emphasizes that a government "is not a State any more than a man's words are the man himself," but "is simply an expression of the State, an agent for putting into execution the will of the State."[146] And Wright also concluded that, "international law distinguishes between a government and the state it governs."[147] Therefore, the Hawaiian state would continue to exist despite its government being unlawfully overthrown by the United States military. The overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003, are two contemporary examples that illustrate this principle of international law and both examples involve the United States military. Afghanistan has been a recognized sovereign state since 1919,[148] and Iraq since 1932.[149]

Sources of international law, in rank of precedence, are: international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations.[150] The legislation of every state, including the United States of America and its Congress, are not sources of international law, but rather sources of domestic laws of the states whose legislatures enacted them. In *The Lotus,* the International Court stated, "Now 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."[151] According to Crawford, derogation of this principle will not be presumed, which he refers to as the *Lotus* presumption.[152]

Since Congressional legislation, whether by a statute or a joint resolution, has no extraterritorial effect, it is not a source of international law, which "governs relations between independent States."[153] The U.S. Supreme Court has always adhered to this principle. It stated, "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[154] The Supreme Court also concluded, "The laws of no nation can justly extend beyond its own territories except so far as

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[144] *Id*., at 1396.
[145] JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 56 (B. Blackwell 1955).
[146] FRANK SARGENT HOFFMAN, THE SPHERE OF THE STATE FOR THE PEOPLE AS A BODY-POLITIC 19 (G.P. Putnam's Sons 1894).
[147] Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) AM. J. INT'L L. 109, 110 (1935).
[148] Manley O. Hudson, *Afghanistan, Ecuador, and the Soviet Union in the League of Nations*, 29 AM. J. INT'L L. 109, 110 (1935).
[149] Manley O. Hudson, *The Admission of Iraq to Membership in the League of Nations*, 27 AM. J. INT'L L. 133 (1933).
[150] Statute of the International Court of Justice, Article 38.
[151] *Lotus*, PCIJ, ser. A no. 10, 18 (1927).
[152] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 41-42 (2nd ed., 2006).
[153] *See Lotus*, at 18.
[154] United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).

regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[155]

The claim of continuity of the Hawaiian Kingdom will arise only when the United States claims to be its successor. According to Craven, "It is generally held that there are three principles that have some bearing upon the issue of continuity. First, that the continuity of the State is not affected by changes in government even if of a revolutionary nature. Secondly, that continuity is not affected by territorial acquisition or loss, and finally, continuity is not affected by belligerent occupation."[156] Crawford points out that, "There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[157]

A presumption shifts the burden of proof, onto the state claiming to be the supposed vanquished state's successor, to show clear and irrefutable evidence that the acquisition was done in accordance with international law. "The continuity of the Hawaiian Kingdom, in other words," states Craven, "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."[158] Under international law, when not at war, for a state to legally claim to be the successor of another state, valid cession must occur. Oppenheim explains that, cession of "State territory is the transfer of sovereignty over State territory by the owner State to another State."[159] Oppenheim further states that the "only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State."[160] The United States' only claim to have extinguished the Hawaiian Kingdom is by a joint resolution of annexation passed by its Congress. A joint resolution, however, is not a treaty or agreement between two states, but rather an agreement between the U.S. House of Representatives and the U.S. Senate in Washington, D.C.. This joint resolution is limited to United States territory.

In the absence of a treaty of cession, no international tribunal decision is required to confirm state continuity of an established state; however, an international tribunal decision is needed to show that an established state was extinguished in accordance with the rules of state successorship. There is no treaty of cession between Hawai'i and the United States, and there is no international tribunal decision confirming that the United States extinguished the sovereignty and independence of the Hawaiian Kingdom. Therefore, the Hawaiian Kingdom was never extinguished and continues to exist as an independent and sovereign state, and it has been under the longest belligerent occupation in the history of international relations.

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[155] The Apollon, 22 U.S. 362, 370 (1824).
[156] Matthew Craven, Continuity of the Hawaiian Kingdom, 1 HAW. J.L. & POL. 511-512 (Summer 2004).
[157] *See* CRAWFORD, at 34.
[158] Craven, 513.
[159] L. OPPENHEIM, INTERNATIONAL LAW VOL. I 285 (2nd ed. 1912).
[160] *Id*., 286.

CONTINUITY OF HAWAIIAN TREATIES

International law provides four ways binding treaties may be terminated. Treaties can expire, be dissolved, be cancelled, or become void.[161] Expiration and dissolution are specifically provided for in the treaty itself. Cancellation is through mutual consent by of notice to the other party of its intention to terminate. All treaties of the Hawaiian Kingdom have provisions for mutual consent to terminate except for the 1851 Hawaiian-British treaty, which has no termination provisions except with regard to import duties. International law, however, allows either party, by mutual consent, to terminate a treaty, even though the treaty lacks provisions for termination. This is because the fundamental principle of international law is mutual consent and legal parity. Therefore, a "treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties."[162]

According to Oppenheim, a treaty between two states, "become void through the extinction of one of the contracting parties."[163] This occurred when the city states of Bremen and Hamburg merged into the German Empire in 1871. They were no longer independent states for international law purposes. The Hawaiian treaties with these city states were replaced with the Hawaiian-German treaty of 1879. As the Hawaiian state remains a subject of international law despite the illegal overthrow of its government, its treaties with other states remain binding and obligatory.

These treaties have the *most favored nation* clause, and secure the equal application of commercial trade in the Hawaiian Islands to all treaty partners. All these treaties have been violated by the United States through the unlawful imposition of the *Merchant Marine Act* (1920)—also known as the *Jones Act*. The Jones Act has secured commercial control of the seas to United States citizens, and has consequently, placed the citizens of all other foreign states at a commercial disadvantage.[164] The most favored nation clause is designed

> "to establish the principle of equality of international treatment. The test of whether the principle is violated by the concession of advantages to a particular nation is not the form in which such concession is made, but the condition on which it is granted; whether it is given for a price, or whether this price is in the nature of a substantial equivalent, and not a mere evasion."[165]

Treaties are legally binding "and the effect of the treaty upon them is that they are bound by its stipulations, and that they must execute it in all its parts,"[166] states Oppenheim. "No distinction should be made between more or less important parts of a treaty as regards its execution. Whatever may be the importance or the insignificance of a part of a treaty, it

[161] *Id,* at 570.
[162] *Id*., at 571.
[163] *Id*., at 576.
[164] 46 U.S.C. §883-1.
[165] BLACK'S LAW DICTIONARY 1013 (6th ed. 1990).
[166] *See* OPPENHEIM, at 561.

must be executed in good faith, for the binding force of a treaty covers equally all its parts and stipulations."[167]

STATUS OF THE STATE OF HAWAI'I UNDER INTERNATIONAL LAW

The State of Hawai'i cannot claim to be a government *de jure* or *de facto*. Customary international law defines this organization as an armed force of the occupying state. Military manuals define armed forces as "organized armed groups which are under a command responsible to that party for the conduct of its subordinates."[168] 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,"[169] 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."[170] Article 1 of the 1907 Hague Convention, IV, provides that

> "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."

The laws and customs of war during occupation applies only to territories that come under the authority of either the occupier's military 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." [171] According to Ferraro, "occupation—as a species of international armed conflict—must be determined solely on the basis of the prevailing facts."[172] Although unlawful, it is a fact that the United States created the State of Hawai'i through congressional action and signed it into law by its President, Dwight D. Eisenhower, in 1959. The United States also approved the constitution of the State of Hawai'i that provides for its organizational structure.

While effectiveness is at the core of sovereignty in international law, it is also at the core of belligerent occupation. For without effective control by the occupying state and its armed forces the duty to administer the laws of the occupied state would fail. Marek explains,

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[167] *Id*., 562.
[168] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I, 14 (2009).
[169] *Id*., at 15.
[170] *Id*.
[171] 1907 Hague Convention, IV, Article 42.
[172] TRISTAN FERRARO, *Determining the beginning and end of an occupation under international humanitarian law*, 94 (no. 885) INT'L REV RED CROSS 133, 134 (Spring 2012).

> "A comparison of the scope of the two legal orders, of the occupied and the occupying State, co-existing in one and the same territory and limiting each other, throws an interesting light on one aspect of the principle of effectiveness in international law. In 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. It can produce legal effects outside the occupied territory and may even develop and expand, not be reason of its effectiveness, but solely on the basis of the positive international rule safeguarding its continuity. Thus, the relation between effectiveness and title seems to be one of inverse proportion: while a strong title can survive a period of non-effectiveness, a weak title must rely heavily, if not exclusively, on full and complete effectiveness. It is the latter which makes up for the weakness in title. Belligerent occupation presents an illuminating example of this relation of inverse proportion. Belligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[173]

As an armed force, the State of Hawai'i established its authority over 137 islands,[174] "together with their appurtenant reefs and territorial and archipelagic waters."[175] These islands include the major islands of Hawai'i, Maui, O'ahu, Kaua'i, Molokai, Lana'i, Ni'ihau, and Kaho'olawe. The effectiveness of the control exercised by the State of Hawai'i over this territory, as an armed force for the United States, triggers the application of occupation law.

Allegiance to the United States

The State of Hawai'i, as an armed force, bears its allegiance to the United States where its public officers, to include its Governor, take the following oath of office: "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."[176]

Commanded by a Person Responsible for His Subordinates

A Governor who is elected by U.S. citizens in Hawai'i is head of the State of Hawai'i. The Governor is responsible for the execution of its laws from its legislature and to carry out the decisions by its courts. The Governor is also the "commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion." [177] The Governor's

[173] See MAREK, at 102.
[174] "Hawai'i Facts and Figures" (December 2014), State of Hawai'i Department of Business, Economic Development & Tourism.
[175] State of Hawai'i Constitution, Article XV, section 1, *available at* http://lrbhawaii.org/con/.
[176] *Id*., Article XVI, sec. 4.
[177] *Id*., Article V, sec. 5.

subordinates include all "executive and administrative offices, departments and instrumentalities of the state government."[178]

Fixed Distinctive Emblem Recognizable at a Distance

According to its constitution, "The Hawaiian flag shall be the flag of the State."[179]

Carry Arms Openly

Law enforcement officers of the State of Hawai'i, including the Sheriff's Division, Department of Land and Natural Resources, and the police of the State's four Counties, all openly carry arms. The State of Hawai'i Department of Defense's Army National Guard and Air National Guard, who openly carry arms while in tactical training, are also law enforcement officers

Conduct Operations in Accordance with the Laws and Customs of War

The Governor is the commander in chief of the State's Armed Forces, and is responsible for the suppression or prevention of insurrection or lawless violence, as well as repelling an invasion, proving the State of Hawai'i is capable of conducting operations in accordance with the laws and customs of war during occupation. The State of Hawai'i Department of Defense's Army National Guard and Air National Guard are trained in the laws and customs of war, and has been deployed to international armed conflicts throughout the world, *e.g.* Iraq war, Afghanistan war, Vietnam war, Korean war, World War II, and World War I;[180]

ACTING GOVERNMENT OF THE HAWAIIAN KINGDOM

In 1996, remedial steps were taken under the doctrine of necessity to reinstate the Hawaiian Kingdom government as it was under our late Queen Lili'uokalani on January 17, 1893.[181] An *acting* Council of Regency 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, an *acting* Government, comprised of *de facto* officers was established and has since received diplomatic recognition.[182]

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[178] *Id.*, sec. 6.
[179] *Id.*, Article XV, sec. 3.
[180] State of Hawai'i Department of Defense, *available at* http://dod.hawaii.gov/.
[181] David Keanu Sai, *Brief—The Continuity of the Hawaiian State and the Legitimacy of the acting Government of the Hawaiian Kingdom*, 25-51 (August 4, 2013), *available at* http://hawaiiankingdom.org/pdf/Continuity_Brief.pdf.
[182] *Id.*, at 40-48. On April 3, 2014, the Directorate of International Law, Swiss Federal Department of Foreign Affairs, in Bern, accepted the *acting* Government's letter of credence for its Envoy whose mission was to initiate negotiations with the Swiss Confederation to serve as a Protecting Power in accordance with the 1949 Geneva Convention, IV. The negotiations are ongoing.

From 1999-2001, the *acting* Government represented the Hawaiian Kingdom in international arbitration proceedings, *Larsen vs. Hawaiian Kingdom*, at the Permanent Court of Arbitration (PCA), The Hague, Netherlands.[183] The PCA recognized the existence of the Hawaiian Kingdom as a State, the *acting* Council of Regency as its government, and the nationality of Lance Larsen being a Hawaiian subject.[184] It was only after the PCA's verification that the arbitration tribunal was convened with three arbitrators to address Larsen's allegation that the Hawaiian Kingdom was negligent for allowing the unlawful imposition of American laws within Hawaiian territory that led to his incarceration. In its commentary on international decisions in the *American Journal of International Law*, Bederman and Hilbert state,

> "At the center of the PCA proceeding was the argument that Hawaiians never directly relinquished to the United States their claim of inherent sovereignty either as a people or over their national lands, and accordingly that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' 'unlawful imposition [over him] of [its] municipal laws' through its political subdivision, the State of Hawaii. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States committed against him."[185]

After oral hearings were held at the Permanent Court of Arbitration on December 7, 8 and 11, the *acting* Government was called to a meeting in Brussels, Belgium, by His Excellency Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium. Ambassador Bihozagara was at the International Court of Justice where he learned of the Hawaiian Kingdom arbitration. At this meeting, in Brussels on December 12, Ambassador Bihozagara conveyed to the *acting* Government that his government was prepared to inform the United Nations General Assembly of the prolonged occupation of the Hawaiian Kingdom.

> "Recalling his country's experience of genocide and the length of time it took for the international community to finally intervene as a matter of international law, Ambassador Bihozagara conveyed to the author that the illegal and prolonged occupation of Hawai'i was unacceptable and should not be allowed to continue. Despite the excitement of the offer, apprehension soon took hold and the acting government could not, in good conscience, accept the offer and put Rwanda in a

[183] The author served as lead agent for the *acting* Government in these arbitral proceedings. For law-reviewed articles on the Hawaiian arbitration, see BEDERMAN & HILBERT, *Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawai'i*, 95 AM. J. INT'L L. 927, 928 (2001); see also DAVID KEANU SAI, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAW. J. L. & POL. 46 (Summer 2004); and PATRICK DUMBERRY, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law*, 2(1) CHINESE J. INT'L L. 655, 682 (2002).

[184] *See* the Permanent Court of Arbitration Case Repository for *Lance Larsen vs. The Hawaiian Kingdom* available at http://www.pcacases.com/web/view/35.

[185] *See* BEDERMAN & HILBERT, at 928.

> position of reintroducing Hawai'i's State continuity before the United Nations, when Hawai'i's community, itself, remained ignorant of Hawai'i's profound legal position. The author thanked Ambassador Bihozagara for his government's offer, but the timing was premature. The author conveyed to the ambassador that the gracious offer could not be accepted without placing Rwanda in a vulnerable position of possible political retaliation by the United States, but that the acting government should instead focus its attention on continued exposure of the occupation both at the national and international levels."[186]

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

> "that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void."[187]

The Proclamation also called upon

> "all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the military government may issue during the present military occupation of the Hawaiian Kingdom so long as these proclamations, rules, regulations and orders are in compliance with the laws and provisional laws of the Hawaiian Kingdom, the international laws of occupation and international humanitarian law."[188]

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[186] David Keanu Sai, *A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today*, 10 J. L. & SOC. CHALLENGES 69, 131 (Fall 2008).
[187] Proclamation (October 10, 2014), *available at* http://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf. Appendix II.
[188] *Id*.

Although, Hawaiian law prohibits the enactment of retrospective laws,[189] the doctrine of necessity would allow for it in extraordinary circumstances. Necessity occurs when the "power of a Head of State under a written Constitution extends by implication to executive acts, and also legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them."[190] Deviations from a State's constitutional order "can be justified on grounds of necessity,"[191] states de Smith, and "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."[192] Lord Pearce also states in *Madzimbamuto,* 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."[193]

According to Sassòli, "The expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders, provided that the 'norms' in question are general and abstract."[194] This Proclamation is part of the "laws in force in the country" as a "decree" of the *acting* Government that must be administered in accordance with Article 43.

On March 5, 2015, an evidentiary hearing was held, where a State of Hawai'i Court received the author as an expert in international law. This Court took judicial notice of the brief titled, "*The Continuity of the Hawaiian State and the Legitimacy of the acting Government of the Hawaiian Kingdom*."[195] According to the State of Hawai'i Rules of Evidence, Rule 201(b)(2), a "judicially noticed fact must be one not subject to reasonable dispute in that it is…capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." When this trial court took judicial notice of the brief, it recognized the continuity of the Hawaiian Kingdom to be true, and it recognized the establishment of the *acting* government to be true. The State of Hawai'i,

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[189] Hawaiian Kingdom Constitution (1864), Article 16—"No Retrospective Laws shall ever be enacted;" see also Hawaiian Kingdom Civil Code, §5—"No law shall have any retrospective operation."
[190] F.M. BROOKEFIELD, The Fiji Revolutions of 1987, NEW ZEALAND L. J. 250, 251 (July 1988).
[191] STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 80 (1986).
[192] *Id*.
[193] Madzimbamuto v. Lardner-Burke, 1 A.C. 645, 732 (1969).
[194] Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century*, 6 (Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004).
[195] Transcript of Proceedings, State of Hawai'i vs. Kaiula Kalawe English, criminal no. 14-1-0819, State of Hawai'i vs. Robin Wainuhea Dudoit, criminal no. 14-1-0820, Circuit Court of the Second Circuit, State of Hawai'i (Mar. 5, 2015), *available at* http://hawaiiankingdom.org/pdf/Transcript_Molokai_hearing.pdf.

in order to claim otherwise, must show that this evidentiary hearing was unfair and did not allow the Prosecutor to object to the judicial notice, neither occurred in this case.

WAR CRIMES COMMITTED WITH IMPUNITY

Since the 1949 Geneva Conventions, the expression "armed conflict" was substituted for the term "war" in order for the Conventions to 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 (Common Article 2)." According to the International Committee of the Red Cross (ICRC) Commentary of Geneva Convention, IV, the wording of Article 2 "was based on the experience of the Second World War, which saw territories occupied without hostilities, the Government of the occupied country considering that armed resistance was useless. In such cases the interests of protected persons are, of course, just as deserving of protection as when the occupation is carried out by force."[196]

Dr. Stuart Casey-Maslen, editor of the War Report, states that an international armed conflict exists "whenever one state uses any form of armed force against another, irrespective of whether the latter state fights back," which "includes the situation in which one state invades another and occupies it, even if there is no armed resistance."[197] The ICRC Commentary further clarifies that "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims."[198]

The International Criminal Court defines war crimes as "serious violations of the laws and customs applicable in international armed conflict."[199] United States Army Field Manual 27-10 expands the definition of a war crime, applying it to armed conflicts that involve United States troops, to be "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[200] War crimes include deliberate acts and omissions. Omissions include the failure to administer the laws of the occupied state (Article 43, 1907 Hague Convention, IV) and the failure to provide a fair and regular trial (Article 147, Geneva Convention, IV). One of the most serious war crimes the United States committed was compelling Hawaiian subjects to serve in its armed forces. Thousands of Hawaiians lost their lives. Conscription of Hawaiian subjects occurred during the First and Second World Wars, the Korean War, and the Vietnam War.

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[196] JEAN S. PICTET, COMMENTARY ON THE IV GENEVA CONVENTION, RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (1958).
[197] STUART CASEY-MASLEN, WAR REPORT 2012 7 (2013).
[198] *See* PICTET, at 20.
[199] International Criminal Court, *Elements of a War Crime*, Article 8(2)(b).
[200] U.S. Army Field Manual 27-10, sec. 499 (July 1956).

International case law requires the mental element of intent for the prosecution of war crimes, whereby the war crimes must be committed willfully, either intentionally—*dolus directus*, or recklessly—*dolus eventualis*. According to Article 30(1) of the Rome Statute, a defendant is "criminally responsible and liable for punishment…only if the material elements [of the war crime] are committed with intent and knowledge." Therefore, in order to prosecute ware crimes there must be a mental element that includes a volitional component (intent) and a cognitive component (knowledge). Article 30(2) further clarifies that "a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." Furthermore, the International Criminal Court's *Elements of a War Crime*, states that there is no requirement for a legal evaluation to be done by the perpetrator.[201]

Is there a particular time or event that could serve as a definitive point of knowledge for purposes of prosecution? In other words, where can there be "awareness that a circumstance exists or a consequence will occur in the ordinary course of events", and how does this standard apply to the illegal overthrow of the Hawaiian Kingdom government on January 17, 1893? For the United States government, that definitive point of knowledge is December 18, 1893, when President Cleveland notified the Congress of the illegality of the overthrow of the Hawaiian Kingdom government and called the landing of U.S. troops an act of war. For the private sector, however, it is the authors opinion that the United States' 1993 apology for the illegal overthrow of the Hawaiian Kingdom government, is the definitive point of knowledge, for those who are not in the service of government. This apology resolution was in the form of a Congressional joint resolution, enacted into United States law, and stated that the Congress "on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i on January 17, 1893 acknowledges the historical significance of this event."[202] Additionally, the Congress also urged "the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i."[203]

Despite the mistake of facts and law riddled throughout this apology resolution, it does serve as a specific point of knowledge, and the ramifications that stem from that knowledge are profound. Evidence that the United States knew of these ramifications was clearly displayed in the apology law's disclaimer, "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."[204] It should be noted that it is a presumption that everyone knows the law, which stems from the legal maxim *ignorantia legis neminem excusat* (ignorance of the law excuses no one). Unlike the United States government, a public body, the State of Hawai'i government cannot claim to be a government at all, and therefore is merely a private organization. Therefore, as a private organization, awareness and knowledge for members of the State of Hawai'i would have begun with the enactment of the Apology resolution in 1993.

[201] *See* ICC Elements of a War Crime, Article 8.
[202] *See* Apology Resolution, at 1513.
[203] *Id*.
[204] *Id*., at 1514.

State of Hawai'i v. Lorenzo (1994),[205] was a State of Hawai'i Intermediate Court of Appeals case where the defendant argued that all State of Hawai'i courts have no jurisdiction because of the illegal overthrow of the Hawaiian Kingdom government. The basis of this appeal stemms from the lower court's ruling, "Although the Court respects Defendant's freedom of thought and expression to believe that jurisdiction over the Defendant for the criminal offenses in the instant case should be with a sovereign, Native Hawaiian entity, like the Kingdom of Hawaii, such an entity does not preempt nor preclude jurisdiction of this court over the above-entitled matter."[206] After acknowledging that the "United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event,"[207] the appellate court denied the appeal.

The appellate court reasoned, the "essence of the lower court's decision is that even if, as Lorenzo contends, the 1893 overthrow of the Kingdom was illegal, that would not affect the court's jurisdiction in this case."[208] The Court, however, admitted its "rationale is open to question in light of international law."[209] The Court also admitted, "The illegal overthrow leaves open the question whether the present governance should be recognized."[210] State of Hawai'i courts are not properly constituted, because the State of Hawai'i is an armed force, not a government. All this clearly confirms awareness by the State of Hawai'i.

In light of both the lower and appellate courts' ignorance of international law, and the presumption of continuity of an established state, despite an illegal overthrow of its government, it clearly shows that both courts were applying the wrong law. According to the International Criminal Court's elements of crimes, there "is no requirement for a legal evaluation by the perpetrator," but "only a requirement of awareness."[211] The *Lorenzo case* has become the seminal case used by the Hawai'i courts to quash all claims by defendants that all courts in the State of Hawai'i are not properly constituted. There is no doubt that each judge, since the Apology resolution in 1993 and the *Lorenzo case* in 1994, who decided against defendants, by relying on Apology resolution or the *Lorenzo* case, did so with full awareness.

War crimes that have and continue to be committed in the Hawaiian Islands include, but are not limited to: *pillaging* (Article 47, Hague Convention, IV, and Article 33, Geneva Convention, IV); *destroying public property belonging to the occupied State* (Article 55, Hague Convention, IV, and Article 147 Geneva Convention, IV); *denationalization in the public schools* (Article 56, Hague Convention, IV); *extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly* (Article 147, Geneva Convention, IV); *depriving individuals of a fair and regular trial* (Article 147,

[205] State of Hawai'i v. Lorenzo, 77 Haw. 219 (1994).
[206] *Id*., at 220.
[207] *Id*., at 221.
[208] *Id*., at 220
[209] *Id*., at 220-221.
[210] *Id*., at 221, n. 2.
[211] *See* ICC Elements of Crimes, Article 8 – Introduction.

Geneva Convention, IV); and *unlawful deportation or transfer or unlawful confinement* (Article 147, Geneva Convention, IV).

This is a human rights crisis of unimaginable proportions. Here follows some of the most serious war crimes that will have a paralyzing effect on the State of Hawai'i as an armed force.

War Crime—Pillaging through Taxation

Articles 46-54 of Hague Convention, IV, contain the rules governing the treatment of both personal and real property belonging to inhabitants of the occupied territory. Under Article 47, "pillage is formally forbidden." In light of the "absolute character of the rule and of its obvious purpose to prevent plundering by any individual, the rule of the article would seem to extend to plundering by any national of the occupant, and generally any person subject to its local jurisdiction, including inhabitants as well as civilian officials of the occupant."[212] The State of Hawai'i's officials and members, being the occupant state's armed force and not a Military government, must not plunder for the private use and purpose of maintaining the organization.

The State of Hawai'i is an armed force comprised of private individuals under the guise of being a *de jure* government. Consequently, the compulsory collection of what it calls taxes, is in fact not taxes at all, but rather revenues derived through pillaging. Pillage or plunder is "the forcible taking of private property," [213] which, according to the Elements of Crimes of the International Criminal Court, must be seized "for private or personal use."[214] As such, the prohibition of pillaging or plundering is a specific application of the general principle of law prohibiting theft.[215]

Currently the State of Hawai'i, including the Counties, derives their revenues through the collection of 14 taxes by the State of Hawai'i (income tax, estate and transfer tax, general excise tax, transient accommodation tax, use tax, public service company tax, banks and other financial corporations franchise tax, fuel tax, liquor tax, cigarette and tobacco tax, conveyance tax, rental motor vehicle and tour vehicle surcharge tax, unemployment insurance tax, and insurance premiums tax), and 3 taxes by the Counties (real property tax, motor vehicle weight tax, and public utility franchise tax). The State of Hawai'i's primary revenue is the general excise tax, followed by the individual income tax. In 2014, the State of Hawai'i and the Counties collected $6.58 billion in taxes. Of all the war crimes, pillaging through taxation, has not only affected the inhabitants of the islands, but also the international community that have traveled through the islands or have been engaged in commercial activities in the islands.

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[212] ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 30 (1958).
[213] *See* BLACK'S LAW, at 1148.
[214] Elements of Crimes, International Criminal Court, Pillage as a war crime (ICC Statute, Article 8(2)(b)(xvi) and (e)(v)).
[215] *See* HENCKAERTS AND DOSWALD-BECK, at 185.

The authority to levy taxes is a fiscal and property right of an independent and sovereign state. Taxes constitute a portion of the property of the State and consist of obligatory contributions, which the State is authorized to levy upon individuals and corporations in order to provide the necessary services of the State. The state's government freely exercises this right as long as it is in conformity with its public law. The public law of the Hawaiian Kingdom provides a list of obligatory contributions, which along with taxes,[216] includes customs and duties on foreign trade,[217] health insurance for visiting tourists,[218] land sales,[219] and bonds.[220] Since January 17, 1893, there has been no government, but rather armed forces established by the United States—the Provisional Government (1893-1894), Republic of Hawai'i (1894-1900), Territory of Hawai'i (1900-1959) and currently the State of Hawai'i (1959-present). As these entities were neither governments *de facto* nor *de jure*, their collection of tax revenues were not for the benefit of a *bona fide* government in the exercise of its police power.

Unlike the State of Hawai'i, which is an armed force, the United States is a *de jure* government, 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 legitimate government, but instead has appropriated private property through unlawful contributions, *e.g.* federal taxation, which is regulated by Article 48, 1907 Hague Convention, IV. The subsequent 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." The United States collection of federal taxes, from the residents of the Hawaiian Islands, is an unlawful contribution because those taxes are 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."

War Crime—Omission of Administering Hawaiian Laws

The willful omission to administer Hawaiian law as mandated under Article 43, Hague Convention, IV, has placed Hawai'i's political economy in peril. In particular, all commercial entities registered to do business in the Hawaiian Islands, since January 17, 1893, including sole proprietorships, general partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, corporations, s corporations, and limited liability companies, are illegal. Their legal basis stems from pretended governments, and not from the Hawaiian Kingdom. Foreign commercial entities doing business in Hawai'i are also illegal because "Every corporation or incorporated company formed or organized under the laws of any foreign State, which may be desirous of carrying on business in this Kingdom and to take, hold and convey real estate therein,

[216] *See* Hawaiian Civil Code, at 117-136.
[217] *Id*., at 137-150.
[218] *Id*., at 666.
[219] *Id*., at 10.
[220] *Id*., at 523, 565, 582, 599, 609, 627, 681.

shall [register with] the office of the Minister of the Interior,"[221] and all these foreign entities have failed to register.

Furthermore, all real estate transactions, *e.g.* deeds, leases or mortgages, since January 17, 1893 were not capable of being conveyed because the notaries public and the registrars of conveyances were self-declared and therefore unlawful. Hawaiian law requires that all conveyances be registered in the Bureau of Conveyances. "To entitle any conveyance, or other instrument to be recorded, it shall be acknowledged by the party or parties executing the same, before the Registrar of Conveyances, or his agent, or some judge of a court of record, or notary public of this Kingdom, or before some minister, commissioner or consul of the Hawaiian Islands, or some notary public or judge of a court of record in any foreign country."[222] Since illegal notarizing and conveyance registering has continued since Jan. 17, 1893, all conveyances of real estate are defective, and all mortgages are voided since then. Compounding the problem is that most mortgages serve as security instruments for loans.

A deed not properly notarized and recorded in the government registry is a covered risk in title insurance policies. Title insurance is a "policy issued by a title company after searching the title, representing the state of that title and insuring the accuracy of the title search against claims of title defects."[223] There are two policies of title insurance; a lender's policies, that cover the lender's debt due to the invalidity of the mortgage loan, and an owner's policies, that cover the value of the owner's property at the time the policies were purchased. Title insurance polices are predominantly sold in the United States.

Since mortgage loans have been unsecured since 1893, this fact has a dramatic and devastating effect on the todays investment ratings and net values of mortgaged-backed securities that comprise mortgage loans from Hawai'i. Mortgage-backed securities are pools of mortgage loans purchased from mortgage lenders by U.S. Government sponsored enterprises, such as Fannie Mae or Freddie Mac, or by private institutions, who then sells, claims to the monthly payments, to investors in the form of securities called *tranches* (slices). The investor banks can also reshape these *tranches* into other securities called collateralized-debt-obligations. Mortgage-backed securities issued by Fannie Mae and Freddie Mac are given the highest investment rating of AAA and are the most actively traded commodities on the U.S. bond market.

Since mortgage lenders are illegally doing business in Hawai'i and since borrowers have title insurance to pay off their debt, these facts can throw the title insurance industry into bankruptcy, and can void stocks of Hawai'i mortgage lenders listed on the stock markets of NASDAQ, NYSE, and AMEX. Bank of Hawai'i is a perfect example. This is not limited to these Hawai'i mortgage lenders, but to all publically traded Hawai'i businesses, such as Hawaiian Electric Industries. Business entities created under State of

[221] An Act Relating to Corporations and Incorporated Companies Organized under the Laws of Foreign Countries and Carrying on Business in this Kingdom (1880).
[222] *See* Hawaiian Civil Code, at §1255.
[223] *See* BLACK'S LAW, at 806.

Hawai‘i law would simply vanish. Furthermore, title insurance companies could target the State of Hawai‘i for reimbursement under subrogation. This could bring down the United States economy, including Hawai‘i, to the brink of financial disaster.

War Crime—Unfair Trials and Pillaging

All judicial and administrative courts in the Hawaiian Islands are not properly constituted under the laws of the Hawaiian Kingdom, nor are they properly constituted as courts of a Military government. As such, these courts cannot provide a fair trial and therefore, their decisions and judgments are extra-judicial. Since 2011, defendants, in over 100 civil cases, whose homes were being foreclosed in Circuit Courts of the State of Hawai‘i or were being evicted as a result of non-judicial foreclosures in the District Courts of the State of Hawai‘i, are challenging the subject matter jurisdiction of these courts based upon evidence that the Hawaiian Kingdom, as an independent and sovereign state, continues to exist. As such, the controlling law for jurisdictions of all courts, whether judicial or administrative, within the territory of the Hawaiian Kingdom, is Hawaiian law and not United States law.

As the occupied state, Hawaiian Kingdom law is the controlling law, not the laws of the United States. In all the above case, the judges systematically and summarily denied the defendants' motions to dismiss. These Judges cited no rebuttable evidence that their courts were properly constituted, nor evidence that defendants' homes were not pillaged. The war crimes of unfair trial and pillaging also occurred when the mortgage lenders were provided evidence, by those being foreclosed on, of defects in their titles and the invalidity of their mortgage instruments, and yet, the mortgage lenders continued foreclosure litigation and refused to file title insurance claims. What is more abhorrent and criminal is that borrowers were required to purchase lender's policies of title insurance, to protect the mortgage lenders, as a condition of the mortgage loan, should the mortgage become void as a result of a title defect.

Common Article 3 of the 1949 Geneva Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Article 43 of the Hague Convention, IV, mandates the occupying state "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." Further, according to United States Supreme Court Justice Kennedy, in *Hamdan v. Rumsfeld*, there was no need to determine whether or not defendants received a fair trial by the military commissions in Guantanamo Bay because they were not properly constituted in the first place. Justice Kennedy reasoned that the fairness of a trial is a moot point since the Court already found that "the military commissions…fail to be regularly constituted under Common Article 3."[224]

[224] Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006).

As an armed force of the United States, the State of Hawai'i is a pretend government, and thus, all decisions and judgments by State of Hawai'i judicial and administrative courts are extrajudicial done "outside the course of regular judicial proceedings."[225] And in cases where individuals have been sentenced to prison, these prisoners would have the status of prisoners of war and afforded protection under the 1949 Geneva Convention, III. In cases where summary judgments stem from "willfully depriving a prisoner of war of the rights of fair and regular trial," a war crime, under Article 130, would have been committed.

RISK OF DELAY

It is impossible for the State of Hawai'i to maintain its existence in light of the ascending knowledge that Hawai'i's legal status is as an independent state under an illegal and prolonged occupation. The foundation for the State of Hawai'i's existence is directly traced to the provisional government. This government was illegally established in 1893 through intervention by the U.S. diplomat to Hawai'i who utilized the military assistance of U.S. troops to do so. In similar fashion through intervention, the U.S. Congress illegally established the State of Hawai'i in 1959 in direct violation of its mandate, under international law, to administer the laws of the Hawaiian Kingdom. This failure by the United States is not only a war crime, but has consequently placed every official and employee of the State of Hawai'i into a position of criminal liability because they all have, and continue to commit, war crimes on a colossal scale. In the latest edition of the War Report, 2013, Hawai'i's occupation is noted under the category of international armed conflicts. Casey-Maslen states, "Other belligerent occupations that have been alleged include the occupation by the UK of the Falkland Islands/Malvinas (Argentina claims this as sovereign territory), of Tibet by China, and of the state of Hawaii by the USA."[226] Hawai'i would not be noted in this report unless there was an evidential basis supporting the existence of belligerent occupation there.

Prompted by his concerns that his agency may be the subject of war crimes allegations, the executive head of the State of Hawai'i's Office of Hawaiian Affairs, Dr. Kamana'opono Crabbe, wrote a letter to the United States Secretary of State John F. Kerry on May 5, 2014 to answer the following questions:

- First, does the Hawaiian Kingdom, as a sovereign independent State, continue to exist as a subject of international law?
- Second, if the Hawaiian Kingdom continues to exist, do the sole-executive agreements bind the United States today?
- Third, if the Hawaiian Kingdom continues to exist and the sole-executive agreements are binding on the United States, what effect would such a conclusion have on United States domestic legislation, such as the Hawai'i Statehood Act, 73 Stat. 4, and Act 195?
- Fourth, if the Hawaiian Kingdom continues to exist and the sole-executive agreements are binding on the United States, have the

[225] *See* BLACK'S LAW, at 586.
[226] *See* CASEY-MASLEN, at 28.

> members of the Native Hawaiian Roll Commission, Trustees and staff of the Office of Hawaiian Affairs incurred criminal liability under international law?[227]

Secretary of State Kerry did not responded to the query by an official of the State of Hawai'i. Crabbe commissioned the author of this paper to draft a memorandum "regarding Hawai'i as an Independent State and the Impact it has on the Office of Hawaiian Affairs," which was completed on May 27, 2014. "The purpose of this memorandum," stated Sai, "is to provide an initial analysis of Hawai'i's situation under public international law and the direct impact it has on OHA. At center is education for both the OHA Trustees and staff, as well as for the Native Hawaiian community it services. Research into questions revolving around Hawai'i's occupation have been ongoing at the University of Hawai'i at the graduate and doctoral levels and OHA should be aware of these extraordinary studies." The memorandum confirmed that war crimes are being committed and the Honolulu-Star Advertiser reported it on August 26, 2014.[228]

In a letter dated September 17, 2014, Williamson Chang, a law professor at the University of Hawai'i William S. Richardson School of Law, reported to the United States Attorney General Eric Holder that war crimes are being committed in Hawai'i by the State of Hawai'i and the Office of Hawaiian Affairs. Chang reported, "Pursuant to 18 U.S.C. §4—Misprision of felony, I am legally obligated to report to you the knowledge I have about multiple felonies that prima facie have been and continue to be committed here in the Hawaiian Islands. I have been made aware of these felonies through the memorandum by political scientist David Keanu Sai, Ph.D., who was contracted by the State of Hawai'i Office of Hawaiian Affairs, entitled *Memorandum for Ka Pouhana, CEO of the Office of Hawaiian Affairs regarding Hawai'i as an Independent State and the Impact[] it has on the Office of Hawaiian Affairs (Memo),* which is enclosed herein."[229] By letter to Chang dated October 10, 2014, the United States Attorney General responded "Your letter will be reviewed and if a response or an update is necessary it will be sent to you within 60 business days," and assigned as ID number 2909292.[230] There has been no denial of the allegations of war crimes by the United States Justice Department.

On June 19, 2015, the Swiss Federal Criminal Court's Objections Chamber rendered a judgment specifically naming former CEO of Deutsche Bank, Josef Ackermann; former

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[227] Press Release—Office of Hawaiian Affairs, *OHA's top executive makes formal request to U.S. Department of State for legal opinion on the current status of Hawai'i under international law* (May 9, 2014). OHA removed the press release from their website but it is *available at* http://hawaiiankingdom.org/blog/press-release-ohas-top-executive-makes-formal-request-to-u-s-department-of-state-for-legal-opinion-on-the-current-status-of-hawaii-under-international-law/.

[228] Rob Perez, *Memo implies nation effort leads to war crimes*, HONOLULU STAR-ADVERTISER, Aug. 24, 2014, at A-1. The memorandum can be accessed at: http://hawaiiankingdom.org/pdf/Memo_Ka_Pouhana_5_27_14.pdf.

[229] Press Release by Professor Williamson Chang (Sep. 19, 2014), *available at* http://hawaiiankingdom.org/blog/senior-law-professor-reports-war-crimes-to-u-s-attorney-general/.

[230] United States Department of Justice response to Chang's reporting of war crimes (Oct. 10, 2014) *available at* http://hawaiiankingdom.org/blog/wp-content/uploads/2014/10/DOJ-Reply-Ltr-to-Prof-Chang.jpg.

State of Hawai'i Governor, Neil Abercrombie; current Lieutenant Governor, Shan Tsutsui; former Director of Taxation, Frederik Pablo; and former Deputy Director of Taxation, Joshua Wisch, as alleged war criminals.[231] The Swiss Federal Criminal Court is currently addressing war crime complaints, filed with the Swiss Attorney General, by a Hawaiian national, who is alleging that Deutsche Bank pillaged his home as a direct result of an unfair trial in a State of Hawai'i court;[232] and by a Swiss citizen, who is alleging that the State of Hawai'i pillaged his private property through taxation.[233]

Switzerland is a civil-law state, as opposed to a common-law state like the United States and the United Kingdom. Under the Swiss criminal procedure, judges have the capacity to conduct criminal investigations as an investigative magistrate, as do the prosecutor and the police. The Objections Chamber of the Federal Criminal Court oversees investigative magistrates, prosecutors and the police in cases where a person objects to their decisions in a criminal investigation. For example, the Federal Criminal Court's April 28 judgment addressed an objection by a Hawaiian and a Swiss national. They were both objecting to the Attorney General's decision to terminate the criminal investigation where the controlling Prosecutor had decided not to pursue an indictment because he erroneously took the position that Hawai'i was annexed by a congressional joint resolution.[234] In its decision, however, the Court appears to be unconvinced that Hawai'i was annexed by a domestic law of the United States. The Court then began to state the relevant facts and allegations of the case. This read like an indictment. Oddly, instead of concluding with charges, the Court stated it was prevented from moving forward because the complainants' objection did not meet the procedural time line requirement to file within ten days.[235]

In the civil-law tradition, a Prosecutor must present written charges—an indictment, to a court for confirmation. According to O'Connor, "the indictment will describe the acts committed by the suspect, and outline the applicable law and the evidence upon which

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[231] Kale Kepekaio Gumapac, et al. v. Office of Federal Attorney General, BB 2015.36+37, new time limit (Art. 94 para. 2, StPO) (June 19, 2015), *available in German at* http://hawaiiankingdom.org/pdf/Federal_Criminal_Court_19_June_2015_Deutsche_(redacted).pdf; and *English translation at* http://hawaiiankingdom.org/pdf/Federal_Criminal_Court_19_June_2015_English_(redacted).pdf.

[232] War Crimes Report, Dec. 7, 2014, *available at* http://hawaiiankingdom.org/pdf/Swiss_AG_War_Crimes_Report.pdf. See also Gumapac's Amended War Crimes Complaint, Jan. 22, 2015, *available at* http://hawaiiankingdom.org/pdf/Gumapac_Amended_Complaint_1_22_15.pdf.

[233] Unnamed Swiss citizen's War Crime Complaint, Jan. 21, 2015, *available at* http://hawaiiankingdom.org/pdf/Swiss_Complaint_(redacted).pdf.

[234] Swiss Prosecutor's Report on War Crimes in Hawai'i, dated February 3, 2015 (English translation), *available at* http://hawaiiankingdom.org/pdf/Prosec_Rep_2_3_15_Eng_redacted.pdf.

[235] The objection was sent from Honolulu by FedEx on April 1, one day prior to the close of the ten-day period, but it did not reach the Objections Chamber until April 8. Under Swiss procedure, the Courts can only accept deliveries of private couriers, *i.e.* FedEx, on the date it was delivered and not the date sent as it would if it was sent via the Swiss postal service or a diplomatic representative in a foreign country. The Swiss Federal Criminal Court Objections Chamber, in its decision, cited A & B., Ltd. vs. Office of the Federal Attorney General, reference no. BB.2012.155-156 (October 31, 2012), as the basis for its rationale.

the accusation rests."[236] This is similar to the contents of an indictment you would find in the common-law system. In a common-law indictment, "the prosecutor must present sufficient evidence to establish the identity of the accused, and probable cause to arrest him or her. However, the 'requirement of sufficient evidence to establish [these two facts] is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding.'"[237] It is clear that the Swiss Court, in its statement, named the accused and provided probable cause. Probable cause is defined as an "apparent state of facts found to exist upon reasonable intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime."[238]

What the judgment does not reference is that on April 9, a day after the Court received the objection by FedEx, a directive from the President of the Objections Chamber was sent to the Prosecutor. The directive stated, "In the matter mentioned above, a complaint against your decision not to engage of February 15, 2015 has been received at the Federal Criminal Court. You are requested to furnish the Federal Criminal Court right away with the records established in the abovementioned matter (including documents of receipt) with an index of the records."[239] Strangely, the Court's recital of facts came from the record of the Prosecutor's investigation and not from the victims themselves, which the Court clearly noted after citing the facts of the case by stating in parenthesis (case files, box section 3+act. 1.1). In other words, the Prosecutor was prepared to pursue written charges, but erroneously decided not to pursue them because he relied on the United States' claimed that it annexed Hawai'i by legislation.

The purpose of criminal investigations is to collect facts that identify and locate the guilty parties and to provide evidence of their guilt.[240] It is important to remember that the time line filing requirement is a procedural matter and does not diminish the facts of the case. A simple remedy would be to re-file a second complaint with the Attorney General and cite the evidence that is already in the possession of the Prosecutor. Here follows the English translation from German of the Court's decision.

> "The Objections Chamber states:
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> -that on December 22, 2014 the former [diplomat], introduced a report by David Keanu Sai (henceforth "Sai") of December 7, 2014 to the Office of the Federal Attorney General, which stated that war crimes had been committed in Hawaii;
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> -that according to this report, Sai suspects the US-American authorities of committing war crimes and pillaging by way of the unlawful levying of taxes,

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[236] DR. VIVIENNE O'CONNOR, *Practitioner's Guide: Common Law and Civil Law Traditions*, INPROL 26 (March 2012), *available at* http://www2.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf.
[237] Commonwealth v. Caracciola, 409 Mass. 648, 650 (1991).
[238] *See* BLACK'S LAW, at 1201.
[239] Directive from President of Objections Chamber to Prosecutor, April 9, 2015, *available at* http://hawaiiankingdom.org/pdf/FCC_Ltr_4_9_15_redacted.pdf.
[240] CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 5 (2nd ed. 1970).

since all locally established authorities are said to be unconstitutional according to Hawaiian Kingdom law;

-that by way of a letter dated January 21, 2015, [Unnamed Swiss citizen] (henceforth "[the Swiss citizen]") and his representative Sai made a criminal complaint with the Office of the Federal Attorney General, stating that [the Swiss] was a victim of a war crime according to Art. 115 StPO, because during the years 2006-2007 and 2011-2013, he had paid taxes to US-American authorities in Hawaii without justification, and that [the Swiss citizen], in addition, is the victim of fraud, committed by the State of Hawaii, because together with his wife he wanted to acquire a real estate property, which however on the basis of the lacking legitimacy of the official authorities of Hawaii to transfer the property title, was not possible, for which reason the governor of the State of Hawaii Neil Abercrombie (henceforth "Abercrombie"), Lieutenant Shan Tsutsui (henceforth "Tsutsui"), the director of the Department of Taxation Frederik Pablo (henceforth "Pablo") and his deputy Joshua Wisch (henceforth "Wisch") are to be held criminally accountable for the pillaging of [the Swiss citizens's] private property and for fraud;

-that, in addition, by way of a letter dated January 22, 2015, Sai, in the name of Kale Kepekaio Gumapac (henceforth "Gumapac") contacted the office of the Federal Attorney General and requested that criminal proceedings against Josef Ackermann (henceforth "Ackermann"), the former CEO of Deutsche Bank National Trust Company (henceforth "Deutsche Bank") be opened and in this connection invoked rights deriving from Art. 1 of the friendship treaty between the Swiss Confederation and the then Hawaiian Kingdom of July 20, 1864, which has not been cancelled; that this complaint arose from a civil dispute between Gumapac and Deutsche Bank; that Gumapac was the owner of a property on Hawaii and a mortgagee of Deutsche Bank; that however the title of property, due to the illegal annexation of the Kingdom of Hawaii, was null and void, since the local US-American notaries were not empowered to transfer title; that Deutsche Bank did not recognize this fact and that it had foreclosed on Gumapac's house to cover the mortgage debt, instead of claiming its rights stemming from a "title insurance;" that the bank therefore pillaged Gumapac's house according to the international laws of war (case files, box section 3 and 5);

-that the office of the Federal Attorney General on February 3, 2015 decreed a decision of non-acceptance of the criminal complaints and civil suits against Ackermann, Abercrombie, Tsutsui, Pablo and Wisch on account of war crimes allegedly committed in Hawaii between 2006 and 2013 (case files, box section 3 + act. 1.1);

-that Gumapac and [the Swiss citizen] introduced, in opposition to this, an objection on March 31, 2015 to the Objections Chamber of the Federal Criminal Court and accordingly requested the cancellation of the decision of non-acceptance, and the carrying out of the criminal proceedings against the defendants indicated by them (act. 1)."[241]

[241] *See* Gumapac, et al. v. Office of Federal Attorney General, English translation.

More importantly, the recital of these facts and the naming of State of Hawai'i officials by the Swiss Court as alleged war criminals should be alarming to the State of Hawai'i. If Hawai'i were a part of the United States there would be no grounds for these allegation of war crimes; and the naming of State of Hawai'i officials, being government officials of the United States, would be a direct act of intervention in the internal affairs of the United States on the part of Switzerland for receiving and acting upon these complaints, and consequently be a violation of the 1850 U.S.-Swiss treaty[242] and international law. Additionally, the naming of the CEO of Deutsche Bank should also be alarming to other lending institutions that have committed war crimes of pillaging through their unlawful foreclosures in Hawai'i.

Furthermore, the Swiss Court also acknowledged that the 1864 treaty between the Hawaiian Kingdom and Switzerland was not cancelled.[243] This is a significant acknowledgment because a treaty is the highest source of international law, and an agreement between two or more sovereign states. This is another indication that the Swiss Court does not recognize Hawai'i as part of the United States, because if Hawai'i were legally annexed under international law, the Swiss treaty would have been void. All "treaties concluded between two States become void through the extinction of one of the contracting parties."[244] According to Hyde, "When a state relinquishes its life as such through incorporation into, or absorption by, another state, the treaties of the former are believed to be automatically terminated."[245] Thus, the Swiss acknowledging that the Hawaiian-Swiss treaty was not canceled is tantamount to acknowledging the continuity of the Hawaiian Kingdom as a state and treaty partner.

In addition to the Swiss proceedings, a war crime complaint has also been filed with the Canadian authorities alleging destruction of property on Mauna Kea by the construction of telescopes.[246] Prior to the Swiss proceedings, complaints against State of Hawai'i judges and mortgage lenders were also filed with the Prosecutor of the International Criminal Court in The Hague, Netherlands.[247] Countries that have similar war crime statutes as Switzerland are also state parties to the Rome Statute of the International Criminal Court, which provides that primary responsibilities for the prosecution for war crimes are with the member states, with the International Criminal Court having

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[242] 11 U.S. Stat. 587; Treaty Series 353.
[243] It should be noted that the term "ungekundigten," which means un-canceled in English, is written in a way that makes the un-cancelled nature of the treaty appear as a statement of fact, whereas, the rest of the decision is paraphrased in a way that is clearly to be understood as allegations of war crimes committed against Mr. Gumapac.
[244] *See* OPPENHEIM, at 851.
[245] Charles Cheney Hyde, *The Termination of the Treaties of a State in Consequence of its Absorption by Another—The Position of the United States*, 26 AM. J. INT'L L. 133 (1932).
[246] KITV News, *TMT protesters in Canada file formal war crime*, available at http://www.kitv.com/news/tmt-protesters-in-canada-file-formal-war-crimes/33066402.
[247] Hawaiian Kingdom Blog, International Criminal Court to Consider Alleged War Crimes Committed by State of Hawai'i Officials, Judges, Banks and Attorneys, available at http://hawaiiankingdom.org/blog/international-criminal-court-to-consider-alleged-war-crimes-committed-by-state-of-hawaii-officials-judges-banks-and-attorneys/.

complimentary jurisdiction.[248] The International Criminal Court will prosecute when states are unwilling or unable to prosecute themselves.

Compliance with the laws of occupation, and with the obligation to administer Hawaiian Kingdom law, will remedy the blatant violations of international law, and properly adjudicate the large-scale commission of war crimes that appear to have been committed as part of a systematic plan or policy, whether by chance or design. As the State of Hawai'i is the product of an unlawful congressional act, it cannot claim any powers or rights as a government—*ex injuria jus non oritur* (illegal acts cannot create law). The State of Hawai'i is an armed force whose actions are limited by the laws and customs of war on land. Since the State of Hawai'i has acted as an unlawful government it is responsible for the dire situation Hawai'i is in now. The remedy for the State of Hawai'i is to be a legitimate government, and the only legitimate government during occupations, is transform itself into a Military government.

REMEDIAL PRESCRIPTION

In decision theory, a negative-sum game is where everyone loses. Any decision from a loss can only have the effect of a loss—a lose-lose situation. The State of Hawai'i is presently operating from a position of no lawful authority, and everything that it has done or that it will do, is unlawful. There is no edible fruit from a poisonous tree. The rapidly growing knowledge and awareness of the prolonged occupation of Hawai'i has caused the State of Hawai'i to swiftly descend and crash. The State of Hawai'i has found itself in a mammoth negative-sum game. In order to stave off the inevitable, the *acting* Government and the State of Hawai'i must cooperate so that positive-sums are realized. The laws and customs of war during occupation provide the legal basis for the State of Hawai'i to realize these positive-sums. The *acting* Government has been adhering to these laws and customs since its inception in 1996.

Critical to the administration of Hawaiian law is the establishment of a Military government, which is "defined as the supreme authority exercised by an armed occupying force over the lands, properties, and inhabitants of an enemy, allied, or domestic territory."[249] The establishment of a Military government is not limited to the U.S. military, but to any armed force of the occupying State that is in effective control of occupied territory. U.S. Army Field Manual FM 27-5 provides that an "armed force in territory other than that of [the occupied state] has the duty of establishing CA/MG [civil affairs/military government] when the government of such territory is absent or unable to function properly."[250] What distinguishes the U.S. military stationed in the Hawaiian Islands from the State of Hawai'i, in light of the laws and customs of war during

[248] Rome Statute, International Criminal Court, preamble, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."
[249] United States Army and Navy Manual of Civil Affairs Military Government, Army Field Manual FM 27-5, Navy Manual OPNAV P22-1115, 2-3 (October 1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/FM-27-5-1947.pdf. Appendix VI.
[250] *Id*., at 4.

occupation, is that the State of Hawai'i, as an armed force, is in effective control of the majority of Hawaiian territory. There are 118 U.S. military sites occupying 230,929 acres of the Hawaiian Islands, which is 20% of the total acreage of Hawaiian territory.[251]

As an armed force, whose allegiance is to the occupier, the State of Hawai'i has no choice but to establish itself as a Military government. This is allowable under the laws and customs of war during occupation. To do so, would prevent the collapse of the State of Hawai'i that would no doubt lead to an economic catastrophe with devastating effects on the U.S. market and the global economy. A military government is empowered, under the laws and customs of war during occupation, to provisionally serve as the administrator of the "laws in force in the country," which includes the "decree" of the *acting* Government in accordance with Article 43. Without the decree of the *acting* Government, all commercial entities created by the State of Hawai'i, *e.g.* corporations and partnerships, and all conveyances of real estate, would simply evaporate. Therefore, it is crucial for the Military government to work in tandem with the *acting* Government to ensure the lawfulness of its actions, in the present and in the future, to maintain Hawai'i's economy.

The proclamation for the establishment of a Military government would be done similar to the declaration of martial law for the Hawaiian Islands from December 7, 1941 to April 4, 1943. Governor Joseph Poindexter and Lieutenant General Walter Short relied on section 67 of the 1900 Territorial Act (48 U.S.C. §532) as the basis to declare martial law under a Military government headed by General Short as the Military governor, being appointed by Poindexter.[252] This Proclamation, however, required the prior approval of President Franklin D. Roosevelt, since the Governor of the Territory of Hawai'i was a Presidential appointment. When the armed force was transformed from Territory to the State of Hawai'i in 1959, section 67 was superseded by Article V, section 5 of the State of Hawai'i Constitution, which gives the Governor full and complete authorization to declare martial law without the prior approval of the President. Section 5 provides, "The governor shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion."

The fundamental difference between Martial law and Military government is that Martial law is instituted within domestic territory when the military supersedes the civil authority on the grounds of self-preservation during a foreign invasion, while a Military Government is instituted in foreign territory when the occupied state's government ceases

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[251] *See* U.S. Department of Defense's Base Structure Report (2012), *available at* http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf.

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

to operate as a result of an armed conflict. Military government "derives its authority from the customs of war, and not the municipal law."[253] Its functions, however, are the same except for the venue.

> "Military government is exercised when an armed force has occupied such territory, whether by force or agreement, and has substituted its authority for that of the sovereign or previous government. The right of control passes to the occupying force limited only by the rules of international law and established customs of war."[254]

The State of Hawai'i Governor has the authority to declare the establishment of a Military government, but this authority will be undermined if the Governor is an alleged war criminal. On August 12, 2015, Mr. Gumapac and the Swiss expatriate re-filed their war crime complaints with Swiss authorities, and they explicitly named current Hawai'i Governor David Ige, the new Director of Taxation Maria E. Zielinski, and the Deputy Tax Director Joseph K. Kim. On July 24, 2015, a New Zealand citizen filed another war crime complaint with the New Zealand Ministry of Justice in Wellington. This complaint alleges the victim was pillaged by the State of Hawai'i when she was compelled to pay taxes as a tourist during her visit of the islands. New Zealand has a similar war crime statute as Switzerland.

In order to transform the State of Hawai'i into a Military government, the Governor will need to decree, by Proclamation, the establishment of a Military government in accordance with section 28 of FM 27-5. Central to this proclamation is the administration of Hawaiian Kingdom law in accordance with Article 43 to include the October 10, 2014 decree of the *acting* Government. Additionally, this proclamation will decree that all State of Hawai'i judicial and executive officers and employees remain in operation with the exception of the State Legislature and County Councils. This reasoning is because "since supreme legislative power is vested in the military governor, existing legislative bodies will usually be suspended."[255] The Military government will have to conform to the laws and customs of war during occupation, international humanitarian law, and FM 27-5—*United States Army and Navy Manual of Civil Affairs Military Government*.

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

[253] WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 53 (3rd ed. 1914).
[254] *See* FM 27-5, at 3.
[255] *See* FM 27-5, at 11.

CONCLUSION

The root cause for putting the State of Hawai‘i into this dire situation is the deliberate and intentional failure of the United States to establish a Military government to administer the laws of the Hawaiian Kingdom in accordance with Article 43. The United States' creation and maintenance of armed forces since 1893, which included the Provisional Government (1893-1894), Republic of Hawai‘i (1894-1900), Territory of Hawai‘i (1900-1959), and the current State of Hawai‘i, has worsened the situation today and placed Hawai‘i, and its residents, in a position of catastrophic proportions. Thus, this is a race against time.

In this article, the author has laid out the overarching themes that warrant and compel the State of Hawai‘i to transform itself into a Military government, not only for its own survival but also for the survival of Hawai‘i. The first armed force, created by the United States in 1893, was comprised of insurgents, who committed the crime of high treason, due to self-gain and greed. The current armed force, the State of Hawai‘i, however, is not comprised of insurgents, but rather people of Hawai‘i who were led to believe, through *Americanization,* that they are an incorporated territory of the United States and that the State of Hawai‘i is a *bona fide* government.

We are at a stage now where no one can deny the true history of this country. People are becoming aware of their own rights and their right to hold people accountable for the violation of these rights. These human rights cannot be dismissed without incurring criminal liability. For all the aforementioned reasons, the Governor of the State of Hawai‘i has no choice but to establish a Military government and to begin compliance of the laws and customs of war during occupation. It is his duty and his moral obligation to the people of Hawai‘i.