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28 July 2025

Ms. Mariana Durney
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Secretariat of the International Seabed Authority
14-20 Port Royal Street
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Sent via electronic mail

Re: Legal status of the Hawaiian Kingdom as a State in continuity since the nineteenth century under customary international law

Dear Ms. Durney:

On 10 July 2025, Madam Secretary-General Her Excellency Ms. Leticia Carvalho received our Special Envoy to the International Seabed Authority, Mr. Solomon Pili Kahoʻohalahala. The purpose of this letter is to assist you in determining, under customary international law, the legal status of the Hawaiian Kingdom as a State in continuity since the nineteenth century, so that the Hawaiian Kingdom can be received as an Observer State. Therefore, I am enclosing the following:

- Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317 (2021).
- Federico Lenzerini, "Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration," 3 (5 December 2021).
- David Keanu Sai, "Backstory—*Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration (1999-2001)," 4 *Hawaiian Journal of Law and Politics* 133 (2022).

- David Keanu Sai, "Hawai'i's Sovereignty and Survival in the Age of Empire," in H.E. Chehabi and David Motadel, eds., *Unconquered States: Non-European Powers in the Imperial Age* (Oxford: Oxford University Press, 2024).

In 1996, remedial steps were taken, under the doctrine of necessity, to reinstate the Hawaiian Kingdom government as it stood under its legal order prior to the U.S. invasion and unlawful overthrow of the Hawaiian government on January 17, 1893.[1] 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 officers *de facto*, was established as the successor to Queen Lili'uokalani, Hawai'i's last Executive Monarch. The Queen died on 11 November 1917 leaving the office vacant without a successor in accordance with Hawaiian constitutional law.

The Hawaiian Council of Regency was established in a similar fashion to the Belgian Council of Regency which was formed after King Leopold was captured by the Germans during the Second World War. As the Belgian Council of Regency was established, under Article 82 of its 1831 Constitution, as amended, *in exile*, so to was the Hawaiian Council of Regency formed under Article 33 of its 1864 Constitution, as amended, not *in exile* but *in situ*. As Professor Oppenheim explains the Belgian situation:

> As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 18[31], as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.[2]

In the *Larsen* case, I served as Lead Agent for the Council of Regency that represented the Hawaiian Kingdom. As Lead Agent, I was in communication with the Permanent Court's Principal Legal Counsel, Ms. Bette Shifman, who had to determine whether the Hawaiian Kingdom exists as a State in continuity since the nineteenth century. This determination was for the purposes of the Permanent Court's institutional jurisdiction in accordance with

[1] David Keanu Sai, "Royal Commission of Inquiry," in David Keanu Sai (ed.) *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[2] F.E. Oppenheimer, "Governments and Authorities in Exile," 36 *American Journal of International Law* 568, 569 (1942).

Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. Article 47 provides, "The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal." State continuity of the Hawaiian Kingdom is determined by the rules of customary international law.

Prior to the Permanent Court's establishment of the arbitral tribunal on 9 June 2000, the Secretariat determined that the Hawaiian Kingdom met the standing of a State and was recognized as a non-Contracting Power. This fact is noted in Annex 2—*Cases Conducted under the Auspices of the PCA or with the Cooperation of the International Bureau* in the Permanent Court's Annual Reports from 2000 to 2011. The Permanent Court also recognized the Council of Regency as the Hawaiian Kingdom's government. I am enclosing a copy of Annex 2 from the 2011 Annual Report that identifies *Larsen v. Hawaiian Kingdom* as the thirty-third case that came under the auspices of the Permanent Court. Since 2012, the Annual Reports no longer included Annex 2 because the Permanent Court's website provided the list of cases, which includes *Larsen v. Hawaiian Kingdom*, Case no. 1999-01.[3]

Under civilian law, the juridical fact of the Hawaiian Kingdom's existence as a State produced the legal effect for the Secretariat to perform a juridical act of accepting the dispute under the auspices of the Permanent Court by virtue of Article 47. According to Professor Lenzerini, this juridical act "may be compared—mutatis mutandis—to a juridical act of a domestic judge recognizing a juridical fact (e.g. filiation) which is productive of certain legal effects arising from it according to law."[4] Since State members of the Permanent Court's Administrative Council furnishes all Contracting States with an Annual Report, this does represent "State practice [that] covers an act or statement by...State[s] from which views can be inferred about international law," and it "can also include omissions and silence on the part of States."[5]

The fact that the United States, to include all Contracting States, did not object to the Secretariat's juridical act of acknowledging the Hawaiian Kingdom's existence as a non-Contracting State, reflects the practice of States—*opinio juris*. Furthermore, the Secretariat and the Administrative Council are treaty-based components of an intergovernmental organization comprised of representatives of States, and "their practice is best regarded as

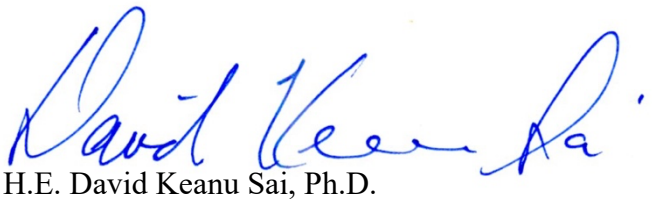
[3] Permanent Court of Arbitration website, Case Repository, PCA Case no. 1999-01, *Larsen v. Hawaiian Kingdom* (online at https://pca-cpa.org/en/cases/35/).
[4] Federico Lenzerini, "Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration," 3 (Dec. 5, 2021).
[5] Michael Akehurst, "Custom as a Source of International Law," 47(1) *British Yearbook of International Law*, 10 (1975).

the practice of States."[6] According to Professor Lenzerini, "it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau."[7]

Of the 169 Member States of the International Seabed Authority, 110 of these States are also Member States of the Permanent Court of Arbitration, to wit: Albania, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia (Purinational State of), Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, Estonia, Eswatini, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iraq, Ireland, Italy, Japan, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Latvia, Lebanon, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, North, Macedonia, Norway, Pakistan, Panama, Paraguay, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, State of Palestine, Sudan, Suriname, Sweden, Switzerland, Thailand, Timor-Leste, Togo, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Vanuatu, Viet Nam, Zambia, and Zimbabwe. And there are 15 Observer States that are also Member States of the Permanent Court of Arbitration, to wit: Cambodia, Colombia, El Salvador, Eritrea, Ethiopia, Iran (Islamic Republic of), Israel, Kyrgyzstan, Libya, Liechtenstein, Peru, Turkey, United Arab Emirates, United States of America, and Venezuela. Hence, these States already recognized the Hawaiian Kingdom as a State by virtue of their membership, as Contracting States, of the Permanent Court of Arbitration.

If you have any questions on this matter, please do not hesitate to contact me.

With sentiments of the highest regard,



H.E. David Keanu Sai, Ph.D.
Minister of Foreign Affairs *ad interim*

enclosures

[6] *Id*., 11.
[7] Lenzerini, 4.

Enclosure “1”

LEGAL OPINION ON THE AUTHORITY OF THE COUNCIL OF REGENCY OF THE HAWAIIAN KINGDOM[†]

Professor Federico Lenzerini[*]

Editor's Note: In light of the severity of the mandate of the Royal Commission, established by the Hawaiian Council of Regency on 17 April

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2019, to investigate war crimes and human rights violations committed within the territorial jurisdiction of the Hawaiian Kingdom, the "authority" of the Council of Regency to appoint the Royal Commission is fundamental and, therefore, necessary to address within the rules of international humanitarian law, which is a component of international law. As explained by the United States Supreme Court in 1900 regarding international law and the works of jurists and commentators:

> *International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*[1]

According to the Statute of the International Court of Justice, "the teachings of the most highly qualified publicists of the various nations, [are] subsidiary means for the determination of rules of law."[2] *Furthermore, Restatement Third—Foreign Relations Law of the United States, recognizes that "writings of scholars"*[3] *are a source of international law in determining, in this case, whether the Council of Regency has been established in conformity with the rules of international humanitarian law. The writing of scholars, "whether a rule has become international law," are not prescriptive but rather descriptive "of what the law really is."*

I. INTRODUCTION

As requested in the Letter addressed to me, on 11 May 2020, by Dr. David Keanu Sai, Ph.D., Head of the Hawaiian Royal Commission of Inquiry, I provide below a legal opinion in which I answer the three questions included in the above letter, for purposes of public awareness and clarification of the Regency's authority.

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[1] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[2] Article 38(1), Statute of the International Court of Justice.

[3] §103(2)(c), *Restatement of the Law (Third)—The Foreign Relations Law of the United States* (1987).

II. DOES THE REGENCY HAVE THE AUTHORITY TO REPRESENT THE HAWAIIAN KINGDOM AS A STATE THAT HAS BEEN UNDER A BELLIGERENT OCCUPATION BY THE UNITED STATES OF AMERICA SINCE 17 JANUARY 1893?

1. In order to ascertain whether the Regency has the authority to represent the Hawaiian Kingdom *as a State*, it is preliminarily necessary to ascertain whether the Hawaiian Kingdom can actually be considered a State under international law. To this purpose, two issues need to be investigated, i.e.: a) whether the Hawaiian Kingdom was a State at the time when it was militarily occupied by the United States of America, on 17 January 1893; b) in the event that the solution to the first issue would be positive, whether the continuous occupation of Hawai'i by the United States, from 1893 to present times, has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law.

2. With respect to the first of the abovementioned issues, as acknowledged by the Arbitral Tribunal of the Permanent Court of Arbitration (PCA) in the *Larsen* case, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[4] At the time of the American occupation, the Hawaiian Kingdom fully satisfied the four elements of statehood prescribed by customary international law, which were later codified by the *Montevideo Convention on the Rights and Duties of States* in 1933[5]: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. This is confirmed by the fact that "the Hawaiian Kingdom became a full member of the Universal Postal Union on 1 January 1882, maintained more than a hundred legations and consulates throughout the world, and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States".[6]

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[4] See *Larsen v. Hawaiian Kingdom*, 119 *International Law Reports*, 2001, 566, at 581.

[5] See *Montevideo Convention on the Rights and Duties of States*, 1933, 165 *LNTS* 19, Article 1. This article codified the so-called *declarative* theory of statehood, already accepted by customary international law; see Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", 37 *Columbia Journal of Transnational Law*, 1998-1999, 403; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity*", The Hague/Boston/London, 2000, at 77; David J. Harris (ed.), *Cases and Materials on International Law*, 6th Ed., London, 2004, at 99.

[6] See David Keanu Sai, "Hawaiian Constitutional Governance", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 58, at 64 (footnotes omitted).

It is therefore unquestionable that in the 1890s the Hawaiian Kingdom was an independent State and, consequently, a subject of international law. This presupposed that its territorial sovereignty and internal affairs could not be legitimately violated by other States.

3. Once established that the Hawaiian Kingdom was actually a State, under international law, at the time when it was militarily occupied by the United States of America, on 17 January 1893, it is now necessary to determine whether the continuous occupation of Hawai'i by the United States from 1893 to present times has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law. This issue is undoubtedly controversial, and may be considered according to different perspectives. As noted by the Arbitral Tribunal established by the PCA in the *Larsen* case, in principle the question in point might be addressed by means of a careful assessment carried out through "having regard *inter alia* to the lapse of time since the annexation [by the United States], subsequent political, constitutional and international developments, and relevant changes in international law since the 1890s".[7]

4. However—beyond all speculative argumentations and the consequential conjectures that might be developed depending on the different perspectives under which the issue in point could be addressed—in reality the argument which appears to overcome all the others is that a long-lasting and well-established rule of international law exists establishing that military occupation, irrespective of the length of its duration, *cannot* produce the effect of extinguishing the sovereignty and statehood of the occupied State. In fact, the validity of such a rule has *not* been affected by whatever changes occurred in international law since the 1890s. Consistently, as emphasized by the Swiss arbitrator Eugène Borel in 1925, in the famous *Affaire de la Dette publique ottomane*,

> "[q]uels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté [...] L'occupation, par l'un des belligérants, de [...] territoire de l'autre belligérant est un pur fait. C'est un état de choses essentiellement provisoire, qui ne substitue pas légalement l'autorité du belligérant envahisseur à celle du belligérant envahi".[8]

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[7] See *Larsen v. Hawaiian Kingdom*, *supra* n. 1, at 9.2.

[8] See *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, *Reports of International Arbitral Awards*, Volume I, 529, also available at <https://legal.un.org/riaa/cases/vol_I/529-614.pdf> (accessed on 16 May 2020), at 555 ("whatever are the effects of the occupation of a territory by the enemy before the re-establishment of peace, it is certain that such an occupation alone cannot legally determine the transfer of sovereignty [...] The occupation, by one of the belligerents, of [...] the territory of the other belligerent is

This position was confirmed by, among others, the US Military Tribunal at Nuremberg in 1948, holding that "[i]n belligerent occupation the occupying power does not hold enemy territory by virtue of any legal right. On the contrary, it merely exercises a precarious and temporary actual control".[9] Indeed, as noted, much more recently, by Yoram Dinstein, "occupation does not affect sovereignty. The displaced sovereign loses possession of the occupied territory de facto but it retains title *de jure* [i.e. "as a matter of law"]".[10] In this regard, as previously specified, this conclusion can in no way be influenced by the length of the occupation in time, as "[p]rolongation of the occupation does not affect its innately temporary nature".[11] It follows that "'precarious' as it is, the sovereignty of the displaced sovereign over the occupied territory is not terminated" by belligerent occupation.[12] Under international law, "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur",[13] which means, in the words of the famous jurist Oppenheim, that "[t]he only form in which a cession [of sovereignty] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war".[14] Such a conclusion corresponds to "a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts".[15]

5. The United States has taken possession of the territory of Hawai'i solely through de facto occupation and unilateral annexation, without concluding any treaty with the Hawaiian Kingdom. Furthermore, it

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nothing but a pure fact. It is a state of things essentially provisional, which does not legally substitute the authority of the invading belligerent to that of the invaded belligerent").

[9] See *USA v. Otto Ohlendorf et al. (Einsatzgruppen Trial)*, 10 April 1948, (1948) *LRTWC* 411, at 492.

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

[11] Ibid.

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

[13] See *Affaire de la Dette publique ottomane*, *supra* n. 5, at 555 ("the transfer of sovereignty can only be considered legally effected by the entry into force of a treaty which establishes it and from the date of such entry into force").

[14] See Lassa FL Oppenheim, *Oppenheim's International Law*, 7th Ed., vol. 1, 1948, at 500.

[15] See Jean S. Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, Geneva, 1958, at 275.

appears that such an annexation has taken place in contravention of the rule of *estoppel*. At it is known, in international law "the doctrine of estoppel protects legitimate expectations of States induced by the conduct of another State".[16] On 18 December 1893 President Cleveland concluded with Queen Lili'uokalani a treaty, by executive agreement, which obligated the President to restore the Queen as the Executive Monarch, and the Queen thereafter to grant clemency to the insurgents.[17] Such a treaty, which was never carried into effect by the United States, would have precluded the latter from claiming to have acquired Hawaiian territory, because it had evidently induced in the Hawaiian Kingdom the legitimate expectation that the sovereignty of the Queen would have been reinstated, an expectation which was unduly frustrated through the annexation. It follows from the foregoing that, according to a plain and correct interpretation of the relevant legal rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and a subject of international law, despite the long and effective exercise of the attributes of government by the United States over Hawaiian territory.[18] In fact, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[19] since "illegal occupation cannot of itself terminate statehood".[20] The possession of the attribute of statehood by the Hawaiian Kingdom was substantially confirmed by the PCA, which, before establishing the Arbitral Tribunal for the *Larsen* case, had to get assured that one of the parties of the arbitration was a State, as a necessary precondition for its jurisdiction to exist. In that case, the Hawaiian Kingdom was actually qualified as a "State", while the Claimant—Lance Paul Larsen—as a "Private entity."[21]

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[16] See Thomas Cottier, Jörg Paul Müller, "Estoppel", *Max Planck Encyclopedias of International Law*, April 2007, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1401> (accessed on 20 May 2020).

[17] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 1269, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).

[18] In this respect, it is to be emphasized that "a sovereign State would continue to exist despite its government being overthrown by military force"; see David Keanu Sai, "The Royal Commission of Inquiry", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 12, at 14.

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

[20] See Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford, 2008, at 78.

[21] See <https://pcacases.com/web/view/35> (accessed on 16 May 2020).

6. The conclusion according to which the Hawaiian Kingdom cannot be considered as having been extinguished—as a State—as a result of the American occupation also allows to confirm, *de plano*, that the Hawaiian Kingdom, as an independent State, has been under uninterrupted belligerent occupation by the United States of America, from 17 January 1893 up to the moment of this writing. This conclusion cannot be validly contested, even by virtue of the hypothetical consideration according to which, since the American occupation of Hawai'i has not substantially involved the use of military force, and has not encountered military resistance by the Hawaiian Kingdom,[22] it consequently could not be considered as "belligerent". In fact, a territory is considered occupied "when it is placed under the authority of the hostile army [...] The law on occupation applies to all cases of partial or total occupation, even if such occupation does not encounter armed resistance. The essential ingredient for applicability of the law of occupation is therefore the actual control exercised by the occupying forces".[23] This is consistent with the rule expressed in Article 42 of the Regulations annexed to the *Hague Convention (IV) respecting the Laws and Customs of War on Land* of 1907—affirming that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" — as well as with Article 2 common to the four Geneva Conventions of 1949, establishing that such Conventions 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*" (emphasis added).

7. Once having ascertained that, under international law, the Hawaiian Kingdom continues to exist as an independent State, it is now time to assess the legitimacy and powers of the Regency. According to the *Lexico Oxford Dictionary*, a "regency" is "[t]he office of or period of government by a regent".[24] In a more detailed manner, the *Black's Law Dictionary*, which is the most trusted and widely used legal dictionary in the United States, defines the term in point as "[t]he man or body of men intrusted with the vicarious government of a kingdom during the

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[22] It is to be noted, in this respect, that no armed resistance was opposed to the occupation despite the fact that, as acknowledged by US President Cleveland, the Queen "had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal"; see United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 453, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).

[23] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", Geneva, June 2002, available at <https://www.icrc.org/en/doc/assets/files/other/law9_final.pdf> (accessed on 17 May 2020), at 3.

[24] See <https://www.lexico.com/en/definition/regency> (accessed on 17 May 2020).

minority, absence, insanity, or other disability of the king".[25] Therefore, it appears that, in consideration of the current situation of the Hawaiian Kingdom, a regency is the right body entitled to provisionally exercise the powers of the Hawaiian Executive Monarch in the absence of the latter, an absence which forcibly continues at present due to the persistent situation of military occupation to which the Hawaiian territory is subjected.

8. In legal terms, the legitimacy of the Hawaiian Council of Regency is grounded on Articles 32 and 33 of the *Hawaiian Kingdom Constitution* of 1864. In particular, Article 32 states that "[w]henever, upon the decease of the Reigning Sovereign, the Heir shall be less than eighteen years of age, the Royal Power shall be exercised by a Regent Council of Regency; as hereinafter provided". As far as Article 33 is concerned, it affirms that "[i]t shall be lawful for the King at any time when he may be about to absent himself from the Kingdom, to appoint a Regent or Council of Regency, who shall administer the Government in His name; and likewise the King may, by His last Will and Testament, appoint a Regent or Council of Regency to administer the Government during the minority of any Heir to the Throne; and should a Sovereign decease, leaving a Minor Heir, and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent of Council of Regency, who shall administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King, until he shall have attained the age of eighteen years, which age is declared to be the Legal Majority of such Sovereign".

   The Council of Regency was established by proclamation on February 28, 1997, by virtue of the offices made vacant in the Cabinet Council, on the basis of the doctrine of necessity, the application of which was justified by the absence of a Monarch. Therefore, the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom. The Council of Regency, composed by *de facto* officers, is actually serving as the provisional government of the Hawaiian Kingdom, and, should the military occupation come to an end, it shall immediately convene the Legislative Assembly, which "shall proceed to choose by ballot, a Regent of Council of Regency, who shall administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King" until it shall not be possible to nominate a Monarch, pursuant to Article 33 of the Hawaiian Kingdom Constitution of 1864.

[25] See <https://thelawdictionary.org/regency/> (accessed on 17 May 2020).

9. In light of the foregoing—particularly in consideration of the fact that, under international law, the Hawaiian Kingdom continues to exist as an independent State, although subjected to a foreign occupation, and that the Council of Regency has been established consistently with the constitutional principles of the Hawaiian Kingdom and, consequently, possesses the legitimacy of temporarily exercising the functions of the Monarch of the Kingdom—it is possible to conclude that the Regency actually has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.

III. ASSUMING THE REGENCY DOES HAVE THE AUTHORITY, WHAT EFFECT WOULD ITS PROCLAMATIONS HAVE ON THE CIVILIAN POPULATION OF THE HAWAIIAN ISLANDS UNDER INTERNATIONAL HUMANITARIAN LAW, TO INCLUDE ITS PROCLAMATION RECOGNIZING THE STATE OF HAWAI'I AND ITS COUNTIES AS THE ADMINISTRATION OF THE OCCUPYING STATE ON 3 JUNE 2019?

10. As previously ascertained, the Council of Regency actually possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom and, consequently, has the authority to represent the Hawaiian Kingdom as a State pending the American occupation and, in any case, up to the moment when it shall be possible to convene the Legislative Assembly pursuant to Article 33 of the Hawaiian Kingdom Constitution of 1864. This means that the Council of Regency is exactly in the same position of a government of a State under military occupation, and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law.

11. In principle, however, such rights and powers are quite limited, by reason of the fact that the governmental authority of a government of a State under military occupation has been replaced by that of the occupying power, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant".[26] At the same time, the ousted government retains the function and the duty of, to the extent possible, preserving order, protecting the rights and prerogatives of local people and continuing to promote the relations between its people and foreign countries. In the *Larsen* case, the claimant even asserted that the Council of Regency had "an obligation and a responsibility under international law, to take steps to protect Claimant's nationality as a Hawaiian subject";[27] the Arbitral Tribunal

[26] See Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

[27] See *Larsen v. Hawaiian Kingdom*, *supra* n. 1, at 12.8.

established by the PCA, however, did not provide a response regarding this claim. In any event, leaving aside the latter specific aspect, in light of its position the Council of Regency may to a certain extent interact with the exercise of the authority by the occupying power. This is consistent with the fact that the occupant is under an international obligation to "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".[28] Indeed, as noted by the eminent jurist Robert Y. Jennings in an influential article published in 1946,[29] one of the main purposes of the law of belligerent occupation is to protect the sovereign rights of the legitimate government of the occupied territory, and the obligations of the occupying power in this regard continue to exist "even when, in disregard of the rules of international law, it claims [...] to have annexed all or part of an occupied territory".[30] It follows that, the ousted government being the entity which represents the "legitimate government" of the occupied territory, it may "attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority, or both. One way to accomplish such goals is to legislate for the occupied population".[31] In fact, "occupation law does not require an exclusive exercise of authority by the Occupying Power. It allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory".[32] While in several cases occupants have maintained the inapplicability to the occupied territory of new legislation enacted by the occupied government, for the reason that it "could undermine their authority [...] the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local law, most notably in matters of personal status".[33] The Swiss Federal Tribunal has even held that "[e]nactments by the [exiled government] are constitutionally laws of the [country] and applied *ab*

[28] See Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

[29] See "Government in Commission", 23 *British Year Book of International Law*, 1946, 112.

[30] See Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, *supra* n. 12, at 276.

[31] See Eyal Benvenisti, *The International Law of Occupation*, 2nd Ed., Oxford, 2012, at 104.

[32] See Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 2014, 182, at 190.

[33] See Benvenisti, *The International Law of Occupation*, *supra* n. 28, at 104-105.

initio to the territory occupied [...] even though they could not be effectively implemented until the liberation".[34] Although this position was taken with specific regard to exiled governments, and the Council of Regency was not established *in exile* but *in situ*, the conclusion, to the extent that it is considered valid, would not substantially change as regards the Council of Regency itself.

12. It follows from the foregoing that, under international humanitarian law, the proclamations of the Council of Regency are not divested of effects as regards the civilian population of the Hawaiian Islands. In fact, considering these proclamations as included in the concept of "legislation" referred to in the previous paragraph,[35] they might even, if the concrete circumstances of the case so allow, apply retroactively at the end of the occupation, irrespective of whether or not they must be respected by the occupying power during the occupation, on the condition that the legislative acts in point do not "disregard the rights and expectations of the occupied population".[36] It is therefore necessary that the occupied government refrains "from using the national law as a vehicle to undermine public order and civil life in the occupied area".[37] In other words, in exercising the legislative function during the occupation, the ousted government is subjected to the condition of not undermining the rights and interests of the civilian population. However, once the latter requirement is actually respected, the proclamations of the ousted government—including, in the case of Hawai'i, those of the Council of Regency—may be considered applicable to local people, unless such applicability is explicitly refuted by the occupying authority, in its position of an entity bearing "the ultimate and overall responsibility for the occupied territory".[38] In this regard, however, it is reasonable to assume that the occupying power should not deny the applicability of the above proclamations when they do not undermine, or significantly interfere with the exercise of, its authority. This would be consistent with the obligation of the occupying power "to maintain the status quo ante (i.e. as it was

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[34] See *Ammon v. Royal Dutch Co.*, 21 *International Law Reports*, 1954, 25, at 27.

[35] This is consistent with the assumption that the expression "laws in force in the country", as used by Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 (see *supra*, text corresponding to n. 25), "refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents [...] as well as administrative regulations and executive orders"; see Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 16 *European Journal of International Law*, 2005, 661, at 668-69.

[36] See Benvenisti, *The International Law of Occupation*, *supra* n. 28, at 105.

[37] Ibid., at 106.

[38] See *supra*, text corresponding to n. 29.

before) in the occupied territory as far as is practically possible",[39] considering that local authorities are better placed to know what are the actual needs of the local population and of the occupied territory, in view of guaranteeing that the status quo ante is effectively maintained.

13. As regards, specifically, the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019,[40] it reads as follows:

> "Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai'i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:
>
> Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize the State of Hawai'i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;
> And, We do hereby further proclaim that the State of Hawai'i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law".

As it is evident from a plain reading of its text, this Proclamation pursues the clear purpose of ensuring the protection of the Hawaiian territory and the people residing therein against the prejudicial effects which may arise from the occupation to which such a territory is actually subjected. Therefore, it represents a legislative act aimed at furthering the interests of the civilian population through ensuring the correct administration of their rights and of the land. As a consequence, it has the nature of an act that is equivalent, in its rationale and purpose (although not in its precise subject), to a piece of legislation concerning matters of personal status of the local

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[39] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", *supra* n. 20, at 9.

[40] Available at <https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf> (accessed on 18 May 2020).

population, requiring the occupant to give effect to it.[41] It is true that the Proclamation of 3 June 2019 takes a precise position on the status of the occupying power, the State of Hawai'i and its Counties being a direct emanation of the United States of America. However, in doing so, the said Proclamation simply reiterates an aspect that is self-evident, since the fact that the State of Hawai'i and its Counties belong to the political organization of the occupying power, and that they are de facto administering the Hawaiian territory, is objectively irrefutable. It follows that the Proclamation in discussion simply restates rules already existing under international humanitarian law. In fact, the latter clearly establishes the obligation of the occupying power to preserve the sovereign rights of the occupied government (as previously ascertained in this opinion),[42] the "overarching principle [of the law of occupation being] that an occupant does not acquire sovereignty over an occupied territory and therefore any occupation must only be a temporary situation".[43] Also, it is beyond any doubts that an occupying power is bound to guarantee and protect the human rights of the local population, as defined by the international human rights treaties of which it is a party as well as by customary international law. This has been authoritatively confirmed, *inter alia*, by the International Court of Justice.[44] While the Proclamation makes reference to the duty of the State of Hawai'i and its Counties to protect the human rights of the local population "under Hawaiian Kingdom law", and not pursuant to applicable international law, this is consistent with the obligation of the occupying power to respect, to the extent possible, the law in force in the occupied territory. In this regard, respecting the domestic laws which protect the human rights of the local population undoubtedly falls within "the extent possible", because it certainly does not undermine, or significantly interfere with the exercise of, the authority of the occupying power, and is consistent with existing international obligations. In other words, the occupying

[41] See *supra* text corresponding to n. 30.

[42] See, in particular, *supra*, para. 11.

[43] See United Nations, Officer of the High Commissioner of Human Rights, "Belligerent Occupation: Duties and Obligations of Occupying Powers", September 2017, available at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_belligerent_occupation_-_legal_note_en.pdf> (accessed on 19 May 2020), at 3.

[44] See, in particular, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports*, 2004, at 111-113; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgement of 19 December 2005, at 178. For a more comprehensive assessment of this issue see Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 173, at 203-205.

power cannot be considered "absolutely prevented"[45] from applying the domestic laws protecting the human rights of the local population, unless it is demonstrated that the level of protection of human rights guaranteed by Hawaiian Kingdom law is less advanced than human rights standards established by international law. Only in this case, the occupying power would be under a duty to ensure in favour of the local population the higher level of protection of human rights guaranteed by international law. In sum, the Council of Regency's Proclamation of 3 June 2019 may be considered as a domestic act implementing international rules at the internal level, which should be effected by the occupying power pursuant to international humanitarian law, since it does not undermine, or significantly interfere with the exercise of, its authority.

14. It may be concluded that, under international humanitarian law, the proclamations of the Council of Regency—including the Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State on 3 June 2019—have on the civilian population the effect of acts of domestic legislation aimed at protecting their rights and prerogatives, which should be, to the extent possible, respected and implemented by the occupying power.

III. COMMENT ON THE WORKING RELATIONSHIP BETWEEN THE REGENCY AND THE ADMINISTRATION OF THE OCCUPYING STATE UNDER INTERNATIONAL HUMANITARIAN LAW.

15. As previously noted, "occupation law [...] allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory".[46] This said, it is to be kept well in mind that belligerent occupation necessarily has a *non-consensual nature*. In fact, "[t]he absence of consent from the state whose territory is subject to the foreign forces' presence [...] [is] a precondition for the existence of a state of belligerent occupation. Without this condition, the situation would amount to a 'pacific occupation' not subject to the law of occupation".[47] At the same time, we also need to remember that the absence of armed resistance by the territorial government can in no way be interpreted as determining the existence of an implied consent to the occupation, consistently with the principle enshrined by Article 2 common to the four Geneva Conventions of 1949.[48]. On the contrary, the consent, "for the

[45] See *supra*, text corresponding to n. 25.

[46] See *supra*, text corresponding to n. 29.

[47] See Spoerri, "The Law of Occupation", supra n. 29, at 190.

[48] See *supra*, para. 6.

purposes of occupation law, [...] [must] be genuine, valid and explicit".[49] It is evident that such a consent has never been given by the government of the Hawaiian Kingdom. On the contrary, the Hawaiian government opposed the occupation since its very beginning. In particular, Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, on 17 January 1893 stated that, "to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands".[50]

The opposition to the occupation has never been abandoned up to the time of this writing, although for some long decades it was stifled by the policy of *Americanization* brought about by the US government in the Hawaiian Islands. It has eventually revived in the last three lustrums, with the establishment of the Council of Regency.

16. Despite the fact that the occupation inherently configures as a situation unilaterally imposed by the occupying power—any kind of consent of the ousted government being totally absent—there still is some space for "cooperation" between the occupying and the occupied government—in the specific case of Hawai'i between the State of Hawai'i and its Counties and the Council of Regency. Before trying to specify the characteristics of such a cooperation, it is however important to reiterate that, under international humanitarian law, the last word concerning any acts relating to the administration of the occupied territory is with the occupying power. In other words, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [...] [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory".[51] This vertical sharing of authority would reflect "the hierarchical relationship between the occupying power and the local authorities, the former maintaining a form of control over the latter through a top-down approach in the allocation of responsibilities".[52]

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[49] See Spoerri, "The Law of Occupation", supra n. 29, at 190.

[50] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 586.

[51] See International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report*, Geneva, 2012, available at <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> (accessed on 20 May 2020), at 20.

[52] Ibid., at footnote 7.

17. The cooperation referred to in the previous paragraph is implied or explicitly established in some provisions of the Fourth Geneva Convention of 1949. In particular, Article 47 states that

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory".

Through referring to possible agreements "concluded between the authorities of the occupied territories and the Occupying Power", this provision clearly implies the possibility of establishing cooperation between the occupying and the occupied government. More explicitly, Article 50 affirms that "[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children", while Article 56 establishes that, "[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory [...]".

As far as United States practice is concerned, it acknowledges that "[t]he functions of the [occupied] government—whether of a general, provincial, or local character—continue only to the extent they are sanctioned".[53] With specific regard to cooperation with the occupied government, it is also recognized that "[t]he occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions".[54]

18. Importantly, the provisions referred to in the previous paragraph exactly refer to issues related to the protection of civilian persons and of their rights, which is one of the two main aspects (together with the preservation of the sovereign rights of the Hawaiian Kingdom government) dealt with by the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019.[55] In practice, the cooperation advocated by the provisions in point may take different forms, one of which translates into the possibility for the ousted government to adopt

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[53] See "The Law of Land Warfare", *United States Army Field Manual* 27-10, July 1956, Section 367(a).

[54] Ibid., Section 367(b).

[55] See *supra*, text following n. 37.

legislative provisions concerning the above aspects. As previously seen, the occupying power has, *vis-à-vis* the ensuing legislation, a duty not to oppose to it, because it normally does not undermine, or significantly interfere with the exercise of, its authority. Further to this, it is reasonable to assume that—in light of the spirit and the contents of the provisions referred to in the previous paragraph—the occupying power has a duty to cooperate in giving realization to the legislation in point, unless it is "absolutely prevented" to do so. This duty to cooperate appears to be reciprocal, being premised on both the Council of Regency and the State of Hawai'i and its Counties to ensure compliance with international humanitarian law.

19. The latter conclusion is consistent with the logical (and legally grounded) assumption that the ousted government is better placed than the occupying power in order to know what are the real needs of the civilian population and what are the concrete measures to be taken to guarantee an effective response to such needs. It follows that, through allowing the legislation in discussion to be applied—and through contributing in its effective application—the occupying power would better comply with its obligation, existing under international humanitarian law and human rights law, to guarantee and protect the human rights of the local population. It follows that the occupying power has a duty—if not a proper legal obligation—to cooperate with the ousted government to better realize the rights and interest of the civilian population, and, more in general, to guarantee the correct administration of the occupied territory.

20. In light of the foregoing, it may be concluded that the working relationship between the Regency and the administration of the occupying State should have the form of a cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory, provided that there are no objective obstacles for the occupying power to cooperate and that, in any event, the "supreme" decision-making power belongs to the occupying power itself. This conclusion is consistent with the position of the latter as "administrator" of the Hawaiian territory, as stated in the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019 and presupposed by the pertinent rules of international humanitarian law.

24 May 2020

Professor Federico Lenzerini

Enclosure “2”

CIVIL LAW ON JURIDICAL FACT OF THE HAWAIIAN STATE AND THE CONSEQUENTIAL JURIDICAL ACT BY THE PERMANENT COURT OF ARBITRATION

FEDERICO LENZERINI*

5 December 2021

Juridical Facts

In the civil law tradition, a *juridical fact* (or *legal fact*) is a fact (or event) – determined either by natural occurrences or by humans – which produces consequences that are relevant according to law. Such consequences are defined *juridical effects* (or *legal effects*), and consist in the establishment, modification or extinction of rights, legal situations or *juridical* (or *legal*) *relationships* (*privity*). Reversing the order of the reasoning, among the multifaceted natural or social facts occurring in the world a fact is *juridical* when it is *legally relevant*, i.e. determines the production of *legal effects* per effect of a *legal* (*juridical*) *rule* (*provision*). In technical terms, it is actually the legal rule which produces legal effects, while the juridical fact is to be considered as the *condition* for the production of the effects. In practical terms, however, it is the juridical fact which activates a reaction by the law and makes the production of the effects concretely possible. At the same time, no fact can be considered as "juridical" without a legal rule attributing this quality to it.[1]

Both *rights*, *powers* or *obligations* – held by/binding a person or another subject of law (in international law, a State, an international organization, a people, or any other entity to which international law attributes legal personality) – may arise from a juridical fact.

Sometimes a juridical fact determines the production of legal effects irrespective of the action of a person or another subject of law. In other terms, in some cases legal effects are automatically produced by a(n *inactive*) juridical fact – only by virtue of the mere existence of the latter – without any need of an action by a legal subject. "Inactive juridical facts are events which occur more or less spontaneously, but still have legal effects because a certain reaction is regarded to be necessary to deal with the newly arisen circumstances".[2] Inactive juridical facts may be based on an occasional situation, a quality of a person or a thing, or the course of time.[3]

Juridical Acts

In other cases, however, the legal effects arising from a juridical fact only exist *potentially*, and, in order to concretely come into existence they need to be activated through a behaviour by a subject of law, which may consist of either an action or a passive behaviour. The legal effects may arise from either an *operational act* – i.e. a behaviour to which the law attributes legally-relevant effects for the sole ground of its existence, "although the acting [subject] had no intention to create this legal

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[1] See Lech Morawski, "Law, Fact and Legal Language", (1999) 18 *Law and Philosophy* 461, at 463.

[2] See "Legal System of Civil Law in the Netherlands", available at <http://www.dutchcivillaw.com/content/legalsystem022aa.htm> (accessed on 4 December 2021).

[3] Ibidem.

effect"[4] – or an act that a subject of law performs intentionally, "because he[/she/it] knows that the law will respond to it by acknowledging the conception of a particular legal effect. The act is explicitly [and voluntarily] chosen to let this legal effect arise".[5] In order to better comprehend this line of reasoning, one may consider the example of adverse possession,[6] which is determined by the juridical fact that a given span of time has passed during which the thing has continuously been in the possession without being claimed by its owner. However, in order for the possessor to effectively acquire the right to property, it is usually necessary to activate a legal action before the competent authority aimed at obtaining its legal recognition. In this and other similar cases a subject of law intentionally performs an act "to set the law in motion" with the purpose of producing a desired juridical effect. The legal subject concerned knows that, through performing such an act, the wanted juridical effect will be produced as a consequence of the existence of a juridical fact. Acts that are intentionally performed by a subject of law with the purpose of producing a desired legal effect are defined as *juridical acts* (or *legal acts*). It follows that an act consequential to a juridical fact (i.e. having the purpose of producing a given juridical effect in consequence of the existence of a juridical fact) is called *juridical* (or *legal*) *act*. The entitlement to perform a *juridical act* is the effect of a *power* attributed by the *juridical fact* to the legal subject concerned. The most evident difference between *juridical facts* and *juridical acts* is that, while the former "produce legal consequences regardless of a [person]'s will and capacity", the latter "are licit volitional acts – in the form of a manifestation of will – that are intended to produce legal consequences".[7]

Effects of Juridical Acts on Third Parties

One legal subject may only perform a juridical act unilaterally when it falls within her/his/its own legal sphere, but an unilateral juridical act may produce effects for other legal subjects as well. For instance, in private law unilateral juridical acts exist which produce juridical effects on third parties – for instance a will or a promise to donate a sum of money. Usually, unilateral juridical acts start to produce their effects from the moment when they are known by the beneficiary, and from that moment their withdrawal is precluded, unless otherwise provided for by applicable law (depending on the specific act concerned).

Similarly, bilateral or plurilateral juridical acts influencing the life of third parties are also provided by law – e.g. a contract in favour of third parties or a trust, typical of the common law tradition. Then, of course, the beneficiary of such acts may decide to refuse the benefits (if any) arising from them; however, if such benefits are not refused, said acts will definitely produce their effects, and may only be withdrawn within the limits established by law. Juridical acts also include the laws and regulations adopted by national parliaments, administrative acts, and, more in general, all acts determining – i.e. creating, modifying or abrogating – legal effects. *Acts of the judiciary* (judgments, orders, decrees, etc.) are also included in the concept of juridical acts. For instance, a judgment recognizing natural filiation produces the effects of filiation – with *retroactive effects* – "transform[ing] the [juridical] fact of procreation (in itself insufficient to create a legal relationship)

[4] Ibidem.

[5] Ibidem.

[6] Adverse possession refers to a legal principle – in force in many countries, especially of civil law – according to which a subject of law is granted property title over another subject's property by keeping continuous possession of it for a given (legally defined) period of time, on the condition that the title over the property is not claimed by the owner throughout the whole duration of that period of time.

[7] See Nikolaos A. Davrados, "A Louisiana Theory of Juridical Acts" (2020) 80 *Louisiana Law Review* 1119, at 1273.

into a state of filiation (recognized child) that is relevant to the law".[8] In this case, a juridical act of the judge actually leads to the recognition of a legal state – productive of a number of juridical effects, including *ex tunc* – arising from the juridical fact of the natural filiation. This is a perfect example of a juridical fact (exactly the natural filiation) whose legal effects exist *potentially*, and are activated by the juridical act represented by the judge's decision.

The Juridical Act of the Permanent Court of Arbitration (PCA) Recognizing the Juridical Fact of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government

According to the *PCA Arbitration Rules*,[9] disputes included within the competence of the PCA include the following instances:

- disputes between two or more States;
- disputes between two parties of which only one is a State (i.e., disputes between a State and a private entity);
- disputes between a State and an international organization;
- disputes between two or more international organizations;
- disputes between an international organization and a private entity.

It is evident that, in order for a dispute to fall within the competence of the PCA, it is *always* necessary that either a State or an international organization are involved in the controversy. The case of *Larsen v. Hawaiian Kingdom*[10] was qualified by the PCA as a dispute between a State (The Hawaiian Kingdom) and a Private entity (Lance Paul Larsen).[11] In particular, the Hawaiian Kingdom was qualified as a non-Contracting Power under Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes.[12] In addition, since the PCA allowed the Council of Regency to represent the Hawaiian Kingdom in the arbitration, it also implicitly recognized the former as the government of the latter.[13]

According to a civil law perspective, the juridical act of the International Bureau of the PCA instituting the arbitration in the case of *Larsen v. Hawaiian Kingdom* may be compared – *mutatis mutandis* – to a juridical act of a domestic judge recognizing a juridical fact (e.g. *filiation*) which is productive of certain legal effects arising from it according to law. Said legal effects may include, depending on applicable law, the power to stand before a court with the purpose of invoking certain rights. In the context of the *Larsen* arbitration, the juridical fact recognized by the PCA in favour of the Hawaiian Kingdom was its quality of *State* under international law. Among the legal effects produced by such a juridical fact, the entitlement of the Hawaiian Kingdom to be part of an international arbitration under the auspices of the PCA was included, since the existence of said juridical fact actually represented an indispensable condition for the Hawaiian Kingdom to be admitted in the *Larsen* arbitration, *vis-à-vis* a private entity (Lance Paul Larsen). Consequently, the

[8] See Armando Cecatiello, "Recognition of the natural child", available at <https://www.cecatiello.it/en/riconoscimento-del-figlio-naturale-2/> (accessed on 4 December 2021).

[9] The *PCA Arbitration Rules 2012* (available at <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf>, accessed on 5 December 2021) constitute a consolidation of the following set of PCA procedural rules: the *Optional Rules for Arbitrating Disputes between Two States (1992)*; the *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State* (1993); the *Optional Rules for Arbitration Between International Organizations and States* (1996); and *the Optional Rules for Arbitration Between International Organizations and Private Parties (1996)*.

[10] Case number 1999-01.

[11] See <https://pca-cpa.org/en/cases/35/> (accessed on 5 December 2021).

[12] Available at <https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> (accessed on 5 December 2021).

[13] See Declaration of Professor Federico Lenzerini [ECF 55-2].

International Bureau of the PCA carried out the juridical act consisting in establishing the arbitral tribunal as an effect of the recognition of the juridical fact in point. Likewise, e.g., the recognition of the juridical fact of filiation by a domestic judge, also the recognition of the Hawaiian Kingdom as a State had in principle retroactive effects, in the sense that the Hawaiian Kingdom did *not* acquire the condition of State per effect of the PCA's juridical act. Rather, the Hawaiian Kingdom's Statehood was a juridical fact that the PCA recognized as *pre-existing* to its juridical act.

The Effects of the Juridical Act of the PCA Recognizing the Juridical Fact of the Continued Existence of the Hawaiian Kingdom as a State and the Council of Regency as its government

At the time of the establishment of the *Larsen* arbitral tribunal by the PCA, the latter had 88 contracting parties.[14] One may safely assume that the PCA's juridical act consisting in the recognition of the juridical fact of the Hawaiian Kingdom as a State, through the institution of the *Larsen* arbitration, reflected a view shared by all such parties, on account of the fact that the decision of the International Bureau of the PCA was not followed by any complaints by any of them. In particular, it is especially meaningful that there was "no evidence that the United States, being a Contracting State [indirectly concerned by the *Larsen* arbitration], protested the International Bureau's recognition of the Hawaiian Kingdom as a State in accordance with Article 47".[15] On the contrary, the United States appeared to provide its acquiescence to the establishment of the arbitration, as it entered into an agreement with the Council of Regency of the Hawaiian Kingdom to access all records and pleadings of the dispute.

Under international law, the juridical act of the PCA recognizing the juridical fact of the Hawaiian Kingdom as a State may reasonably be considered as an important manifestation of – contextually – State practice and *opinio juris*, in support of the assumption according to which the Hawaiian Kingdom is actually – and has never ceased to be – a sovereign and independent State pursuant to customary international law. As noted a few lines above, it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau. In fact, in international law, *acquiescence* "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State [or an international institution] would be called for".[16] The case in discussion is evidently a situation in the context of which, in the event that any of the PCA contracting parties would have disagreed with the recognition of the continued existence of the Hawaiian Kingdom as a State by the International Bureau through its juridical act, an explicit reaction would have been necessary. Since they "did not do so […] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*".[17]

[14] See <https://pca-cpa.org/en/about/introduction/contracting-parties/> (accessed on 5 December 2021).
[15] See David Keanu Sai, "The Royal Commission of Inquiry", in David Keanu Sai (ed.), The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom (Honolulu 2020) 12, at 25.
[16] See Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006), at para. 2.
[17] See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

Enclosure “3”

BACKSTORY—*LARSEN V. HAWAIIAN KINGDOM* AT THE PERMANENT COURT OF ARBITRATION (1999-2001)

David Keanu Sai, Ph.D.*

I. INTRODUCTION

To the layperson, the word Hawai'i would be the common understanding for the Hawaiian Islands, and the term Hawaiian Kingdom would be novel. It is in fact the opposite. The Hawaiian Kingdom gained prominence in the nineteenth century as a recognized independent State. Prior to becoming the first non-European State admitted into the *Family of Nations*, the Hawaiian Kingdom was a British protectorate from 1794 to 1843. The term Hawai'i replaced the Hawaiian Kingdom in the early twentieth century while under American control.

If one were to do a google search "Hawai'i," at the top of the list would be the official website for the State of Hawai'i government. But if you google "Hawaiian Kingdom," what is first on the list would be the official website of the Hawaiian Kingdom government. Both governments claim territorial jurisdiction of the Hawaiian Islands. Can there be two lawful governments within one and the same territory? The answer is both yes and no. International humanitarian law provides for two governments, that of the occupying State and that of the occupied State. Under a State's domestic

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law, however, there can only be one government. The Hawaiian Kingdom is an occupied State.

In its 2001 arbitral award in *Larsen v. Hawaiian Kingdom*, the Tribunal at the Permanent Court of Arbitration ("PCA") concluded, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[1] This article will provide a history of the Hawaiian Kingdom since the nineteenth century and the backstory as to why the PCA acknowledged, by a *juridical act*, the continuity of the Hawaiian Kingdom—a *juridical fact*, and the Council of Regency as its government.

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 Legislature, 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;[3] Belgium on October 4, 1862;[4] Bremen on August 7, 1851;[5] Denmark on October 19, 1846;[6] France on October 29, 1857;[7] Germany on March 25, 1879;[8] Hamburg on January 8, 1848;[9] Italy

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[1] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).

[2] Robert C. Lydecker, *Roster Legislatures of Hawaii* (Honolulu: The Hawaiian Gazette Co., Ltd., 1918), 57.

[3] "Treaty with Austria-Hungary," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 237-240, https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf.

[4] *Id.*, "Treaty with Belgium," 241-246.

[5] *Id.*, "Treaty with Bremen," 247-248.

[6] *Id.*, "Treaty with Denmark," 255-256.

[7] *Id.*, "Treaty with France,"257-264.

[8] *Id.*, "Treaty with Germany," 265-272.

[9] *Id.*, "Treaty with Hamburg," 273-274.

on July 22, 1863;[10] Japan on August 19, 1871;[11] the Netherlands-Luxembourg on October 16, 1862;[12] Portugal on May 5, 1882;[13] Russia on June 19, 1869;[14] Spain on October 29, 1863;[15] Sweden-Norway on July 1, 1852;[16] Switzerland on July 20, 1864;[17] Great Britain on July 10, 1851;[18] and the United States of America on December 20, 1849.[19] Hawai'i also became a full member of the Universal Postal Union on January 1, 1882.

By 1893, the Hawaiian Kingdom maintained diplomatic representatives and consulates accredited to foreign States. Hawaiian Legations were established in Washington, D.C., London, Paris, Lima, Valparaiso, and Tokyo, while diplomatic representatives and consulates accredited to the Hawaiian Kingdom were from the United States, Portugal, Great Britain, France, and Japan. There were two Hawaiian consulates in Mexico; one in Guatemala; two in Peru; one in Chile; one in Uruguay; thirty-three in Great Britain and her colonies; five in France and her colonies; five in Germany; one in Austria; ten 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 one in Japan.[20] 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.[21]

The recognition of the Hawaiian Kingdom as a State was also the recognition of its government—a constitutional monarchy, as its agent. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King

[10] *Id.*, "Treaty with Italy," 275-280.

[11] *Id.*, "Treaty with Japan," 281-282.

[12] *Id.*, "Treaty with the Netherlands & Luxembourg," 283-284.

[13] *Id.*, "Treaty with Portugal," 285-286.

[14] *Id.*, "Treaty with Russia," 287.

[15] *Id.*, "Treaty with Spain," 290-295.

[16] *Id.*, "Treaty with Sweden and Norway," 296-300.

[17] *Id.*, "Treaty with Switzerland," 301-304.

[18] *Id.*, "Treaty with Britain," 249-254.

[19] *Id.*, "Treaty with the United States of America," 305-310.

[20] "Hawaiian Register and Directory for 1893," in *Hawaiian Almanac and Annual for 1893*, ed. Thomas Thrum (Honolulu: Thos. G. Thrum, 1892), 14-141.

[21] *Id.*

Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, and Queen Lili'uokalani in 1891. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[22] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to Professor Peterson,

> A government succeeding to power according to the constitution, basic law, or established domestic custom is assumed to succeed as well to its predecessor's status as international agent of the state. Only if there is legal discontinuity at the domestic level because a new government comes to power in some other way, as by coup d'état or revolution, is its status as an international agent of the state open to question.[23]

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 displayed 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 since the Spanish-American War, in similar fashion, to Germany's occupation of Luxembourg during the First World War.

Since the occupation began on January 17, 1893, the world has been led to believe 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."[24] There is no treaty. Instead, there is only a congressional statute called a joint resolution purporting to have annexed a foreign State—the Hawaiian Kingdom.

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[22] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* (London: MacMillan, 1997), 26.

[23] *Id.*, 185.

[24] Wm. H. Michael, *History of the Department of State on the United States* (Washington: Government Printing Office, 1901), 38.

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.[25] Kmiec concluded that only the President and not the Congress 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."[26] He further stated, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[27] Therefore, he stated it is "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."[28]

Kmiec cited United States constitutional scholar Professor 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."[29] 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."[30]

II. HAWAIIAN INDEPENDENCE AND NEUTRALITY

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

[25] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," *Opinions of the Office of Legal Counsel* 12 (1988): 238.

[26] *Id.*, 242.

[27] *Id.*

[28] *Id.*, 262.

[29] *Id.*, 252.

[30] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1 (New York: Baker, Voorhis & Company, 1910), 345.

chiefs and people. The code provided 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."[31] 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.[32]

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. Lord Ingestre 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."[33] Viscount Palmerston reported he knew very little of the situation with the 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."[34]

In the eyes of the Hawaiian government, Viscount Palmerston's report quelled the notion of British dependency and acknowledged Hawaiian autonomy.[35] Two years later, a clearer British policy toward the Hawaiian Islands, by Viscount Palmerston's successor, Lord Aberdeen, reinforced the position taken by the Hawaiian government. In a letter to the British Admiralty on October 4, 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."[36]

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[31] "William Richards' Report to the Sandwich Islands Mission on His First Year in Government Service, 1838-1839," in *Fifty-First Annual Report of the Hawaiian Historical Society for the Year 1942* (Honolulu: Hawaiian Printing Company, Ltd., 1943), 68.

[32] Lit Bernd Marquardt, *Universalgeschichte des Staates: von der vorstaatlichen Gesellschaft zum Staat der Industriegesellschaft* (Zurich: Lit Verlag, 2009), 478.

[33] Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, vol. 1 (Honolulu: University of Hawai'i Press, 1938), 185.

[34] *Id.*

[35] *Report of the Minister of Foreign Affairs, May 21, 1845* (Honolulu: Polynesian Press 1845), 7.

[36] *Report of the Historical Commission of the Territory of Hawai'i for the two years ending December 31, 1924*, (Honolulu: Star-Bulletin, Ltd., 1925), 36.

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 Haʻalilio, 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 King Kamehameha I in 1794, 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."[37]

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,[38] 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 and non-European nation to be recognized as a sovereign and independent State.

As a recognized 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. According Mykkanen, "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."[40]

On March 16, 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:

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[37] United States House of Representatives, 53d Cong., *Executive Documents on Affairs in Hawaii: 1894-95* (Washington, D.C.: Government Printing Office, 1895), 42.

[38] *Id.*, 120.

[39] Report of the Minister of Foreign Affairs, 4.

[40] Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* (Honolulu: University of Hawai'i Press, 2003), 161.

> 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.[41]

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.[42] Lisiansky Island also was annexed by discovery of Captain Paty on May 10, 1857.[43] Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on April 15, 1862, and proclaimed as Hawaiian Territory.[44] Ocean Island, also called Kure atoll, was acquired September 20, 1886, by proclamation of Colonel J.H. Boyd.[45]

King Kamehameha III sought 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 this policy of neutrality. 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. Similar provisions were also provided under Article XXVI of the 1863 treaty with Spain, and Article VIII of the 1879 treaty with Germany.

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. In 1841, the Hawaiian Kingdom became the fifth country in the world to provide compulsory education through a Department of Public Instruction. The other four countries were Prussia in 1763, Denmark in 1814, Greece in 1834, and Spain in 1838.

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[41] A.P. Taylor, *Islands of the Hawaiian Domain* (Honolulu: Librarian Archives of Hawaii, January 10, 1931), 5.

[42] *Id.*, 7.

[43] *Id.*

[44] *Id.*

[45] *Id.*, 8.

There were three levels of schools in the country that were both public and private schools. Common Schools were for children between the ages of four and fourteen where the attendance was mandatory. The curriculum of study was "confined chiefly to Reading, Mental and Written Arithmetic, Geography, and Penmanship."[46] Secondary Schools or High Schools were for students of fifteen and older, where attendance was not mandatory. And High Education Institutions that were also not mandatory, which were Lahainaluna Seminary and Oʻahu College. The aboriginal Hawaiian students attended the former, while those students of foreign parentage attended the latter.[47] Curriculum studies at Lahainaluna Seminary, a public school, included a good knowledge of English and "instruction in all the Higher Mathematics, in subjects of Natural and Moral Science, History, and Political Economy, and also instruction in the principles and practice of teaching."[48] The Secondary Schools and the High Education Institutions were English immersion, while the Common Schools were taught solely in the Hawaiian language until 1851 when legislation established Independent Common Schools to provide instruction in the English language.

In 1859, universal healthcare was provided at no charge for aboriginal Hawaiians through hospitals regulated and funded by the Hawaiian government. Tourists were also provided health coverage after paying a hospital tax. As part of Hawaiʻi's mixed economy, the Hawaiian government appropriated funding for the maintenance of its quasi-public hospital, the Queen's Hospital, where the monarch served as the head of the Board of Trustees comprised of ten appointed government officials and ten persons elected by the corporation's shareholders. According to Witney, "Native Hawaiians are admitted free of charge, while foreigners pay from seventy-five cents to two dollars a day, according to accommodations and attendance."[49]

Under the Hawaiian Constitution of 1864, the office of Prime Minister was repealed, which established an Executive Monarch. The separation of powers doctrine was also fully adopted, and according to Article 13, "The King conducts His Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among his subjects." The Hawaiian Kingdom's political economy was not based on Adam Smith's *Wealth of Nations*, but rather Francis Wayland's

[46] Biennial Report of the President of the Board of Education to the Legislative Assembly of 1880 (1880), 5.

[47] *Id.*, 27.

[48] *Id.*, 17.

[49] Henry Witney, *The Tourists' Guide through the Hawaiian Islands Descriptive of Their Scenes and Scenery* (Honolulu: Hawaiian Gazette Company's Press, 1895), 21.

Elements of Political Economy.[50] Wayland was interested in "defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members."[51]

III. UNITED STATES INVASION OF THE HAWAIIAN KINGDOM AND TWO FAILED ATTEMPTS TO ACQUIRE HAWAIIAN TERRITORY

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 with a minority of insurgents to take over the Hawaiian government. The following day, U.S. troops forcibly removed the executive Monarch—Queen Lili'uokalani, her Cabinet of four ministers and the Marshal of the Hawaiian Kingdom. 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.[52]

Once the regime change was complete, all remaining government officers and employees were forced to sign oaths of allegiance or face termination or arrest. 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, the Hawaiian Kingdom's sovereignty and territory to the United States.

U.S. Naval Captain Alfred 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, Captain 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

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[50] David Keanu Sai, "Hawaiian Constitutional Governance," in *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 60.

[51] Mykkanen, *Inventing Politics*, 154.

[52] Lydecker, *Roster Legislatures*, 188.

Hawaiian Islands, "with their geographical and military importance, [to be] unrivalled by that of any other position in the North Pacific."[53] Captain 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 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?"[54] 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.

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,[55] and "that the provisional government owes its existence to an armed invasion by the United States."[56] He also determined that the "military demonstration upon the soil of Honolulu was itself an act of war."[57]

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.[58] The first of several meetings were held at the U.S. Legation in Honolulu on November 13, 1893.[59] An agreement was reached on December 18, 1893,[60] but President Cleveland was unable to get Congressional authorization for the use of force to redeploy U.S. troops to the islands. Although the agreement was not carried out, this agreement is recognized

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[53] Captain A.T. Mahan, *The Interest of America in Sea Power, Present and Future* (Boston: Little, Brown, and Company, 1897), 31.

[54] *Id.*, 32.

[55] United States, *Executive Documents*, 453.

[56] *Id.*, 454.

[57] *Id.*, 451.

[58] *Id.*, 458.

[59] *Id.*, 1241-43.

[60] *Id.*, 1269-73.

under international law and American public law as a treaty that did not require ratification by the U.S. Senate.[61]

Foremost, the overthrow of the Hawaiian government did not affect, in the least, the continuity of the Hawaiian State, being the subject of international law. As Professor Wright asserts "international law distinguishes between a government and the state it governs."[62] Professor Cohen also posits that the "state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law."[63] And according to Professor Crawford "Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[64]

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. 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."[65]

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."[66] Branded self-declared by U.S. President Cleveland, the puppet renamed themselves the Republic of

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[61] 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).

[62] Quincy Wright, "The Status of Germany and the Peace Proclamation," *American Journal of International Law* 46, no. 2 (1952): 299-308, 307.

[63] Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* (Boulder, Taylor & Francis Ltd., 1989), 17.

[64] James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006), 34.

[65] Lydecker, *Roster Legislatures*, 225.

[66] *Id.*, 187.

Hawai'i,[67] and empowered its so-called President, under Article 32 of its 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 islands tomorrow."[68] Moreover, Roosevelt told Mahan that Cleveland's handling of the Hawaiian situation was "a colossal crime, and we should be guilty of aiding him after the fact if we do not reverse what he did."[69] 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."[70]

In a follow up letter to Mahan, on June 9, 1897, Roosevelt wrote that he "urged immediate action by 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."[71] Eight days later, on June 16, the McKinley administration signed a treaty of annexation with the American puppet in Washington, D.C. On the following day, June 17, Queen Lili'uokalani submits a formal protest to the U.S. State Department. She 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

[67] 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).

[68] H.W. Brands, *The Selected Letters of Theodore Roosevelt* (Lanham: Rowman & Littlefield Publishers, 2006), 132.

[69] *Id.*

[70] *Id.*, 133.

[71] *Id.*, 141.

> constitutional government was overthrown, and, finally, an act of gross injustice to me.[72]

President McKinley ignored the protest and submitted the treaty for Senate ratification, which required a minimum of 60 votes. The Senate, however, was not convening until December 6, 1897. These facts prompted two Hawaiian political organizations to mobilize signature petitions protesting annexation. According to Professor 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."[73] The Hawaiian Political Association (Hui Kalaiʻāina) gathered over 17,000 signatures, and the Hawaiian Patriotic League (Hui Aloha ʻĀina) gathered 21,269 signatures.[74] 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.[75] 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.[76]

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 Lā Kūʻokoʻa, a national holiday celebrating Hawaiian Independence. 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."[77] He added, the "United States

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[72] Liliuokalani, *Hawaii's Story by Hawaii's Queen* (Boston: Lothrop, Lee & Shepard Co., 1898), 354; Petition (June 17, 1897), http://libweb.hawaii.edu/digicoll/annexation/protest/pdfs/liliu5.pdf.

[73] Noenoe K. Silva, *Aloha Betrayed* (Durham & London: Duke University Press, 2004), 146.

[74] *Id.*, 151.

[75] David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," *Hawaiian Journal of Law and Politics* 1 (2004), 46-81, 63.

[76] Hawaiian Patriotic League petition, http://libweb.hawaii.edu/digicoll/annexation/petition.html.

[77] "Hawaii's Last Struggle for Freedom," *San Francisco Call Newspaper*, Nov. 28, 1897, 1.

cannot…if it has any regard for justice, annex our country, after our protest."[78]

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 2 shy of the 60 votes needed for ratification.[79] 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 'Āina because the substance of the two sets of petitions were different. Hui Aloha 'Āina's petition protested annexation, but the Hui Kālai'āina'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."[80]

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 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."[81] 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 Senators Henry Cabot Lodge and 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 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."[82]

This was war rhetoric to justify the preemptive seizure of a neutral State for military interests. 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

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[78] *Id.*

[79] Silva, *Aloha Betrayed*, 158.

[80] *Id.*

[81] *Id.*, 159.

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

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."[83] 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."[84] 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."[85]

It appears the Senators were not swayed by Mahan's position because by the time the Hawaiian Committee left Washington, D.C., on February 27, 1897, they had successfully chiseled the 58 Senators in support of annexation down to 46.[86] Unable to garner the necessary 60 votes, the treaty was dead by March, yet war with Spain was looming over the horizon, and the Hawaiian Kingdom would have to face the belligerency of the United States again. American military interests would be the driving forces behind the occupation of the islands, and Captain Mahan's philosophy, the guiding principles.

IV. The SPANISH-AMERICAN WAR AS A PRETENCE TO UNILATERALLY SEIZE THE HAWAIIAN ISLANDS

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."[87] The U.S. 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."[88] The U.S. administration was clearly giving the impression that this war would be

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[83] James Wilford, *International Law and the World War*, vol. II (New York, Bombay, Calcutta, and Madras: Longmans, Green and Co., 1920), 233.

[84] *Id.*, 234.

[85] *Id.*, 235.

[86] Silva, *Aloha Betrayed*, 159.

[87] 30 U.S. Stat. 1770.

[88] *The Paquete Habana*, 175 U.S. 712 (1900).

conducted in compliance with international law, yet they were already making plans to violate Hawaiian neutrality 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, Representative Francis Newlands (S-Nevada) 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 protected 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 Hawaiian neutrality, the convoy set a course to re-coal and arrived in Honolulu harbor on June 1. This convoy took on 1,943 tons of coal before it left 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."[89]

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 the Hawaiian Kingdom at that time. From Professor 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 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."[90] Bailey also wrote, "At the end of the war, Spain or a 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."[91]

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

[89] 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.

[90] T.A. Bailey, "The United States and Hawaii During the Spanish-American War," *American Historical Review* 36, no. 3 (1931): 552-560, 557.

[91] *Id.*

advocated by Captain Mahan. 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 of congressional laws.

On June 15, 1898, Representative Thomas H. Ball (D-Texas) emphatically stated, "The annexation of Hawaii 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."[92] When the resolution reached the Senate, Senator Augustus Bacon (D-Georgia) 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 to nullify the provision in 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."[93] Senator William Allen (P-Nebraska) added, "The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated."[94] He later reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution."[95] Despite these objections, the Congress passed the joint resolution and President McKinley signed it into law on July 7, 1898.

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."[96]

"Puppet governments," according to Marek, "are organs of the occupant and, as such form part of his legal order. The agreements concluded by

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[92] 31 Cong. Rec. 5975 (1898).

[93] *Id.*, 6150.

[94] *Id.*, 6635.

[95] 33 Cong. Rec. 2391.

[96] "Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898," *Hawaiian Journal of Law and Politics* 1 (2004): 230-284, 280.

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."[97] 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. In the hands of U.S. Minister Harold Sewell was the joint resolution, and in the hands of Republic President Sanford Dole was their ratification. They were exchanging an apple for an orange.

Many government officials and constitutional scholars could not explain how a joint resolution could have the extra-territorial force and effect in annexing a foreign State. During the nineteenth century, Professor Born states, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction."[98] 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 its own territory,"[99] for it would be "at variance with the independence and sovereignty of foreign nations."[100] 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."[101]

The war with Spain came to an end on April 11, 1899, after ratifications of the Treaty of Paris were exchanged. This was a *bona fide* exchange, unlike the Hawaiian situation. 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 were the laws that stood in force prior to 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 Congress changed the name of the Republic of Hawai'i to the Territory of Hawai'i on April

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[97] Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed. (Geneva: Libraire Droz S.A., 1968), 114.

[98] Gary Born, *International Civil Litigation in United States Courts*, 3d ed. (Boston: Wolters Kluwer Law & Business, 1996), 493.

[99] *Rose v. Himely*, 8 U.S. 241, 279 (1808).

[100] *The Apollon*, 22 U.S. 362, 370 (1824).

[101] *Id.*

30, 1900.[102] Later, on March 18, 1959, the Congress, again by statute, changed the name of the Territory of Hawai'i to the State of Hawai'i.[103] According to the U.S. Supreme Court, however, "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory," which renders these congressional acts *ultra vires*.[104]

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."[105] 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 customary international law at the time, which was later codified under Article 43 of the 1907 Hague Regulations,[106] and Article 64 of the 1949 Fourth Geneva Convention.[107] 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 Professor Schabas, these crimes include usurpation of sovereignty, compulsory enlistment, denationalization, pillage, destruction of property, unfair trial, deporting civilians, and transferring populations into an occupied State.[108] According to Benvinisti, "The occupations of Hawaii, The Philippines, and Puerto Rico reflected the same unique US view on the unlimited authority of the occupant."[109]

In 1906, the intentional policy and methodical plan of *Americanization* began. This plan intended to conceal the unlawful overthrow of the Hawaiian Kingdom government 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

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[102] 31 U.S. Stat. 141.

[103] 73 U.S. Stat. 4.

[104] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

[105] Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University of Press, 1993), 19.

[106] 36 U.S. Stat. 2277.

[107] 6.3 U.S.T. 3516.

[108] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 167-169.

[109] Eyal Benvenisti, *The International Law of Occupation*, 2d ed. (Oxford: Clarendon Press, 2012), 37.

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 the 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!'"[110]

Since this policy began, *Americanization* has become so pervasive and institutionalized throughout the islands, that the national consciousness of the Hawaiian Kingdom was 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."[111]

It took 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 the Hawaiian Kingdom to the international community and to its treaty partners and highlighting the violations of human rights and war crimes committed against Hawaiian subjects and the citizens, and subjects of foreign States, who have visited, resided, or have done business in the Hawaiian Islands.

V. RESTORING THE GOVERNMENT OF THE HAWAIIAN KINGDOM

International humanitarian law reverses the principle of effective control of territory. According to Professor Marek, "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…strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."[112] Therefore, belligerent

[110] Territory of Hawai'i, *Programme for Patriotic Exercises* (1906), 4, http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf.

[111] Willy Daniel Kaipo Kauai, "The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai'i" (PhD diss., University of Hawai'i at Mānoa, 2014), 298.

[112] Marek, *Identity and Continuity of States*, 102.

occupation "is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[113]

In 1996, remedial steps were taken, under the *doctrine of necessity*, to reinstate the Hawaiian Kingdom government as it was under its legal order prior to the U.S. invasion in 1893.[114] 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 officers *de facto*, was established as the successor to Queen Lili'uokalani who passed away on November 11, 1917.

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

> As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821, as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.[115]

Article 33 provides that the Cabinet Council "shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King." Like the Belgian Council, the Hawaiian Council was bound to call into session the Legislative Assembly to provide for a regency but because of the prolonged belligerent occupation and the effects of denationalization it was impossible for the Legislative Assembly to function. Until the Legislative Assembly can be called into session, Article 33 provides that

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[113] *Id.*

[114] David Keanu Sai, "Royal Commission of Inquiry," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 18-23.

[115] F.E. Oppenheimer, "Governments and Authorities in Exile," *American Journal of International Law* 36 (1942): 568-595, 569.

the Cabinet Council, comprised of the Ministers of the Interior, Foreign Affairs, Finance and the Attorney General, "shall be a Council of Regency, until the Legislative Assembly" can be called into session.

The Hawaiian Council is a government restored in accordance with the constitutional laws of the Hawaiian Kingdom as they existed prior to the unlawful overthrow of the previous administration of Queen Lili'uokalani. It was not established through "extra-legal changes," and, therefore, did not require diplomatic recognition to give itself validity as a government. It was a successor in office to Queen Lili'uokalani as the Executive Monarch.

According to Professor Lenzerini, based on the *doctrine of necessity*, "the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[116] He also concluded that the Regency "has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level."[117]

In 1998, a dispute arose between the Council of Regency and Lance Larsen, a Hawaiian subject. Larsen was subjected to an unfair trial by a State of Hawai'i court and incarcerated for thirty days, seven of which were served in solitary confinement. Larsen's defense was that the State of Hawai'i court was unlawful because there is no treaty of cession whereby the Hawaiian Kingdom ceded its sovereignty to the United States. He was, therefore, subject to Hawaiian Kingdom laws and not the laws of the United States to include the laws of the State of Hawai'i. After being incarcerated, he alleged the Council of Regency was liable for allowing the unlawful imposition of American municipal laws over him.

In a lawsuit filed in the United States District Court for the District of Hawai'i, *Larsen v. United Nations, et al.*, on August 4, 1999, Larsen alleged that the Hawaiian Kingdom is "in continual violation of the… 1849 Treaty of Friendship, Commerce and Navigation between the [Hawaiian Kingdom and the United States], and in violation of the principles of international law laid in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful imposition of American municipal laws over Plaintiff's person within the territorial jurisdiction of the Hawaiian Kingdom."

On October 13, 1999, a notice of voluntary dismissal without prejudice was filed as to the United States and nominal defendants, United Nations, France, Denmark, Sweden, Norway, United Kingdom, Belgium,

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[116] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," *Hawaiian Journal of Law and Politics* 3 (2020): 317-333, 324.

[117] *Id.*, 325.

Netherlands, Italy, Spain, Switzerland, Russia, Japan, Germany, Portugal and Samoa by the plaintiff. On October 29, 1999, the remaining parties, Larsen and the Hawaiian Kingdom, by its Council of Regency, entered into a stipulated settlement agreement dismissing the entire case without prejudice as to all parties and all issues and submitting their dispute to binding arbitration. An agreement between Larsen and the Hawaiian Kingdom to submit their dispute to final and binding arbitration at the PCA at The Hague, the Netherlands, was entered into on October 30, 1999.[118] On November 8, 1999, a notice of arbitration was filed with the International Bureau of the PCA—*Lance Paul Larsen v. Hawaiian Kingdom*.[119]

VI. ARBITRATION PROCEEDINGS UNDER THE AUSPICES OF THE PERMANENT COURT OF ARBITRATION

The first allegation of the war crime of usurpation of sovereignty,[120] was made the subject of an arbitral dispute in *Larsen v. Hawaiian Kingdom* at the PCA, whereby the claimant alleged that the Plaintiff was legally liable "for allowing the unlawful imposition of American municipal laws" over him within Hawaiian territory.[121] According to Schabas, the war crime of usurpation of sovereignty consists of the "imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation."[122]

To ensure that the dispute is international, the PCA needed to possess institutional jurisdiction first,[123] before it could form the *ad hoc* arbitral tribunal to resolve the dispute. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties. International disputes, involving States, include disputes between two or more States, a State and an international

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[118] Agreement between plaintiff Lance Paul Larsen and defendant Hawaiian Kingdom to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at The Hague, the Netherlands (October 30, 1999), https://www.alohaquest.com/arbitration/pdf/Arbitration_Agreement.pdf.

[119] Notice of Arbitration (November 8, 1999), https://www.alohaquest.com/arbitration/pdf/Notice_of_Arbitration.pdf.

[120] Memorial of Lance Paul Larsen (May 22, 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, para. 62-64, https://www.alohaquest.com/arbitration/pdf/Memorial_Larsen.pdf.

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

[122] Schabas, "War Crimes," 157.

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

organization, or a State and a private party.[124] Contracting States to the 1907 Hague Convention for the Pacific Settlement of International Disputes ("1907 Convention") have direct access to the PCA.[125] Whereas, non-Contracting States have access to the PCA by virtue of Article 47 of the 1907 Convention, which states, "The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to…non-Contracting [States]."[126] Private parties do not have access to the PCA unless sponsored by their home State.[127] In this case, the Hawaiian Kingdom did not sponsor Larsen in its suit, but rather waived its sovereign immunity by consenting to submit their dispute to the PCA for resolution by virtue of Article 47.

The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "Pursuant to article 47 of the 1907 Convention."[128]

From an evidential standpoint, Hawaiian laws are silent in explaining the actions taken by the PCA in acknowledging the Hawaiian Kingdom's status as a non-Contracting State. When Hawaiian "laws are silent on the subject of evidence," the Hawaiian Kingdom Supreme Court stated that it would "be guided by the general principles which are recognized in civilized countries, and providing that we may adopt, in any case, the reasonings and analogies of the common law, or of the civil law, so far as they are deemed to founded in justice, and not in conflict with the laws and usages of this Kingdom."[129]

The common law is English in origin and is derived from judicial decisions, which cannot explain the action taken by the PCA. The civil law, on the other hand, "is the freest of all because it is purely theoretical. It is also the most prolific because it is developed leisurely. In its examination it does not confine itself to an isolated case. It gives to its

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[124] *Id.*

[125] 36 U.S. Stat. 2199.

[126] *Id.*, 2224.

[127] See *Ilya Levitis (United States) v. The Kyrgyz Republic*, PCA Case no. 2021-21, https://pca-cpa.org/en/cases/97/; *U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic*, PCA Case no. 2013-06, https://pca-cpa.org/en/cases/2/; *Windstream Energy LLC (United States) v. The Government of Canada*, PCA Case no. 2013-22; and *Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic*, PCA Case no. 2014-01, https://pca-cpa.org/en/cases/24/).

[128] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

[129] *Bullions v. Loring Brothers & Co.*, 1 Haw. 372, 377 (1856).

concepts and its deductions the broadness of view, the logic and the force of synthesis."[130] According to Professor Picker, "There is a wide degree of support for the proposition that civil law has served as the most significant influence on international law."[131] He goes on to state that "some would even argue that international law is essentially a civil law system."[132] And Professor Nagle explains, "[i]t is the civil-law traditions that have most widely influenced international law [and] international organizations."[133] Furthermore, as stated by Professors Merryman and Clark, "[t]he civil law was the legal tradition familiar to the Western European scholar-politicians who were the fathers of international law. The basic charters and the continuing legal development and operation of the European Communities are the work of people trained in the civil law tradition."[134]

Of the forty-four Contracting States to the 1907 Convention that established the PCA at the Hague Conference in 1907, the United States and Great Britain, as common law States, were the only States that were not from a civil law tradition. The other forty-two States were represented by men who were "trained in the civil law tradition." This includes the Netherlands where the PCA is situated in its city The Hague. The current number of Contracting States to the 1907 Convention is 122, the majority of which are based on the civil law tradition.

Therefore, the International Bureau of the PCA in acknowledging the continuity of the Hawaiian Kingdom as a State for purposes of its institutional jurisdiction should be viewed through the reasonings of the civil law tradition. According to civilian law, a fact is juridical or legal when it produces a legal effect, by virtue of a legal rule. In *Schexnider v. McDermott Int'l Inc.*, the federal court in Louisiana stated *juridical facts* are defined as "events having prescribed legal effects."[135] According to the German tradition of the civil law, a *juridical act*, which is triggered by a *juridical fact*, "sets the law in motion and produces legal consequences."[136]

The Hawaiian Kingdom, as an independent State in continuity, is a *juridical fact* according to the civilian law. Both rights and powers held by

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[130] 1 Planiol, *Civil Law Treatise* (translation by the Louisiana State Law Institute) (St. Paul, Minnesota: West Publishing Company, 1959), §21.

[131] Colin B. Picker, "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction," *Vanderbilt Journal of Transnational Law* 41 (2008): 1083-1140, 1106.
[132] *Id.*

[133] Estella Nagle, "Maximizing Legal Education: The International Component," *Stetson Law Review* 29 (2000): 1091-1117, 1092.

[134] John Henry Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: The Bobbs-Merrill, 1978), 77.

[135] *Schexnider v. McDermott Int'l Inc.*, 688 F. Supp. 234, 238 (W.D. La. 1988).

[136] Nikolaos A. Davrados, "A Louisiana Theory of Juridical Acts," *Louisiana Law Review* 80, no. 4 (2020): 1119-1284, 1129.

a subject of international law, which includes the PCA as an intergovernmental institution, may arise from a *juridical fact*. Access to the institutional jurisdiction of the PCA would only be triggered by the *juridical fact* of the Hawaiian Kingdom being a non-Contracting "State," and not by Larsen as a "private party." This *juridical fact* set in motion and produced legal consequences, which was the convening of the *ad hoc* arbitral tribunal on June 9, 2000. Professor Shaw recently drew attention to the institutional jurisdiction of the International Criminal Court regarding Palestinian Statehood and its territory for purposes of investigating international crimes.[137] Shaw does not see Palestine as a *juridical fact* that would have otherwise triggered the Court's institutional jurisdiction to investigate international crimes under Article 12(2)(a) of the Rome Statute.

The *juridical fact* of the Hawaiian State produced a legal effect for the International Bureau of the PCA to do a *juridical act* of accepting the dispute under the auspices of the PCA by virtue of Article 47, being a legal rule. The international dispute between Larsen and the Hawaiian Kingdom was not created by the *juridical fact*, but rather the *juridical fact* determined the legal conditions for the PCA's acceptance of the dispute, which is the *juridical act* by which the dispute is established to gain access to the jurisdiction of the PCA. This *juridical act* "may be compared—*mutatis mutandis*—to a juridical act of a domestic judge recognizing a juridical fact (*e.g. filiation*) which is productive of certain legal effects arising from it according to law."[138] The significance of the *juridical act* is that the United States, as a member of the PCA Administrative Council, was fully aware of the *Larsen* case and did not object. In fact, the United States entered into an agreement with the Council of Regency to access all records and pleadings of the case.[139]

State continuity of the Hawaiian Kingdom is determined by the rules of customary international law. And while State members of the Administrative Council furnishes all Contracting States "with an annual Report" in accordance with Article 49,[140] it does represent "State practice [that] covers an act or statement by…State[s] from which views can be inferred about international law," and it "can also include omissions and

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[137] Professor Malcom N. Shaw, *Amicus Curiae on the Situation in the State of Palestine*, ICC-01-18 (March 16, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_01017.PDF.

[138] Federico Lenzerini, "Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration," (Dec. 5, 2021), 3, https://hawaiiankingdom.org/pdf/Memo_Re_Juridical_Fact_and%20Act_of_PCA_(Lenzerini).pdf.

[139] Sai, "Royal Commission of Inquiry," 25-26.

[140] 36 U.S. Stat. 2199, 2225.

silence on the part of States."[141] The fact that the United States, to include all member States of the PCA Administrative Council did not object to the International Bureau's *juridical act* of acknowledging the Hawaiian Kingdom's existence as a non-Contracting State, is a reflection of the practice of States—*opinio juris*. Furthermore, the Administrative Council is a treaty-based component of an intergovernmental organization comprised of representatives of States, and "their practice is best regarded as the practice of States."[142] According to Professor Lenzerini, "it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau."[143]

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but their denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.[144] The Tribunal explained it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[145] Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

VII. CONCLUSION

The *Larsen v. Hawaiian Kingdom* case was a major public event in international relations and international law, but its significance, for reasons unknown, only recently garnered the attention of legal scholars and historians. Given the international reach of the Hawaiian Kingdom through its treaties and diplomatic posts, scholars in the fields of history, law and political science should have been engaging the legal and political history of the Hawaiian Kingdom and its continued existence as a State under a prolonged and belligerent occupation since 1893. Notwithstanding, the discourse regarding the history of the Hawaiian

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[141] Michael Akehurst, "Custom as a Source of International Law," *British Yearbook of International Law* 47, no. 1 (1975): 1-53, 10.

[142] *Id.*, 11.

[143] Lenzerini, *Civil Law*, 4.

[144] Sai, "Royal Commission of Inquiry," 25-26.

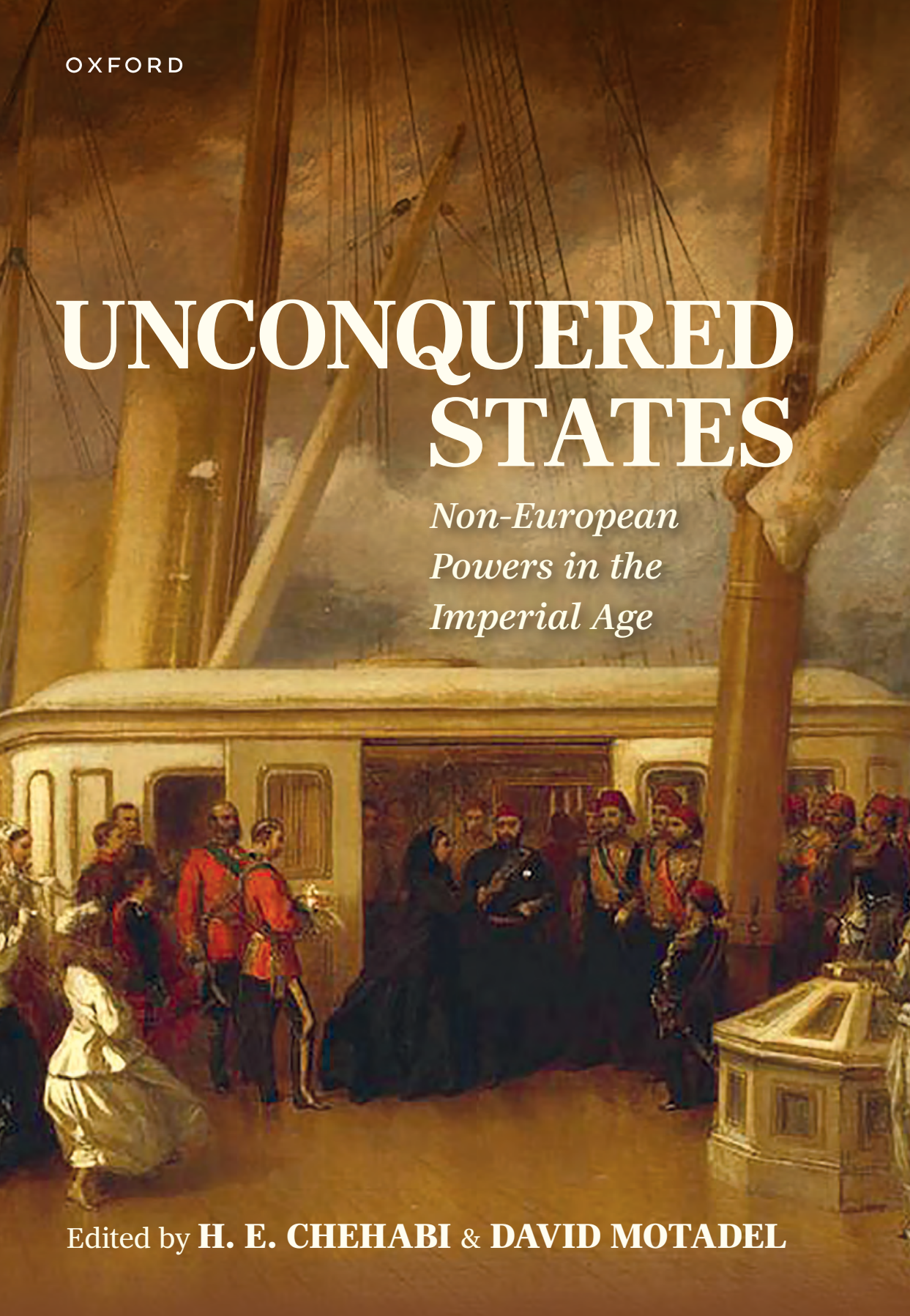
[145] Larsen v. Hawaiian Kingdom, International Law Reports, 596.

Islands since the *Larsen* case has managed to shift from an American colonial context of race and indigeneity to State theory and international humanitarian law.[146] Professor Young advocates for "a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity."[147]

[146] David Keanu Sai, "Setting the Record Straight on Hawaiian Indigeneity," *Hawaiian Journal of Law and Politics* 3 (2021): 6-72, http://www2.hawaii.edu/~anu/pdf/Indigeneity_Sai_(HJLP)_Vol_3.pdf.

[147] Kanalu Young, "Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001," *Hawaiian Journal of Law and Politics* 2 (2006): 1-33, 1.

Enclosure “4”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MARTTI KOSKENNIEMI, University of Helsinki

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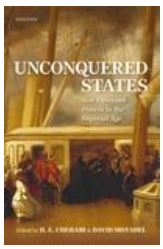

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21

Hawai‘i’s Sovereignty and Survival in the Age of Empire

David Keanu Sai

Three years after the tragic demise of Captain James Cook on the shores of the royal residence of Kalaniopu‘u, king of the Hawai‘i Island kingdom, 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 (Fig. 21.1). Just three years later, Kamehameha joined the British Empire under an agreement with Captain George Vancouver on 25 February 1794. According to Willy 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.”[1]

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.”[2] Kamehameha and his chiefs acknowledged they were British subjects. 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.”[3] 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

[1] Willy Daniel Kaipo Kauai, “The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai‘i” (Ph.D. dissertation, University of Hawai‘i at Manoa, 2014), 55.

[2] George Vancouver, *A Voyage of Discovery to the North Pacific Ocean and Round the World* (London: G. G. and J. Robinson, and J. Edwards, 1798), 3:56.

[3] Manley Hopkins, *Hawaii: The Past, Present and Future of Its Island Kingdom* (London: Longmans, Green, and Co., 1866), 133.

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> 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 [Hawaiʻi] to His Britannic Majesty, and acknowledged themselves to be subjects of Great Britain.[4]

In April of 1795, Kamehameha conquered the Kingdom of Maui and acquired the islands of Maui, Lanaʻi, Molokaʻi, and Oʻahu. By April of 1810, the Kingdom of Kauaʻi capitulated and its ruler, Kaumualiʻi, ceded his kingdom and its dependent island of Niʻihau to Kamehameha, thereby becoming a vassal state, with the Kauaʻi king paying an annual tribute to Kamehameha.[5] Thus, the entire archipelago had been consolidated by the Kingdom of Hawaiʻi, which 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 a prime minister and governors over the former kingdoms of Hawaiʻi, Maui, and Oʻahu.[6] 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."[7] *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, who thereafter adopted his title as his name—Kālaimoku.

Foreigners also commonly referred to Kālaimoku as Billy Pitt, the namesake of the younger William Pitt, who served as Britain's prime minister under King George III. The British Prime Minister was also the First Lord of the Treasury and Kālaimoku was also referred to as the chief treasurer. Kālaimoku's duty was to manage day-to-day operations of the royal 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: 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."[8]

After the death of Kamehameha I in 1819, the kingdom would continue its transformation as a self-governing member of the British realm. As Lorenz

[4] Vancouver, *A Voyage of Discovery*, 56–7.

[5] This vassalage, however, was terminated in 1821 by Kamehameha's successor and son, Kamehameha II, when he removed Kaumualiʻi to the island of Oʻahu and replaced him with a governor named Keʻeaumoku.

[6] Walter Frear, "Hawaiian Statute Law," *Thirteenth Annual Report of the Hawaiian Historical Society* (Honolulu: Hawaiian Gazette Co., 1906), 15–61, at 18. Frear mistakenly states that Kamehameha established four earldoms that included the Kingdom of Kauaʻi. Kaumualiʻi was not a governor, but remained a king until 1821.

[7] Ibid.

[8] Samuel Kamakau, *Ruling Chiefs* (Honolulu: Kamehameha Schools Press, 1992), 175.

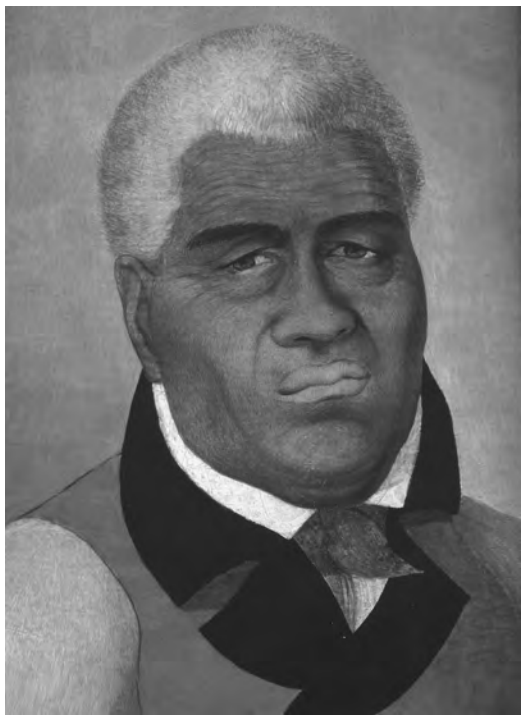

Fig. 21.1 King Kamehameha I, progenitor of the Hawaiian Kingdom, 1795–1819. (Unknown Artist) (Public Domain)

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 the existing political system,"[9] 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."[10] In 1824, Protestantism became the national religion, and in 1829 Hawaiian authorities took steps to change the name from Sandwich Islands to Hawaiian Islands.[11] The country later came to be known as the Hawaiian Kingdom.

[9] Lorenz Gonschor, *A Power in the World: The Hawaiian Kingdom in Oceania* (Honolulu: University of Hawai'i Press, 2019), 22.

[10] Lorenz Gonschor, "Ka Hoku o Osiania: Promoting the Hawaiian Kingdom as a Model for Political Transformation in Nineteenth-Century Oceania," in Sebastian Jobs and Gesa Mackenthun, eds., *Agents of Transculturation: Border-Crossers, Mediators, Go-Betweens* (Münster: Waxmann, 2013), 157–86, at 161.

[11] "Capt. Finch's Cruise in the U.S.S. Vincennes," U.S. Navy Department Archives. "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."

On 8 October 1840, Kamehameha III approved the Hawaiian Kingdom's first constitution. Bernd Marquardt acknowledges that Hawaiʻi's transformation into a constitutional monarchy even precedes that of Prussia.[12] While other European monarchs instituted constitutional reforms before Prussia, what is remarkable is that Hawaiʻi was the first consolidated non-European constitutional monarchy. 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.[13]

After French troops temporarily occupied the Hawaiian Kingdom in 1839 under the command of Captain Laplace, Lord Talbot, a British member of parliament, 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."[14] Viscount Palmerston reported he knew very little of the French occupation, 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."[15]

In the eyes of the Hawaiian government, Palmerston's report quelled the notion of British dependency and acknowledged Hawaiian autonomy.[16] Two years later, a clearer British policy toward the Hawaiian Islands by Palmerston's successor, Lord Aberdeen, reinforced the position of the Hawaiian government. In a letter to the British Admiralty on 4 October 1842, Talbot 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

[12] Bernd Marquardt, *Universalgeschichte des Staates: von der vorstaatlichen Gesellschaft zum Staat der Industriegesellschaft* (Zurich: LIT, 2009), 478.
[13] *Rex v. Joseph Booth*, 3 Hawaiʻi 616, 630 (1863).
[14] Ralph S. Kuykendall, *The Hawaiian Kingdom*, vol. 1, *Foundation and Transformation, 1778–1854* (Honolulu: University of Hawaiʻi Press, 1938), 185.
[15] Ibid.
[16] Robert C. Wyllie, *Report of the Minister of Foreign Affairs, 21 May 1845* (Honolulu: The Polynesian Press, 1845), 7.

> 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.[17]

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent and sovereign state under international law, which was unprecedented for a country that had no historical ties to Europe. He sought the formal recognition of Hawaiian independence from the three naval powers in the Pacific at that time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys: Timoteo Haʻalilio; William Richards, who was at the time an American citizen; and Sir George Simpson, a British subject.

While the envoys were on their diplomatic mission, a British Naval ship, HBMS *Carysfort*, under the command of Lord Paulet, entered Honolulu harbor on 10 February 1843. Basing his actions on complaints in letters from British Consul Richard Charlton, who was absent from the kingdom at the time, that British subjects were being treated unfairly, Paulet seized control of the Hawaiian government on 25 February 1843, after threatening to level Honolulu with cannon fire.[18] 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 the Chilean port of Valparaiso, and arrived in the islands on 25 July 1843. After a meeting with Kamehameha III, Admiral Thomas concluded that Charlton's complaints did not warrant a British takeover and ordered the restoration of the Hawaiian government. The restoration took place in a grand ceremony on 31 July 1843.[19] At a thanksgiving service after the ceremony, Kamehameha III proclaimed before a large crowd, "*ua mau ke ea o ka ʻāina i ka pono*" (the life of the land is perpetuated in righteousness). The king's statement later became the national motto for the country.

The Hawaiian envoys succeeded in obtaining a joint proclamation by Great Britain and France formally recognizing the Hawaiian Kingdom as a sovereign and "Independent State" on 28 November 1843 at the Court of London.[20] The United States followed on 6 July 1844 by a letter of Secretary of State John

[17] The Historical Commission, *Report of the Historical Commission of the Territory of Hawai'i for the Two Years Ending 31 Dec. 1924* (Honolulu: Star Bulletin, 1925), 36.

[18] Kuykendall, *The Hawaiian Kingdom*, 1:214.

[19] Ibid., 220.

[20] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894–1895* (Washington, DC: Government Printing Press, 1895), 120. "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."

C. Calhoun.[21] Thus the Hawaiian Islands became the first Pacific country to be recognized as an independent and sovereign state. According to the legal scholar John Westlake, the family of nations comprised "first, all European States . . . Secondly, all American States . . . Thirdly, a few Christian States in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State."[22]

In 1845, the Hawaiian Kingdom organized its military under the command of the governors of the several islands of Hawaiʻi, Maui, Oʻahu, and Kauaʻi, but subordinate to the monarch. Hawaiian statute provided that "all male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective islands where they have their most usual domicile, whenever so required by proclamation of the governor thereof."[23] The legislature enacted in 1886 a statute "for the purpose of more complete military organization in any case requiring recourse to arms and to maintain and provide a sufficient force for the internal security and good order of the Kingdom, and being also in pursuance of Article 26 of the Constitution."[24] This military force was renamed the King's Royal Guard in 1890.[25] Augmenting the regular force was the call for duty of the civilian population under the 1845 statute.

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 Congress of Vienna by virtue of the fact that Hawaiʻi was admitted as a monarchical member of the family of nations.[26] The first diplomatic post was established in London with the appointment of Archibald Barclay as Hawaiian Commissioner on 17 May 1845.[27] Within fifty years, the Hawaiian Kingdom maintained more than ninety legations and consulates throughout the world and entered into extensive diplomatic and treaty relations with other states, including Austria-Hungary, Belgium, Chile, China, Denmark, France, German states, Great Britain, Guatemala, Italy, Japan, Mexico, Netherlands, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, the United States, and Uruguay.[28] The Hawaiian

[21] Wyllie, 1845 Report, 4.

[22] John Westlake, *Chapters on the Principles of International Law* (Cambridge: University Press, 1894), 81.

[23] *Statute Laws of His Majesty Kamehameha III*, Hawaiian Kingdom (Honolulu: Government Press, 1846), 1:69.

[24] *An Act to Organize the Military Forces of the Kingdom*, Laws of His Majesty Kalakaua I (Honolulu: P. C. Advertiser Steam Print, 1886), 37.

[25] *An Act to Provide for a Military Force to be Designated as the "King's Royal Guard,"* Laws of His Majesty Kalakaua I (Honolulu: Gazette Publishing Company, 1890), 107.

[26] "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* (Honolulu: University of Hawaiʻi Press, 2003), 161.

[27] Robert C. Wyllie, "Report of the Minister of Foreign Affairs," in *Annual Reports read before His Majesty, to the Hawaiian Legislature, May 12, 1851* (Honolulu: Government Press, 1851), 39.

[28] Thos. G. Thrum, *Hawaiian Almanac and Annual for 1893* (Honolulu: Press Publishing Co., 1892), 140–1. For the treaties with Austria-Hungary, Belgium, Bremen, Britain, Denmark, France, Germany, Hamburg, Italy, Japan, the Netherlands and Luxembourg, Portugal, Russia, Samoa, Spain, Sweden-Norway,

Kingdom also became a member state of the Universal Postal Union on 1 January 1882.

On 16 March 1854, Robert Wyllie, Hawaiian Minister of Foreign Affairs, announced to the resident foreign diplomats that the Hawaiian domain included twelve islands.[29] In its search for guano, the Hawaiian Kingdom annexed four additional islands, under the doctrine of discovery, north-west of the main islands. Laysan Island was annexed by discovery of Captain John Paty on 1 May 1857.[30] Lisiansky Island also was annexed by discovery of Captain Paty on 10 May 1857.[31] Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on 15 April 1862 and proclaimed as Hawaiian territory.[32] Ocean Island, also called Kure Atoll, was subsequently acquired on 20 September 1886, by proclamation of Colonel J. H. Boyd.[33] In all cases, the acquisitions were effected according to the rules of international law.

The Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with rapidly changing political, social, and economic conditions. Under the 1864 constitution, the office of prime minister was repealed, which effectively established an executive monarch, and the separation of powers doctrine was fully adopted.[34] It was also a progressive country when compared to the other European states and their successor states on the American continent in the nineteenth century. Its political economy was not based on Smith's capitalism of *The Wealth of Nations*, but rather on Francis Wayland's approach of cooperative capitalism. According to Juri Mykkanen, Wayland was interested in "defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members."[35]

Wayland's book *Elements of Political Economy* became the fundamental basis of Hawaiian economic policy-making when translated into the Hawaiian language and adjusted to apply to Hawaiian society accordingly. The book was titled *No Ke Kālaiʻāina*, which theorized "governance from a foundation of *natural rights* within an agrarian society based upon capitalism that was not only cooperative

Switzerland, and the United States, see "Treaties with Foreign States," in David Keanu Sai, ed., *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 237–310.

[29] A. P. Taylor, "Islands of the Hawaiian Domain," unpublished report, 10 January 1931, 5. "I have the honor to make known to you that the following islands, &c., are within the domain of the Hawaiian Crown, viz: Hawai'i, 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."

[30] Ibid, 7. [31] Ibid. [32] Ibid. [33] Ibid., 8.

[34] 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."

[35] Mykkanen, *Inventing Politics*, 154.

in nature, but also morally grounded in Christian values."[36] The national motto "*ua mau ke ea o ka ʻāina i ka pono*" (the life of the land is perpetuated in righteousness) reflects this national discourse and was adopted by the Hawaiian Kingdom Supreme Court as a legal maxim in 1847. In the words of Chief Justice William Lee:

> For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, "The life of the land is preserved by righteousness." We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, "Let justice be done though the heavens fall." Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.[37]

Education was through the medium of the native language. On 7 January 1822, the first printing of an eight-page Hawaiian spelling book was carried out, and all "the leading chiefs, including the king, now eagerly applied themselves to learn the arts of reading and writing, and soon began to use them in business and correspondence."[38] By 1839, the success of the schools was at its highest point, and literacy was "estimated as greater than in any other country in the world, except Scotland and New England."[39] English immersion schools, both public and private, soon became the preferred schools by the Hawaiian population.

The Privy Council in 1840 established a system of universal education under the leadership of what came to be known as the minister of public instruction. A Board of Education later replaced the office of the minister in 1855 and was named the Department of Public Instruction. This department was under the supervision of the minister of the interior and the monarch served on the board as its president. The president and board administered the educational system through school agents stationed in twenty-four school districts throughout the country. And in 1865, the office of inspector general of schools was formed in order to improve the quality of education.

[36] David Keanu Sai, "Hawaiian Constitutional Governance," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Hawaiian Kingdom, 2020), 57–94, at 60.

[37] *Shillaber v. Waldo* et al., 1 Hawaiʻi 31, 32 (1847).

[38] W. D. Alexander, *A Brief History of the Hawaiian People* (New York: American Book Company, 1891), 179.

[39] Laura Fish Judd, *Honolulu: Sketches of Life, Social, Political, and Religious, in the Hawaiian Islands* (New York: Anson D. F. Randolph & Company, 1880), 79.

The Hawaiian Kingdom became the fifth country in the world to provide compulsory education for all youth in 1841, which predated compulsory education in the United States by seventy-seven years. The previous four countries were Prussia in 1763, Denmark in 1814, Greece in 1834, and Spain in 1838. Education was a hallowed word in the halls of the Hawaiian government, "and there [was] no official title more envied or respected in the islands than that of a member of the board of public instruction."[40] Charles de Varigny explained:

> This is because there is no civic question more debated, or studied with greater concern, than that of education. In all the annals of the Hawaiian Legislature one can find not one example of the legislative houses refusing—or even reducing—an appropriation requested by the government for public education. It is as if this magic word alone seems to possess the prerogative of loosening the public purse strings.[41]

Secondary education was carried out through the medium of English in English immersion schools. At Lahainaluna Seminary, a government-run secondary education school, the subjects of mathematics (algebra, geometry, calculus, and trigonometry), English grammar, geography, Hawaiian constitutional history, political economy, science, and world history were taught. Secondary schools were predominantly attended by aboriginal Hawaiians after completing their common school education.[42] The Hawaiian Kingdom also had a study abroad program in the 1880s through which seventeen young Hawaiian men and one woman "attended schools in six countries where they studied engineering, law, foreign language, medicine, military science, engraving, sculpture, and music."[43]

As Gonschor points out, Hawaiian governance also had an impact on other states in Oceania and Asia.[44] In particular, Dr. Sun Yat-sen, who received his secondary education in the Hawaiian Kingdom at Iolani College and Punahou College between 1879 and 1883, told a reporter when he returned to the country in 1910: "This is my Hawaii. Here I was brought up and educated; and it was here that I came to know what modern, civilized governments are like and what they mean."[45] Sun Yat-sen would not have learned "what modern, civilized governments are like" in

[40] Charles De Varigny, *Fourteen Years in the Sandwich Islands, 1855–1868* (Honolulu: University of Hawai'i Press, 1981), 151.

[41] Ibid.

[42] Annual Examination of the Lahainaluna Seminary (12, 13, and 14 July 1882), website of the Hawaiian Kingdom, online. Lahainaluna's 1882 annual exams reflect the breadth of Hawaiian national consciousness.

[43] Agnes Quigg, "Kalākaua 's Hawaiian Studies Abroad Program," *The Hawaiian Journal of History* 22 (1988): 170–208, at 170.

[44] Gonschor, "Ka Hoku o Osiania"; and Gonschor, *A Power in the World.*

[45] Albert Pierce Taylor, "Sun Yat Sen in Honolulu," *Paradise of the Pacific* 38:8 (1928): 8–11, at 8; see also Yansheng Ma Lum and Raymon Mun Kong Lum, *Sun Yat-sen in Hawai'i: Activities and Supporters* (Honolulu: University of Hawai'i Press, 1999), 5.

the United States but only in the Hawaiian Kingdom, where racism was, at the time, unthinkable.

Virginia Dominguez has found that before the United States' seizure of Hawaiʻi in 1898 there was "very little overlap with Anglo-American" race relations.[46] She found that there were no "institutional practices [that] promoted social, reproductive, or civic exclusivity on anything resembling racial terms before the American period."[47] In comparing the two countries she stated that unlike "the extensive differentiating and disempowering laws put in place throughout the nineteenth century in numerous parts of the U.S. mainland, no parallels—customary or legislated—seem to have existed in the [Hawaiian Kingdom]."[48] She admits that with "all the recent, welcomed publishing flurry on the social construction of whiteness and blackness and the sociohistorical shaping of racial categories . . . there are usually at best only hints of the possible—but very real—unthinkability of 'race.'"[49] According to Kauai, the "multi-ethnic dimensions of the Hawaiian citizenry coupled by the strong voice and participation of the aboriginal population in government played a prominent role in constraining racial hierarchy and the emergence of a legal system that promoted white supremacy."[50]

Hawaiian society was not based on race or gender, but rather class, rank, and education. Hawaiian women in the nineteenth century served as monarchs—Victoria Kamāmalu (1863) and Liliʻuokalani (1891–1917); regents—Kaʻahumanu (1823–1825) and Liliʻuokalani (1881, 1891); and prime ministers—Kaʻahumanu (1819–1823, 1825–1832), Elizabeth Kinaʻu (1832–1839), Miriam Kekāuluohi (1839–1845), and Victoria Kamāmalu (1855–1863) (Fig. 21.2).

In 1859, universal healthcare was provided at no charge for aboriginal Hawaiians through hospitals regulated and funded by the Hawaiian government.[51] Even tourists visiting the country were provided health coverage during their sojourn under *An Act Relating to the Hospital Tax levied upon Passengers* (1882).[52] As part of Hawaiʻi's mixed economy, the Hawaiian government appropriated funding for the maintenance of its quasi-public hospital, the Queen's Hospital, where the monarch served as head of the Board of Trustees, comprised of ten appointed government

[46] Virginia R. Dominguez, "Exporting U.S. Concepts of Race: Are There Limits to the U.S. Model?" *Social Research* 65:2 (1988): 369–99, at 372.

[47] Ibid. [48] Ibid. [49] Ibid., 371–2. [50] Kauai, "The Color of Nationality," 31.

[51] Jeffrey J. Kamakahi, "A Socio-Historical Analysis of the Crown-based Health Ensembles (CBHEs) in Hawaii: A Satrean Approach" (Ph.D. dissertation, University of Hawaiʻi at Mānoa, 1991), 49–125. As to the dismantling of the universal health care during the American occupation, David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in Sai, ed., *The Royal Commission of Inquiry*, 97–121, at 115–6.

[52] *Compiled Laws of the Hawaiian Kingdom* (Honolulu: Printed at the Hawaiian Gazette Office, 1884), 666. Section 1 provides that "the Trustees of the Queen's Hospital are hereby authorized and directed to reserve and apply to uses hereinafter mentioned the sum of two thousand and five hundred dollars per annum out of all moneys received by them as and for hospital tax levied upon and received from passengers arriving at the several ports of this Kingdom."

Fig. 21.2 Queen Lili'okalani, Constitutional Executive Monarch, 1891–1917. (Unknown Artist) (Public Domain)

officials and ten persons elected by the corporation's shareholders. According to Henry Witney: "Native Hawaiians are admitted free of charge, while foreigners pay from seventy-five cents to two dollars a day, according to accommodations and attendance."[53] It wasn't until the mid-twentieth century that the Nordic countries did what the Hawaiian Kingdom had done with universal health care.

Kamehameha III sought to secure the independent status of Hawai'i by ensuring international recognition of the kingdom's neutrality. "A nation that wishes to secure her own peace," said Emmerich de Vattel, "cannot more successfully attain that object than by concluding treaties [of] neutrality."[54] Unlike states that were neutralized by agreement of third states, such as Switzerland, Belgium, and Luxembourg, the Hawaiian Kingdom took a proactive approach to secure its neutrality through diplomacy and treaty provisions. The country made full use of its global location and became a beneficial asylum for all states who found

[53] Henry Witney, *The Tourists' Guide through the Hawaiian Islands Descriptive of Their Scenes and Scenery* (Honolulu: Hawaiian Gazette Company's Press, 1895), 21.

[54] Emmerich de Vattel, *The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, 6th ed. (Philadelphia, PA: T. & J. W. Johnson, 1844), 333.

themselves at war in the Pacific. Hawaiian Minister of Foreign Affairs Robert Wyllie secured equal and Most Favored Nation treaties for the Hawaiian Kingdom, and, wherever possible, included in the treaties the recognition of Hawaiian neutrality.[55] When he opened the Legislative Assembly on 7 April 1855, Kamehameha IV stated in his speech:

> 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, contained in the Convention between his Majesty the Emperor of all the Russians, and the United States, concluded in Washington on the 22nd July last.[56]

Since 1858, Japan had been forced to recognize the extraterritoriality of foreign 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."[57] The Hawaiian Kingdom's 1871 treaty with Japan provided for Hawaiian extraterritoriality of Hawaiian law under Article II, which stated that Hawaiian subjects in Japan would 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."[58] 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 11 January 1881, a decision was made for King Kalākaua to undertake a world tour, which was unprecedented at the time for any monarch. His objectives were, "first, to recuperate his own health and second, to find means for recuperating his people, the latter . . . by the introduction of foreign immigrants."[59] The royal party departed Honolulu harbor on 20 January 1881 on the steamer *City of Sydney* headed for San Francisco. From San Francisco, they embarked for Japan on 8 February. The world tour would last

[55] Provisions of neutrality can be found in the treaties with Sweden/Norway (1852), under Article XV; Spain (1863), under Article XXVI; Germany (1879), under Article VIII; and Italy (1869), under its additional article.

[56] Robert C. Lydecker, comp., *Roster Legislatures of Hawaii, 1841–1918* (Honolulu: Hawaiian Gazette Co., 1918), 57.

[57] *Treaty of Amity between the United States and Japan* (29 July 1858) U.S. Treaty Series 185, 365.

[58] "Treaty with Japan," 19 August 1871, in *Treaties and Conventions Concluded between the Hawaiian Kingdom and Other Powers since 1825* (Honolulu: Elele, 1887), 115.

[59] Ralph S. Kuykendall, *The Hawaiian Kingdom*, vol. 3, *The Kalakaua Dynasty, 1874–1893* (Honolulu: University of Hawaiʻi Press, 1967), 228. Kalākaua's motto was "*hoʻoulu lāhui*" (increase the race). The native population was decimated by foreign diseases of which they had no immunity, and Hawaiian leaders sought a resolution by introducing foreigners to intermarry.

Fig. 21.3 King Kalākaua with officials of the Empire of Japan, 1881. (Top row L–R) Hawaiian Colonel Charles Hastings Judd, Japanese state official Tokunō Ryōsuke, and William N. Armstrong, Kalākaua's aide; (bottom row L–R) Prince Komatsu Akihito, King Kalākaua, and Japanese Minister of Finance Sano Tsunetami. (Public Domain)

ten months and take the Hawaiian king to Japan, China, Hong Kong, Siam (Thailand), Singapore, Johor (now in Malaysia), India, the Suez Canal, Egypt, Italy, France, Great Britain, Scotland, Belgium, Germany, Austria, Spain, and Portugal (Fig. 21.3). All graciously received the King and he exchanged royal orders with these countries.[60] After he returned home, Kalākaua also exchanged royal orders with Naser al-Din Shah of Persia.[61]

When Kalākaua visited Japan, the Meiji Emperor "asked for Hawai'i to grant full recognition to Japan and thereby create a precedent for the Western powers to

[60] Gonschor, *A Power in the World*, 76–87.

[61] Persian Foreign Minister to Hawaiian Foreign Minister, F. O. Ex. 1886 Misc. Foreign, July–September, Hawai'i Archives.

follow."[62] Hawaiian recognition of Japan's full sovereignty and repeal of the Hawaiian Kingdom's consular 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 Queen Liliʻuokalani, successor to King Kalākaua, R. W. Irwin, Hawaiian minister to the court of Japan in Tokyo, sent a diplomatic note to the Japanese Minister of Foreign Affairs, in which he stated: "I now have the honour formally to announce, that the Hawaiian Government do fully, completely, and finally abandon and relinquish the jurisdiction acquired by them in respect of Hawaiian subjects and property in Japan, under the Treaty of the 19th August, 1871."[63]

On 10 April 1894, the Japanese Foreign Minister 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 your Excellency's note."[64] This dispels the commonly held belief among historians that Great Britain was the first to abandon its extraterritorial jurisdiction in Japan under the 1894 Anglo-Japanese Treaty of Commerce and Navigation. This action taken by the Hawaiian Kingdom, being a non-European power, ushered in Japan's full and complete independence of its laws over Japanese territory.

Japan's request also serves as an acknowledgment of Hawaiʻi's international standing as a fully sovereign and independent state. 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: "it is here alone that men of their race enjoy most of the advantages and all the pomp of independence."[65]

The population of the Hawaiian Kingdom consisted of aboriginal Hawaiians, naturalized immigrants, native-born non-aboriginals, as well as resident foreigners. In 1890, the majority of Hawaiian subjects were aboriginal Hawaiians, both pure and part, at forty thousand six hundred and twenty-two, and non-aboriginal Hawaiians subjects at seven thousand four hundred and ninety-five.[66] Of the alien population, Americans were at one thousand nine hundred and twenty-eight, Chinese at fifteen thousand three hundred and one, Japanese at twelve thousand three hundred and sixty, Norwegians at two hundred and twenty-seven, British at one thousand three hundred and forty-four, Portuguese at eight thousand six

[62] Gonschor, "Ka Hoku o Osiania," 163.

[63] Mr. Irwin to the Japanese Minister for Foreign Affairs, 18 January 1893, in *British and Foreign State Papers*, vol. 86, *1893–1894*, ed. Augustus H. Oakes and Willoughby Maycock (London: Her Majesty's Stationery Office, 1899), 1186.

[64] The Japanese Minister for Foreign Affairs to Mr. Irwin, in ibid., 1186–7.

[65] Robert Louis Stevenson, *A Footnote to History: Eight Years of Trouble in Samoa* (New York: Charles Scribner's Sons, 1895), 59.

[66] Thos. G. Thrum, *Hawaiian Almanac and Annual for 1892* (Honolulu: Press Publishing Co., 1891), 11.

hundred and two, Germans at one thousand and thirty-four, French at seventy, Polynesians at five hundred and eighty-eight, and other foreigners at four hundred and nineteen.[67] The total population of the Hawaiian Kingdom in 1890 was eighty-nine thousand nine hundred and ninety. The country's primary trading partners were the United States, Great Britain, Germany, British Columbia, Australia and New Zealand, China and Japan, and France.[68]

While preparing to celebrate the 50th anniversary of Hawaiian independence, the Hawaiian Kingdom was invaded, without just cause, by American troops on 16 January 1893. Under orders of US minister John Stevens, "a detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu."[69] This invasion force coerced Queen Lili'uokalani to conditionally surrender to the superior power of the United States military, on which she stated: "Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[70]

President Cleveland initiated an investigation on 11 March 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and to provide periodic reports to Secretary of State Walter Gresham. After receiving the final report from Special Commissioner Blount, Gresham, on 18 October 1893, notified the president:

> The Government of Hawaii surrendered its authority under threat of war, until such time as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign . . . Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice. Can the United States consistently insist that other nations shall respect the independence of Hawaii while not respecting it themselves? Our Government was the first to recognize the independence of the Islands and it should be the last to acquire sovereignty over them by force and fraud.[71]

"Traditional international law was based upon a rigid distinction between the state of peace and the state of war," says Judge Greenwood.[72] "Countries were either in a state of peace or a state of war; there was no intermediate state."[73] This

[67] Ibid. [68] Ibid., 33.
[69] United States House of Representatives, *Executive Documents*, 451. [70] Ibid., 586.
[71] Ibid., 462–3.
[72] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* (New York: Oxford University Press, 1995), 39–63, at 39.
[73] United States House of Representatives, *Executive Documents*, 586.

distinction is also reflected by the renowned jurist of international law Lassa Oppenheim, who separated his treatise on *International Law* into two volumes: *Peace* (volume 1) and *War and Neutrality* (volume 2).[74] In the nineteenth century, war was recognized as lawful if justified under *jus ad bellum*.

International law distinguishes the state, being the subject of international law, from its government, being the subject of the state's municipal law.[75] In *Texas v. White*, the United States Supreme Court stated that "a plain distinction is made between a State and the government of a State."[76] Therefore, the military overthrow of the government of a state by another state's military in a state of war does not equate to an overthrow of the state itself. Its sovereignty and legal order continue to exist under international law, and the occupying state, when it is in effective control of the occupied state's territory, is obligated to administer the laws of the occupied state until a treaty of peace.

An example of this principle was the overthrow of Spanish governance in Santiago de Cuba in July 1898. The military overthrow did not transfer Spanish sovereignty to the United States but triggered the customary international laws of occupation later codified under the 1899 Hague Convention (III) and the 1907 Hague Convention (IV), whereby the occupying state has a duty to administer the laws of the occupied state over territory of which it is in effective control. This customary law was the basis for General Orders no. 101, issued by President McKinley to the War Department on 13 July 1898:

> Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force.[77]

An armistice was eventually signed by the Spanish government on 12 August 1898, after its territorial possessions of the Philippines, Guam, Puerto Rico, and Cuba were under the effective occupation of US troops. This led to a treaty of peace that was signed in Paris on 10 December 1898 ceding Spanish territories of Philippines, Guam, and Puerto Rico to the United States.[78] It was after 11 April 1899 that Spanish title and sovereignty was transferred to the United States and American municipal laws replaced Spanish municipal laws that previously applied over the territories of the Philippines, Guam, and Puerto Rico. Unlike Spain, there is no treaty where the Hawaiian Kingdom ceded its territory to the United States.

[74] L. Oppenheim, *International Law: A Treatise*, vol. 1, *Peace* (London: Longmans, Green & Co., 1905) and vol. 2, *War and Neutrality* (London: Longmans, Green & Co., 1906).

[75] David Keanu Sai, "The Royal Commission of Inquiry," in Sai, ed., *The Royal Commission of Inquiry*, 11–52, at 11, 13–4.

[76] *Texas v. White*, 74 U.S. 700, 721 (1868).

[77] *Ochoa v. Hernandez*, 230 U.S. 139, 155 (1913).

[78] 30 Stat. 1754 (1899).

On 18 December 1893, President Cleveland notified Congress that the "military demonstration upon the soil of Honolulu was of itself an act of war,"[79] and that "Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands . . . except the United States Minister." He also determined "that the provisional government owes its existence to an armed invasion by the United States."[80] And, finally, the president admitted that by "an act of war . . . the Government of a feeble but friendly and confiding people has been overthrown." Customary international law at the time obligated the United States, as an occupying state, to provisionally administer the laws of the Hawaiian Kingdom, being the occupied state, until "either the occupant withdraws or a treaty of peace is concluded which transfers sovereignty to the occupant."[81]

Through executive mediation an agreement of restoration was reached on 18 December 1893.[82] Political wrangling in the Congress, however, blocked the president from carrying out his obligation under the agreement. Five years later, at the height of the Spanish-American War, President William McKinley, Cleveland's successor, unilaterally annexed the Hawaiian Islands by congressional legislation on 8 July 1898, in violation of international law at the time. Senator William Allen clearly stated the limitations of United States laws when the resolution of annexation was debated on the floor of the Senate on 4 July 1898. Allen argued:

> The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein.[83]

Two years later, when the Senate was considering the formation of a territorial government for Hawai'i, Allen reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void."[84] Krystyna Marek asserts that "a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State."[85] Only by way of a treaty can one state acquire the territory of another state.

[79] United States House of Representatives, *Executive Documents*, 451. [80] Ibid., 454.
[81] Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), 224.
[82] United States House of Representatives, *Executive Documents*, 1269–70, 1283–4.
[83] 31 Cong. Rec. 6635 (1898). [84] 33 Cong. Rec. 2391 (1900).
[85] Krystyna Marek, *Identity and Continuity of State in Public International Law*, 2nd ed. (Geneva: Librairie Droz, 1968), 110.

Without a treaty between the Hawaiian Kingdom and the United States whereby Hawaiian territory had been ceded, strictly speaking congressional laws have no effect within Hawaiian territory. This is what prompted the US Department of Justice in 1988 to admit it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."[86] The conclusion by the Justice Department is in line with the United States Supreme Court, which stated in a 1824 decision that the "laws of no nation can justly extend beyond its own territories [and they] can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[87] Furthermore, under international law, the Permanent Court of International Justice 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. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[88]

On 28 February 1997, a group of Hawaiian subjects set up a restored government of the Hawaiian Kingdom under a Regency in accordance with the kingdom's constitutional law.[89] There was no legal requirement for the Council of Regency, being the successor in office to Queen Liliʻuokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844 was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was king of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Liliʻuokalani in 1891, and the Council of Regency in 1997.

The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing state.[90] Successors to King Kamehameha III were not established through "extra-legal changes," but rather

[86] Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," *Opinions of the Office of Legal Counsel of the United States Department of Justice*, vol. 12 (Washington, D.C.: Government Printing Press, 1996), 238–63, at 238, 252.

[87] *The Appollon*, 22 U.S. 362, 370 (1824).

[88] *Lotus* case (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).

[89] Sai, "The Royal Commission of Inquiry," 18–23; Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," *The Hawaiian Kingdom*, 24 May 2020, online; and Royal Commission of Inquiry, "Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom," *The Hawaiian Kingdom*, 27 May 2020, online.

[90] M. J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815–1995* (New York: St. Martin's Press, 1997), 26.

under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, "Where a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[91]

Two years later, the restored government found itself in a dispute with one of its nationals, Lance Larsen, who alleged that the Regency was liable "for allowing the unlawful imposition of American municipal laws over [his] person within the territorial jurisdiction of the Hawaiian Kingdom." On 8 November 1999, the dispute was submitted to binding arbitration at the Permanent Court of Arbitration, The Hague, Netherlands, whereby the Secretariat acknowledged the continued existence of the Hawaiian Kingdom as a state in *Larsen v. Hawaiian Kingdom*, and the Council of Regency as its government.[92]

This awareness of Hawai'i's prolonged occupation brought about by the *Larsen* case also caught the attention of United Nations Independent Expert Alfred-Maurice de Zayas, in Geneva, Switzerland. In a letter to members of the judiciary of the State of Hawai'i dated 25 February 2018, de Zayas concluded:

> I have come to understand that the lawful political status of the Hawaiian Islands is that of sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).[93]

Despite over a century of revisionist history, "the continuity of the Hawaiian Kingdom as a sovereign State is grounded in the very same principles that the United States and every other State have relied on for their own legal existence."[94] The Hawaiian Kingdom is a magnificent story of perseverance and continuity.[95]

[91] American Law Institute, *The Restatement Third of the Foreign Relations Law of the United States* (St. Paul, MN: American Law Institute Publishers, 1987), §203, comment c.

[92] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999–01, online; also David Bederman and Kurt Hilbert, "Arbitration—UNCITRAL Rules—Justiciability and Indispensable Third Parties—Legal Status of Hawaii," *American Journal of International Law* 95:4 (2001): 927–33; and *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Rep. 566 (2001).

[93] Sai, "The Royal Commission of Inquiry," 33.

[94] 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," *Journal of Law and Social Challenges* 10 (2008): 68–133, at 132.

[95] Sai, ed., *The Royal Commission of Inquiry*.