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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,
Plaintiffs,

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,
Defendant.

Case No. 1:25-cv-450-MWJS-RT

NON-PARTY INTERVENOR HAWAIIAN KINGDOM'S MOTION TO INTERVENE

The Council of Regency of the Hawaiian Kingdom (hereinafter, the "Hawaiian Kingdom"), by undersigned counsel, respectfully moves this Honorable Court for permission to intervene as a non-party intervenor pursuant to Fed. R. Civ. P. 24(a), or alternatively, for permissive intervention pursuant to Fed. R. Civ. P. 24(b). This Motion complies with Local Rule 7.1.

In support of this motion, the Hawaiian Kingdom states:

1. The plaintiffs' complaint was filed on October 20, 2025, asserting claims that directly challenge the validity of the admissions policy of Kamehameha Schools, a charitable trust established under the laws of the Hawaiian Kingdom by the will of Ali'i Bernice Pauahi Bishop, established before the United States overthrew the government of the Hawaiian Kingdom. Plaintiffs filed an amended complaint on December 1, 2025.

2. Plaintiffs' claims affect not only Kamehameha Schools but also the legal rights and interests of aboriginal Hawaiians as beneficiaries of trusts established under Hawaiian Kingdom law. The amended complaint relies upon material misstatements of historical fact and governing law, including the erroneous assumption that United States constitutional and statutory law supplanted Hawaiian Kingdom law.

3. The Council of Regency of the Hawaiian Kingdom, as an interim government, has a direct, substantial, and legally protectable interest in the subject matter of this litigation. That interest includes (a) the continued application and integrity of Hawaiian Kingdom law governing charitable trusts and civil rights, (b) the protection of aboriginal Hawaiians and future generations, and (c) the correction of historical and legal mischaracterizations that underlie Plaintiffs' claims.

4. Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as of right when an applicant claims an interest in the subject matter of the action and is so situated that disposition of the action may impair or impede the intervenor's ability to protect that interest, unless existing parties adequately represent it. Rule 24(b) provides for permissive intervention when a claim and the main action have common questions of law or fact.

5. The Hawaiian Kingdom meets the requirements of Rule 24(a) because it possesses a legally protectable interest in the interpretation and application of Hawaiian Kingdom law governing the trust at issue, including admissions policies expressly grounded in nineteenth-century Hawaiian Kingdom law. A ruling applying United States civil rights statutes to invalidate those policies would directly impair the Hawaiian Kingdom's sovereign legal interests and its duty to protect its subjects.

6. No existing party adequately represents these interests. Plaintiffs challenge the validity of Hawaiian Kingdom law itself, while Defendants are private trustees whose interests are narrower than those of the sovereign legal order under which the trust was created. The Hawaiian Kingdom alone is positioned to address the continuity, applicability, and content of Hawaiian Kingdom law under international law.

7. The requirements for permissive intervention are also met. The Hawaiian Kingdom has a strong interest in the proper and effective interpretation and implementation of Hawaiian Kingdom laws and interests of the Hawaiian people, which may be affected by this litigation. The Hawaiian Kingdom also has an interest in correcting misstatements of historical fact upon which plaintiffs rely in their interpretation of "affirmative action" admissions policy of the Kamehameha Schools.

8. The Hawaiian Kingdom's proposed intervention is timely. No dispositive motions have been filed with the Court. The Court recently certified the case as one containing a constitutional question to the U.S. Attorney General and she has not yet made a determination whether the United States will intervene in the case. Allowing intervention at this stage will not prejudice any party and will assist the Court in resolving threshold legal issues.

9. Intervention as of right is further warranted because this case implicates international humanitarian law governing prolonged occupation. Under the principle of conservation, an occupying power must preserve, to the fullest extent possible, the existing legal, political, and social structures of the occupied State. Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18, Oct. 1907 (hereinafter "The 1907 Hague Regulations"), Art. 42-56 (Article 43 of the Hague Regulations obliges occupying powers 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."). Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (hereinafter "Fourth Geneva Convention of 1949"), Art. 47-78. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8, June, 1977 (hereinafter "Add. Protocol I to the Geneva Conventions (1977)").

10. The continuity of the Hawaiian Kingdom as a state under international law persists despite the overthrow of its government by the United States in 1893, a fact recognized by the Secretariat of the Permanent Court of Arbitration in the Hague, the Hawaiian Kingdom has a duty to protect Hawaiians from the improper

manipulation of the law that would affect future generations of aboriginal Hawaiians. *See* Matthew Craven, *The Continuity of the Hawaiian Kingdom as a State Under International Law,* Ch. 3, at 126–149 (David Keanu Sai ed., 2020). The Permanent Court not only recognized the continued existence of the Hawaiian Kingdom as a State but also recognized the Council of Regency as its interim government.

11. Because Hawaiian Kingdom law remains in force under the law of occupation, the Hawaiian Kingdom has a duty to protect its nationals from the improper displacement of its legal system. Plaintiffs' effort to invalidate admissions policies grounded in Hawaiian Kingdom law through application of United States civil rights statutes directly threatens that duty and the rights of future generations of aboriginal Hawaiians.

12. Plaintiffs oppose this Motion but do not oppose the filing of a timely amicus brief. Defendant has not taken a position on this Motion.

13. While amicus participation may be helpful, it is insufficient to protect the Hawaiian Kingdom's sovereign legal interests, which are directly at stake and may be impaired by a ruling in this case.

14. For the foregoing reasons, and for the reasons set forth more fully in the accompanying Memorandum of Law, movant respectfully requests this Court:

a) grant the Hawaiian Kingdom's Motion to Intervene, b) direct the Clerk of the Court to file the Motion to Dismiss attached as Exhibit A, and c) if the Court deems it helpful, schedule oral argument on this Motion.

Respectfully submitted this 16th of January, 2026.

By: __s/ Edward Halealoha Ayau_____

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Case No. 1:25-cv-450-MWJS-RT

MEMORANDUM OF LAW IN SUPPORT OF HAWAIIAN KINGDOM'S MOTION TO INTERVENE

INTRODUCTION

1. The Council of Regency of the Hawaiian Kingdom (hereinafter, "Hawaiian Kingdom") respectfully submits this Memorandum of Law in support of its Motion to Intervene in the above-captioned matter. The Hawaiian Kingdom moves pursuant to Federal Rule of Civil Procedure 24 to intervene as a non-party intervenor as of right, or alternatively, by permission, for the limited purpose of preserving its interests and that of all Hawaiians, including future generations, which are not and cannot be adequately represented by any of the parties in this litigation.

2. Beyond this Court, there is no adequate protection for the rights of Hawaiian subjects, as the Trustees of Kamehameha Schools can only represent the interests of the entity, and not for aboriginal Hawaiians nor the specific interests of the Hawaiian Kingdom to protect future generations of aboriginal Hawaiians, as originally intended by Aliʻi Bernice Pauahi Bishop in her will prior to the overthrow of the government of the Hawaiian Kingdom.

3. The Motion to Intervene in this matter is timely. An amended complaint was filed on December 1, 2025. No answer has yet been filed.

4. ʻŌlelo noʻeau (Hawaiian proverbs) say: "I ka wā ma mua, ka wā mahope" - the future is shaped by the past. This case deals with both the past and the future.

5. Accordingly, the Hawaiian Kingdom moves to intervene to protect the Kamehameha Schools, an entity created under the nineteenth century laws of the Hawaiian Kingdom – laws that continue to apply today under the law of occupation, as well as future generations of aboriginal Hawaiians who were the intended beneficiaries of Ali‘i Pauahi’s trust.

6. This Court can only gain from granting limited purpose intervention as only the Hawaiian Kingdom as a non-party intervenor can provide accurate international legal context. The Hawaiian Kingdom does not ask this Court to adjudicate sovereignty, but rather to apply settled international law governing occupied territory for purposes of threshold jurisdiction and applicable law.

FACTUAL BACKGROUND

7. On October 20, 2025, plaintiffs Students for Fair Admissions (“SFFA”) filed a complaint against defendant Trustees of the Estate of Bernice Pauahi Bishop d/b/a Kamehameha Schools for an allegedly race-based admissions policy giving preference for native Hawaiians.

8. SFFA alleges that Kamehameha’s admission policy is illegal under 42 U.S.C. §1981. SFFA claims that the United States District Court for the District of Hawai‘i has subject-matter jurisdiction under 28 U.S.C. §1331, which provides the “district

courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." §1981 is a federal law.

9. On December 1, 2025, SFFA filed an amended complaint.

10. SFFA's amended complaint states an incorrect conclusion of law: "Once Hawaii became a territory over a century ago, Kamehameha became subject to §1981." SFFA assumes Hawai‘i was legitimately a U.S. territory and reveals the lack of historical knowledge that informs its misguided lawsuit**.** *See* Am. Compl. ¶ 122.

11. SFFA's claims are entirely premised on this incorrect conclusion of law. All claims that flow from this mistaken conclusion of law and historical misstatement are flawed.

12. At the time Pauahi's trust was created until the overthrow in 1893, the Hawaiian Kingdom had over a hundred legations and consulates around the world.

13. Despite the unlawful overthrow of the government of the Hawaiian Kingdom in 1893, Hawaiian State sovereignty and independence under international law was never ceded to the United States by a treaty of cession.

14. The government of the Hawaiian Kingdom was restored by a Council of Regency by proclamation in 1997. *See* Dr. David Keanu Sai, The Royal

Commission of Inquiry p. 19, 48 (attached as Exhibit C) (hereinafter "The Royal Commission of Inquiry").

15. Since 1893, Hawai'i was and continues to be, an occupied State under international law. *See* Matthew Craven, *The Continuity of the Hawaiian Kingdom as a State Under International Law,* Ch. 3, at 125–149 (in David Keanu Sai ed., (2020)) (attached as Exhibit B) (hereinafter "Craven Opinion"); *see infra* Section IV(A).

ARGUMENT

16. The Hawaiian Kingdom may intervene as of right under Rule 24(a). In the alternative, the Hawaiian Kingdom satisfies the requirements for permissive intervention under Rule 24(b).

I. The Hawaiian Kingdom May Intervene as Matter of Right

17. Rule 24(a)(2) grants a party the right to intervene if (1) its motion is "timely," (2) it "ha[s] a significantly protectable interest relating to the property or transaction that is the subject of the action;" (3) it is "situated such that the disposition of the action may impair or impede the party's ability to protect that interest;" (4) it is "not […] adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing Fed. R. Civ. P. 24(a)(2)).

A. The Motion to Intervene is Timely and Does Not Cause Undue Delay or Prejudice

18. By any standard, the Hawaiian Kingdom's motion is timely. *Cf. Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (deeming motion to intervene was timely when made two years after the case was filed); *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (deeming motion to intervene timely when made twenty years after the case was filed).

19. The Hawaiian Kingdom's intervention does not prejudice or unduly create delay to any party and intervened "at th[e] particular stage of the lawsuit" in which its interests were implicated because neither party is a governmental entity nor can represent its interests. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

B. The Hawaiian Kingdom Has a Significant Protectable Interest in the Subject Matter of this Case

20. The Ninth Circuit, in *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Donnely v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998)), explained that an applicant for intervention has adequate interests in a lawsuit where "the resolution of the plaintiff[']s] claims actually will affect the applicant (emphasis added)." Courts must make a "practical, threshold inquiry," designed to "involve[e]

as many apparently concerned persons" in a lawsuit "as is compatible with efficiency and due process." *Id.*

21. The Hawaiian Kingdom has a vital legal interest in the outcome of this case. As a State under international law, the Hawaiian Kingdom has a duty to protect its territorial integrity. *See e.g. The Royal Commission of Inquiry; see also* David J. Bederman and Kurt R. Hilbert, *"Arbitration—UNCITRAL Rules—Justiciability and Indispensable Third Parties—Legal Status of Hawaii,"* 95 Am. J. Int'l L. 927, 928 (2001) (discussing the *Larsen v. Hawaiian Kingdom* case at the Permanent Court of Arbitration wherein the PCA agreed that the Hawaiian Kingdom continues to exist "and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant.").

22. The continuity of the Hawaiian Kingdom despite overthrow, subsequent attempt at "annexation" and continuing occupation by the United States, has been chronicled extensively by experts in international law and diplomacy since the overthrow of the monarchy itself. *See* U.S. House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894–95 (1895); *The Royal Commission of Inquiry, supra*; *see* Craven Opinion; *see also* Professor Federico Lenzerini, on the authority of the Council of Regency as temporal interim

government, attached hereto as Exhibit D (hereinafter "Lenzerini Opinion"); *see also* Dr. 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 (2024), attached hereto as Exhibit F.

23. The Hawaiian Kingdom also has a duty to protect the public interest and ensure due process and fair trial rights are respected. If the lawsuit is allowed to proceed without adequate application and consideration of Hawaiian Kingdom laws and administrative measures allowed under international humanitarian law and the law of occupation, this could result in an unfair trial, which international legal experts agree could amount to usurpation of sovereignty under the law of occupation. *See* Professor William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," international law scholar on fair trial and usurpation of sovereignty, attached hereto as Exhibit E (hereinafter "Schabas Opinion").

24. The U.S. Supreme Court has recognized that the writings of legal scholars are a source of customary international law: "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects 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." *Paquete Habana*, 175 U.S. 677, 700 (1900).

25. Finally, the Hawaiian Kingdom has a duty to protect the Kamehameha Schools, being a private trust established under and by virtue of Hawaiian Kingdom laws, as well as future generations of aboriginal Hawaiians who were the intended beneficiaries of Ali'i Pauahi's trust. The admission policy of Kamehameha Schools favoring aboriginal Hawaiians is consistent with controlling Hawaiian Kingdom laws regarding affirmative action in *Rex v. Booth*, 2 Haw. 616 (1863). *See* Exhibit A, Motion to Dismiss (addressing the particulars of nineteenth century Hawaiian Kingdom law regarding Kamehameha Schools admission policies in the context of applicable civil rights and national welfare laws).

C. The Disposition of this Matter Would Impair the Hawaiian Kingdom's Ability to Protect its Interest

26. The third requirement of intervention under Rule 24(a)(2) is satisfied when the lawsuit "may as a practical matter impair or impede [an applicant's] ability to safeguard [its] protectable interest." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 862 (9th Cir. 2016).

27. Here, the Hawaiian Kingdom meets the third requirement for intervention as it "can demonstrate that representation of its interests 'may be' inadequate." *Citizens*

for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 898 (9th Cir. 2011); *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972).

28. Three factors are relevant in conducting this inquiry: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (emphasis added).

29. As a practical matter, neither the SFFA nor the Kamehameha Schools can protect the interests of the Hawaiian Kingdom as a government, nor of its people at large, which is a function inherent to the sovereignty of a governing body of a country called a State under international law. *See* Lenzerini Opinion at ¶ 11; *see also* The Royal Commission of Inquiry at ¶¶ 57, 90-97.

30. Although Kamehameha Schools was established by Pauahi's will in trust for the benefit of aboriginal Hawaiians, this case strikes at the core of its viability as an entity, thus the arguments made by Kamehameha Schools pertain only to the school. They do not and cannot articulate the duty to protect future generations of aboriginal Hawaiians who will be harmed if this case proceeds and either is not aware of or

otherwise disregards applicable Hawaiian Kingdom law and customary international law.

II. Alternatively, the Hawaiian Kingdom Meets the Requirements for Permissive Intervention

31. Alternatively, the Hawaiian Kingdom should be permitted to intervene pursuant to Rule 24(b).

32. Rule 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Permissive intervention is construed liberally, and doubts are resolved in favor of intervention. *Beckman Indus., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 473 (9th Cir. 1992).

33. There is no standing requirement for permissive intervention under Rule 24(b). *Perry v. Proposition 8 Official Proponents,* 587 F.3d 947, 955 (9th Cir. 2009); *see also Diamond v. Charles*, 476 U.S. 54, 68–69 (1986). Where, as here, an intervenor seeks limited participation to protect sovereign, institutional, and public interests rather than to assert independent damages claim, no separate jurisdictional basis is required. *Beckman*, 966 F.2d at 473.

34. The Hawaiian Kingdom seeks intervention for the limited purpose of ensuring that the Court is presented with accurate governing law, historical context, and applicable international legal obligations. Such limited-purpose intervention

strongly favors permissive intervention. *See Flynt v. Lombardi,* 782 F.3d 963, 967 (8th Cir. 2015).

35. As set forth above, this motion is timely. No answer has been filed, no discovery has commenced, and no scheduling order has issued. Permissive intervention at this stage will not disrupt the proceedings and is routinely allowed. *See Smith v. L.A. Unified Sch. Dist.,* 830 F.3d 843, 854 (9th Cir. 2016).

36. The Hawaiian Kingdom's interests share common questions of law and fact with the main action including but not limited to what the appropriate law governing the interpretation and administration of the Bernice Pauahi Bishop trust is, whether admissions preferences for aboriginal Hawaiians are lawful (and under what law they must be analyzed), and whether failure to apply the law of occupation results in the unlawful usurpation of sovereignty. These questions underlie the plaintiffs' claims. This satisfies Rule 24(b)'s "common question" requirement. *See Freedom from Religion Found, Inc. v. Geithner,* 644 F.3d 836, 843 (9th Cir. 2011).

37. A court may deny a motion to intervene if it "will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly v. Glickman,* 159 F.3d 405, 412 (9th Cir. 1998).

38. Allowing intervention here will streamline adjudication by ensuring that dispositive threshold issues including jurisdiction and applicable law, are properly addressed at the outset.

39. Failure to allow intervention risks incomplete legal analysis and an erroneous application of the law. Courts favor permissive intervention where the intervenor contributes distinct legal perspectives not otherwise presented. *Citizens for Balanced Use*, 647 F.3d at 898.

III. The Hawaiian Kingdom Has a Duty to Protect

40. There is a reciprocal relationship between every government and the public.

41. This principle was expressly recognized in Hawaiian Kingdom constitutional and statutory law. Article 14 of the 1864 Constitution, as amended states: "Each member of society [both Hawaiian subjects and resident aliens have] a right to be protected by [the government], in the enjoyment of life, liberty, and property, according to law... [and] the laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom…" §6 of the Hawaiian Civil Code. *See also* Hawaiian Penal Code, section 2 (1869) (allegiance "is the obedience and fidelity due to the kingdom from those under its protection.)

42. Customary international law affirms a State government's duty to protect. *See* G.A. Res. 60/1, ¶¶ 138–39, 2005 World Summit Outcome (Sept. 16, 2005) (Responsibility to Protect was unanimously adopted with three pillars 1) responsibility to protect from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; 2) the wider international community

has the responsibility to encourage and assist individual States in meeting that responsibility; and 3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action.).

43. Consistent with the UN Charter, the nations have the right to determine their own political status and exercise permanent sovereignty within their territorial jurisdictions. *See* G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962). *See also International Covenant on Civil and Political Rights,* Dec. 16, 1966, 999 U.N.T.S. 171.

44. The Hawaiian Kingdom's intervention in this case is needed to protect its interests as an occupied State and the interests of its population against the usurpation of sovereignty through an unfair trial. *See* Schabas Opinion at 155-157; 164-165.

IV. The Laws of the Hawaiian Kingdom Control In this Matter

A. The Overthrow and Annexation of the Hawaiian Kingdom and Later Admission to the Union Was Not Lawful

45. "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." See *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Reports, 566, 581 (2001). These treaties have never been terminated.

Undoubtedly, the Hawaiian Kingdom was a State at the time when the United States of America militarily occupied it on January 17, 1893.

46. At the time of the American overthrow and occupation, the Hawaiian Kingdom fully satisfied the four elements of statehood prescribed by customary international law, later codified by the Montevideo Convention on the Rights and Duties of States in 1933: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. *See Montevideo Convention on the Rights and Duties of States*, 1933, 165 LNTS 19, Article 1. This instrument codified the so-called declarative theory of statehood, already accepted by customary international law.

47. The United States occupation began on January 17, 1893, when a small group of insurgents who favored annexation by the United States, supported by John Stevens, the U.S. Minister to Hawai‘i, and a contingent of Marines from the warship U.S.S. Boston overthrew Queen Lili‘uokalani in a *coup de main* and proclaimed a provisional government. The Government of Hawai‘i conditionally surrendered its authority under threat of war. *See* U.S. House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai‘i: 1894-95, 62, 1295 (1895) (“Last January, a political crime was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole of the Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-

government. This was done by a *coup de main* [a foreign invasion] of U.S. Minister Stevens, in collusion with a cabal of conspirators, mainly faithless sons of missionaries and local politicians angered by continuous political defeat, who, as revenge for being a hopeless minority in the country, resolved to 'rule or ruin' through foreign help. The facts of this 'revolution,' as it is improperly called, are now a matter of history.").

48. Shortly into his presidency, Cleveland appointed Special Commissioner Blount to look into the events leading to Queen Lili'uokalani's yielding her authority temporarily "until such time as the Government of the United States shall, upon facts being presented to it, undo the actions of its representative… [and restore the Queen] as the constitutional sovereign of the Hawaiian Islands." *Id.* at 586.

49. Special Commissioner Blount was a factfinder who provided periodic reports to Secretary of State Walter Gresham. Following his final report dated July 17, 1893, Secretary Gresham notified President Cleveland on October 18, 1893: "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." *Id.* at 463.

50. In October, President Cleveland initiated negotiations for an executive agreement with Queen Lili‘uokulani in order to establish mutually agreed upon conditions for her restoration. *Id.* at 464.

51. The apology came from President Cleveland by a dispatch from Secretary Gresham to Minister Albert Willis dated October 18, 1893. He stated: “On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination, making known to her the President’s sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.” *Id*. In the first meeting with the Queen, Willis conveyed this to her. *Id.* at 1242. On December 18, 1893, an executive agreement, by exchange of notes, had been made between the Queen and Minister Willis, on behalf of President Cleveland. *Id*. 1269.

52. However, insurgent Sanford Dole, the self-appointed president of the Provisional Government of Hawai‘i, refused to turn over power and unilaterally proclaimed Hawai‘i a republic in 1894. *Id.* at 1276, 1350.

53. President Cleveland concluded that the provisional government “was neither a government *de facto* nor *de jure,*” and “that the provisional government owes its existence to an armed invasion by the United States.” *Id.* at 453-54. The provisional

government's change in name to the Republic of Hawai‘i did not alter its status as "'neither a government *de facto* nor *de jure*.'" *Id.*

54. On June 16, 1897, with President William McKinley recently inaugurated, McKinley and representatives of the self-proclaimed government of the Republic of Hawai‘i signed a treaty of annexation, later submitted for ratification to the U.S. Senate. That treaty was defeated due to the organizing of fierce opposition from over 21,269 Hawaiian subjects and resident aliens opposed to annexation who gathered signatures for anti-annexation in an effort broadly known today as the Kū‘ē Petitions. *See* Petition Against the Annexation of Hawai‘i (1897), records of the U.S. Senate, RG 46, National Archives.

55. Nevertheless, when the Spanish-American war broke out, part of which was fought in the Spanish colonies of Guam and the Philippines, the strategic value of the Hawaiian Islands became palatable and pro-annexation forces in Congress submitted a proposal to annex Hawai‘i by joint resolution. *See generally* 31 Cong. Rec. 5975–6635 (1898).

56. On May 17, 1898, Congressman Robert Hitt reported the Newlands out of the House Committee on Foreign Affairs and debate ensued until the resolution was passed on June 15, 1898. *See* 31 Cong. Rec. 6019 (1898).

57. Congressman Thomas Ball argued, "Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution

to admit new States. Opponents of the annexation of Texas contended that even that express power did not confer the right to admit State not carved from territory already belonging to the United States or some one of the States forming the Federal Union." *Id.* at 5975. He then characterized the effort to annex Hawai‘i by a joint resolution after the defeat of the treaty as "a deliberate attempt to do unlawfully that which cannot be lawfully done." *Id.*

58. From June 16 to July 6, 1898, the resolution of annexation was in the Senate Chambers. In the debate, Senator William Allen explained the limitation of American laws: 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… 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." *Id.* at 6635; *See also The Apollon,* 22 U.S. (9 Wheat.) 362, 370 (1824) (confirming that the "laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction.").

59. Notwithstanding, the Senate passed the resolution on July 6, 1898, and President William McKinley signed the joint resolution of annexation the following day. 30 Stat. 759 (1898).

60. Annexation is the outcome of a process, normally a bilateral treaty between the ceding State and acquiring State; a joint resolution is not a treaty, merely an agreement between the House of Representatives and the Senate signed by the President, but it has no extraterritorial effect.

61. In a 1988 legal opinion, the Office of Legal Counsel of the United States examined the purported annexation of Hawai‘i by a joint resolution and concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution." *See* Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," 12 Op. O.L.C., 238, 252 (1988).

62. According to constitutional scholar Westel Willoughby: "The constitutionality of 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 it is enacted." *Id.*

63. When the United States assumed control of its installed regime, the Republic of Hawai‘i, under the new heading of the Territory of Hawai‘i in 1900, 31 Stat. 141,

and later the State of Hawai‘i in 1959, 73 Stat. 4, it surpassed “its limits under international law through extraterritorial prescription emanating from its national institutions: the legislature, government, and courts.” *See* Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

64. The continuity of the Hawaiian Kingdom as a State under international law has not been affected despite the American occupation of its territory since January 17, 1893. *See* Craven Opinion at 126 (“The implications of continuity in case of Hawai‘i are several: a) [the] authority exercised by US over Hawai‘i is not one of sovereignty… the US has no legally protected ‘right’ to exercise that control and that it has no original claim to the territory of Hawai‘i or right to obedience on the part of the Hawaiian population… b) the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail… the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government… c) [t]hat the treaties of the Hawaiian Kingdom remain in force...”).

65. On November 23, 1999, Public Law No. 103-150 of the 103rd Congress, approved by President Clinton, issued the Apology Resolution “to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii” and that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as people or over their national lands to the United States,

either through their monarchy or through a plebiscite or referendum." This was the last public acknowledgment by the United States of the overthrow of the government of the Hawaiian Kingdom.

B. Hawai‘i Remains an Occupied Nation Recognized under International Law

66. Under international law, the overthrow of a government does not equate to an obliteration of the State. *See* Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) *Am. J. Int'l L.* 299, 307 (Apr. 1952) ("international law distinguishes between a government and the state it governs."); *see also* Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century 17 (1989)* ("[t]he state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law."); *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868) (the term State "is also used to express the idea of a people or political community, as distinguished from the government.").

67. General Assembly Resolution 2625 on Friendly Relations provides: "The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." G.A. Res. 2625 (XXV), Declaration on

Principles of International Law Concerning Friendly Relations (Oct. 24, 1970); *see* Craven Opinion at 126-149.

68. The continuous occupation of Hawai‘i by the United States from 1893 to the present, has not extinguished the Hawaiian Kingdom as an independent State, and consequently, as a subject of international law. *See* Lenzerini Opinion at 322.

69. 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.'" Lenzerini Opinion at 322.

70. "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." Lenzerini Opinion at 322.

71. The Permanent Court of Arbitration, in *Larsen v. Hawaiian Kingdom*, recognized the continued existence of the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes, 36 Stat. 2199, in its Annual Reports from 2001-2011. *Larsen v. Hawaiian Kingdom*, 119 *Int'l L. Reports* 566, 581 (Perm. Ct. Arb. 2001); *see also* Annual Report of 2011, annex 2, p. 51.

72. On February 25, 2018, Dr. Alfred M. deZayas, a United Nations Independent Expert from the Office of the High Commissioner for Human Rights, communicated to two State of Hawai‘i trial judges and members of the judiciary: “I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws 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).” Letter from Alfred-Maurice de Zayas, Independent Expert on the Promotion of a Democratic and Equitable International Order (Feb. 25, 2018).

C. Under International Law, the Laws of the Occupied Nation Control

73. Federal courts look to international law for interpretative guidance of constitutional and statutory provisions, as well as to ensure compliance with international legal obligations. *Graham v. Florida*, 560 U.S. 48, 80 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting international authority as “instructive for [the Court’s] interpretation” of the Constitution); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)

("International law . . . is part of our law, and must be ascertained and administered by the courts of justice . . . .").

74. In *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), the U.S. Supreme Court recognized: "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *See e.g. Sabbatino*, 376 U.S., at 423 ("[I]t is, of course, true that United States courts apply international law as a part of our own…"; *Paquete Habana*, 175 U.S., at 700 ("International law is part of our law"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is part of the law of the land").

75. Under Article 43 of the Hague Regulations, the occupant must respect existing laws and customs of war of occupied land: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277; *see also* Marco Sassoli, "Article 43 of the Hague Resolution and Peace Operations in the Twenty-first Century," International Humanitarian Law Research Initiative (2004) (explaining that an occupying force may not extend its own legislation over the occupied territory – "it must, as a matter

of principle, respect the laws in force in the occupied territory at the beginning of the occupation.").

76. The military occupation of a foreign State "necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional. On the other hand, subjugation or conquest implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty of peace. When sovereignty passes, belligerent occupation, as such, of course ceases, although the territory may and usually does, for a period at least, continue to be governed through military agencies." *See U.S. Army Field Manual* 27-10 at 353 (1956). Without a treaty of peace between the Hawaiian Kingdom and the United States, the military occupation persists today.

77. On November 10, 2020, the National Lawyers Guild (NLG) sent a letter to then-Governor Ige that cited Article 42 of the 1907 Hague Regulations and urged the immediate compliance with the law of occupation: "The United States has been in violation of international law for over a century, exercising, since 1893, the longest belligerent occupation of a foreign country in the history of international relations..." National Lawyers Guild, *NLG Calls upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (January 13, 2020).

78. "During the occupation, the ousted government would often attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority or both… [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 laws, most notably in matters of personal status." *See* Eyal Benvenisti, *The International Law of Occupation* 104 (2nd ed., 2012).

79. Thus, this court can apply international law because it is part of domestic law and under the international law of occupation, the laws of the occupied nation apply in addition to any laws of the occupying force (here, the United States) that are not inconsistent, are also applicable. *See supra* ¶¶ 75–80.

D. The Laws of the Hawaiian Kingdom Should Control Here

80. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), the Supreme Court stated, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."

81. The Hawaiian Kingdom continues to exist under international law and its legal framework governs trust administration, property, admission policies as part of its civil laws. Trust administration, beneficiary designation, and matters of personal

status and civil law remain governed by the laws of the occupied state. *See* Hague Regulations, Art. 43.

82. The Bernice Pauahi Bishop trust was created, accepted, and administered under the laws of the Hawaiian Kingdom. The Hawaiian Kingdom Supreme Court accepted Pauahi's will and trust on March 4, 1885 - eight years before the overthrow, and the trust vested rights and obligations under Hawaiian civil law.

83. U.S. federal statutes are presumed not to apply extraterritorially absent clear congressional intent. *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247, 255 (2010). Congress has never expressed an intent for 42 U.S.C. § 1981 to displace the domestic civil law of an occupied foreign State.

84. As explained further in the attached Motion to Dismiss, this case raises threshold jurisdictional and choice-of-law issues and requires application of international law principles prior to reaching the merits of the plaintiffs' claims. Without such analysis, applying § 1981 to invalidate admissions policies lawful under Hawaiian Kingdom law would constitute an impermissible extension of U.S. municipal law into foreign territory, contrary to *Curtiss-Wright,* 299 U.S. at 318, and *The Apollon,* 22 U.S. at 370.

85. In 2014, the Council of Regency of the Hawaiian Kingdom confirmed that the laws of the United States "shall be the provisional laws of the Realm… with the

express proviso that these provisional laws do not run contrary to the express reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void." *See* Proclamation of the Council of Regency of the Hawaiian Kingdom, October 10, 2014, attached as Exhibit G.

86. Hawaiian Kingdom jurisprudence expressly recognized lawful distinctions favoring aboriginal Hawaiians as part of the Kingdom's duty to promote national welfare and protect its population. *See Rex v. Booth*, 2 Haw. 616 (1863).

87. Kamehameha Schools' admissions policy is consistent with that legal tradition and with Ali'i Pauahi's expressed intent to educate aboriginal Hawaiians as a national remedial measure, not as racial discrimination within a U.S. constitutional framework that did not exist at the time.

88. Failure to apply Hawaiian Kingdom law risks violating fundamental fair trial principles under international law. *See Professor Schabas,* Exhibit E (adjudicating rights under the wrong legal system in an occupied State, may constitute deprivation of fair trial and usurpation of sovereignty under the law of occupation).

89. This Court has an obligation to avoid interpretations that place the United States in continuing violation of international law. *See Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804).

CONCLUSION

For the foregoing reasons, the Hawaiian Kingdom respectfully requests that this Court:

1. Grant its Motion to Intervene as of right under Rule 24(a), or alternatively by permission under Rule24(b);

2. Direct the Clerk of the Court to file the Hawaiian Kingdom's Proposed Motion to Dismiss, attached as Exhibit A, should intervention be granted; and

3. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 16th of January, 2026.

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Exhibit “A”

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,
Plaintiffs,

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,
Defendant.

Case No. 1:25-cv-450-MWJS-RT

NON-PARTY INTERVENOR HAWAIIAN KINGDOM'S PROPOSED RULE 12(b)(6) MOTION TO DISMISS

INTRODUCTION

1. The Council of Regency of the Hawaiian Kingdom (hereinafter, "Hawaiian Kingdom"), as proposed non-party intervenor in the above-captioned case, respectfully moves this Court to dismiss the plaintiffs' complaint because it fails as a matter of law and fact and proceeds under an inapplicable legal framework.

2. The claims brought forward by plaintiffs fail to recognize the continued existence of the Hawaiian Kingdom as a sovereign State under international law, and they misapply U.S. civil rights statutes to a trust lawfully established and governed under Hawaiian Kingdom law.

3. Kamehameha Schools, as a charitable trust created under will of Princess Bernice Pauahi Bishop in 1883, is governed by Hawaiian Kingdom law. This legal framework predates the overthrow of the government of the Hawaiian Kingdom in 1893 and purported statehood.

4. Plaintiffs' claims must be dismissed because they misstate the governing law, ignore controlling Hawaiian Kingdom constitutional law, and improperly attempt to apply United States civil rights statutes to a foreign charitable trust established and governed by a separate sovereign legal system.

5. Put simply, Plaintiffs ignore the historical and legal context behind Bernice Pauahi Bishop's trust, and fail to state a claim upon which relief can be granted.

6. The law that governs the trust, its purpose, and its admissions policies is Hawaiian Kingdom law, as recognized under principles of international law, comity, and the law of occupation, including the provisional laws proclaimed by the Council of Regency in 2014 pursuant to Article 43 of the 1907 Hague Regulations. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277; Council of Regency of the Hawaiian Kingdom, Proclamation of Provisional Laws (Oct. 10, 2014) (Exhibit G, memorandum of law in support of motion to intervene).

BACKGROUND

The History and Validity of Bernice Pauahi Bishop's Will

7. By her Last Will and Testament dated October 31, 1883, with two codicils dated October 4, 1884, and October 9, 1884, Princess Bernice Pauahi Bishop established a charitable trust mandating the creation of two schools "to be known as, and called the Kamehameha Schools," and expressly directed that a portion of the annual income be devoted to "the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood." *See* Will of Bernice Pauahi Bishop (Oct. 31, 1883).

8. The Will and codicils were admitted to probate by the Supreme Court of the Hawaiian Kingdom on December 2, 1884. The designated trustees formally accepted their duties on March 4, 1885. These actions took place in full accordance with the laws and constitutional structure of the Hawaiian Kingdom, which recognized and enforced the trust's charitable purpose.

9. The Will further required that vacancies in trusteeship be filled by a majority of the Justices of the Hawaiian Kingdom Supreme Court and that annual reports be submitted to the Chief Justice or highest judicial officer of the Kingdom.

10. The Kamehameha Schools for Boys opened in 1887, followed by the Schools for Girls in 1894, fulfilling Pauahi's testamentary mandate to provide educational opportunities primarily for Hawaiian children.

11. Contemporary statements by Charles Reed Bishop confirm that Pauahi's intent was to provide educational opportunities in which "Hawaiians have the preference," so that her people could protect their material and national welfare in a changing political environment. *See* Charles R. Bishop, Address at First Founder's Day Celebration of the Kamehameha Schools (Dec. 19, 1888).

12. The trust was properly constituted under Hawaiian Kingdom law, including its formation, charitable purpose, trustee oversight, and admissions preference, and

was accepted and supervised by the highest judicial authority of the Kingdom in accordance with then-existing constitutional and trust principles.

ARGUMENT

I. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted (12(b)(6))

A. Standard of Review

13. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted if the complaint fails "to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6).

14. To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

15. The plausibility standard requires more than conclusory allegations or a "formulaic recitation of the elements of a cause of action." *Id.*

16. Here, the Complaint fails both factual and legal plausibility because a) it misstates the governing law, attempting to apply U.S. statutes to a foreign trust; b) it ignores the historical context and controlling Hawaiian Kingdom law; and c) it asserts claims that are legally incompatible under the applicable sovereign Hawaiian Kingdom framework, even if the factual allegations were accepted as a true.

17. Even assuming arguendo that all the factual allegations in the Complaint are true, Plaintiffs cannot prevail as a matter of law because their claims rest on a fundamentally flawed legal theory. Dismissal is therefore warranted under 12(b)(6).

B. The Hawaiian Kingdom Has a Duty to Protect Future Generations

18. Hawaiian Kingdom law recognizes a duty to safeguard future generations, including the welfare of the Hawaiian people, as consistent with constitutional principles and national interests. *See Rex v. Booth,* 2 Haw. 616, 631 (1863).

19. Plaintiffs' claims, if successful, threaten Kamehameha Schools' lawful policies that benefit native Hawaiians. Should the lawsuit succeed, it would impact the admissions policies of Kamehameha Schools that were expressly mandated by Pauahi's will and upheld under Hawaiian Kingdom law, thereby threatening an institution designed to benefit aboriginal Hawaiians and future generations.

20. The admission policies and trust administration are not arbitrary exclusions but are integral to the trust's charitable purpose: to protect the cultural, educational, and civil interests of aboriginal Hawaiians.

C. Plaintiffs Misstate Hawaiian History and Legal Status

21. Plaintiffs incorrectly assert that "[o]nce Hawaii became a territory over a century ago, Kamehameha became subject to Section 1981." Am. Compl. ¶ 122.

22. At the time of Pauahi's will and when the trust was accepted by the Hawaiian Kingdom Supreme Court, the Hawaiian Kingdom existed as a recognized sovereign and independent State under international law; its laws still govern trusts and the civil rights of Hawaiian subjects, including native Hawaiians. *See Larsen v. Hawaiian Kingdom,* 119 I.L.R. 566, 581 (Perm. Ct. Arb. 2001).

23. Moreover, annexation of the Hawaiian Islands did not occur through a treaty. International scholars agree that Hawai‘i was never properly annexed nor did it constitute a purported territory or purported state of the American union; under international law and the law of occupation, the Hawaiian Kingdom continues to exist as a State. *Id.*

D. Hawaiian Kingdom Law Controls, Not U.S. Statutes

24. Plaintiffs' Complaint rests on fundamental errors concerning (a) the governing law (U.S. civil rights statutes versus Hawaiian Kingdom law), (b) historical context (overthrow, annexation, and statehood), and (c) the legal status of Kamehameha Schools as a foreign charitable trust.

25. International law establishes that the laws of the occupied State control and not the laws of the occupying State. Article 43 of the Hague Regulations of 1907 requires the occupying power to respect the laws "in force in the country" which

remain applicable during occupation with respect to civil status, property, trusts, and education. Hague Convention (IV) art. 43, Oct. 18, 1907, 36 Stat. 2277.

26. Although this Court is not an occupation court – which would be the proper venue for an occupying force in a foreign nation, U.S. courts routinely apply foreign law where appropriate, including to trusts and civil matters governed by another sovereign under principles of comity and choice of law. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

27. Under these principles, and under international law governing occupation, the Court has an obligation to apply Hawaiian Kingdom law, which remains controlling with respect to the trust at issue. Plaintiffs' claims fail under this governing law. *See* Hague Convention (IV) art. 43, Oct. 18, 1907, 36 Stat. 2277.

28. The Complaint misstates the controlling law. Plaintiffs assert claims under 42 U.S.C. § 1981, premised on United States constitutional and statutory concepts of racial discrimination. However, § 1981 does not apply to a private charitable trust organized and governed under foreign law, particularly where that law remains operative under international law.

29. Kamehameha Schools is governed by Hawaiian Kingdom law with respect to trust formation, administration, and admissions policy, and Plaintiffs' attempt to impose U.S. constitutional standards misapplies governing principles.

II. Hawaiian Kingdom Law Supports Kamehameha Schools' Admission Policies

30. Hawaiian Kingdom constitutional law allows for preferential policies that promote the welfare of aboriginal Hawaiians, consistent with the Kingdom's conception of civil rights and national welfare.

31. Comparable trusts, including the Lunalilo Trust and the Lili'uokalani Trust, lawfully incorporated preferences for Hawaiians of pure or part aboriginal blood. Preferential treatment for aboriginal Hawaiians was thus consistent with civil rights and national welfare.

32. The Hawaiian Kingdom Supreme Court addressed the scope of civil rights and special legislation affecting aboriginal Hawaiians in *Naone v. Thurston,* 1 Haw. 392 (1856); *Rex v. Booth,* 2 Haw. 616 (1863); and *Rex v. Henry H. Sawyer* (Haw. Kingdom Sup. Ct. 1859). These cases establish that Hawaiian law allows special legislation to protect the material interests of aboriginal Hawaiians.

33. In *Booth*, the Supreme Court rejected arguments grounded in notions of equality imported from U.S. constitutional theory and clarified that Hawaiian constitutional law permits measures that promote the material interests and general welfare of the nation, including its aboriginal population. *Rex v. Booth*, 2 Haw. at 629–31.

34. The Court emphasized that civil rights under Hawaiian law must be interpreted within the Kingdom's constitutional structure as a limited monarchy, not a republic, and that policies benefiting aboriginal Hawaiians are lawful where they advance national welfare. *Id.* at 631.

35. Kamehameha Schools' admissions policy is a private trust policy, not legislation, and it conforms to the same constitutional framework upheld in *Booth* and related cases.

36. Accordingly, the preference for aboriginal Hawaiian students is lawful under Hawaiian Kingdom law and consistent with Pauahi's testamentary intent, Hawaiian constitutional principles, and the trust's charitable purpose.

III. No Legal Remedy Exists Because Plaintiffs Cannot Override Hawaiian Kingdom Law

37. Plaintiffs' attempt to apply U.S. constitutional law misapplies governing principles. The Complaint does not address Hawaiian Kingdom law, does not refute its applicability, and does not allege facts sufficient to override the trust's governing legal framework.

38. Kamehameha Schools' policies promote the welfare of aboriginal Hawaiians in accordance with Hawaiian Kingdom law, and Plaintiffs cannot obtain relief by imposing an inapplicable U.S. statutory regime.

39. The Complaint therefore fails as a matter of law and must be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, dismissal is warranted because:

1) Plaintiffs misapply United States law to an entity governed by Hawaiian Kingdom law, making their claims legally unsustainable;

2) The historical and legal record does not support plaintiffs' allegations, as Kamehameha Schools' admissions policies are lawful under Hawaiian Kingdom law and consistent with Pauahi's will and the constitutional principles of the Hawaiian Kingdom;

3) Kamehameha Schools' policies, in accordance with Hawaiian Kingdom law, protect the rights and welfare of aboriginal Hawaiians and plaintiffs' claims cannot override this lawful framework.

Accordingly, the Hawaiian Kingdom respectfully requests that this Court dismiss the Complaint in its entirety.

//

Respectfully submitted this 16th of January, 2026.

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Exhibit “B”

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom

Edited by *Dr. David Keanu Sai*
HEAD, ROYAL COMMISSION OF INQUIRY

CHAPTER 3

CONTINUITY OF THE HAWAIIAN KINGDOM AS A STATE UNDER INTERNATIONAL LAW

Professor Matthew Craven

CONTINUITY OF THE HAWAIIAN KINGDOM AS A STATE UNDER INTERNATIONAL LAW

Professor Matthew Craven

Introduction

The issue of State continuity usually arises in cases in which some element of the State has undergone some significant transformation (such as changes in its territorial compass or in its form of government). A claim as to state continuity is essentially a claim as to the continued independent existence of a State for purposes of international law in spite of such changes. It is essentially predicated, in that regard, upon an insistence that the State's legal identity has remained intact. If the State concerned retains its identity it can be considered to 'continue' and *vice versa*. Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another 'successor' state (to the extent provided by rules of succession). At its heart, therefore, the issue of State continuity is concerned with the parameters of a state's existence and demise (or extinction) in international law.

The implications of continuity in case of Hawai'i are several:

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

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

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

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

Bearing in mind the consequences elucidated in c) and d) above, it might be said that a claim of state continuity on the part of Hawai'i has to be opposed as against a claim by the US as to its succession. It is apparent, however, that this opposition is not a strict one. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one state to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might

operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a great deal in terms of their effect. Whilst State continuity certainly denies the applicability of principles of succession and holds otherwise that rights and obligations remain intact save insofar as they may be affected by the principles *rebus sic stantibus* or impossibility of performance, there is room in theory at least for a principle of universal succession to operate such as to produce exactly the same result (under the theory of universal succession).[1] The continuity of legal rights and obligations, in other words, does not necessarily suppose the continuity of the State as a distinct person in international law, as it is equally consistent with discontinuity followed by universal succession. Even if such a thesis remains largely theoretical, it is apparent that a distinction has to be maintained between continuity of personality on the one hand, and continuity of specific legal rights and obligations on the other. The maintenance in force of a treaty, for example, in relation to a particular territory may be evidence of State continuity, but it is far from determinative in itself.

Even if it is relatively clear as to when States may be said to come into being for purposes of international law (in many cases predicated upon recognition or admission into the United Nations),[2] the converse is far from being the case.[3] Beyond the theoretical circumstance in which a body politic has dissolved (for example by submergence of the territory or the dispersal of the population), it is apparent that all cases of putative extinction will arise in cases where certain changes of a material nature have occurred—such as a change in government and change in the territorial configuration of the State. The difficulty, however, is in determining when such changes are merely incidental, leaving intact the identity of the state, and when they are to be regarded as fundamental going to the heart of that identity.[4] The problem, in part, is the lack of any institution by which such an event may be marked: governments do not generally withdraw recognition even if circumstances might so warrant,[5] and there is no mechanism by which membership in international organisations may be terminated by reason of extinction. It is evident, moreover, that states are complex political communities possessing various attributes of an abstract nature which vary in space as well as time, and, as such, determining the point at which changes in those attributes are such as to affect the State's identity will inevitably call for very fine distinctions.

It is generally held, nevertheless, that there exist several uncontroversial principles that have some bearing upon the issue of continuity. These are essentially threefold, all of which assume an essentially negative form.[6] First that the continuity of the State is not affected by changes

1 Article 34, Vienna Convention on State Succession in Respect of Treaties (1978).

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

3 *Ibid*, p.417.

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

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

6 Further principles have also been suggested, such as: i) the State does not cease to exist by reason of its entry into a personal union, P. Pradier-Fodéré, *Traité de droit international public Européen et Americain* s.148, 253 (1885); ii) that the State does not expire by reason of becoming economically or politically weak, *id.*, s. 148, 254; iii) that the State does not cease to exist by reason of changes in its population, *id.*, 252; iv) that the State is not affected by changes in the social or economic system, J.H.W. Verzijl, *International Law in Historical Perspective*, 118 (1974); v) that the State is not affected by being reduced to a State of semi-sovereignty, Phillimore, 202. According to Vattel, the key to sovereignty was 'internal independence and sovereign authority' (E. Vattel, *The Law of Nations or the Principles of Natural Law*, Bk. 1, s. 8 (1758, trans Fenwick C., 1916) – if a State maintained these, it would not lose its sovereignty by the conclusion of unequal treaties or tributary agreements or the payment of homage. Sovereign States could be subject

in government even if of a revolutionary nature.[7] Secondly, that continuity is not affected by territorial acquisition or loss,[8] and finally that it is not affected by belligerent occupation (understood in its technical sense). Each of these principles reflects upon one of the key incidents of statehood—territory, government and independence—making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity.[9] As Hall was to express the point, a State retains its identity

> 'so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.'[10]

The only exception to this general principle, perhaps, is to be found in case of multiple changes of a less than total nature, such as where a revolutionary change in government is accompanied by a broad change in the territorial delimitation of the State.[11]

If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other

to the same prince and yet remain sovereign e.g Prussia and Neufchatel (*id.*, Bk.1, s.9). The formation of confederative republic of States did not destroy sovereignty because 'the obligation to fulfill agreements one has voluntarily made does not detract from one's liberty and independence' (*id.*, Bk.1, s.10) e.g. the United Provinces of Holland and the members of the Swiss Confederation.

7 For early versions of this principle see, Grotius, *De Iure Belli ac Pacis* Bk. II, c. xvi, 418. See also, S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* B. VIII, c. xii, s.1, 1360 (1688, trans Oldfather C. and Oldfather W., 1934); Rivier, Principes du Droit des Gens I, 62 (1896); F. De Martens, *Traité de Droit International* 362 (1883); J. Westlake, *International Law* I, 58 (1904); Q. Wright, 'The Status of Germany and the Peace Proclamation', 46 *Am. J. Int'l. L.* 299, 307 (1952); A. McNair, 'Aspects of State Sovereignty', *Brit. Y.B. Int'l L.* 8 (1949). Jennings and Watts (Oppenheim's International Law, 146 (9th ed., 1996)) declare that: 'Mere territorial changes, whether by increase or by dimunution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties. Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired'. See also, *United States v. Curtiss Wright Export Corp. et al* 299 U.S. 304, 316 (1936) (J. Sutherland): 'Rulers come and go; governments end and forms of government change; but sovereignty survives.'

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

9 Crawford points out that 'the presumption—in practice a strong one—is in favour of the continuance, and against the extinction, of an established state', Crawford, 417.

10 Hall, 22.

11 See e.g. Marek.

States. It is commonly recognised that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entirety of the territory of the State, as they do in case of Hawai'i, and when they are accompanied by effective occupation to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands.

In light of such considerations any claim to State continuity will be dependent upon the establishment of two legal facts: first that the State in question existed as a recognised entity for purposes of international law at some relevant point in history; and secondly that intervening events have not been such as to deprive it of that status. It should be made very clear, however, that the issue is not simply one of 'observable' or 'tangible facts', but more specifically of 'legally relevant facts'. It is not a case, in other words, simply of observing how power or control has been exercised in relation to persons or territory, but of determining the scope of 'authority' (understood as 'a legal entitlement to exercise power and control'). Authority differs from mere control by not only being essentially rule governed, but also in virtue of the fact that it is not always entirely dependent upon the exercise of that control. As Arbitrator Huber noted in the *Island of Palmas Case*:

> 'Manifestations of sovereignty assume… different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.'[12]

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

The Status of the Hawaiian Kingdom as a Subject of International Law

Whilst the Montevideo criteria[13] (or versions of) are now regarded as the definitive determinants of statehood, the criteria governing the 'creation' of states in international law in the 19th Century were somewhat less clear.[14] The rise of positivism and its rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many to posit international law less in terms of a 'universal' law of nations and more in terms of an international public

12 *Island of Palmas Case (Netherlands v. United States)* 2 R.I.A.A. 829 (1928).

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

14 Doctrine towards the end of the 19th Century began to articulate those criteria. Rivier, for example, described the 'essential elements of the state' as being evidenced by 'an independent community, organised in a permanent manner on a certain territory' (Rivier, I, 62). Hall similarly speaks about the 'marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.' Hall, 18.

law of European (and North American) States.[15] According to this view, international law was gradually extended to other portions of the globe primarily in virtue of imperialist ambition and colonial practice - much of the remainder was regarded as simply beyond the purview of international law and frequently as a result of the application of a highly suspect 'standard of civilisation'. It was not the case, therefore, that all territories governed in a stable and effective manner would necessarily be regarded as subjects of international law and much would apparently depend upon the formal act of recognition, which signaled their 'admittance into the family of nations'.[16] Thus, on the one hand commentators frequently provided impressively detailed 'definitions' of the State. Phillimore, for example, noted that 'for all purposes of international law, a state… may be defined to be a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe'.[17] These definitions, however, were not always intended to be prescriptive. Hall maintained, for example, that whilst States were subjected to international law 'from the moment… at which they acquire the marks of a state'[18] he later added the qualification that States 'outside European civilisation… must formally enter into the circle of law-governed countries'.[19] In such circumstances recognition was apparently critical. Given the trend to which this gave rise, Oppenheim was later to conclude in 1905, that 'a State is and becomes an international person through recognition only and exclusively'.[20]

Whatever the general position, there is little doubt that the Hawaiian Kingdom fulfilled all requisite criteria. The Kingdom was established as an identifiable, and independent, political community at some point in the early 19th Century (the precise date at which this occurred is perhaps of little importance). During the next half- Century it was formally recognised by a number of Western powers including Belgium, Great Britain,[21] France,[22] and the United States,[23] and received and dispatched diplomatic agents to more than 15 States (including Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden and Norway and the United States). Secretary of State Webster declared, for example, in a letter to Hawaiian agents in 1842 that:

> 'the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the Islands as a conquest or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.'[24]

15 See e.g., T. Lawrence, *Principles of International Law*, 83 (4th ed., 1913); Pradier-Fodéré, s.148, 253.

16 Hall comments, for example, that 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired'. Hall, 87.

17 Phillimore, I, 81.

18 Hall, 21.

19 *Id.*, 3-44.

20 International Law: A Treatise I, 109 (1905).

21 Declaration of Great Britain and France relative to the Independence of the Sandwich Islands, London, 28 Nov. 1843.

22 *Id.*

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

24 Letter of 19 Dec. 1842, Moore's Digest, I, 476.

This point was reiterated subsequently by President Tyler in a message to Congress.[25] In similar vein, Britain and France declared in a joint declaration in 1843 that they considered 'the Sandwich Islands as an independent State' and vowed 'never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed'.[26] When later in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions 'incompatible with any just regard for the Hawaiian Government as an independent State' and calling upon France to 'desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands'.[27]

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

There is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893, the moment of the first occupation of the Island(s) by American troops.[28] Indeed, this point was explicitly accepted in the *Larsen v. Hawaiian Kingdom* Arbitral Award.[29]

The consequences of Statehood at that time were several. States were deemed to be sovereign not only in a descriptive sense, but were also regarded as being 'entitled' to sovereignty. This entailed, amongst other things, the rights to free choice of government, territorial inviolability, self-preservation, free development of natural resources, of acquisition and of absolute jurisdiction over all persons and things within the territory of the State.[30] It was, however, admitted that intervention by another state was permissible in certain prescribed circumstances such as for purposes of self-preservation, for purposes of fulfilling legal engagements or of opposing wrong-doing. Although intervention was not absolutely prohibited in this regard, it was generally confined as regards the specified justifications. As Hall remarked,

> 'The legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it.'[31]

A desire for simple aggrandisement of territory did not fall within these terms, and intervention for purposes of supporting one party in a civil war was often regarded as unlawful.[32] In any case, the right of independence was regarded as so fundamental that any action against it 'must be looked upon with disfavour'.[33]

25 Message of President Tyler, 30 Dec. 1842, Moore's Digest, I, 476-7.
26 For. Rel. 1894, App. II, 64.
27 Letter of 19 June 1851, For. Rel. 1894, App. II, 97.
28 For confirmation of this fact see e.g. Rivier, I, 54.
29 *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, para. 7.4. (2001).
30 Phillimore, I, p. 216.
31 Hall, 298.
32 See e.g. Lawrence, 134.
33 Hall, 298.

In light of the evident existence of Hawai'i as a sovereign State for some period of time prior to 1898, it would seem that the issue of continuity turns upon the question whether Hawai'i can be said to have subsequently ceased to exist according to the terms of international law. Current international law recognises that a state may cease to exist in one of two scenarios: by means of that State's integration with another in some form of union (such as the GDR's accession to the FRG), or by its dismemberment (such as in case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia).[34] As will be seen, events in Hawai'i in 1898 are capable of being construed in several ways, but it is evident that the most obvious characterisation was one of annexation (whether by cession or conquest).

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

> 'The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.'[35]

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness[36] (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.[37] It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.[38]

Even if the annexation of the Hawaiian Islands would be regarded as unlawful according to accepted standards today, it does not necessarily follow that US claims to sovereignty are unfounded. It is generally maintained that the legality of any act should be determined in accordance with the law of the time when it was done, and not by reference to law as it might have become at a later date. This principle finds its expression in case of territorial title, as Arbitrator Huber pointed out in the *Island of Palmas* case,[39] in the doctrine of inter-temporal law. As far as Huber was concerned, there were two elements to this doctrine – the first of which is relatively uncontroversial, the second of which has attracted a certain amount of criticism. The first, uncontroversial, element is simply that 'a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises

34 Jennings and Watts add one further category: when a State breaks up into parts all of which become part of other states (such as Poland in 1795), 204.

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

36 See, Crawford, 418.

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

38 Article 52 Vienna Convention on the Law of Treaties (1969).

39 *Island of Palmas,* 829.

or falls to be settled'.[40] In the present context, therefore, the extension of US sovereignty over Hawai'i should be analysed in terms of the terms of international law, as they existed at the relevant point(s) in time. This much cannot be disputed. The second element outlined by Huber, however, is that, notwithstanding the legitimate origins of an act creating title, the continued existence of that title – its continued manifestation – 'shall follow the conditions required by the evolution of law'. The issue in consideration, here, is whether title based upon historical discovery, or conquest, could itself survive irrespective of the fact that neither is regarded as a legitimate mode of acquisition today. Whilst some have regarded this element as a dangerous extension of the basic principle,[41] its practical effects are likely to be limited to those cases in which the State originally claiming sovereignty has failed to reinforce that title by means of effective occupation (acquisitive prescription). This was evident in case of the Island of Palmas, but is unlikely to be so in other cases – particularly in light of Huber's comment that sovereignty will inevitably have its discontinuities. In any case, it is apparent that, as Huber stressed, any defect in original title is capable of being remedied by means of a continuous and peaceful exercise of territorial sovereignty and that original title, whether defective or perfect, does not itself provide a definitive conclusion to the question.

Turning then to the law as it existed at the critical date of 1898, it was generally held that a State might cease to exist in one of three scenarios:

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

b) By the dissolution of the corpus of the State (cases include the dissolution of the German Empire in 1805-6; the partition of the Pays-Bas in 1831 or of the Canton of Bale in 1833).

c) By the State's incorporation, union, or submission to another (cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886).[42]

Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently distinguished between two processes – one of which involved a voluntary act (i.e. union or incorporation), the other of which came about by non- consensual means (i.e. conquest and submission followed by annexation).[43] It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory[44] and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

Although annexation was regarded as a legitimate means of acquiring territory, it was recognised as taking a variety of forms.[45] It was apparent, to begin with, that a distinction was typically drawn between those cases in which the annexation was implemented by Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part

40 *Id*.
41 Jessup, 22 Am. J. Int'l. L. 735 (1928).
42 See e.g. Pradier-Fodéré, I, 251; Phillimore, I, 201; *de Martens Traite de Droit International*, I, 367-370 (1883).
43 See e.g., J. Westlake, 'The Nature and Extent of the Title by Conquest', 17 L.Q.R. 392 (1901).
44 Oppenheim (288) remarks that '[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory'.
45 H. Halleck, *International Law* 811 (1861); H. Wheaton H., *Elements of International Law*, II, c. iv, s. 165 (8th ed., 1866).

of the annexing power. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.[46] Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,[47] title acquired in virtue of a peace treaty was considered to be essentially derivative (i.e. being transferred from one state to another).[48] There was little, in other words, to distinguish title acquired by means of a treaty of peace backed by force, and a voluntary purchase of territory: in each case the extent of rights enjoyed by the successor were determined by the agreement itself. In case of conquest absent an agreed settlement, by contrast, title was thought to derive simply from the fact of military subjugation and was complete 'from the time [the conqueror] proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act… his intention to retain it as part of his own territory'.[49] What was required, in other words, was that the conflict be complete (acquisition of sovereignty *durante bello* being clearly excluded) and that the conqueror declare an intention to annex.[50]

What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession (a point of particular importance for possessions held in foreign territory).[51] Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the state in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.[52] Title, in other words, was original, and rights of the occupants were limited to those which they possessed (perhaps under the doctrine *uti possidetis de facto*). Others, by contrast, seemed to assume some form of 'transfer of title' as taking place (i.e. that conquest gave rise to a derivative title[53]), and concluded in consequence that the conqueror 'becomes, as it were, the heir or universal successor of the defunct or extinguished State'.[54] Much depended, in such circumstances, as to how the successor came to acquire title.

It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization[55] and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that 'the principle of conquest shall not… be recognised as admissible under American public law'. It had, furthermore, later taken the lead in adopting a policy of non-recognition of 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' (the 'Stimpson Doctrine') which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

46 See e.g. Lawrence, 165-6 ('Title by conquest arises only when no formal international document transfers the territory to its new possessor'.)
47 Now article 52 Vienna Convention on the Law of Treaties (1969).
48 See e.g. Rivier, 176.
49 S. Baker, *Halleck's International Law* 468 (3rd ed., 1893).
50 This point was of considerable importance following the Allied occupation of Germany in 1945.
51 For an early version of this idea see de Vattel, Bk III, ss. 193-201; Bynkershoek C., *Quaestionum Juris Publici Libri Duo*, Bk. I, pp. 32-46 (1737, trans Frank T., 1930).
52 Rivier, 182.
53 Phillimore, I, p. 328.
54 Baker, 495.
55 'The American continents, by the free and independent conditions which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.'

United States Acquisition of the Hawaiian Islands

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

Acquisition of the Hawaiian Islands in 1898

The facts giving rise to the subsequent occupation and control of the Hawaiian Kingdom by the US government are, no doubt, susceptible to various interpretations. It is relatively clear, however, that US intervention in the Islands first took place in 1893 under the guise of the protection of the US legation and consulate and 'to secure the safety of American life and property'.[56] US troops landed on the Island of O'ahu on 16th January and a Provisional Government was established by a group of insurgents under their protection. On the following day, and once Queen Lili'uokalani had abdicated her authority in favour of the United States, US minister Stevens formally recognised *de facto* the Provisional Government of Hawai'i. The Provisional Government then proceeded to draft and sign a 'treaty of annexation' on February 14th 1893 and dispatch it to Washington D.C. for ratification by the US Senate.

According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy 'was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili'uokalani which put in serious peril not only the large and preponderating interests of the United States in the Islands, but all foreign interests'.[57] It was further emphasised in a report of Mr Foster to the President that the US marines had taken 'no part whatever toward influencing the course of events'[58] and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of government. This version of events was to be contradicted in several important respects shortly after.

Following receipt of a letter of protest sent by Queen Lili'uokalani, newly incumbent President Cleveland withdrew the Treaty of Annexation from the Senate and dispatched US Special Commissioner James Blount to Hawai'i to investigate. The investigations of Mr Blount revealed that the presence of American troops, who had landed without permission of the existing government, were 'used for the purpose of inducing the surrender of the Queen, who abdicated under protest [to the United States and not the provisional government] with the understanding that her case would be submitted to the President of the United States.'[59] It was apparent, furthermore, that the Provisional Government had been recognised when it had

56 Order of 16 Jan. 1893.
57 For. Rel. 1894, App. II, 198.
58 Report of Mr. Foster, Sec. of State, For. Rel., App. II, 198-205 (1894).
59 Moore's Digest, I, 499.

little other than a paper existence, and 'when the legitimate government was in full possession and control of the palace, the barracks, and the police station'.[60] On December 18th 1893, President Cleveland addressed Congress on the findings of Commissioner Blount. He emphasised that the Provisional Government did not have 'the sanction of either popular revolution or suffrage' and that it had been recognised by the US minister pursuant to prior agreement at a time when it was 'neither a government de facto nor de jure'.[61] He concluded as follows:

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

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

It is fairly clear then, that the position of the US government in December 1893 was that its intervention in Hawai'i was an aberration which could not be justified either by reference to US law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands 'as being neither a government *de facto* nor *de iure*'. At this stage there was an implicit acknowledgement of the fact that the US intervention not only conflicted with specific US commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that '[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors') but also with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.[62]

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

Despite admitting the unlawful nature of its original intervention, the US, however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili'uokalani to the throne even though she had acceded to the US proposals in that regard. Rather it left control of Hawai'i in the hands of the insurgents it had effectively put in place and who clearly did not enjoy the popular support of the Hawaiian people.[63] Following a proclamation establishing the Republic of Hawai'i by the insurgents in 1894 – the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United

60 *Id.*, 498-99.
61 *Id.*, 501.
62 I. Brownlie, *International Law and the Use of Force by States* 46-7 (1963).
63 See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992).

States[64] - *de facto* recognition of the Republic was affirmed by the US[65] and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili'uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai'i.[66] A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai'i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

> 'by that resolution the Republic of Hawai'i as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions vested in the United States…'.[67]

Although the Japanese minister in Washington had raised certain concerns in 1897 as regards the position of Japanese labourers emigrating to the Islands under the Hawaiian-Japanese Convention of 1888, and had insisted that 'the maintenance of the status quo' was essential to the 'good understanding of the powers having interests in the Pacific', it subsequently withdrew its opposition to annexation subject to assurances as regards the treatment of Japanese subjects.[68] No other state objected to the fact of annexation.

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

The Cession of the Hawaiian Islands to the United States

The joint resolution itself speaks of the government of the Republic of Hawai'i having signified its consent 'to cede absolutely and without reserve to the United States of American all rights of sovereignty of whatsoever kind', suggesting, as some commentators have later accepted, that the process was one of voluntary merger.[69] Hawai'i brought about, according to this thesis, its own demise by means of voluntary submission to the sovereignty of the United States.[70] This interpretation was bolstered by the fact that the government of the Republic had exercised *de facto* control over the Islands since 1893 – as President McKinley was to put it: 'four years having abundantly sufficed to establish the right and the ability of the Republic of Hawai'i to enter, as a sovereign contractant, upon a conventional union with the United States'.[71] Furthermore, even if it had not been formally recognised as the *de jure* government of Hawai'i by other nations,[72] it was effectively the only government in place (the government of Queen Lili'uokalani being forced into internal exile).

64 Article 32 Constitution of the Republic of Hawai'i.
65 For. Rel. 1894, 358-360.
66 XC B.F.S.P. 1897-8 1248 (1901).
67 President McKinley, Third Annual Message, 15 Dec. 1899, Moore's Digest, I, 511.
68 See, Moore's Digest, I, 504-9.
69 See e.g. Verzijl, 118.
70 *Id.*, 129.
71 Message of President McKinley to the Senate, Moore's Digest, I, 503 (16 June 1897).
72 Some type of recognition was provided by Great Britain in 1894, however.

Such a thesis overlooks two facts. First of all, whilst the Republic of Hawai'i had certainly sponsored the adoption of a treaty of cession, the failure by the US to ratify that instrument meant that no legally binding commitments in that regard were ever created. This is not to say that the US actions in this regard were therefore to be regarded as unlawful for purposes of international law. Even if doubts exist as to the constitutional competence of US Congress to extend the jurisdiction of the United States in the manner prescribed by the Resolution,[73] this in itself does not prevent the acts in question from being effective for purposes of international law.[74] Indeed, as suggested above it was widely recognised that, for purposes of international law, annexation need not be accomplished by means of a treaty of peace and could equally take the form of a unilateral declaration of annexation. The significance of the failure to ratify, however, does suggest that the acquisition was achieved, if at all, by unilateral act on the part of the United States rather than being governed by the terms of the bilateral agreement.

Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sahib v.Chief Commissioner Pondicherry*[75] in which it was held that Pondicherry was not to be considered as part of India, despite India's administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.[76]

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

Central to the US thesis, in this respect, is the view that the government of the self-proclaimed Republic enjoyed the necessary competence to determine the future of Hawai'i. Notwithstanding the fact that the Republic was itself maintained in power by means of US military presence, and notwithstanding its recognition of the legitimate claims on the part of the Kingdom, the US recognised the former as a *de facto* government with which it could deal. This, despite the fact that US recognition policy during this period was 'based predominantly on the principle of effectiveness evidenced by an adequate expression of popular consent'.[77] As Secretary Seward was to indicate in 1868, revolutions 'ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanence.'[78] The US refusal, therefore, to recognise the Rivas Government in Nicaragua in 1855 on the basis that '[i]t appears to be no more than a violent usurpation of power, brought about by an irregular self-organised military force, as yet unsanctioned by the

73 See W. Willoughby, *The Constitutional Law of the United States*, I, 427 (2nd ed., 1929).

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

75 I.L.R. 49v (1969).

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

77 Lauterpacht, *Recognition in International Law* 124 (1947).

78 US Diplomatic Correspondence, II, 630 (1866).

will or acquiescence of the people',[79] stands in marked contrast to its willingness to offer such recognition to the government of the Republic of Hawai'i in remarkably similar circumstances. Given the precipitous recognition of the government of the Republic – itself an act of unlawful intervention - it seems unlikely that the US could legitimately rely upon the fact of its own recognition as a basis for claiming that its acquisition of sovereignty over Hawai'i issued from a valid expression of consent.

The Annexation of the Hawaiian Islands by the United States

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

The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.[80] Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai'i.[81] It could not easily be construed, in other words, merely as an instrument of US government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

> 'unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal. It makes no difference that the territory involved may already be under the firm control of the State declaring the annexation.'[82]

79 Mr. Buchanan to Mr. Rush. Moore's Digest, 124.
80 See, Hackworth G., *Digest of International Law*, I, 333-338 (1940).
81 Moore's Digest, 500.
82 R. Bindschedler, 'Annexation', in *Encyclopedia of Public International Law*, III, 19, 20 (1992).

The reason for this, no doubt, was the tendency to view international law as being comprised of two independent sets of rules applicable respectively in peacetime and in war (a differentiation which is no longer as sharp as it once was). A State of war had several effects at the time including not merely the activation of the laws and customs of war, but also the invalidation or suspension of existing treaty obligations.[83] This meant, in particular, that in absence of armed conflict, in other words, the US would be unable to avoid its commitments under the 1849 Treaty with Hawai'i, and would therefore be effectively prohibited from annexing the Islands by unilateral act. This, no doubt, informed President Cleveland's unwillingness to support the treaty of annexation in 1893, and meant that the only legitimate basis for pursuing annexation in the circumstances would have been by treaty of cession.

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

Belligerent Occupation and Occupation Pacifica

From the time of Vattel onwards it was frequently been held that the mere occupation of foreign territory did not lead to the acquisition of title of any kind until the termination of hostilities.[84] During the course of the 19th Century, however, this became not merely a doctrinal assertion, but a firmly maintained axiom of international law.[85] Up until the point at which hostilities were at an end, the control exercised over territory was regarded as a 'belligerent occupation' subject to the terms of the laws of war. The hallmark of belligerent occupation being that the occupant enjoyed *de facto* authority over the territory in question, but that sovereignty (and territorial title) remained in the hands of the displaced government. As President Polk noted in his annual message of 1846 'by the law of nations a conquered territory is subject to be governed by the conqueror during his military possession and until there is either a trea ty of peace, or he shall voluntarily withdraw from it.'[86] In such a case '[t]he sovereignty of the enemy is in such case "suspended", and his laws can "no longer be rightfully enforced" over the occupied territory and that "[b]y the surrender, the inhabitants pass under a temporary allegiance to the conqueror."[87] The suspensory, and provisional, character of belligerent occupation was further confirmed in US case law of the time,[88] in academic doctrine[89] and in various Manuals on the Laws of War.[90] The general idea was subsequently recognised in Conventional

83 Brownlie, 26-40.

84 See e.g. de Vattel III, s. 196.

85 Graber believes this was the case following the Franco-Prussian war. D. Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* 40-41 (1968).

86 President Polk's Second Annual Message, 1846, Moore's Digest, I, 46.

87 President Polk's Special Message, 24 July 1848. Moore's Digest, I, 46-7.

88 *United States v. Rice*, 4 Wheat. 246 (1819).

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

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

form in article 43 of the 1907 Hague Regulations,[91] and in the US Military Manual of 1914.[92] In essence, the doctrine of belligerent occupation placed certain limits on the capacity of the occupying power to acquire or dispose of territory *durante bello*. By inference, sovereignty remained in the hands of the occupied power and, as a consequence it was generally assumed that until hostilities were terminated, title to territory would not pass and the extinction of the state would not be complete. This doctrine was subsequently elaborated during the course of the First and Second World Wars to the effect that States would not be regarded as having been lawfully annexed even when the entirety of the territory was occupied and the government forced into exile, so long as the condition of war persisted, albeit on the part of allied States. The general prohibition on the threat or use of armed force in the Charter era since 1945 has further reinforced this regime to the point at which it might be said that 'effective control by foreign military force can never bring about by itself a valid transfer of sovereignty'.[93]

Until the adoption of common article 2 of the 1949 Geneva Conventions,[94] however, the doctrine of belligerent occupation applied primarily to time of war or armed conflict where military intervention met armed resistance. Indeed, the absence of resistance would not infrequently be construed either as an implicit acceptance of the fact of occupation, or as a signal that the original sovereign had been effectively extinguished in virtue of *debellatio*. It is evident, however, that by the turn of the century a notion of peacetime occupation (*occupatio pacifica*) was coming to be recognised.[95] This concept encompassed not merely occupation following the conclusion of an agreement between the parties, but also non-consensual occupation occurring outside armed conflict (but normally following the threatened use of force).[96] Practice in the early 20th Century suggests that even though the Hague Regulations were themselves limited to occupations *pendente bello*, their provisions should apply to peacetime occupations such as the British occupation of Egypt in 1914-18,[97] the Franco- Belgian occupation of the Ruhr in 1923-5[98] and the occupation of Bohemia and Moravia by Germany in 1939.[99] Indeed, the Arbitral Tribunal in the *Coenca Brothers v. Germany Arbitration Case*[100] took the view that

91 Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907. The Brussels Declaration of 1874 provided similarly (Article 2) that 'The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety'.

92 Rules of Land Warfare 105-6 (1914): 'Military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty of the occupant, but simply the authority or power to exercise some of the rights of sovereignty'.

93 E. Benvenisti, The International Law of Occupation 5 (1993).

94 Common Article 2 of the 1949 Geneva Conventions 75 U.N.T.S. 31 reads: 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.' It would seem that the purpose of this 'extension' of the regime of military occupation was to take account of the peculiar facts surrounding the German occupation of Czechoslovakia in 1939 and Denmark in 1940.

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

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

97 *Leban and Others v. Alexandria Water Co. Ltd. and Others Egypt*, Mixed Court of Appeal, A.D. 1929/30, Case No. 286 (25 March 1929).

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

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

100 7 M.A.T., 1929, 683.

the Allied occupation of Greece in 1915 was governed by the terms of the law of belligerent occupation notwithstanding the fact that Greece was not a belligerent at that time, but had merely invited occupation of Salonika in order to protect the Serbian State. Similarly, in the *Chevreau Case* the Arbitrator intimated that the laws of belligerent occupation would apply to the British forces occupying Persia under agreement with the latter in 1914.[101]

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

> '[i]n the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation…'.[102]

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

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

Acquisition of the Hawaiian Islands in virtue of the Plebiscite of 1959

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

> 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

101 *Chevreau Case (France v. Great Britain), 27 Am. J. Int'l. L.* 159, 159-160 (1931).
102 Jones, 159.

a) to ensure, with due respect for culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement…
d) to transmit regularly to the Secretary-General for information purposes… statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.'

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

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

A higher level of scrutiny was generally exercised in case of integration than in respect of other forms of self-determination. Until the time in which self- determination is exercised, furthermore, 'the territory of a… Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State' (Resn. 2625 (XXV) para. VI).[103] As the ICJ subsequently noted in its Advisory Opinion in the *Namibia case*, the 'development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them'.[104] It emphasised, furthermore, in the *Western Sahara case* that 'the application of the right of self-determination

103 This follows by implication from the terms of Article 74 UN Charter.
104 ICJ Rep. 31, para. 51 (1971).

requires a free and genuine expression of the will of the peoples concerned'.[105]

An initial point in question here is whether Hawai'i should have been listed as a Non-Self-Governing Territory at all for such purposes. Article 73 of the Charter refers to peoples 'who have not yet attained a full measure of self-government' – a point which is curiously inapplicable in case of Hawai'i. That being said, the regime imposed was designed, primarily, to foster decolonisation after 1945 and it was only with some reluctance that the United States agreed to include Hawai'i on the list at all. The alternative would have been for Hawai'i to remain under the control of the United States and deprived of any obvious means by which it might re-obtain its independence. The UN Charter may be seen, in that respect, as having created a general but exclusive system of entitlements whereby only those non-State entities regarded as either Non-Self-Governing or Trust Territories would be entitled to independence by way of self-determination absent the consent of the occupying power.[106] It may be emphasised, furthermore, that to regard Hawai'i as being a territory entitled to self-determination was not entirely inconsistent with its claims to be the continuing State. The substance of self- determination in its external form as a right to political independence may be precisely that which may be claimed by a State under occupation. Indeed, the General Assembly Declaration on Friendly Relations (Resn. 2625) makes clear that the right is applicable not simply in case of colonialism, but also in relation to the 'subjection of peoples to alien subjugation, domination and exploitation'. Crawford points out, furthermore, that self-determination applies with equal force to existing states taking 'the well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government'.[107] The international community's subsequent recognition of the applicability of self-determination in case of the Baltic States, Kuwait and Afghanistan, for example, would appear merely to emphasise this point.[108] One may tolerate, in other words, the placing of Hawai'i on the list of non-self-governing territories governed by article 73 only to the extent that the entitlement to self-determination under that article was entirely consonant with the general entitlements to 'equal rights and self- determination' in articles 1(2) and 55 of the Charter.

Notwithstanding doubts as to the legality of US occupation/ annexation of Hawai'i, it would seem evident that any outstanding problems would be effectively disposed of by way of a valid exercise of self-determination. In general, the principle of self-determination may be said to have three effects upon legal title. First of all it envisages a temporary legal regime that may, in effect, lead to the extinction of legal title on the part of the Metropolitan State.[109] Secondly, it may nullify claims to title in cases where such claims are inconsistent with the principle. Finally, and most importantly in present circumstances, it may give rise to a valid basis for title including cases where it has resulted in free integration with another State. In this third scenario, if following a valid exercise of self-determination on the part of the Hawaiian people it was decided that Hawai'i should seek integration into the United States, this would effectively bring to a close any claims that might remain as to the continuity of the Hawaiian Kingdom.

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

105 ICJ Rep. 12, 32 (1975).
106 For a review of the practice in this regard see J. Crawford, 'State Practice and International Law in Relation to Secession', 69 *Brit. Y.B. Int'l L.* 85 (1998).
107 Crawford, *Creation of States*, 100.
108 See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 94-5 (1995).
109 Crawford, Creation of States, 363-4; *Shaw, Title to Territory in Africa*, 149.

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

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

Two particular concerns may be raised in this context. First, the plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them. This was certainly an extraordinary situation when compared with other cases with which the UN was dealing at the time, and has parallels with one other notoriously difficult case, namely the Falkland Islands/Malvinas (in which the entire population is of settler origin). There is certainly nothing in the concept of self-determination as it is known today to require an administering power to differentiate between two categories of residents in this respect, and indeed in many cases it might be treated as illegitimate.[110] By the same token, in some cases a failure to do so may well disqualify a vote where there is evidence that the administering state had encouraged settlement as a way of manipulating the subsequent result.[111] This latter point seems to be even more clear in a case such as Hawai'i in which the holders of the entitlement to self-determination had presumptively been established in advance by the fact of its (prior or continued) existence as an independent State. In that case, one might suggest that it was only those who were entitled to regard themselves as nationals of the Hawaiian Kingdom (in accordance with Hawaiian law prior to 1898), who were entitled to vote in exercise of the right to self-determination.

A second, worrying feature of the plebiscite concerns the nature of the choice being presented to the Hawaiian people. As GA Resn. 1514 makes clear, a decision in case of integration should be made 'with full knowledge of the change in their status… expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage'. It is far from clear that much, if any, information was provided as regards the 'change in status' that would occur with integration, and there is no evidence that the alternative of full independence was presented as an option. Judged in terms of the later resolutions of the General Assembly on the issue, then, it would seem that the plebiscite falls considerably short of that which would be required for purposes of a valid exercise of self-determination.[112]

An important point, here, as is evident from the discussion above, is that most of the salient resolutions by which the General Assembly 'developed' the law relating to decolonisation post-dated the plebiscite in Hawai'i, and the organisation's practice in that respect changed quite radically following the establishment of the Committee of Twenty-Four in 1961 (Resn. 1700 (XVI)). Up until that point, many took the view that Non-Self-Governing Territories were merely entitled to 'self-government' rather than full political independence, and that self-determination was little more than a political principle being, at best, *de lege farenda*.[113]

110 See, H. Hannum, 'Rethinking Self-Determination', 34 *Va. J. Int'l. L.* 1, 37 (1993).
111 The case of Israeli settlements in the Occupied Territories, Cassese, 242.
112 Similar points have been made as regards the disputed integration of West Irian into Indonesia.
113 See, R. Jennings, *The Acquisition of Territory in International Law* 69-87 (1963).

There was, in other words, no clear obligation as far as UN practice at the time was concerned, for the decision made in 1959 to conform to the requirements later spelled out in relation to other territories – practice was merely crystallising at that date. The US made clear, in fact, that it did not regard UN supervision as necessary for purposes of dealing with its Non-Self-Governing Territories such as Puerto Rico, Alaska or Hawai'i.[114] Whilst such a view was, perhaps, defensible at the time given the paucity of UN practice, it does not itself dispose of the self-determination issue. It might be said, to begin with, that in light of the subsequent development of the principle, it is not possible to maintain that the people of Hawai'i had in reality exercised their right of self-determination (as opposed to having merely been granted a measure of self-government within the Union). Such a conclusion, however, is debatable given the doctrine of inter- temporal law. More significant, however, is the fact that pre-1960 practice did not appear to be consistent with the type of claim to self-determination that would attach to independent, but occupied, States (in which one would suppose that the choice of full political independence would be the operative presumption, rebuttable only by an affirmative choice otherwise). As a consequence, there are strong arguments to suggest that the US cannot rely upon the fact of the plebiscite alone for purposes of perfecting its title to the territory of Hawai'i.

Acquisition of Title by Reason of Effective Occupation / Acquisitive Prescription

As pointed out above, it cannot definitively be supposed that the US did acquire valid title to the Hawaiian Islands in 1898, and even if it did so, the basis for that title may now be regarded as suspect given the current prohibition on the annexation of territory by use of force. In case of the latter, the second element of the doctrine of inter-temporal law as expounded by Arbitrator Huber in the *Island of Palmas case* may well be relevant. Huber distinguishes in that case between the acquisition of rights on the one hand (which must be founded in the law applicable at the relevant date) and their existence or continuance at a later point in time which must 'follow the conditions required by the evolution of the law'. One interpretation of this would be to suggest that title may be lost if a later rule of international law were to arise by reference to which the original title would no longer be lawful. Thus, it might be said that since annexation is no longer a legitimate means by which title may be established, US annexation of Hawai'i (if it took place at all) would no longer be regarded as well founded. Apart from the obvious question as to who may be entitled to claim sovereignty in absence of the United States, it is apparent that Huber's *dictum* primarily requires that 'a State must continue to maintain a title, validly won, in an effective manner – no more no less.'[115] The US, in other words, would be entitled to maintain its claim over the Hawaiian Islands so long as it could show some basis for asserting that claim other than merely its original annexation. The strongest type of claim in this respect is the 'continuous and peaceful display of territorial sovereignty'.

The emphasis given to the 'continuous and peaceful display of territorial sovereignty' in international law derives in its origin from the doctrine of occupation which allowed states to acquire title to territory which was effectively *terra nullius*. It is apparent, however, and in line with the approach of the ICJ in the *Western Sahara Case*,[116] that the Islands of Hawai'i cannot be regarded as *terra nullius* for purpose of acquiring title by mere occupation. According to some, nevertheless, effective occupation may give rise to title by way of what is known as 'acquisitive prescription'.[117] As Hall maintained, '[t]itle by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or

114 United States Department of State Bulletin, 270 (1952).
115 R. Higgins, 'Time and the Law: International Perspectives on an Old Problem', 46 *Int. Comp. Law Q.* 501, 516 (1997).
116 ICJ Rep., 12, 32 (1975).
117 For a discussion of the various approaches to this issue see Jennings and Watts, 705-6.

where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.'[118] Johnson explains in more detail:

> 'Acquisitive Prescription is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor…) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or international tribunal or – exceptionally in cases where no such action was possible – have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.'[119]

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,[120] and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case[121] found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,[122] the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*[123] and in the *Island of Palmas Arbitration*.[124]

If a claim as to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indica* have to be considered including, for example, the length of time of effective and peaceful occupation, the extent of opposition to or acquiescence in, that occupation and, perhaps, the degree of recognition provided by third states. As Jennings and Watts confirm, however, 'no general rule [can] be laid down as regards the length of time and other circumstances which are necessary to create such a title by prescription. Everything [depends] upon the merits of the individual case'.[125] As regards the temporal element, the US could claim to have peacefully and continuously exercised governmental authority in relation to Hawai'i for over a century. This is somewhat more than was required for purposes of prescription in the *British Guiana-Venezuela Boundary Arbitration,* for example,[126] but it is clear that time alone is certainly not determinative. Similarly, in terms of the attitude of third states, it is evident that apart from the initial protest of the Japanese Government in 1897, none has opposed the extension of US jurisdiction to the Hawaiian Islands. Indeed the majority of States may be said to have acquiesced in its claim to sovereignty in virtue of acceding to its exercise of sovereign prerogatives in respect of the Islands (for example, in relation to the policing of territorial waters or airspace, the levying of customs duties, or the extension of treaty rights and obligations to that territory). It is important, however, not to attach too much emphasis to third party recognition. As Jennings points out, in case of adverse possession '[r]ecognition or acquiescence

118 W. Hall, *A Treatise on International Law,* Pearce Higgins, 143 (8th ed., 1924).
119 Johnson, 27 *Brit. Y.B. Int'l L.* 332, 353-4 (1950).
120 Prescription may be said to have been recognized in the *Chamizal Arbitration*, 5 A.J.I.L. 785 (1911); the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*.
121 ICJ Rep. 6 (1960).
122 ICJ Rep. 47 (1953)
123 ICJ Rep. 116 (1951.
124 *Island of Palmas Case*, 829
125 *Jennings and Watts*, 706.
126 The arbitrators were instructed by their treaty terms of reference to allow title if based upon 'adverse holding or prescription during a period of 50 years'. 92 B.F.S.P 160 (1899-1900).

on the part of third States… must strictly be irrelevant'.[127]

More difficult, in this regard, is the issue of acquiescence/protest. In the *Chamizal Arbitration*[128] it was held that the US could not maintain a claim to the Chamizal tract by way of prescription in part because of the protests of the Mexican government. The Mexican government, in the view of the Commission, had done 'all that could be reasonably required of it by way of protest against the illegal encroachment'. Although it had not attempted to retrieve the land by force the Commission pointed out that:

> 'however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.'[129]

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

The difficulty of applying such considerations in the current circumstances is evident. Although the Hawaiian Kingdom (the Queen) protested vociferously at the time, and on several separate occasions, and although this protest resulted in the refusal of the US Senate to ratify the treaty of cession, from 1898 onwards no further action was taken in this regard. The reason, of course, is not hard to find. The government of the Kingdom had been effectively removed from power and the US had *de facto*, if not *de jure*, annexed the Islands. The Queen herself survived only until 1917 and did so before a successor could be confirmed in accordance with article 22 of the 1864 Constitution. This was not a case, moreover, of the occupation of merely part of the territory of Hawai'i in which case one might have expected protests to be maintained on a continuous basis by the remaining State. In the circumstances, therefore, it is entirely understandable that the Queen or her government failed to pursue the matter further when it appeared exceedingly unlikely that any movement in the position of the US government would be achieved. This is not to say, of course, that the government of the Kingdom subsequently acquiesced in the US occupation of the Islands, which of course raises the question whether a claim of acquisitive prescription may be sustained. In the view of Jennings, in cases of acquisitive prescription, 'an acquiescence on the part of the State prescribed against is of the essence of the process'.[130] If, as he suggests, some positive indication of acquiescence is to be found, there is remarkably little evidence for it. Indeed, of significance in this respect is the admission of the United States in the 'Apology Resolution' of 1993 in which it noted that 'the indigenous Hawaiian people never directly relinquished their claims to the inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum'. By the same token, the weight of evidence in favour of prescription should not be underplayed. As Jennings and Watts point out:

> 'When, to give an example, a state which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another state, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among states that the present condition of things is in conformity with international order.'[131]

127 Jennings, *The Acquisition of Territory*, 39.
128 United States v. Mexico, 5 *Am. J. Int'l L.* 782 (1911).
129 *Id.*
130 Jennings, *The Acquisition of Territory*, 39.
131 *Jennings and Watts,* 707.

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

Exhibit “C”

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom

Edited by *Dr. David Keanu Sai*
HEAD, ROYAL COMMISSION OF INQUIRY

THE ROYAL COMMISSION OF INQUIRY

Dr. David Keanu Sai
Head, Hawaiian Royal Commission of Inquiry

THE ROYAL COMMISSION OF INQUIRY

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Introduction

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[1] This invasion coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior power of the United States military, whereby 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.[2]

President Cleveland initiated a presidential investigation on 11 March 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on 29 March after which he "directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels."[3] His last report was dated 17 July 1893, and on 18 October 1893, Secretary of State Gresham notified the President:

> The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.
>
> The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. …
>
> The Government of Hawaii surrendered its authority under a threat of war, until such time only 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

1 United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 451 (1895) (hereafter "Executive Documents") (online at https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).
2 *Id.*, 586.
3 *Id.*, 568.

> 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.[4]

On 18 December 1893, President Cleveland delivered a manifesto[5] to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government. The President concluded that the "military occupation of Honolulu by the United States…was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[6] He also determined "that the provisional government owes its existence to an armed invasion by the United States."[7] Finally, the President admitted that by "an act of war…the Government of a feeble but friendly and confiding people has been overthrown."[8]

Through executive mediation between the Queen and the new U.S. Minister to the Hawaiian Islands, Albert Willis, that lasted from 13 November through 18 December, an agreement of peace was reached. According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents. Political wrangling in the Congress, however, blocked President Cleveland from carrying out his obligation of restoration of the Queen.

Five years later, at the height of the Spanish-American War, President Cleveland's successor, William McKinley, signed a congressional joint resolution of annexation on 7 July 1898, unilaterally seizing the Hawaiian Islands. The legislation of every State, including the United States of America and its Congress, are not sources of international law. In *The Lotus* case, the Permanent Court of International Justice stated that "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."[9] According to Judge Crawford, derogation of this principle will not be presumed.[10]

Furthermore, as long as occupation continues, the Occupying State cannot "annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts."[11] Since 1898, the United States has unlawfully imposed its municipal laws throughout the territory of the Hawaiian Kingdom, which is the war crime of usurpation of sovereignty.

Despite the United States' admitted illegality of its overthrow of the Hawaiian government, it did not affect the continued existence of the Hawaiian Kingdom as a State. In the sixteenth century, French jurist and political philosopher Jean Bodin stressed the importance that "a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state."[12] Nineteenth century political philosopher Frank Hoffman also emphasizes that a government "is not a State any more than a man's

4 *Id.*, 462-463.
5 *Manifesto* is defined as a "formal written declaration, promulgated by…the executive authority of a state or nation, proclaiming its reasons and motives for…important international action." Black's Law 963 (6th ed., 1990).
6 *Id.*, 452.
7 *Id.*, 454.
8 *Id.*, 454.
9 *Lotus*, PCIJ Series A, No. 10, 18 (1927).
10 James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).
11 Jean S. Pictet, *Commentary—The Geneva Conventions of 12 August 1949* 275 (1958).
12 Jean Bodin, *Six Books of the Commonwealth* 56 (1955).

words are the man himself," but "is simply an expression of the State, an agent for putting into execution the will of the State."[13] Quincy Wright, a twentieth century American political scientist, also concluded that, "international law distinguishes between a government and the state it governs."[14] Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003, whereby the former has been a recognized sovereign State since 1919, and the latter since 1932.

Stark parallels can be drawn between what the United States did to the Hawaiian Kingdom and what Iraq did to Kuwait in 1990, commonly referred to as the First Gulf War. Just as Iraq, without justification, invaded Kuwait and overthrew the Kuwaiti government on 2 August 1990, and then unilaterally announced it annexed Kuwaiti territory on 8 August 1990, the United States did the same to the Hawaiian Kingdom and its territory. Where Kuwait was under a belligerent occupation by Iraq for 7.5 months, the Hawaiian Kingdom has been under a belligerent occupation by the United States for 127 years. Unlike Kuwait, the Hawaiian Kingdom did not have the United Nations Security Council to draw attention to the illegality of Iraq's invasion and annexation of Kuwaiti territory.[15]

From a State of Peace to a State of War

Fundamental to deciphering the Hawaiian situation is to discern between a state of peace and a state of war. "Traditional international law," states Judge Greenwood, "was based upon a rigid distinction between the state of peace and the state of war."[16] This bifurcation provides the proper context by which certain rules of international law would or would not apply. The laws of war—*jus in bello*, otherwise known today as international humanitarian law, are not applicable in a state of peace. Inherent in the rules of *jus in bello* is the co-existence of two legal orders, being that of the occupying State and that of the occupied State. As an occupied State, the continuity of the Hawaiian Kingdom has been maintained for the past 127 years by the positive rules of international law, notwithstanding the absence of effectiveness, which is required during a state of peace.[17]

The failure of the United States to comply with international humanitarian law, for over a century, has created a humanitarian crisis of unimaginable proportions where war crimes have since risen to a level of *jus cogens*. At the same time, the obligations have *erga omnes* characteristics—flowing to all States. The international community's failure to intercede, as a matter

13 Frank Sargent Hoffman, *The Sphere of the State or the People as a Body-Politic* 19 (1894).

14 Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) *Am. J. Int'l L.* 299, 307 (Apr. 1952).

15 United Nations Security Council Resolution 662 (9 August 1990). In its resolution, the Security Council stated: "*Gravely alarmed* by the declaration by Iraq of a "comprehensive and eternal merger" with Kuwait, *Demanding* once again that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990, *Determined* to bring the occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait, *Determined also* to restore the authority of the legitimate Government of Kuwait, 1. *Decides* that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void; 2. Calls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation; 3. Demands that Iraq rescind its actions purporting to annex Kuwait; 4. Decides to keep this item on its agenda and to continue its efforts to put an early end to the occupation."

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

17 Crawford, 34; Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (2nd ed., 1968).

of *obligatio erga omnes*, is explained by the United States deceptive portrayal of Hawai'i as an incorporated territory. As an international wrongful act, States have an obligation to not "recognize as lawful a situation created by a serious breach … nor render aid or assistance in maintaining that situation,"[18] and States "shall cooperate to bring to an end through lawful means any serious breach [by a State of an obligation arising under a peremptory norm of general international law]."[19]

Jus Cogens—War Crimes and their Prosecution under Universal Jurisdiction

Jus cogens norms are defined as those "peremptory norms" that "are nonderogable and enjoy the highest status within international law."[20] Such norms come first from "customary international law," which is a body of law that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[21] After a norm or rule has been incorporated into customary international law, it may become a *jus cogens*, or peremptory, norm if there is "further recognition by the international community as a whole that this is a norm from which no derogation is permitted."[22] Once a norm has become *jus cogens*, it is incapable of being derogated by any State, and if a treaty or agreement conflicts with the norm, it is void.[23]

Since the atrocities of the Second World War, the development of the concept of *jus cogens* norms has corresponded with a shift in international law that went from "the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States."[24]

As such, *jus cogens* norms have developed as an expression of the international community's recognition that all States are obligated to respect certain fundamental rights of individuals. It is clear that war crimes are not only international crimes along with crimes against humanity, genocide, and aggression,[25] but "are *jus cogens*" as well.[26] In particular, the prohibition of war crimes is an "old norm which [has] acquired the character of *jus cogens*."[27] There is also a sufficient legal basis for concluding that war crimes are part of *jus cogens*.[28] According to the

18 *Articles of Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001,* vol. II, Article 41(2) (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

19 *Id.*, Article 41(1).

20 *Committee of United States Citizens in Nicaragua, et al., v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *see* also *Vienna Convention on the Law of Treaties* art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

21 *Comm. of U.S. Citizens*, at 940 (quoting Restatement Third §102(2)).

22 *Id.*

23 Vienna Convention art. 53; *Comm. of U.S. Citizens*, at 940.

24 Wilfred Jenks, *The Common Law of Mankind* 17 (1958).

25 Terje Einarsen, *The Concept of Universal Crimes in International Law* 21 (2012).

26 M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," 59(4) *Law and Contemporary Problems* 63, 68 (1996).

27 Grigory I. Tunkin, "Jus Cogens in Contemporary International Law," 3 *U. Tol. L. Rev.* 107, 117 (1971).

28 The 1993 International Tribunal For the Former Yugoslavia and the 1994 International Tribunal for Rwanda statutes include the Statute of the International Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., at 1, U.N. Doc. S/RES/827 (1993) and the Statute for the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., at 1, U.N. Doc. S/RES/955 (1994), and address Genocide, Crimes Against Humanity, and War Crimes. The 1996 Code of Crimes includes these three crimes plus Aggression. See Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), revised by U.N. Doc. A/

International Criminal Tribunal for the Former Yugoslavia, international crimes, which includes war crimes, are "universally condemned wherever they occur,"[29] because they are "peremptory norms of international law or jus cogens."[30]

Since 1898 when the United States began to usurp its authority by imposing its legislation and administrative measures within Hawaiian territory, much has evolved in customary international law. In particular, usurpation of sovereignty was made a war crime by the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* established at the Paris Peace Conference in 1919 in the aftermath of the First World War. The Commission provided examples of the war crime of usurpation of sovereignty during the First World War that bore a striking resemblance to the American occupation of Hawai'i. In the case of the occupation of the Serbian State "Serbian law, courts and administration [were] ousted"[31] by Bulgaria, and taxes were "collected under [the] Bulgarian fiscal regime [and not the Serbian fiscal regime]." Another example the Commission provided was when "Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organization, etc."[32]

According to Schabas, usurpation of sovereignty is recognized as a war crime under customary international law.[33] In the Hawaiian situation, he states that "the usurpation of sovereignty would appear to have been total since the beginning of the twentieth century,"[34] and that it is not an instantaneous act or event but rather a continuous offense that "consists of discrete acts."[35] As such, the *actus reus* of the offense of usurpation of sovereignty occurs where the "perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation."[36] And the *mens rea* would consist of where the "perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation."[37] "There is no requirement for a legal evaluation by the perpetrator," explains Schabas, "as to the existence of an armed conflict or its character as international or non-international. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international [but]…only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict."[38]

From a human rights standpoint, "implications arising from such a crime are determined by the fact that it usually hinders the effective exercise by the citizens of the occupied State of the right to participate in government, provided for by Article 25 [International Covenant on Civil and Political Rights] and Article 23 [American Convention on Human Rights]."[39] Lenzerini explains:

> Even supposing that the citizens of the country to which sovereignty has been

CN.4L.532/Corr.1 and U.N. Doc. A/CN.4l.532/Corr.3; Crimes Against U.N. Personnel, in M. Cherif Bassiouni, International Criminal Law Conventions (1997).

29 ICTY, *Prosecutor, v. Furundzija*, Case No. IT-95-17/1, Judgment, 156 (10 Dec. 1998).

30 ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, para. 520 (14 Jan. 2000).

31 Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

32 *Id.*

33 Schabas, Chapter 4, 155-157, 167.

34 *Id.*, 157

35 *Id.*

36 *Id.*, 167

37 *Id.*, 168

38 *Id.*, 167

39 Lenzerini, Chapter 5, 208.

> usurped are given the formal opportunity to participate in the government installed on their territory by the occupied State, this would hardly comply with the requirement, inherent in the right in point, that all citizens shall enjoy the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. In fact, it is reasonable to maintain that in most cases the representatives "freely chosen" by the citizens of the occupied State would be part of the political organization of the latter, and not of the government imposed by the occupying power.[40]

What was once recognized as a delict or violation of international law by the State in 1898 has risen today to the level of an international crime where criminal culpability falls upon persons and not the State. In the words of the International Military Tribunal, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[41] The passage of time will not remove the stain of criminal culpability for persons who commit war crimes because there is no statute of limitation.[42] However, enquiry into the commission of war crimes can last up to "80 years, bearing in mind the age of criminal responsibility."[43]

The prosecution of war crimes, being international crimes, is recognized as obligatory upon all States of the international community under the doctrine of universal jurisdiction, which is the "prosecution of crimes committed by foreigners in a foreign land."[44] Feldman argues that universal jurisdiction "rests not on the notion that some wrongs are so grave that they must be unlawful, but rather on the proposition that actually existing legal systems must address grave wrongs that come before them if they are to justify their existence."[45]

A valid assertion of universal jurisdiction "as the sole basis for the prosecution of international crimes requires a conclusion that the state of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible."[46] Arguing, in the context of universal jurisdiction, that a state's right to "exclusive jurisdiction over matters that concern only those within its territorial borders…rests on the state's satisfactory performance of the requisite political functions."[47] Duff sees "an international court [or domestic court] with universal jurisdiction as a safeguard or fallback for cases with which, for whatever reason, the national courts cannot be expected to deal adequately."[48] In other words, the "principle of universal jurisdiction in the sense of a competence for all states to extradite or prosecute (*aut dedere, aut judicare*) a suspected perpetrator of grave international crimes undoubtedly forms part of general international law."[49]

40 *Id.*
41 *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
42 As a *jus cogens*—peremptory norm, customary international law prohibits any statute of limitation for war crimes. See also GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); and GA Res. 3074 (XXVIII).
43 Schabas, Chapter 4, 155.
44 Einarsen, 23.
45 Noah Feldman, "Cosmopolitan Law," 116 *Yale L. J.* 1022, 1065 (2007).
46 Anthony Sammons, "The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," 21 *Berkeley J. Int'l L.* 111, 115 (2003).
47 Andrew Altman & Christopher Heath Wellman, "A Defense of International Criminal Law," 115 *Ethics* 35, 46 (2004).
48 R. A. Duff, *Criminal Responsibility, Municipal and International* 25 (unpublished manuscript) (online at http://www.trinitinture.com/documents/duff.pdf).
49 Einarsen, 65.

The gravity of the Hawaiian situation has been heightened by North Korea's announcement that "all of its strategic rocket and long range artillery units are assigned to strike bases of the U.S. imperialist aggressor troops in the U.S. mainland and on Hawaii," which is an existential threat.[50] As the Hawaiian Kingdom has been subjected to a prolonged occupation by the United States for the past 127 years, wherein the United States has not complied with the rules of *jus in bello*—laws of occupation, awareness of the occupation by a few Hawaiian subjects prompted the restoration of the government of the Hawaiian Kingdom under Hawaiian municipal laws. This was done to address the illegal nature of the occupation and to seek compliance with international law.

On 10 December 1995, the author and Donald A. Lewis ("Lewis"), both being Hawaiian subjects, formed a general partnership in compliance with an *Act to Provide for the Registration of Co-partnership Firms* (1880).[51] This partnership was named the Perfect Title Company ("PTC") and functioned as a land title abstracting company.[52] According to Hawaiian law, co-partnerships were required to register their articles of agreement with the Interior Department's Bureau of Conveyances, and for the Minister of the Interior, it was his duty to ensure that co-partnerships maintain their compliance with the statute. However, due to the failure of the United States to administer Hawaiian Kingdom law, there was no government, whether established by the United States President or a restored Hawaiian Kingdom government *de jure*, to ensure the company's compliance to the co-partnership statute.

The partners of PTC intended to establish a legitimate co-partnership in accordance with Hawaiian Kingdom law and in order for the title company to exist as a legal co-partnership firm, the Hawaiian Kingdom government had to be reestablished in an acting capacity. An acting official is "not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to which he himself does not claim title."[53] Hawaiian law did not assume that the entire Hawaiian government would be made vacant, and, consequently, the law did not formalize provisions for the reactivation of the government in extraordinary circumstances. Therefore, notwithstanding the prolonged occupation of the Hawaiian Kingdom since 17 January 1893, a deliberate course of action was taken to re-activate the Hawaiian government by and through its executive branch, as officers *de facto,* under the common law doctrine of necessity.

The Hawaiian Kingdom's 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances, which is under the administration of the Ministry of the Interior. This same Bureau of Conveyances is now under the State of Hawai'i's Department of Land and Natural Resources, which was formerly the Interior Department of the Hawaiian Kingdom. The Minister of the Interior holds a seat of government as a member of the Cabinet Council, together with the other Cabinet Ministers—Minister of Foreign Relations, Minister of Finance and the Attorney General. Article 43 of the 1864 Hawaiian constitution, as amended, provides that, "[e]ach member of the King's Cabinet

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

51 *An Act to Provide for the Registration of Co-partnership Firms* (1880) (online at http://hawaiiankingdom.org/pdf/1880_Co-Partnership_Act.pdf).

52 Perfect Title Company's articles of agreement (10 Dec. 1995) (online at http://hawaiiankingdom.org/pdf/PTC_(12.10.1995).pdf).

53 Black's Law, 26.

shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks." Necessity dictated that in the absence of any "deputies or clerks" of the Interior department, the partners of a registered co-partnership could assume the duty of the same because of the current state of affairs.

Therefore, it was reasonable for the partners of this registered co-partnership to assume the office of the Registrar of the Bureau of Conveyances in the absence of the same; then assume the office of the Minister of Interior in the absence of the same; then assume the office of the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General; and, finally assume the office constitutionally vested in the Cabinet as a Regency, in accordance with Article 33 of the 1864 Hawaiian constitution, as amended.[54] A regency is a person or body of persons "intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the [monarch]."[55] In the Hawaiian situation it was in the absence of the monarch.

On 15 December 1995, with the specific intent of assuming the "seat of Government," the partners of PTC formed a second partnership called the Hawaiian Kingdom Trust Company ("HKTC").[56] The partners intended that this registered partnership would serve as a provisional surrogate for the Hawaiian government by explicitly stating in its articles of agreement:

> The company will serve in the capacity of acting for and on behalf [of] the Hawaiian Kingdom government, hereinafter referred to as the absentee government, and also act as a repository for those who enter into the trust of the same. The company has adopted the Hawaiian constitution of 1864 and the laws lawfully established in the administration of the same.[57]

Therefore, and in light of the aforementioned ascension process, HKTC would serve, by necessity, as officers *de facto,* in an acting capacity, for the Registrar of the Bureau of Conveyances, the Minister of Interior, the Cabinet Council, and ultimately for the Council of Regency. Article 33 of the 1864 Constitution, as amended, provides, "should a Sovereign decease…and having made no last Will and Testament, the Cabinet Council…shall be a Council of Regency." Queen Lili'uokalani's last will and testament could not be accepted into probate under Hawaiian law since the government, which would include the probate courts, was not restored since 17 January 1893.

Furthermore, the only heir to the throne after her death on 11 November 1917, was Prince Jonah Kuhio Kalaniana'ole who died on 7 January 1922. According to Article 22 of the 1864 Constitution, in order to be a successor to the throne, "the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life, [but] should there be no such appointment and proclamation, and the Throne should become vacant, then the Cabinet Council, immediately after the occurring of such vacancy, shall cause a meeting of the Legislative Assembly, who shall elect by ballot some native Alii of the Kingdom as Successor to the Throne; and the Successor so elected shall become a new *Stirps* for a Royal Family." Filling the vacancy after the death of Prince Jonah Kuhio Kalaniana'ole would be the Cabinet Council that serves as a Council of Regency in accordance with Article 33 of the 1864 Constitution. When the occupation comes to an end, the Council of Regency "shall cause a meeting of the Legislative Assembly."

54 "Hawaiian Constitution" (1864). Part III, 219.
55 Black's Law, 1282.
56 Hawaiian Kingdom Trust Company articles of agreement (15 Dec. 1995) (online at http://hawaiiankingdom.org/pdf/HKTC_(12.15.1995).pdf).
57 *Id.*

The purpose of the HKTC was twofold; first, to ensure PTC complies with the co-partnership statute, and, second, to provisionally serve as an acting government of the Hawaiian Kingdom. What became apparent was the impression of a conflict of interest, whereby the duty to comply and the duty to ensure compliance was vested in the same two partners of those two companies. Therefore, in order to avoid this apparent conflict of interest, the partners of both PTC and HKTC, reasoned that an *acting* Regent, having no interests in either company, should be appointed to serve as a *de facto* officer of the Hawaiian government. Since the HKTC assumed to represent the interests of the Hawaiian government in an acting capacity, the trustees would make the appointment.

The assumption by Hawaiian subjects, through the offices of constitutional authority in government, to the office of Regent, as enumerated under Article 33 of the Hawaiian Constitution, was a *de facto* process born out of necessity. Cooley defines an officer *de facto* "to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," but rather "comes in by claim and color of right."[58] In *Carpenter v. Clark*, the Michigan Court stated the "doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned."[59] In *The King v. Ah Lin*, the Hawaiian Kingdom Supreme Court stated "the doctrine…as to officers de facto is sustained by a long line of authorities in England and America, and we have found none questioning it."[60]

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

To accomplish this, the author would relinquish, by a deed of conveyance in both companies, his entire one-half (50%) interest to Lewis, after which, Lewis would convey a redistribution of interest to Naiʻa-Ulumaimalu, then the former would hold a ninety-nine percent (99%) interest in the two companies and the latter a one percent (1%) interest in the same. In order to have these two transactions take place simultaneously, without affecting the standing of the two partnerships, both deeds of conveyance took place on the same day but did not take effect until the following day, on 28 February 1996.[61] On 1 March 1996, the Trustees of HKTC appointed the author as *acting* Regent.[62]

On the same day, the author, as *acting* Regent, proclaimed himself, as the successor of the HKTC.[63] On 15 May 1996, the Trustees conveyed by deed, all of its right, title and interest acquired by thirty-eight deeds of trust, to the author, then as *acting* Regent, and stipulated that the company would be dissolved in accordance with the provisions of its deed of general

58 Thomas Cooley, *A Treatise on the Law of Taxation* 185 (1876).
59 *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).
60 *The King v. Ah Lin*, 5 Haw. 59, 61 (1883).
61 Deed from David Keanu Sai to Donald A. Lewis (27 Feb. 1996) (online at http://hawaiiankingdom.org/pdf/Sai_to_Lewis_Deed.pdf), Deed of Donald A. Lewis to Naiʻa-Ulumaimalu's (27 Feb. 1996) (online at http://hawaiiankingdom.org/pdf/Nai%E2%80%98a_to_Lewis_Deed.pdf).
62 Notice of appointment of Regent by Hawaiian Kingdom Trust Company (1 Mar. 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Appt_Regent.pdf).
63 Hawaiian Kingdom Trust Company's notice of proclamation no. 1 by the Regent (1 Mar. 1996) (online at http://hawaiiankingdom.org/pdf/Proc_(3.1.1996).pdf).

partnership on or about 30 June 1996.[64]

On 28 February 1997, a proclamation by the *acting* Regent announcing the restoration of the provisional Hawaiian government was printed in the Honolulu Sunday Advertiser on 9 March 1997.[65] The international law of occupation allows for an occupied State's government and the occupying State to co-exist within the same territory. According to Marek, "it is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the [occupying] State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the [occupying] State and that of the occupied State…is not one of delegation, but of co-existence."[66]

On 7 September 1999, the *acting* Regent, commissioned Peter Umialiloa Sai, a Hawaiian subject, as *acting* Minister of Foreign Affairs, and Mrs. Kauʻi P. Goodhue, later to be known as Mrs. Kauʻi P. Sai-Dudoit, a Hawaiian subject, as *acting* Minister of Finance.[67] On 9 September 1999, the *acting* Regent commissioned Gary Victor Dubin, Esquire, a Hawaiian denizen, as *acting* Attorney General.[68] Dubin resigned on 21 July 2013, and was replaced by Dexter Kaʻiama, Esquire, on 11 August 2013.[69] The *acting* Council of Regency ("Council of Regency") was established on 26 September 1999, by resolution whereby the author would resume the office of *acting* Minister of the Interior and serve as Chairman of the Council.[70]

His Excellency Peter Umialiloa Sai died on 17 October 2018, and, thereafter, by proclamation of the Council of Regency on 11 November 2019, the author was designated "to be Minister of Foreign Affairs *ad interim* while remaining as Minister of the Interior and Chairman of the Council of Regency."[71] According to Justice Harris of the Hawaiian Kingdom Supreme Court, where there is "a vacancy occurring, by death or otherwise," the Council of Regency, serving in the absence of the Monarch, can "delegate the authority to act for the time being, to another Ministerial officer" as *ad interim*.[72] Justice Harris further explained that the ministers are "not subordinate to the other, nor do we see that the duties of one in any way interfere with the duties of the other," and, therefore, "one person [can hold] two appointments [because the] two offices are not declared by the Constitution or statute to be incompatible."[73]

64 Deed from Hawaiian Kingdom Trust Company to Regent (15 May 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Deed_to_Regent.pdf).
65 Proclamation by the Regent, Honolulu Advertiser newspaper (28 Feb. 1997) Part III, 227-228.
66 Marek, 91.
67 Hawaiian Minister of Foreign Affairs commission—Peter Umialiloa Sai (5 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Umi_Sai_Min_Foreign_Affairs.pdf), and the Hawaiian Minister of Finance commission—Kauʻi P. Goodhue (Sep. 5, 1999) (online at http://hawaiiankingdom.org/pdf/Kaui_Min_of_Finance.pdf).
68 Hawaiian Attorney General commission—Gary V. Dubin (9 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Dubin_Att_General.pdf).
69 Hawaiian Attorney General commission—Dexter Keʻeaumoku Kaʻiama (11 Aug. 2013) (online at https://www.hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf).
70 Privy Council Resolution establishing a Council of Regency (26 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Council_of_Regency_Resolution.pdf).
71 Council of Regency, Proclamation of Minister of Foreign Affairs ad interim (11 Nov. 2019), Part III, 235.
72 *Rex v. C.W. Kanaau*, 3 Haw. 669, 670 (1876).
73 *Id.*, 670-671.

The establishment of the Council of Regency, as officers *de facto*, was a political act of self-preservation, not revolution, and was grounded upon the legal doctrine of limited necessity. Under British common law, deviations from a State's constitutional order "can be justified on grounds of necessity."[74] De Smith also states, that "State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution."[75]

According to Oppenheimer, "a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country."[76] In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated there are certain limitations to the principle of necessity, "namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful…Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign."[77] National courts, to include the Supreme Court of the United States,[78] have consistently held that emergency action cannot justify a subversion of a State's constitutional order. The doctrine of necessity provides the necessary parameters and limits of emergency action. The governing principles of necessity were stated in *Mitchell v. Director of Public Prosecutions*:[79]

> (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State:
> (ii) there must be no other course of action reasonably available;
> (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
> (iv) it must not impair the just rights of citizens under the Constitution;
> (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

The Council of Regency, serving as the provisional government of the Hawaiian Kingdom, was established *in situ* and not *in exile*. The Hawaiian government was established in accordance with the Hawaiian constitution and the doctrine of necessity to serve in the absence of the executive monarch. By virtue of this process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley,

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

74 Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).
75 *Id*.
76 F.W. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l. L.* 568, 581 (1942).
77 See *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 732 (1969). See also *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokotso v. HM King Moshoeshoe* II, LRC (Const) 24, 132 (1989).
78 *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).
79 *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88–89 (1986).

> resulting from some great necessity, and its authority is limited to the necessity.[80]

During the Second World War, like other governments formed during foreign occupations of their territory, the Hawaiian government did not receive its mandate from the Hawaiian legislature, but rather by virtue of Hawaiian constitutional law as it applies to the Cabinet Council.[81] Although Article 33 provides that Cabinet Council "shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately [and] shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King," the convening of the Legislative Assembly was impossible in light of the prolonged occupation. The impossibility of convening the Legislative Assembly during the occupation did not prevent the Cabinet from becoming the Council of Regency because of the operative word "shall," but only prevents the Legislature from electing a Regent or Regency.

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

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

The existence of the restored government *in situ* was not dependent upon diplomatic recognition by foreign States, but rather operated on the presumption of recognition these foreign States already afforded the Hawaiian government as of 1893. The Council of Regency was not a new government like the Czech government established in exile in London during World War II, but rather the successor of the same government of 1893 formed under and by virtue of its constitutional provisions. It is a government restored in accordance with the municipal laws of the Hawaiian Kingdom as these laws existed prior to the unlawful overthrow of the *de jure* government on 17 January 1893. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[83] The Council of Regency was not established through "extra-legal changes in government" but rather through existing laws of the kingdom.

80 Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).

81 The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and, third, prepare for an effective transition to a de jure government when the occupation ends. The Strategic Plan of the Hawaiian government is online at http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf.

82 F.E. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l L.* 568, 569 (1942).

83 M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* 26 (1997).

Lance Larsen v. Hawaiian Kingdom—Permanent Court of Arbitration

The first allegation of the war crime of usurpation of sovereignty,[84] was made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian Kingdom* at the Permanent Court of Arbitration ("PCA"), whereby the claimant alleged that the Council of Regency was legally liable "for allowing the unlawful imposition of American municipal laws" over him within Hawaiian territory.[85] The war crime of usurpation of sovereignty consist 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."[86]

In order to ensure that the dispute is international, the PCA must possess jurisdiction, as an institution, first,[87] before it can form *ad hoc* tribunals. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties. International disputes, capable of being accepted under the PCA's institutional jurisdiction, include disputes between: any two or more States; a State and an international organization (i.e. an intergovernmental organization); two or more international organizations; a State and a private party; and an international organization and a private entity.[88] The PCA accepted the case as a dispute between a State and a private party, and acknowledged the Hawaiian Kingdom to be a non-Contracting Power under Article 47 of the Hague Convention for the Pacific Settlement of International Disputes, I ("Convention, I") in its annual reports from 2001 to 2011.[89] Oral hearings were held at the PCA on 7, 8 and 11 December 2000.

Recognition of the Hawaiian Kingdom as a State by the Permanent Court of Arbitration

Article 93 of Convention I provides that ratification to the treaty is open to all "'Powers,' an old term which eventually can be taken to mean open to 'all States.'"[90] Should a State decide

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

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

86 Schabas, chapter 4, 157.

87 United Nations, *United Nations Conference on Trade and Development: Dispute Settlement* 15 (2003).

88 *Id*.

89 *Annual Reports of the PCA* (online at https://pca-cpa.org/en/about/annual-reports/).

90 Gentian Zyberi, "Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration," 5(3) *ESIL Reflections* 1, 5 (2016) (online at https://esil-sedi.eu/fr/esil-reflection-membership-in-international-treaties-of-contested-states-the-case-of-the-permanent-court-of-arbitration/).

to ratify the treaty, Article 97 provides that the State shall deposit its ratification with the "Netherlands Government, and duly certified copies of which shall be sent, through diplomatic channel, to the Contracting [States]." However, access to the jurisdiction of the PCA, which is a separate issue of the subject of ratification, is not limited to Contracting States but also to non-Contracting States. Article 47 of Convention I reads, "[t]he jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting [States] or between Contracting [States] and non-Contracting [States], if the parties are agreed on recourse to this Tribunal."

Under Article 43 of Convention I, the "International Bureau serves as registry for the Court [and] it has charge of the archives and conducts all the administrative business." Opening the Court to "non-Contracting [States]" is an administrative decision by the International Bureau and in order for non-Contracting States to have access to the "jurisdiction of the Permanent Court" they must exist as a State in accordance with recognized attributes of a State's sovereign nature.[91] While the government of the Hawaiian Kingdom was unlawfully overthrown by "an act of war," committed by the United States, Hawaiian statehood remained intact along with its permanent population and defined territory. In other words, the Hawaiian Kingdom was not claiming to be a new State but rather exists as an independent State since the nineteenth century.

As an intergovernmental organization, the Permanent Court, through its International Bureau, was vested with the authority by the "Contracting Powers" under Article 47 to grant access to the jurisdiction of the Permanent Court to non-Contracting States. In determining whether or not a State exists in accordance with Article 47, the International Bureau must rely on the rules of customary international law as it relates to an existing State under belligerent occupation.[92] There is no evidence that the United States, being a Contracting State, protested the International Bureau's recognition of the Hawaiian Kingdom as a State in accordance with Article 47. Furthermore, the International Bureau recognized the Council of Regency as the government agent for the Hawaiian Kingdom.

United States Invited to Join in the Arbitration

Before the *Larsen* tribunal was formed on 9 June 2000, Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with the author, as agent for the Hawaiian Kingdom, over the telephone and recommended that the Hawaiian government provide an invitation to the United States to join in the arbitration. The Hawaiian government agreed with the recommendation, which resulted in a conference call meeting on 3 March 2000 in Washington, D.C., between the author, Larsen's counsel, Mrs. Ninia Parks, and John Crook from the State Department. The meeting was reduced to a formal note and mailed to Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Council of Regency to the PCA Registry for record that the United States was invited to join in the arbitral proceedings.[93] The note was signed off by the author as "Acting Minister of Interior and Agent for the Hawaiian Kingdom."

91 Article 1, 1933 *Montevideo Convention on the Rights and Duties of States* defines a State "as a person of international law [that] possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."

92 "Military occupation, whether during war or after an armistice, does not terminate statehood, *e.g.* Germany's occupation of European states during World War II, or the allies' occupation of Germany and Japan after the war." Restatement (Third) of Foreign Relations Law of the United States §201, Reporters' note 3 (1987).

93 "Letter confirming telephone conversation with U.S. State Department relating to arbitral proceedings at the Permanent Court of Arbitration, 3 Mar. 2000, (online at http://hawaiiankingdom.org/pdf/State_Dpt_Ltr_(3.3.2000).pdf).

Under international law, this note served as an offering instrument that contained the following text:

> [T]he reason for our visit was the offer by the…Hawaiian Kingdom, by consent of the Claimant [Larsen], by his attorney, Ms. Ninia Parks, for the United States Government to join in the arbitral proceedings presently instituted under the auspices of the Permanent Court of Arbitration at The Hague, Netherlands. … [T]he State Department should review the package in detail and can get back to the Acting Council of Regency by phone for continued dialogue. I gave you our office's phone number…, of which you acknowledged. I assured you that we did not need an immediate answer, but out of international courtesy the offer is still open, notwithstanding arbitral proceedings already in motion. I also advised you that Secretary-General van den Hout of the Permanent Court of Arbitration was aware of our travel to Washington, D.C. and the offer to join in the arbitration. As I stated in our conversation he requested that the dialogue be reduced to writing and filed with the International Bureau of the Permanent Court of Arbitration for the record, and you acknowledged.

Thereafter, the PCA's Deputy Secretary General, Phyllis Hamilton, informed the author that the United States, through its embassy in The Hague, notified the PCA, by *note verbale*, that the United States declined the invitation to join the arbitral proceedings. Instead, the United States requested permission from the Hawaiian government to have access to the pleadings and records of the case. The Hawaiian government consented to this request. The PCA, represented by the Deputy Secretary General, served as an intermediary to secure an agreement between the Hawaiian Kingdom and the United States.

According to Wilmanns, "[l]egally there is no difference between a formal note, a *note verbale* and a memorandum. They are all communications which become legally operative upon the arrival at the addressee. The legal effects depend on the substance of the note, which may relate to any field of international relations."[94] And as "a rule, the recipient of a note answers in the same form. However, an acknowledgment of receipt or provisional answer can always be given in the shape of a *note verbale*, even if the initial note was of a formal nature."[95]

The offer by the Secretary General to have the Hawaiian government provide the United States an invitation to join in the arbitral proceedings, and the Hawaiian government's acceptance of this offer, also constitutes an international agreement by exchange of *notes verbales* between the PCA and the Hawaiian Kingdom. "[T]he growth of international organizations and the recognition of their legal personality has resulted in agreements being concluded by an exchange of notes between such organizations and states."[96]

The United States' request to have access of the arbitral records, in lieu of the invitation to join in the arbitration, and the Hawaiian government's consent to that request constitutes an international agreement by exchange to *notes verbales*. According to Assche, "the exchange of two *notes verbales* constituting an agreement satisfies the definition of the term 'treaty' as provided by Article 2(1)(a) of the Vienna Convention."[97] Altogether, the exchange of *notes verbales* on this subject matter, between the Hawaiian Kingdom, the PCA, and the United States of America, constitutes a multilateral agreement of the *de facto* recognition of the restored Hawaiian government.

94 Johst Wilmanns, "Note," in 9 *Encyclopedia of Public International Law* 287 (1986).
95 *Id*.
96 J.L. Weinstein, "Exchange of Notes," 20 *Brit. Y.B. Int'l L.* 205, 207 (1952).
97 Cendric van Assche, "1969 Vienna Convention," *The Vienna Conventions on the Law of Treaties, A Commentary*, Vol. I, Corten & Klein, eds., vol. 1 261 (2011).

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

> At the center of the PCA proceedings was…that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawaii. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States had committed against him.[98]

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

> It follows that the Tribunal cannot determine whether the respondent [the Hawaiian Kingdom] has failed to discharge its obligations towards the claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the *Monetary Gold* principle precludes the Tribunal from doing. As the International Court of Justice explained in the *East Timor* case, "the Court could not rule on the lawfulness of the conduct of a 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."[99]

The Tribunal, however, stated:

> At one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for fact-finding, both as between States and otherwise.[100]
>
> The Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.[101]
>
> Part III of each of the Hague Conventions of 1899 and 1907 provide for International Commissions of Inquiry. The PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry.[102]

Under the indispensable third-party rule, *Larsen* was prevented from maintaining his suit against the Council of Regency "for allowing the unlawful imposition of American municipal laws," because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

98 David Bederman & Kurt Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensible third parties—legal status of Hawaii," 95 *Am. J. Int'l L.* 927, 928 (2001).
99 *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Rep. 566, 596 (2001) ("Larsen Award").
100 *Id.*, 597.
101 *Id.*
102 *Id.*, n. 28.

Meeting with the Rwandan Government in Brussels

After the last day of the *Larsen* hearings were held at the PCA on 11 December 2000,[103] the Council was called to an urgent meeting by Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium. Ambassador Bihozagara had been attending a hearing before the International Court of Justice on 8 December 2000, (*Democratic Republic of the Congo v. Belgium*),[104] where he became aware of the Hawaiian arbitration case taking place in the hearing room of the PCA.

The following day, the Council, which included the author as Agent, and two Deputy Agents, Peter Umialiloa Sai, *acting* Minister of Foreign Affairs, and Mrs. Kauʻi P. Sai-Dudoit, formerly known as Kauʻi P. Goodhue, *acting* Minister of Finance, met with Ambassador Bihozagara in Brussels.[105] In that meeting, the Ambassador explained that since he accessed the pleadings and records of the *Larsen* case on 8 December from the PCA's secretariat, he had been in communication with his government in Kigali. This prompted our meeting where the Ambassador conveyed to the author, as Chairman of the Council and agent in the *Larsen* case, that his government was prepared to bring to the attention of the United Nations General Assembly the prolonged occupation of the Hawaiian Kingdom by the United States and to place our situation on the agenda. The author requested a short break from the meeting in order to consult with the other members of the Council who were present.

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

Since the *Larsen* case, the following States have also provided recognition of the Hawaiian government. On 5 July 2001, China, as President of the United Nations Security Council, recognized the Hawaiian government when it accepted the Hawaiian government's complaint submitted by the author, as agent for the Hawaiian Kingdom, in accordance with Article 35(2) of the United Nations Charter. [106] Article 35(2) provides that a "State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter." Also, by exchange of *notes*, through email, Cuba recognized the Hawaiian government when on 10 November 2017, the Cuban government received the author, as Ambassador-at-large for the Hawaiian Kingdom, at the Cuban embassy in The Hague, Netherlands.[107]

103 Video of the oral hearings in *Larsen v. Hawaiian Kingdom* (7, 8, 11 Dec. 2000) (online at https://www.youtube.com/watch?v=tmpXy2okJIg&t=10s).

104 *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order, I.C.J. Rep. 182 (8 Dec. 2000).

105 David Keanu Sai, "A Slippery Path towards Hawaiian Indigeneity," 10 *J. L. & Soc. Challenges* 69, 130-131 (2008).

106 David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 *Haw. J.L. & Pol.* 46, 74 (2004).

107 Email notes between the Hawaiian Ambassador-at-large and the Cuban Embassy in The Hague (Nov. 2017) (online at http://hawaiiankingdom.org/pdf/Cuban_Embassy_Corresp.pdf).

The decision by the Council to forego Rwanda's invitation was made in line with section 495—*Remedies of Injured Belligerent*, United States Army FM-27-10, which states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: *a.* Publication of the facts, with a view to influencing public opinion against the offending belligerent."[108] After the *Larsen* case, the policy of the Council would be threefold: *first*, exposure of the prolonged occupation; *second*, ensure that the United States complies with international humanitarian law; and, *third*, prepare for an effective transition to a *de jure* government when the occupation ends.

The United States' belligerent occupation rests squarely within the regime of the law of occupation in international humanitarian law. The application of the regime of occupation law "does not depend on a decision taken by an international authority,"[109] and "the existence of an armed conflict is an objective test and not a national 'decision.'"[110] According to Article 42 of the 1907 Hague Regulations, a State's territory is considered occupied when it is "actually placed under the authority of the hostile army."

Article 42 has three requisite elements: first, the presence of a foreign State's forces; second, the exercise of authority over the occupied territories by the foreign State or its proxy; and, third, the non-consent by the occupied State. U.S. President Grover Cleveland's 1893 manifesto to the Congress, which is Annexure 1 in the *Larsen v. Hawaiian Kingdom* Award,[111] and the continued U.S. presence today, without a treaty of peace, firmly meets all three elements of Article 42. Hawai'i's people, however, have become denationalized and the history of the Hawaiian Kingdom has been, for all intents and purposes, obliterated within three generations since the United States' takeover.

The Council deemed it their duty to explain to Hawai'i's people that before the PCA could facilitate the formation of the *Larsen* tribunal, it had to ensure that it possessed jurisdiction as an institution. This jurisdiction required that the Hawaiian Kingdom be a "State."[112] This finding authorized the Hawaiian Kingdom's access to the PCA pursuant to Article 47 of the Hague Convention, I, as a non-Contracting State to the convention. This acknowledgement is significant on two levels, first, the Hawaiian Kingdom had to currently exist as a State under international law, otherwise the PCA would not have accepted the dispute to be settled through international arbitration, and, second, the PCA explicitly recognized the Council of Regency as the government of the Hawaiian Kingdom.

History of the illegal overthrow and purported annexation of the Hawaiian Islands is provided not only in the pleadings of the *Larsen* case,[113] but also in a 2002 legal opinion by Matthew Craven, Professor of Law from the University of London, SOAS, titled *Continuity of the Hawaiian Kingdom*. Craven wrote the legal opinion for the Council of Regency as part of the

108 "United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare), though not a source of law like a statute, prerogative order or decision of a court, is a very authoritative publication." *Trial of Sergeant-Major Shigeru Ohashi and Six Others,* 5 Law Reports of Trials of Law Criminals (United Nations War Crime Commission) 27 (1949).

109 C. Ryngaert and R. Fransen, "EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts," 2(1) Europe and the World: A law review 8 (2018).

110 Stuart Casey-Maslen, ed., *The War Report* 2012 ix (2013).

111 Larsen Award, 598-610.

112 United Nations, *United Nations Conference on Trade and Development, Dispute Settlement—Permanent Court of Arbitration* 15 (2003) (online at https://unctad.org/en/Docs/edmmisc232add26_en.pdf).

113 *Larsen v. Hawaiian Kingdom* Arbitration Log Sheet (online at http://www.alohaquest.com/arbitration/log.htm).

latter's focus on exposure of the Hawaiian Kingdom's legal status under international law, through academic research, after the Council of Regency returned from The Hague in 2000. Craven's memo was also referenced in Judge Crawford's seminal book, *The Creation of States in International Law*. Judge Crawford wrote, "Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States."[114]

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. As explained by Judge Crawford, "[t]here is a presumption that the State continues to exist, with its rights and obligations … despite a period in which there is … no effective, government."[115] Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[116]

"If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[117] Craven's opinion is premised on the theory that once recognition of a new State is granted it "is incapable of withdrawal"[118] by the recognizing States and that "recognition estops [precludes] the State which has recognized the title from contesting its validity at any future time."[119] Therefore, because the "Hawaiian Kingdom existed as an independent State [and] recognized as such by the United States of America,"[120] the United States is precluded "from contesting its validity at any future time" unless it has extinguished Hawaiian statehood in accordance with international law.

In his legal opinion, Craven interrogated modes of extinction by which, under international law, the United States could provide rebuttable evidence that the Hawaiian State was indeed extinguished. Notwithstanding the imposition of United States municipal laws, he found no such evidence under international law to support a claim that the United States extinguished Hawaiian statehood. As such, Craven cited implications regarding the continuity of the Hawaiian Kingdom.

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

114 Crawford, 623, n. 83.

115 *Id.*, 34. If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.

116 *Id.* Crawford also stated, the "occupation of Iraq in 2003 illustrated the difference between 'government' and 'State'; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid 'restoration of Iraq's sovereignty', they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored." *Id*, n. 157.

117 Craven, Chapter 3, 128.

118 Lassa Oppenheim, *International Law* 137 (3rd ed., 1920).

119 Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *Am. J. Int'l L.* 308, 316 (1957).

120 Larsen Award, 581.

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

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

d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian Kingdom incurred prior to its occupation.[121]

Regarding the implication that "the Hawaiian people retain a right to self-determination," Lenzerini notes:

> Based on the postulation…that the Hawaiian Kingdom was occupied by the United States in 1893 and that it has remained in the same condition since that time, it may be concluded that the potential implications on such a situation arising from the applicable international legal rules on human rights and self-determination are remarkable. [Therefore,] an adequate legal basis would exist for claiming in principle the international responsibility of the United States of America—as occupying Power—for violations of both internationally recognized human rights to the prejudice of individuals and of the right of the Hawaiian people to freely exercise self-determination.[122]

In order to carry into effect the Council of Regency's policy, it was decided that since the author already had a bachelor's degree from the University of Hawai'i at Manoa and was familiar with what they have been instructing on Hawai'i's history, he would enter the University of Hawai'i at Manoa political science department and secure a master's degree specializing in international relations. Then the author would acquire a Ph.D. with specific focus on the continuity of the Hawaiian Kingdom as an independent and sovereign State that has been under a prolonged occupation. Through this policy, the Council of Regency has been able to effectively shift the discourse to belligerent occupation.

The Council of Regency's objective was to engage over a century of denationalization through the medium of academic research and publications, both peer and law review. As a result, awareness of the Hawaiian Kingdom's political status has grown exponentially with multiple masters theses, doctoral dissertations, and publications written on the subject. What the world knew before the *Larsen* case has been drastically transformed to the present. This transformation was the result of academic research in spite of the continued American occupation.

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

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to rec-

121 Craven, Chapter 3, 126.
122 Lenzerini, Chapter 5, 215.

> ognize and deal with its takeover of Hawai'i. In the book's subtitle, the word *Annexation* has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since definition of international law there was no annexation, we are left with the word *occupation*.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for…the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of Hawai'i, the might of the United States does not make it right.[123]

Furthermore, in 2016, Japan's Seijo University's Center for Glocal Studies published an article by Dennis Riches titled *This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation*.[124] At the center of this article was the continuity of the Hawaiian Kingdom, the Council of Regency, and the commission war crimes. Riches, who is Canadian, wrote:

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

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

> The NEA will publish an article that documents the illegal overthrow of the Hawaiian Monarchy in 1893, the prolonged illegal occupation of the United States in the Hawaiian Kingdom, and the harmful effects that this occupation has had on the Hawaiian people and resources of the land.[125]

As a result, three articles were published by the NEA: first, *The Illegal Overthrow of the Hawaiian Kingdom Government* (2 April 2018);[126] second, *The U.S. Occupation of the Hawaiian Kingdom* (1 October 2018);[127] and, third, *The Impact of the U.S. Occupation on the Hawaiian People*

123 Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* xvi (2016).
124 Dennis Riches, "This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation," *Center for Glocal Studies*, Seijo University 81, 89 (2016).
125 NEA New Business Item 37 (2017) (online at https://ra.nea.org/business-item/2017-nbi-037/).
126 Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NEA Today (2 Apr. 2018) (online at http://neatoday.org/2018/04/02/the-illegal-overthrow-of-the-hawaiian-kingdom-government/).
127 Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom,* NEA Today (1 Oct. 2018) (online at http://neatoday.org/2018/10/01/the-u-s-occupation-of-the-hawaiian-kingdom/).

(13 October 2018).[128] Awareness of the Hawaiian Kingdom's situation has reached countless classrooms across the United States. These publications by the NEA was the Council's crowning jewel for its policy to engage denationalization through *Americanization*.

Director of Russia's PIR-CENTER Acknowledges Illegal Annexation by the United States

This exposure also prompted the director of Russia's PIR-CENTER, on 4 October 2018, to admit that Hawai'i was illegally annexed by the United States. This acknowledgement occurred at a seminar entitled "Russian America: Hawaiian Pages 200 Years After" held at the PIR-CENTER, Institute of Contemporary International Studies, Diplomatic Academy of the Russian Foreign Ministry, in Moscow. The topic of the seminar was the restoration of Fort Elizabeth, a Russian fort built on the island of Kaua'i in 1817.

Leading the seminar was Dr. Vladimir Orlov, director of the PIR-CENTER. Notable participants included Deputy Foreign Minister Sergej Ryabkov, Head of the Department of European Cooperation and specialist on nuclear and other disarmament negotiations, and Russian Ambassador to the United States, Anatoly Antonov. In a report to the Hawaiian Minister of Foreign Relations, it was noted that Dr. Orlov stated that the "annexation of Hawai'i by the US was of course illegal and everyone knows it."

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

This educational exposure also prompted United Nations Independent Expert, Dr. Alfred deZayas, to send a communication, dated 25 February 2018, to members of the State of Hawai'i Judiciary stating that the Hawaiian Kingdom is an occupied State and that the 1907 Hague Convention, IV, and the 1949 Geneva Convention, IV, must be complied with.[129] In that communication, deZayas stated:

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

The Independent Expert clearly stated the application of "the Hague and Geneva Conventions" requires the administration of Hawaiian Kingdom law, not United States law, in Hawaiian territory. The United States' noncompliance to international humanitarian law has created the façade of an incorporated territory of the United States called the State of Hawai'i. As a *de facto* proxy for the United States that maintains effective control over Hawaiian territory, the State of Hawai'i is a non-State actor. *The War Report 2017* refers to such entities as an armed

128 Keanu Sai, *The Impact of the U.S. Occupation on the Hawaiian People* NEA Today (13 Oct. 2018) (online at http://neatoday.org/2018/10/13/us-occupation-of-hawaii/).

129 *Letter from U.N. Independent Expert Dr. deZayas to Members of the Judiciary of the State of Hawai'i* (25 Feb. 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

non-state actor (ANSA) "operating in another state when that support is so significant that the foreign state is deemed to have 'overall control' over the actions of the ANSA."[130] Whether by proxy or not, the United States is the occupying State and "as the right of an occupant in occupied territory is merely a right of administration, he may [not] annex it."[131]

The ICRC Commentary on Article 47 also emphasize, "[i]t will be well to note that the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty."[132] Therefore, according to the ICRC, "an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims to have annexed all or part of an occupied territory."[133] As there is no treaty of peace between the Hawaiian Kingdom and the United States, the belligerent occupation continues.

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

> "The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein."[134]

Two years later, on 28 February 1900, during a debate on senate bill no. 222 that proposed the establishment of the Territory of Hawai'i, Senator Allen reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void."[135] In response, Senator John Spooner of Wisconsin, a constitutional lawyer, dismissively remarked, "that is a political question, not subject to review by the courts."[136] Senator Spooner explained, "[t]he Hawaiian Islands were annexed to the United States by a joint resolution passed by Congress. I reassert…that that was a political question and it will never be reviewed by the Supreme Court or any other judicial tribunal."[137]

Senator Spooner never argued that congressional laws have extra-territorial effect. Instead, he said this issue would never see the light of day because United States courts would not review it due to the *political question* doctrine. This is strictly an American doctrine concerning issues that are so politically charged that federal courts could choose not to hear the issue. The doctrine allows federal courts to invoke a political question if the issue before the court challenges the way in which the executive uses its power in foreign relations. It is a doctrine invoked by American courts where the question before the court is deemed political and not legal, and therefore the courts should refuse to hear the case. It is a controversial doctrine in the United States. This exchange between the two Senators is also illuminating as it reveals an intent to conceal an internationally wrongful act. The Territory of Hawai'i is the predecessor of the State of Hawai'i.

130 Annyssa Bellal, *The War Report: Armed Conflicts in 2017* 22 (2018) (online at https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf).
131 Oppenheim, *International Law*, vol. II, 237 (6th ed., 1921).
132 Pictet, 276.
133 *Id.*, 276.
134 31 Cong. Rec. 6635 (1898).
135 33 Cong. Rec. 2391 (1900).
136 *Id.*
137 *Id.*

It would take another ninety years before the U.S. Department of Justice addressed this issue. In a 1988 legal opinion, the Office of Legal Counsel ("OLC") examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored this opinion for Abraham Sofaer, legal advisor to the U.S. Department of State. After covering the limitation of congressional authority, which, in effect, confirmed the statements made by Senator Allen, the OLC found that it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."[138] The federal government views opinions by the OLC as authoritative, and, therefore, the 1988 legal opinion is an admission against interest and precludes the federal government from claiming that the Hawaiian Islands were annexed by a joint resolution of Congress.

Rights of Protected Persons under International Humanitarian Law

According to the International Committee of the Red Cross, the "Geneva Conventions and their Additional Protocols form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. They protect people not taking part in hostilities and those who are no longer doing so."[139] Coverage of the Geneva Conventions also apply to occupied territories where there is no actual fighting.

Under international humanitarian law, a protected person is a legal term that refers to specific protections afforded to civilians in occupied territory whose rights are protected under the 1949 Geneva Convention, IV ("Fourth Geneva Convention"), and its Additional Protocol. According to Article 4 of the Fourth Geneva Convention, "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of [an] occupation, in the hands of [an] Occupying Power of which they are not nationals." Protected persons also include public officials of the occupied State. As such, they "enjoy the same safeguards under the Convention as any other protected person."[140]

Under this definition, civilians who possess the nationality of the occupying State, while they reside in the territory of the occupied State, are not protected under the Geneva Convention. Article 147 of the Fourth Geneva Convention provides a list of grave breaches, called war crimes, which would apply to protected persons as defined under Article 4.

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of [an occupying] Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Fifty years later, however, this definition of protected persons was expanded to include the citizenry of the occupying State. This was an evolution of international criminal law ushered

138 Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," 12 *Op. O.L.C.,* 238, 252 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).

139 The Geneva Conventions of 1949 and their Additional Protocols, *International Committee of the Red Cross* (online at https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols).

140 Pictet, 303.

in by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). The case was the prosecution and conviction of Duško Tadić who was a Bosnian Serb. After being arrested in Germany in 1994, he faced among other counts, twelve counts of grave breaches of the 1949 Geneva Convention, IV. On 7 May 1997, Tadić was convicted by the trial court on 11 counts that did not include the counts of grave breaches of the Geneva Convention.

In its judgment, the trial court found that Tadić was not guilty of 11 counts of grave breaches because the civilian victims possessed the same Yugoslavian citizenship as Tadić who represented the occupying Power in the war. The prosecutors appealed this decision and it was not only reversed by the Appeal Chamber of the ICTY, but it also expanded the definition of protected persons in occupied territory under international humanitarian law. The Appeals Chamber concluded:

> [The] primary purpose [of Article 4] is to ensure the safeguards afforded by the [Geneva] Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not their legal characterisation as such. … Hence, even if in the circumstances of the case the perpetrators and the victim were to be regarded as possessing the same nationality, Article 4 [Geneva Convention] would still be applicable.[141]

This decision is an important development in international criminal law and has a profound impact on the occupation of the Hawaiian Kingdom. Up until 1999, protected persons in the Hawaiian Islands excluded American citizens. But since 1999, the *Tadić* case has expanded protection to citizens of the occupying State who reside in the territory of an occupied State. The operative word is no longer nationality or citizenship, but rather allegiance that would apply to all persons in an occupied State. This distinction is not to be confused with an oath of allegiance, but rather the law of allegiance that applies over everyone whether they signed an oath or not. Hawaiian law only requires an oath of allegiance for government employees.

Under Hawaiian Kingdom law allegiance is found in the Hawaiian Penal Code under Chapter VI for the crime of treason.[142]

> 2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
>
> 3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.

By expanding the scope and application of protected persons to American citizens residing in the Hawaiian Kingdom, they, along with all other nationalities of foreign States, as well as Hawaiian subjects, are all afforded equal protection under the Fourth Geneva Convention.

141 ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, para. 168 and 169 (15 July 1999).

142 Chapter VI, Penal Code of the Hawaiian Kingdom (online at https://hawaiiankingdom.org/penalcode/pdf/Penal_Code.pdf).

When the United States assumed control of its installed regime, under the new heading of the Territory of Hawai'i in 1900, and later the State of Hawai'i in 1959, it surpassed "its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts."[143] The legislation of every State, including the United States by its Congress, are not sources of international law.

Since Congressional legislation has no extraterritorial effect, it cannot unilaterally establish governments in the territory of a foreign State. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[144] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[145] Therefore, the State of Hawai'i cannot claim to be a government because its only claim to authority derives from Congressional legislation that has no extraterritorial effect. As such, *jus in bello* defines the State of Hawai'i as an organized armed group acting for and on behalf of the United States.[146]

"[O]rganized armed groups … are under a command responsible to that party for the conduct of its subordinates."[147] According to Henckaerts and Doswald-Beck, "this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command,"[148] and that this "definition of armed forces builds upon earlier definitions contained in the Hague Regulations and the Third Geneva Convention which sought to determine who are combatants entitled to prisoner-of-war status."[149] Article 1 of the 1907 Hague Convention, IV ("HC IV"), provides:

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

Since the *Larsen* case, defendants that have appeared before the courts of this armed group have begun to deny the courts' jurisdiction. In a contemptible attempt to quash this defense, the Supreme Court of the State of Hawai'i in 2013 responded to a defendant, who "contends that the courts of the State of Hawai'i lacked subject matter jurisdiction over his criminal prosecution because the defense proved the existence of the Hawaiian Kingdom and the illegitimacy of the State of Hawai'i government,"[150] with "whatever may be said regarding the lawfulness" of its origins, "the State of Hawai'i … is now, a lawful government."[151]

The courts of the State of Hawai'i, to include its Supreme Court, are not regularly constituted

143 Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
144 *United States v. Curtiss Wright Export Corp.,* 299 U.S. 304, 318 (1936).
145 *The Apollon*, 22 U.S. 362, 370 (1824).
146 Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.
147 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I 14 (2009).
148 *Id.*, 5.
149 *Id.*
150 *State of Hawai'i v. Dennis Kaulia*, 128 Haw. 479, 486 (2013).
151 *Id.*, 487.

under international humanitarian law. Common Article 3 of the 1949 Geneva Convention, IV ("GC IV") provides that only a "regularly constituted court" can pass judgment on an accused person.[152] When a court is not regularly constituted, the proceedings that would lead to a judgment imposed by it would not only be extrajudicial but would constitute a war crime. According to Henckaerts and Doswald-Beck, a "court is regularly constituted if it has been established and organized in accordance with laws and procedures already in force in a country,"[153] which would be Hawaiian Kingdom law. In the absence of Hawaiian courts, United States military tribunals, also called Article II courts, would be lawful in territories occupied by the United States.[154]

In addition, the absurdity of such a statement by the Court can be amplified when placed against the Louisiana Supreme Court's 1953 decision in *King v. Moresi*. In his dissenting opinion Justice Moise stated, "[t]he maxim of law as old as Justinian— *"Quod ab initio non valet in tractu temporis non convalesait"*—That which was originally void does not by lapse of time become valid. A dead thing is dead. There can be no resurrection."[155] Furthermore, Hawaiian Kingdom law states that "[w]hatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed,"[156] which is based on the maxim *actus regis nemini est damnosa*—the law will not work a wrong.

This fiat of the so-called highest court of the State of Hawai'i has since been continuously invoked by prosecutors in criminal cases and plaintiffs in civil cases to avoid the undisputed and insurmountable factual and legal conclusions as to the continued existence of the Hawaiian Kingdom, as a subject of international law, and the illegitimacy of the State of Hawai'i government. On this note, Marek explains that an occupier without title or sovereignty "must rely heavily, if not exclusively, on full and complete effectiveness."[157]

The laws and customs of war during occupation applies only to territories that come under the authority of either the occupier's military and/or an occupier's armed force, such as the State of Hawai'i, and that the "occupation extends only to the territory where such authority has been established and can be exercised."[158] According to Ferraro, "occupation—as a species of international armed conflict—must be determined solely on the basis of the prevailing facts."[159] Legally speaking, effectiveness under the law of occupation does not equate to power but rather duties and obligations. As political science defines power as the ability to get someone or an entity to do something it would not normally do, the fiat by the State of Hawai'i court is a reaction to the power of the evidence that the Hawaiian Kingdom continues to exist. This forced the court to defy the recognized maxim of law that time does not validate an illegality.

State of Hawai'i v. Lorenzo —The Case that Brought Down the State of Hawai'i

One year after the United States Congress passed the joint resolution apologizing for the United States overthrow of the Hawaiian Kingdom government in 1993, an appeal was heard by the State of Hawai'i Intermediate Court of Appeals that centered on a claim that the Hawaiian Kingdom continues to exist. In *State of Hawai'i v. Lorenzo*, the appellate court stated:

152 Henckaerts and Doswald-Beck, 354.
153 *Id.*, 355.
154 David J. Bederman, "Article II Courts," 44 *Mercer L. Rev.* 825, 826 (1992-1993).
155 *King v. Moresi*, 64 So. 2d 841, 843 (1953).
156 §8, *Civil Code*, Compiled Laws of the Hawaiian Kingdom (1884).
157 Marek, 102.
158 1907 Hague Convention, IV, Article 42. See Part III, 320.
159 Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law," 94 (885) *Int'l Rev. Red Cross* 133, 134 (Spring 2012).

> Lorenzo appeals, arguing that the lower court erred in denying his pretrial motion (Motion) to dismiss the indictment. The essence of the Motion is that the [Hawaiian Kingdom] (Kingdom) was recognized as an independent sovereign nation by the United States in numerous bilateral treaties; the Kingdom was illegally overthrown in 1893 with the assistance of the United States; the Kingdom still exists as a sovereign nation; he is a citizen of the Kingdom; therefore, the courts of the State of Hawai'i have no jurisdiction over him. Lorenzo makes the same argument on appeal. For the reasons set forth below, we conclude that the lower court correctly denied the Motion.[160]

While the appellate court affirmed the trial court's judgment, it admitted "the court's rationale is open to question in light of international law."[161] By not applying international law, the court concluded that the trial court's decision was correct because Lorenzo "presented no factual (or legal) basis for concluding that the Kingdom [continues to exist] as a state in accordance with recognized attributes of a state's sovereign nature." Since 1994, the *Lorenzo* case became a precedent case that served as the basis for denying defendants' motions to dismiss that claimed the Hawaiian Kingdom continues to exist. In *State of Hawai'i v. Fergerstrom*, the appellate court stated, "[w]e affirm that relevant precedent [in State of Hawai'i v. Lorenzo]," [162] and that defendants have an evidentiary burden that shows the Hawaiian Kingdom continues to exist.

The Supreme Court, in *State of Hawai'i v. Armitage*, clarified the evidentiary burden that Lorenzo placed upon defendants. The court stated:

> Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the Kingdom of Hawai'i "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack jurisdiction over him or her.[163]

What is profound is that if the appellate court did apply international law in its decision it would have confirmed the continued existence of the Hawaiian Kingdom as a State and ruled in favor of Lorenzo. As stated before, international law recognizes the difference between the State and its government, and that there is a presumption, as Crawford previously explained, that the State continues to exist despite its government being overthrown. In other words, all Lorenzo needed to provide was evidence that the Hawaiian Kingdom "did" exist as a State, which would then shift the burden on the prosecution to provide rebuttable evidence that the United States extinguished the Hawaiian State in accordance with recognized modes of extinction under international law.

The appellate court did acknowledge that Lorenzo, in fact, provided evidence in his motion to dismiss "that the [Hawaiian Kingdom] was recognized as an independent sovereign nation by the United States in numerous bilateral treaties."[164] In other words, the "bilateral treaties" were the evidence of Hawaiian statehood. Therefore, the appellate court erred in placing the burden on the defendant to provide evidence of the Kingdom's continued existence, when it should have determined from the trial records if the prosecution provided rebuttable evidence against the presumption of the Kingdom's continued existence as a State, which was evidenced by the "bilateral treaties." The prosecution provided no such evidence.

160 *State of Hawai'i v. Lorenzo*, 77 Haw. 219, 220; 883 P.2d 641, 642 (1994).
161 *Id.,* 221, 643.
162 *State of Hawai'i v. Fergerstrom,* 106 Haw. 43, 55; 101 P.3d 652, 664 (2004).
163 *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
164 *Lorenzo case,* 220, 642.

If, for the sake of argument, the State of Hawai'i argued before the trial court that the 1898 joint resolution of annexation extinguished Hawaiian statehood, it would be precluded from doing so under the rules of evidence because the United States Department of Justice's Office of Legal Counsel concluded in 1988 that it is "unclear which constitutional power Congress exercised when it acquired Hawaii by a joint resolution."[165] The opinion is an admission against interest, which is an out-of-court statement made by the federal government prior to the date of Lorenzo's trial that that would have bound the State of Hawai'i from claiming otherwise. Furthermore, a congressional joint resolution is not a source of international law, and as such could not have affected Hawaiian statehood. According to the American Law Institute, a "rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or by derivation from general principles common to the major legal systems of the world."[166]

The significance of the *Lorenzo* case is that the appellate court, when international law is applied, answered its own question in the negative as to "whether the present governance system should be recognized,"[167] and that a "state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force."[168] In other words, the State of Hawai'i cannot be recognized as a State of the United States, which arose "as a result of a…use of armed force." As stated before, President Cleveland concluded that the provisional government, which is the predecessor of the State of Hawai'i, "owes its existence to an armed invasion by the United States."[169] Therefore, a proper interpretation of *State of Hawai'i v. Lorenzo* renders all courts of the State of Hawai'i not regularly constituted, and that every judgment, order or decree that emanated from any court of the State of Hawai'i is void.

As such, these decisions are subject to collateral attack, which is where a defendant has a right to impeach a decision previously made against him because the "court that rendered judgment lacked jurisdiction of the subject matter."[170] While these decisions are subject to collateral attack, there is the problem as to what court is competent to receive a motion to set aside judgment because all courts of the State of Hawai'i are not regularly constituted pursuant to *Lorenzo*. "If a person or body assumes to act as a court without any semblance of legal authority so to act and gives a purported judgment," explains the American Law Institute, "the judgment is, of course, wholly void."[171] And according to Moore, "[c]ourts that act beyond…constraints act without power; judgments of courts lacking subject matter jurisdiction are void—not deserving of respect by other judicial bodies or by the litigants."[172] Furthermore, courts who were made aware of the American occupation prior to their decisions would have met the constituent elements of the war crime of depriving a protected person of a fair and regular trial.

Sai v. Trump—Petition for Writ of Mandamus

On 25 June 2018, the author, on behalf of the Council of Regency, filed an emergency petition for a writ of mandamus against President Donald Trump with the United States District Court

165 Kmiec, 252.
166 American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States,* §102 (1987).
167 *Lorenzo case,* fn. 2.
168 *Id.*
169 Executive Documents, 454.
170 Black's Law, 1574.
171 American Law Institute, *Restatement of the Law Second, Judgments, §7,* comment f, 45 (1942).
172 Karen Nelson Moore, "Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments," 66 *Cornell Law Review* 534, 537 (1981).

of the District of Columbia.[173] The petition sought an order from the Court to:

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

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

On 11 September 2018, Judge Chutkan issued an order, *sua sponte,* dismissing the case as a political question.[174] On the very same day the U.S. Attorney for the District of Columbia filed a "Motion for Extension of Time to Answer in light of the order dismissing this action," but it was denied by minute order.[175] Reminiscent of Senator Spooner's statement in 1900 regarding the American courts and the political question for Hawai'i's annexation, Judge Chutkan stated, "[b]ecause Sai's claims involve a political question, this court is without jurisdiction to review his claims and the court will therefore DISMISS the Petition."

When the federal court declined to hear the case because of the political question doctrine it wasn't because the case was without merit but rather "refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue."[176] If the petition was without merit it would have been dismissed for "failure to state a claim upon which relief can be granted" under rule 12(b)(6) of the Federal Rules of Civil Procedure. Political questions, however, are dismissed under rule 12(b)(1) regarding subject matter jurisdiction.

In 2008, the same United States District Court for the District of Columbia, dismissed a case concerning Taiwan as a political question under Rule 12(b)(1) in *Lin v. United States*.[177] The federal court in its order stated that it "must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)." When this case went on appeal, the D.C. Appellate Court underlined the modern doctrine of the political question, "[w]e do not disagree with Appellants' assertion that we could resolve this case through treaty analysis and statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that

173 *Sai v. Trump*, Petition for Writ of Mandamus (25 June 2018) (online at https://hawaiiankingdom.org/pdf/Petition_for_Mandamus.pdf).
174 *Sai v. Trump*, Order (11 Sep. 2018) (online at: https://hawaiiankingdom.org/pdf/Order_Mandamus.pdf).
175 *Sai v. Trump*, Minute Order (11 Sep. 2018) (online at https://hawaiiankingdom.org/pdf/Minute_Order_Mandamus.pdf).
176 Cornell Law School, Legal Information Institute, *Political Question Doctrine* (online at https://www.law.cornell.edu/wex/political_question_doctrine).
177 *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008).

otherwise familiar task."[178]

The significance in the Hawaiian Kingdom case is that the federal court accepted the allegations of facts in the petition as true but that subject matter jurisdiction lies in another branch of the United States government that being the executive branch. This may also explain why the U.S. Attorney sought to answer the petition in light of it being dismissed as a political question. From an international law perspective, the facts of the prolonged occupation are not in dispute and the petition sought to address the violations of the rights of protected persons under international humanitarian law.

The dismissal of the petition under the political question doctrine would satisfy the requirement to exhaust local remedies, which is a "'principle of general international law' supported by judicial decisions, State practice, treaties and the writings of jurists."[179] Under this principle, the International Court of Justice in the *ELSI* case stated that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."[180] In the Hawaiian situation, this strict requirement must be balanced by the exception to the rule where the local remedies are "obviously futile," "offer no reasonable prospect of success," or "provide no reasonable possibility of effective redress."[181]

State of Hawai'i Official Reports War Crimes

On 21 August 2018, State of Hawai'i County of Hawai'i Councilmember Jennifer Ruggles requested a legal opinion from the government's attorney whether she has incurred criminal liability for committing war crimes.[182] In a letter written by her attorney:

> Council member Ruggles formally requests that you, in your capacity as the Office of Corporation Counsel to assure her that she is not incurring criminal liability under international humanitarian law and United States Federal law as a Council member for:
>
> 1. Participating in legislation of the Hawai'i County Council that would appear to be in violation of Article 43 of the Hague Regulations and Article 64 of the Geneva Convention which require that the laws of the Hawaiian Kingdom be administered instead of the laws of the United States;
> 2. Being complicit in the collection of taxes, or fines, from protected persons that stem from legislation enacted by the Hawai'i County Council, appear to be in violation of Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging;
> 3. Being complicit in the foreclosures of properties of protected persons for delinquent property taxes that stem from legislation enacted by the Hawai'i County Council, which would appear to violate Articles 28 and 47 of the Hague Regulations and Article

178 *Lin v. United States*, 561 F.3d 506 (2009).
179 Text of the Draft Articles on Diplomatic Protection (2006) 2 *Y.B. Int'l L. Comm'n* 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 1.
180 *Elettronica Sicula S.P.A.* (ELSI), Judgment, I.C.J. Reports, para. 59 (1989).
181 *Id.*, art. 15, cmt. 2.
182 Letter from Laudig to Kamelamela (21 Aug. 2018) (online at https://jenruggles.com/wp-content/uploads/Stephen-Laudigs-Letter-to-Corporation-Counsel-8-21-18.pdf).

33 of the Geneva Convention which prohibit pillaging, as well as in violation of Article 46 of the Hague Regulations and Articles 50 and 53 of the Geneva Convention where private property is not to be confiscated; and

4. Being complicit in the prosecution of protected persons for committing misdemeanors, or felonies, that stem from legislation enacted by the Hawai'i County Council, which would appear to violate Article 147 of the Geneva Convention where protected persons cannot be unlawfully confined, or denied a fair and regular trial by a tribunal with competent jurisdiction.

In his response letter dated 22 August 2018, Corporation Counsel Kamelamela stated:

> At the Council Committee meeting held on Monday, August 21, 2018 at the West Hawai'i Civic Center, you announced that you "will be refraining from participating in the proposing and enacting of legislation" until county lawyers will assure you in writing that you will not incur "criminal liability under international humanitarian law and U.S. law."
>
> In response to your inquiry, we opine that you will not incur any criminal liability under state, federal and international law. See Article VI, Constitution of the United States of America (international law cannot violate federal law).[183]

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

> Until you provide Council member Ruggles with a proper legal opinion responding to the statement of facts in that she has not incurred criminal liability for violating the 1907 Hague Regulations and the 1949 Geneva Convention, IV, I have advised my client that she must continue to refrain from legislating. For your reference, I am attaching the aforementioned legal opinions by Deputy Assistant Attorney General John Yoo [for you] and your office.[184]

Corporation Counsel refused to respond to this letter, which prompted Ruggles to become a whistleblower. She began sending notices to perpetrators of war crimes throughout the State of Hawai'i. Under United States federal law, war crimes are defined as violations of the 1907 Hague Regulations, the 1949 Geneva Conventions—18 U.S.C. §2441, as well as under customary international law. Her story was broadcasted on television by KGMB news,[185] Big Island Video News,[186] and published by the British news outlet *The Guardian*.[187]

Ruggles reported war crimes committed by the Queen's Hospital, in violation of 18 U.S.C. §2441 and §1091, and war crimes committed by thirty-two Circuit Judges of the State of Hawai'i, in violation of 18 U.S.C. §2441.[188] She also reported additional war crimes of pillaging

183 Letter from Kamelamela to Ruggles (22 Aug. 2018) (online at http://jenruggles.com/wp-content/uploads/Kamelamela-Response-Letter-2018-08-22.pdf).

184 Letter from Laudig to Kamelamela (28 Aug. 2018) (online at http://jenruggles.com/wp-content/uploads/Laudig_Ltr_to_Corp_Counsel_8.28.2018-.pdf).

185 KGMB News (24 Sep. 2018) (online at https://www.youtube.com/watch?v=-YiXpiwVHr0).

186 Big Island Video News (25 Sep. 2018) (online at http://www.bigislandvideonews.com/2018/09/25/video-jen-ruggles-holds-community-meeting-on-war-crimes/).

187 Breena Kerr, "Hawaii politician stops voting, claiming islands are 'occupied sovereign country,'" *The Guardian* (30 Nov. 2018) (online at https://www.theguardian.com/us-news/2018/nov/29/hawaii-politician-jennifer-ruggles-sovereign-country).

188 Letter from Ruggles to Kaul (11 Oct. 2018) (online at https://jenruggles.com/wp-content/uploads/

committed by State of Hawai'i tax collectors, in violation of §2441,[189] the war crime of unlawful appropriation of property by the President of the United States and the Internal Revenue Service, in violation of §2441,[190] and the war crime of destruction of property by the State of Hawai'i on the summit of Mauna Kea, in violation of §2441.[191]

National Lawyers Guild Calls Upon the United States to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands

The actions taken by Ruggles prompted the International Committee of the National Lawyers Guild, at its weekend retreat in San Francisco in March 2019, to form the Hawaiian Kingdom Subcommittee.[192] Established in 1937, the National Lawyers Guild is an American bar association of lawyers and legal persons across the United States. According to the Guild's International Committee website:

> The Hawaiian Kingdom Subcommittee provides legal support to the movement demanding that the U.S., as the occupier, comply with international humanitarian and human rights law within Hawaiian Kingdom territory, the occupied. This support includes organizing delegations and working with the United Nations, the International Committee of the Red Cross, and NGOs addressing U.S. violations of international law and the rights of Hawaiian nationals and other Protected Persons.[193]

At its annual conference held in Durham, North Carolina, from 16-20 October 2019, a resolution was submitted by the Hawaiian Kingdom Subcommittee to be voted upon by the entire Guild's membership. The resolution stated, "that the National Lawyers Guild calls upon the United States of America immediately to begin to comply with international humanitarian law in its prolonged and illegal occupation of the Hawaiian Islands." The Guild's members were notified on 19 December 2019, that the resolution passed by a vote of 78.37%—yes, 4.61%—no, and 17.02%—abstain. The National Lawyers Guild also "supports the Hawaiian Council of Regency...in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."[194] The resolution provided that:

> The Hawaiian Kingdom Subcommittee will take the lead in implementing this resolution. The National Office will support the implementation by: sharing resources on this topic created by NLG with members and the public, link the resolution to the NLG website, email the resolution to members, circulate the resolution on social media, send the resolution to relevant press, promote and highlight the Subcommittee's work on this issue, provide logistical support for a webinar on

Reporting_to_FBI_10.11.18.pdf).

189 Letter from Ruggles to State of Hawai'i officials (15 Nov. 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr-to-State-of-HI-re-Taxes.pdf).

190 Letter from Ruggles to Trump (28 Nov. 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr_to_President_Trump.pdf).

191 Letter from Ruggles to Ige (3 Dec. 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr-to-Gov.-and-Sup.-Ct.pdf).

192 "NLG launches new Hawaiian Kingdom Subcommittee," *NLG International Committee* (online at https://nlginternational.org/2019/04/nlg-launches-new-hawaiian-kingdom-subcommittee/).

193 "Hawaiian Kingdom Subcommittee," *NLG International Committee* (online at https://nlginternational.org/hawaiian-kingdom-subcommittee/).

194 NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands, 13 Jan. 2020 (online at https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/).

this topic, and highlight work around the United States' immediate compliance with international humanitarian law and human rights law in its long and illegal occupation of the Hawaiian Islands in Guild Notes and NLG Review.[195]

Unlawful Presence of Foreign Consulates

The first foreign agent to be appointed to the Hawaiian Kingdom was John Coffin Jones in 1820, as "Agent of the United States for Commerce and Seamen," a position similar to a consular agent. In 1824, Great Britain appointed Richard Charlton as "Consul for the Sandwich, the Society and Friendly Islands [Tonga]," and both Jones and Charlton formed the Consular Corps for the Hawaiian Kingdom. France soon joined the Corps with its appointment of Jules Dudoit as French Consul in 1837. After Hawaiian independence was achieved in 1843, the Consular Corps grew with foreign missions from Denmark, Bremen, Prussia, Sweden and Norway, Peru, the Netherlands, the Austro-Hungarian Empire, and Japan.

In 1893, there existed five legations from France, United Kingdom, Japan, Portugal and the United States as well as fifteen consulates from the United States, Italy, Chile, Germany, Sweden and Norway, Denmark, Peru, Belgium, Netherlands, Spain, Austria-Hungary, Russia, Great Britain, Mexico and China. Italy's consul, F.A. Schaefer, served as Dean of the Consular Corps in 1893. According to Hawaiian Kingdom law:

> §458. It shall be incumbent upon all foreign consuls-general, consuls, vice-consuls, and consular agents, to present their commissions through the diplomatic agents of their several nations, if such exist, and if not, direct to the Minister of Foreign Affairs, who, if they are found to be regular, shall, unless otherwise directed by the King, give them exequaturs under the seal of his department; and it shall be the duty of said minister to cause all such exequaturs to be published in the Government Gazette.
>
> §459. No foreign consul, or consular or commercial agent shall be authorized to act as such, or entitled to recover his fees and perquisites in the courts of this Kingdom, until he shall have received his exequatur.
>
> §460. It shall be incumbent upon every diplomatic agent, coming accredited to the King, to notify the Minister of Foreign Affairs of his arrival, and to request an audience of the King, for the purpose of presenting his credentials. Said minister, upon receipt of such notice, with copy of his credentials, shall take His Majesty's orders in regard thereto, and communicate the same to such agent.

In 1893, all foreign missions were received by the Hawaiian Kingdom government and were in good standing. The foreign missions today, however, have not been received and granted exequaturs by the Hawaiian Kingdom government. Instead, they all have been granted exequaturs by the United States. The granting of exequaturs by the United States is an administrative measure "by the occupying power that go beyond those required by what is necessary for military purposes of the occupation."[196] The granting of exequaturs is an administrative function derived from the sovereignty of the Hawaiian Kingdom and not the sovereignty of the United States. Once the members of the Consular Corps become aware "of the factual circumstances that

195 National Lawyers Guild Resolution "Calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands" (2019) (online at https://www.hawaiiankingdom.org/pdf/NLG_2019_Hawaiian_Reso.pdf.)

196 Schabas, Chapter 4, 157.

established the existence of an armed conflict," they are duty bound to not "recognize as lawful a situation created by a serious breach…nor render aid or assistance in maintaining that situation," and "shall cooperate to bring to an end through lawful means any serious breach [by a State of an obligation arising under a peremptory norm of general international law]."

These foreign consuls include from the Americas and Africa: Brazil, Chile, Mexico and Morocco; from Asia: Bangladesh, India, Japan, Korea, Nepal, Philippines, Sri Lanka and Thailand; from Europe: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, and Switzerland; and from Oceania: Australia, Kiribati, Marshall Islands, Micronesia, New Zealand, Samoa and Tonga. The present Dean of the Consular Corps is Germany's Denis Salle.

The Hawaiian Kingdom also maintains treaties with Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Luxembourg, the Netherlands, Portugal, Russia, Samoa, Spain, Switzerland, Sweden and Norway, and the United States, all of which have not been cancelled according to the terms of the treaties.[197]

Recognition of the State of Hawai'i and its Counties as Governments under International Law

It is recognized that a State has a centralized government that exercises effective control over a population within its defined territory. However, during belligerent occupation when an effective government of the occupied State has been overthrown, the law of occupation mandates the occupying State, once it is in effective control of territory as defined under Article 42 of the Hague Regulations, shall administer the laws of the occupied State as prescribed under Article 43. Section 358, U.S. Army Field Manual 27-10, states:

> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.

In order to administer the laws of the occupied State, the occupying State must establish a military government, which "is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions on account of the military occupation."[198] As to the nature of this government, it "is immaterial whether the government over an [occupied] territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority the same. It is a government imposed by force, and the legality of its acts is determined by the law of war."[199]

In the summer of 1943 during the Second World War, British Prime Minister Winston Churchill sent a telegram to U.S. President Franklin Roosevelt regarding the President's recognition of the French Committee of National Liberation ("FCNL") asking, "[w]hat does recognition mean? One can recognize a man as an Emperor or as a grocer. Recognition is meaningless without a defining formula."[200] The FCNL was not formed in accordance with French law that stood before the German invasion of France as other governments in exile had done but was rather an organization of unified leadership established by two French generals in order to fight the Nazis. A careful examination of President Roosevelt's recognition specifically

197 Part III, 236-310.
198 U.S. Army FM 27-10, section 362.
199 *Id.*, section 368.
200 Winston Churchill, *The Second World War,* v. 137 (1954).

addresses authority and not government. Talmon points out:

> Thus, when on 26 August 1943 the United States recognized the [FCNL] 'as administering those French overseas territories which acknowledges its authority', it was pointed out that 'this statement does not constitute recognition of a government of France or of the French Empire by the United States. It does not constitute recognition of the French Committee of National Liberation as funtioning within specific limitations during the war.[201]

The FCNL eventually became the provisional government of outlying French territories that were liberated and eventually became the provisional government of the French Republic. In the Hawaiian situation, the case of recognition is reversed. The State of Hawai'i and its County governments are not governments established in exile but rather "owes its existence to an armed invasion by the United States." As such, the State of Hawai'i and its predecessors—the Territory of Hawai'i (1900-1959), the Republic of Hawai'i (1894-1900) and the provisional government (1893-1894), have been carrying out governmental functions within the territory of the Hawaiian Kingdom without lawful authority.

According to Henkin, "[a] regime that governs in fact is a Government and must be treated as such."[202] Through the lens of international humanitarian law, Henkin's position on governance can be understood with more coherence. As Henkin's theory of governance relies on effectiveness, effectiveness is at the core of Article 42 of the Hague Regulations. United States practice provides that a military government is not limited to the U.S. military, but to any armed force of the occupying State that is in effective control of occupied territory. U.S. Army Field Manual FM 27-5 provides that an "armed force in territory other than that of [the occupied State] has the duty of establishing military government when the government thereof is absent or unable to maintain order."[203] What distinguishes the U.S. military stationed in the Hawaiian Islands from the State of Hawai'i, in light of the laws and customs of war during occupation, is that the State of Hawai'i, as an armed force, is in effective control of the majority of Hawaiian territory. There are 118 U.S. military sites occupying 230,929 acres of the Hawaiian Islands, which is only 20% of the total acreage of Hawaiian territory.[204]

With a view to bringing compliance with international humanitarian law by the State of Hawai'i and its County governments, and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations, the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The proclamation read:

> 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

201 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 25 (1998).

202 Louis Henkin, *International Law: Politics, Values and Functions* 32 (1990).

203 *United States Army and Navy Manual of Military Government and Civil Affairs*, FM 27-5 2 (1943).

204 U.S. Department of Defense's Base Structure Report (2012) (online at http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf.)

> 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.[205]

The State of Hawai'i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the "laws in force in the country," which includes the 2014 decree of provisional laws by the Council of Regency in accordance with Article 43. "During the occupation," according to Benvenisti, "the ousted government would often 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."[206] Furthermore, 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 laws, most notably in matters of personal status."[207] The decree of 10 October 2014, stated:

> 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 acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;
>
> And, We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void;
>
> And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).[208]

205 Council of Regency, Proclamation Recognizing the State of Hawai'i and its Counties (3 June 2019) (online https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

206 Eyal Benvenisti, *The International Law of Occupation* 104 (2nd ed., 2012).

207 *Id.*

208 Council of Regency, Proclamation of Provisional Law (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).

The State of Hawai'i, however, has yet to implement the 2014 decree of the Council of Regency. Without implementing the decree, all commercial entities created by the State of Hawai'i, *e.g.* corporations and partnerships, and all conveyances of real estate, would simply evaporate. Until the State of Hawai'i and its Counties begin to comply with international humanitarian law, war crimes continue to be committed with impunity.

In his legal opinion for the Royal Commission of Inquiry, Schabas identified the following war crimes being committed in the Hawaiian Kingdom together with the necessary elements that would constitute criminal culpability. This includes *mens rea* and *actus reus*.[209]

> With respect to the last two elements listed for each crime:
>
> 1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
> 2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;
> 3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."
>
> *Elements of the war crime of usurpation of sovereignty during occupation*
>
> 1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
> 2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
> 3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
> 4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.
>
> *Elements of the war crime of compulsory enlistment*
>
> 1. The perpetrator recruited through coercion, including by means of pressure or propaganda, of nationals of an occupied territory to serve in the forces of the occupying State.
> 2. The perpetrator was aware the person recruited was a national of an occupied State, and the purpose of recruitment was service in an armed conflict.
> 3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
> 4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

209 Schabas, Chapter 4, 167-169.

Elements of the war crime of denationalization

1. The perpetrator participated in the imposition or application of legislative or administrative measures of the occupying power directed at the destruction of the national identity and national consciousness of the population.
2. The perpetrator was aware that the measures were directed at the destruction of the national identity and national consciousness of the population.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of pillage

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of confiscation or destruction of property

1. The perpetrator confiscated or destroyed property in an occupied territory, be it that belonging to the State or individuals.
2. The confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
3. The perpetrator was aware that the owner of the property was the State or an individual and that the act of confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of deprivation of fair and regular trial

1. The perpetrator deprived one or more persons in an occupied territory of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.
2. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of deporting civilians of the occupied territory

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons in the occupied State to another State or location, including the occupying State, or to another location within the occupied territory, by expulsion or coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of transferring populations into an occupied territory

1. The perpetrator transferred, directly or indirectly, parts of the population of the occupying State into the occupied territory.
2. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Conclusion: Royal Commission of Inquiry

On 19 January 2017, the Hawaiian government and Lance Larsen entered into a Special Agreement to form an international commission of inquiry. As proposed by the Tribunal, both Parties agreed to the rules provided under Part III—*International Commissions of Inquiry* (Articles 9-36), Hague Convention, I.[210] In what appears to be obstruction of these fact-finding proceedings by the PCA Secretary General, Hugo H. Siblesz, a complaint was filed in 2017 by the Council of Regency with one of the member States of the PCA's Administrative Council at its embassy in The Hague, Netherlands.[211] The name of the State is being kept confidential at its request.

The unfortunate circumstances of these fact-finding proceedings prompted the Council of Regency to exercise its prerogative of the Crown and to not allow the unfounded actions taken by the PCA's Secretary General to compromise the sovereignty and authority of the Hawaiian Kingdom. Notwithstanding this international wrongful act by an intergovernmental organization, the Council of Regency established a Royal Commission of Inquiry ("Royal Commission") on 17 April 2019 in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War "to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course."[212]

210 Special Agreement (19 Jan. 2017) (online at http://hawaiiankingdom.org/pdf/ICI_Agmt_1_19_17(amended).pdf).

211 Complaint against PCA Secretary General Hugo H. Siblesz (8 Nov. 2017) (online at http://hawaiiankingdom.org/pdf/Hawaiian_Complaint_PCA_Admin_Council.pdf).

212 International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction-Memorandum submitted by the Secretary-General* 54 (1949).

In accordance with Hawaiian administrative precedence in addressing crises, the Royal Commission was established by "virtue of the prerogative of the Crown provisionally vested in [the Council of Regency] in accordance with Article 33 of the 1864 Constitution, and to ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom." The author has been designated as Head of the Commission. Pursuant to Article 3—*Composition of the Royal Commission*, the author has been authorized to seek "recognized experts in various fields." According to Article 1:

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

The Royal Commission has acquired legal opinions from the following experts in international law: on the subject of the continuity of the Hawaiian Kingdom under international law, Professor Matthew Craven from the University of London, SOAS, School of Law; on the subject of the elements of war crimes committed in the Hawaiian Kingdom since 1893, Professor William Schabas, Middlesex University London, School of Law; and on the subject of human rights violations in the Hawaiian Kingdom and the right of self-determination by the Hawaiian citizenry, Professor Federico Lenzerini, University of Siena, Department of Political and International Studies. These experts, to include the author, are the authors of chapters 1, 2, 3, 4 and 5 of Part II of this book.

In Restatement (Third) of Foreign Relations Law of the United States, it recognizes that when "determining whether a rule has become international law, substantial weight is accorded to… the writings of scholars."[213] United States courts have acknowledged that the "various Restatements have been a formidable force in shaping the disciplines of the law covered [and] they represent the fruit of the labor of the best legal minds in the diverse fields of law covered."[214] The Restatement drew from Article 38(1)(d) of the Statute of the International Court of Justice, which provides that "the teachings of the most highly qualified publicists of the various nations [are] subsidiary means for the determination of rules of [international] law." These "writings include treatises and other writings of authors of standing." Professors Craven, Schabas, and Lenzerini are "authors of standing" and their legal opinions are "sources" of the rules of international law.

The Royal Commission will provide periodic reports of its investigation of war crimes that meet the constituent elements of *mens rea* and *actus reus*, and human rights violations.

213 Restatement Third, §103(2)(a).
214 Black's Law, 1313.

Exhibit “D”

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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

Exhibit “E”

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom

Edited by *Dr. David Keanu Sai*
HEAD, ROYAL COMMISSION OF INQUIRY

CHAPTER 4

WAR CRIMES RELATED TO THE UNITED STATES BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM

Professor William Schabas

WAR CRIMES RELATED TO THE UNITED STATES BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM

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Introduction

For the purposes of this chapter, the relevant treaties appear to be the following: Hague Convention II on the Laws and Customs of War, 1899; Hague Convention IV on the Laws and Customs of War, 1907; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 ('fourth Geneva Convention'). All of these treaties have been ratified by the United States. They codify obligations that are imposed upon an occupying power. Only the fourth Geneva Convention contains provisions that can be described as penal or criminal, by which liability is imposed upon individuals. Article 147 of the fourth Geneva Convention provides a list of 'grave breaches', that is, violations of the Convention that incur individual criminal responsibility and that are known colloquially as 'war crimes': 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

There are other treaties that codify war crimes relevant to the conduct of an occupying power but these have not been ratified by the United States. Article 85 of the first Additional Protocol to the Geneva Conventions of 1977 defines as 'grave breaches' subject to individual criminal liability when perpetrated against 'persons in the power of an adverse Party', including situations of occupation:

a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
b) unjustifiable delay in the repatriation of prisoners of war or civilians;
c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

Some of these war crimes are listed in the Rome Statute of the International Criminal Court but it, too, has not been ratified by the United States.

In addition to crimes listed in applicable treaties, war crimes are also recognized under customary international law. Customary international law applies generally to States regardless of whether they have ratified relevant treaties. The customary law of war crimes is thus applicable to the situation in Hawai'i. Many of the war crimes set out in the first Additional Protocol and in the Rome Statute codify customary international law and are therefore applicable to the United States despite its failure to ratify the treaties.

Crimes under customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.[1] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution. Article 11(2) of the Universal Declaration of Human Rights states that '[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed'. Applying this provision or texts derived from it, tribunals have recognized 'a penal offence, under national or international law' where the crime was not codified but rather was recognized under international law.

The International Military Tribunal ('the Nuremberg Tribunal') was empowered to exercise jurisdiction over 'violations of the laws or customs of war'. Article VI(b) of the Charter of the Tribunal provided a list of war crimes but specified that '[s]uch violations shall include, but not be limited to', confirming that the Tribunal had authority to convict persons for crimes under customary international law. The United States is a party to the London Agreement, to which the Charter of the International Military Tribunal is annexed. The corresponding provision in the Charter of the International Military Tribunal for the Far East ('the Tokyo Tribunal') does not even provide a list of war crimes, confining itself to authorizing the prosecution of 'violations of the laws or customs of war'.

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over 'violations of the laws or customs of war'. Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in a Security Council Resolution, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. The Appeals Chamber of the International Criminal Tribunal explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to incur individual criminal responsibility, the Tribunal said that the 'violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'. As an example of a violation that would not be serious enough, it provided the example of the appropriation of a loaf of bread belonging to a private individual by a combatant in occupied territory. It said that to meet the threshold of seriousness, it was not necessary for violations to result in death or physical injury, or even the risk thereof, although breaches of rules protect-

1 See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, Vol. I, 568-603 (2005), 'Rule 156. Definition of War Crimes'.

ing important values often result in distress and anxiety for the victims.[2] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[3] there is no authority to support this rule being considered a war crime for which individuals are punishable. Moreover, the incidents of coerced swearing of allegiance in Hawai'i appear to date to the late nineteenth century, making criminal prosecution today entirely theoretical, as explained further below.

Evidence of recognition of crimes under customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of 'violations of the laws and customs of war' was developed by the Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions, of 1899 and 1907, although the preparatory work does not provide any precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was 'not regarded as complete and exhaustive'. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

> Murders and massacres; systematic terrorism.
> Torture of civilians.
> Deliberate starvation of civilians.
> Rape.
> Abduction of girls and women for the purpose of enforced prostitution.
> Deportation of civilians.
> Internment of civilians under inhuman conditions.
> Forced labour of civilians in connection with the military operations of the enemy.
> Usurpation of sovereignty during military occupation.
> Compulsory enlistment of soldiers among the inhabitants of occupied territory.
> Attempts to denationalize the inhabitants of occupied territory.
> Pillage.
> Confiscation of property.
> Exaction of illegitimate or of exorbitant contributions and regulations.
> Debasement of the currency, and issue of spurious currency.
> Imposition of collective penalties.
> Wanton destruction of religious, charitable, educational, and historic buildings and monuments.[4]

Temporal issues

As a preliminary matter, two temporal issues require attention. First, international criminal law, like criminal law in general, is a dynamic phenomenon. Conduct that may not have been criminal at a certain time can become so, reflecting changing values and social development, just as certain acts may be decriminalized. It is today widely recognized that the recruitment and active use of child soldiers is an international crime. A century ago, the practice was not necessarily viewed in the same way. There is no indication of prosecution of child soldier offences relating

2 *Prosecutor v. Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).

3 Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 *Martens Nouveau Recueil* 461, Art. 45. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988.

4 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities,* Conference of Paris (1919).

to the Second World War, for example. Similarly, some acts that were once prohibited and that might even be viewed as criminal are now accepted as features of modern warfare.

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[5] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Writing in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary law.[6] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[7] In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that 'under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.'[8]

Specific Crimes

A thorough review of all war crimes is beyond the scope of this chapter, which is focused on those for which allegations have been made that they appear to arise in the case of occupation of Hawai'i. As explained above, war crimes that may have been perpetrated at the time the occupation began cannot today be prosecuted and for this reason these do not receive any detailed attention.

Usurpation of Sovereignty during Occupation

The war crime of 'usurpation of sovereignty during occupation' appears on the list issued by the Commission on Responsibilities. The Commission did not indicate the source of this crime in treaty law. It would appear to be Article 43 of the Hague Regulations: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of 'usurpation of sovereignty during occupation'. The Commis-

5 *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

6 *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984). Also, France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994, 286 (1999).

7 GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); GA Res. 3074 (XXVIII).

8 Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, Annex I, 2 (21 January 1991).

sion charged that in Poland the German and Austrian forces had 'prevented the populations from organising themselves to maintain order and public security' and that they had '[a]ided the Bolshevist hordes that invaded the territories'. It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies'. In Serbia, the Bulgarian authorities had [p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian'. It listed several other war crimes of Bulgaria committed in occupied Serbia: 'Serbian law, courts and administration ousted'; 'Taxes collected under Bulgarian fiscal regime'; 'Serbian currency suppressed'; 'Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub)'; 'Prohibited sending Serbian Red Cross to occupied Serbia'. It also charged that in Serbia the German and Austrian authorities had committed several war crimes: 'The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.'; 'Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna'.[9]

The crime of 'usurpation of sovereignty' was referred to by Judge Blair of the American Military Commission in a separate opinion in the 'Justice Case': 'This rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.'[10]

Article 64 of the fourth Geneva Convention imposes a similar norm:

> Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.
>
> Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The Commentary to the fourth Geneva Convention describes Article 64 as giving 'a more precise and detailed form' to Article 43 of the Hague Regulations.[11]

The war crime of 'usurpation of sovereignty' has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for the crime by international

9 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).

10 *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

11 Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).

criminal tribunals.

In the situation of Hawai'i, the usurpation of sovereignty would appear to have been total since the beginning of the twentieth century. It might be argued that usurpation of sovereignty is a continuous offence, committed as long as the usurpation of sovereignty persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the actus reus of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made to the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is 'characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred'. Therefore, it is not 'an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.'[12] In order to counteract such an interpretation, the Elements of Crimes of the Rome Statute specify that the widespread or systematic attack associated with the enforced disappearance must have taken place after entry into force of the Statute.[13] Given that there have been no prosecutions for 'usurpation of sovereignty' and essentially no clarification at the legislative level or in the academic literature, whether or not the crime is 'continuing' remains open to debate.

On the assumption that it is an ongoing crime, the actus reus of the offence of 'usurpation of sovereignty' would consist 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. The occupying power may therefore cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.[14] The occupying power may also cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

Given that this is essentially a crime involving State action or policy or the action or policies of an occupying State's proxies, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights.

Compulsory Enlistment of Soldiers

The 'compulsory enlistment of soldiers among the inhabitants of occupied territory' was listed as a war crime by the Commission on Responsibilities in its 1919 report.[15] In treaty law, authority for the crime is found in Article 23 of the 1907 Hague Regulations: 'A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.' The prohibition is repeated, in a somewhat broader manner, in Article 51 of the fourth Geneva Convention of 1949: 'The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.' Article 147 of the fourth Convention declares that 'compelling a protected person to serve in the forces of a hostile Power' is a grave

12 *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.
13 Elements of Crimes, Crimes Against Humanity, Art. 7(1)(i).
14 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.
15 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, 17-18.

breach (and therefore a war crime). More recently, the United Nations Security Council listed 'compelling a … a civilian to serve in the forces of a hostile power' among the grave breaches of the fourth Geneva Convention punishable by the International Criminal Tribunal for the former Yugoslavia.[16] There is a similar provision in the Rome Statute of the International Criminal Court: 'Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power'.[17]

The Commentary on the fourth Geneva Convention explains that the prohibition on 'forcing enemy subjects to take up arms against their own country' is 'universally recognized in the law of war'.[18] It says that the object of Article 51 is 'to protect the inhabitants of the occupied territory from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country'.[19] Nevertheless, Article 147 of the Convention does not require that civilians in the occupied territory be forced 'to take up arms against their own country'. The same can be said of the modern formulations in the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court. The Elements of Crimes of the Rome Statute, which are intended to assist in the interpretation of its provisions, describe the material element of the war crime of compulsory enlistment as follows: 'The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.'[20] When the Elements of Crimes were being negotiated, some States wanted it to be clearly indicated that the provision did not require the civilian to act against his or her own country. It was felt that an explicit mention was unnecessary and that the issue was addressed adequately with the words 'or otherwise serve'.[21]

There do not appear to have been any prosecutions for this crime by international criminal tribunals. The Commission on Responsibilities provided examples of the crime of compulsory enlistment committed by Bulgarian authorities in Greece, where '[m]any thousands of Greeks [were] forcibly enlisted by Bulgarians' in Eastern Macedonia', by Bulgarian authorities in Serbia who '[f]orced Serbian subjects to fight in the ranks of Bulgarians against their own country' and where '[f]amilies and villages were held responsible for refusal to enlist (in Eastern Serbia)', and by Austrian and German authorities in Serbia where 'Serbian subjects were recruited for the Austrian armies, or were sent to the Bulgarians to be incorporated in their forces'.[22]

In the author's opinion, the material elements (actus reus) of the crime of 'compulsory enlistment' are: coercion, including by means of pressure or propaganda, of nationals of an occupied territory to serve in the forces of the occupying State. The enlistment must be undertaken during armed conflict and the service must have a connection or nexus with the armed conflict. The mental element (mens rea) consists of knowledge of the existence of an armed conflict, knowledge that the person recruited is a national of an occupied State, and the intent to enlist or recruit the person for the purposes of serving in an armed conflict.

16 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, Art. 2(e).
17 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 8(2)(a)(v) (2002).
18 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 293.
19 *Id.*, 294,
20 Elements of Crimes, Art. 8(2)(a)(v).
21 Knut Dörmann, 'Paragraph 2(a)(v): Compelling a protected person to serve in the hostile forces', in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 329-331, 330 (3rd ed., 2015).
22 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports, Annex*, TNA FO 608/245/4.

The list of war crimes of the Commission on Responsibilities included '[a]ttempts to denationalize the inhabitants of occupied territory'. The crime does not appear to be derived from any specific provision of the Hague Conventions where the notion of denationalization is not apparent. Decades later, discussing the war crime of denationalization, the United Nations War Crimes Commission suggested it was related to Article 43 of the Hague Conventions because it was 'clearly the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the territory'. The Commission also referred to the protection of educational institutions enshrined in Article 56 of the Hague Conventions.[23]

Under the heading 'attempts to denationalise the inhabitants of occupied territory', the Commission on Responsibilities charged several crimes committed in Serbia by the Bulgarian authorities: 'Efforts to impose their national characteristics on the population'; 'Serbian language forbidden in private as well as in official relations. People beaten for saying "Good morning" in Serbian'; 'Inhabitants forced to give their names a Bulgarian form'; 'Serbian books banned – were systematically destroyed'; 'Archives of churches and law-courts destroyed'; 'Schools and churches closed, sometimes destroyed'; 'Bulgarian schools and churches substituted – attendance at school made compulsory'; 'Population forced to be present at Bulgarian national solemnities'. It also said that in Serbia the Austrian and German authorities 'interfered with religious worship, by deportation of priests and requisition of churches for military purposes. Interfered with use of Serbian language'.[24]

The war crime of denationalization received some attention during the post-Second World War period. The United Nations War Crimes Commission used the list of war crimes adopted by the 1919 Commission on Responsibilities as a basis for its consideration of war crimes. However, it also discussed the relevance of the list and considered specifically the nature of the war crime of 'denationalization'. Unlike many other war crimes that constituted in and of themselves criminal acts under ordinary criminal law, 'denationalization' might involve underlying conduct that was not normally or inherently criminal, such as administrative measures governing language of education. In an expert opinion for the Commission, Egon Schwelb wrote:

> It is submitted that each case will have to be judged on its own merits. The 'denationalization' may be either effected or accompanied by acts on the part of the occupying authorities, which are criminal *per se.* There may, on the other hand, exist circumstances which do not let the activities appear criminal, though they, no doubt, are illegal. An example of the latter type of 'attempts at denationalization' may exist where the occupation authorities do not close the existing schools and do not prevent parents from sending their children to them either by actual violence, or by threat, but where they try to bribe parents into sending children to schools instituted by the occupant by offering various advantages, like better school meals, clothing, etc.

In his report to the United Nations War Crimes Commission dated 28 September 1945, Bohuslav Ečer argued that 'denationalisation' was not only a war crime but also 'a genuine

23 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 488 (1948). See also Egon Schwelb, 'Note on the Originality of "Attempts to Denationalize the `Inhabitants of Occupied Territory" (appendix to Doc. C.1. No. XII) – Question Referred to Committee III by Committee I, UNWCC Doc. III/15.

24 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4.

international crime – a crime against the very foundations of the Community of Nations'.[25]

This discussion must be understood in the context of legal debates about the time about the creation of new categories of international crime, specifically crimes against humanity and genocide, neither of which had been contemplated by the 1919 Commission on Responsibilities. The scholar who devised the term 'genocide', Raphael Lemkin, writing in late 1944 referred to the inadequacies of the Hague Conventions in dealing with the scope of Nazi atrocity directed at minority groups. Lemkin considered that the Hague Regulations dealt with technical rules concerning occupation but he said 'they are silent regarding the preservation of the integrity of a people'.[26] Lemkin specifically acknowledged the war crime of denationalization in the list of the Commission on Responsibilities, saying it was 'used in the past to describe the destruction of a national pattern'. He said it was inadequate in three respects: it did not 'connote the destruction of the biological structure', 'in connoting the destruction of one national pattern it does not connote the imposition of the national pattern of the oppressor' and 'denationalization is used by some authors to mean only deprivation of citizenship'.[27]

The United Nations War Crimes Commission discussed the war crime of denationalization in the note accompanying the judgment in the *Greifelt et al.* case. The Commission referred to the list of war crimes in the report of the 1919 Commission on Responsibility, observing that

> [a]ttempts of this nature were recognized as a war crime in view of the German policy in territories annexed by Germany in 1914, such as in Alsace and Lorraine. At that time, as during the war of 1939-1945, inhabitants of an occupied territory were subjected to measures intended to deprive them of their national characteristics and to make the land and population affected a German province. The methods applied by the Nazis in Poland and other occupied territories, including once more Alsace and Lorraine, were of a similar nature with the sole difference that they were more ruthless and wider in scope than in 1914-1918. In this connection the policy of 'Germanizing' the populations concerned, as shown by the evidence in the trial under review, consisted partly in forcibly denationalizing given classes or groups of the local population, such as Poles, Alsace-Lorrainers, Slovenes and others eligible for Germanization under the German People's List. As a result in these cases the programme of genocide was being achieved through acts which, in themselves, constitute war crimes.[28]

Evidence in the *Greifelt et al.* case dealt with Nazi policies in occupied Poland aimed at 'Germanization'. These included measures to prevent births and measures of population displacement that might today be described as 'ethnic cleansing'. The *History of the United Nations War Crimes Commission* also refers to attempts at denationalization conducted by both Italian and German occupation authorities in Greece, Poland and Yugoslavia. These were directed at 'uproot[ing] and destroy[ing] national cultural institutions and national feeling. The effort took various forms including a ban on the use of native language, supervision of the schools, forbidding the publication of native language newspapers, and various other devices and regulations.'[29]

Denationalization does not appear in any of the modern codifications of war crimes. This is

25 Preliminary Report by the Chairman of Committee III, UNWCC Doc. C/148, p. 3
26 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 90 (1944).
27 *Id.*, 80.
28 *United States v. Greifelt et al.*, 13 LRTWC 1, 42 (1948).
29 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 488 (1948).

explained by the development of robust bodies of international criminal law and international human rights law dealing with the protection of groups and minorities, applicable in time of peace and in time of war. Acts of 'denationalization' as the concept was understood by the 1919 Commission on Responsibilities and the post-Second World War United Nations War Crimes Commission would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide.

There are similar concerns about the continuing nature of the crime as those expressed above with respect to the war crime of usurping sovereignty.

On the assumption that it is an ongoing crime, the actus reus of the offence of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population.[30]

Given that this is essentially a crime involving State action or policy or the action or policies of an occupying State's proxies, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act was directed at the destruction of the national identity and national consciousness of the population.

Pillage

'Pillage' is a war crime included in the list of the 1919 Commission on Responsibilities.[31] It is derived from Articles 28 and 47 of the Hague Regulations. Prohibition of pillaging is also set out in Article 33 of the fourth Geneva Convention ('Pillage is prohibited'). In the modern era, pillage is a war crime punishable by the International Criminal Court.[32] Acts of 'pillage' have been held to be comprised within 'plunder',[33] and the two terms have often been treated as if they are synonyms.[34] The Charter of the International Military Tribunal referred to 'plunder of public or private property' rather than to 'pillage'. This provision was repeated in article 3(e) of the Statute of the International Criminal Tribunal for the former Yugoslavia.[35] The Commentary to the fourth Geneva Convention explains that international law is concerned not only with 'pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay'.[36]

'Pillage' is also subject to prosecution by the International Criminal Tribunal for Rwanda.[37] The Elements of Crimes of the Rome Statute of the International Criminal Court provide important additional criteria: the perpetrator appropriated certain property; the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; the appropriation was without the consent of the owner.[38] A footnote in the Elements of Crime specifies that 'appropriations justified by military necessity cannot constitute the crime

30 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.
31 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, 17-18.
32 Rome Statute, Art. 8(2)(b)(xvi).
33 *Prosecutor v. Blaškić* (IT-95-14-A) Judgment, para. 147 (29 July 2004); *Prosecutor v. Delalić* (IT-96-21-A), Judgment, para. 591 (20 February 2001); *Prosecutor v. Kordić et al.* (IT-95-14/2-A), Judgment, para. 77 (17 December 2004).
34 *Prosecutor v. Brima et al.* (SCSL-04-16-T), Judgment, para. 751 (20 June 2007).
35 UN Doc. S/RES/827 (1993).
36 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 226.
37 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, Annex, Art. 4(f) (1994).
38 Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, paras. 1–3; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, paras. 1–3.

of pillaging'.

The war crime of pillage has been interpreted recently by various international criminal tribunals, notably the International Criminal Court. One of its Pre-Trial Chambers wrote that the war crime of pillage 'entails a somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property, which goes beyond mere sporadic acts of violation of property rights'.[39] With specific reference to the Rome Statute, which limits its jurisdiction to war crimes that are 'serious', the Pre-Trial Chamber said that 'cases of petty property expropriation' might not be within the scope of the provision. 'A determination on the seriousness of the violation is made by the Chamber in light of the particular circumstances of the case', it said.[40] Subsequently, however, a Trial Chamber of the Court discouraged the notion that there is any particular gravity threshold for the crime of pillaging.[41] The Chamber said it would determine a violation to be serious 'where, for example, pillaging had significant consequences for the victims, even where such consequences are not of the same gravity for all the victims, or where a large number of persons were deprived of their property'.[42] Judgments of the International Criminal Tribunal for the former Yugoslavia hold that 'all forms of seizure of public or private property constitute acts of appropriation, including isolated acts committed by individual soldiers for their private gain and acts committed as part of a systematic campaign to economically exploit a targeted area'.[43]

Because it must belong to an 'enemy' or 'hostile' party, 'pillaged property – whether moveable or immoveable, private or public – must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator'.[44] The same requirement is not explicitly imposed with respect to the war crime of destruction of property but the view that this is implicit finds support.[45] It is not excluded that the property that is pillaged belongs to combatants.[46] The crime of pillage occurs when the property has come under the control of the perpetrator, because it is only then that he or she can 'appropriate' the property.[47]

In *Prosecutor v. Katanga*, a Trial Chamber of the International Criminal Court said 'the pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by combatants in their own interest'.[48] There is some old authority for the view that pillage entails an element of force or violence,[49] but this is not confirmed by recent case law. The Elements of Crimes of the Rome Statute specify that the perpetrator 'intended to deprive the owner of the property and to appropriate it for private or personal use'.[50] An accompanying footnote

39 *Prosecutor v. Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 317 (15 June 2009).
40 *Id.*
41 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 908 (7 March 2014).
42 *Id.*
43 *Prosecutor v. Gotovina* (IT-06-90-T), Judgment, para. 1778 (15 April 2011).
44 *Prosecutor v. Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, para. 329 (30 September 2008).
45 *Id.*, fn. 430.
46 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 907 7 (March 2014).
47 *Prosecutor v. Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, para. 330 (30 September 2008).
48 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 905 (7 March 2014).
49 49. See Andreas Zimmermann, 'Pillage', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 238 (1999).
50 Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2; Elements of Crimes,

specifies that '[a]s indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging'.[51] The Rome Statute provision on pillage was copied into the Statute of the Special Court for Sierra Leone, and has been interpreted by one of its Trial Chambers, which explained: 'The inclusion of the words "private or personal use" excludes the possibility that appropriations justified by military necessity might fall within the definition. Nevertheless, the definition is framed to apply to a broad range of situations.'[52] The Special Court was of the view that the requirement of 'private or personal use', imposed by the Elements of Crimes applicable to the Rome Statute, was 'unduly restrictive and ought not to be an element of the crime of pillage'.[53]

The *actus reus* of pillage consists of the appropriation of property belonging to members of the civilian population without the consent of the owner. Whether the appropriation must also be for personal use of the perpetrator is a matter of debate. The *mens rea* requires that the perpetrator act with the specific intent of depriving the owner of the property without consent.

Confiscation and Destruction of Property

Confiscation of property is included in the list of war crimes adopted by the 1919 Commission on Responsibilities. It appears to be derived from Article 55 of the Hague Regulations: 'Exaction of illegitimate or of exorbitant contributions and regulations: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

The fourth Geneva Convention lists as a grave breach the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. It is derived from a number of provisions of the Convention that mainly concern attacks in the course of armed conflict and the conduct of hostilities, a matter that is not of concern in this legal opinion. With respect to occupied territory, the relevant provision is Article 53: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.' The Commentary to the fourth Convention observes:

> In the very wide sense in which the Article must be understood, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of co-operative organizations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.[54]

War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2.

51 Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2, fn. 47; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2, fn. 61. See *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 906.

52 *Prosecutor v. Brima et al.* (SCSL-04-16-T), Judgment, para. 753 (20 June 2007).

53 *Id.*, para. 754. See also *Prosecutor v. Brima et al.* (SCSL-2004-16-T), Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, paras. 241–243 (31 March 2006).

54 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 301.

The grave breach of 'extensive destruction and appropriation of property' is included in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court.[55]

The Prosecutor considered charging this offence in the *Gaza flotilla situation*, based on confiscation by Israeli military personnel of the belongings of passengers on the humanitarian relief ship *Mavi Marmara*, such as cameras, mobile phones, laptop computers, MP3 players, recording devices, cash, credit cards, identity cards, watches, jewellery and clothing. Only a portion of the property was returned, some of it in a damaged or incomplete state. The Prosecutor said that some of the Israeli soldiers 'may have unlawfully and wantonly appropriated the personal property and belongings', noting that it was not possible to justify the taking of some of this property on grounds of military necessity. Some of this property, such as cash, jewellery and personal electronic devices, did not fall within the scope of article 8(2)(a)(iv), according to the Prosecutor. She explained that although Article 53 of the fourth Geneva Convention refers to real or personal property belonging individually to private persons, the reference only applies in the context of destruction and not appropriation, noting that 'it is not evident that this grave breach was intended to encompass appropriation of personal property belonging to private individuals'. The Prosecutor also noted that appropriation within the meaning of article 8(2)(a)(iv) must be 'extensive' and therefore did not generally apply to an isolated act or incident although each assessment would have to be made on a case by case basis.[56]

The actus reus consists of an act of confiscation or destruction of property in an occupied territory, be it that belonging to the State or individuals. The mens rea requires that the perpetrator act with intent to confiscate or destroy the property and with knowledge that the owner of the property was the State or an individual.

Exaction of Illegitimate or Exorbitant Contributions

The war crime of 'exaction of illegitimate or of exorbitant contributions and regulations' is included in the list of war crimes of the 1919 Commission on Responsibilities. It is derived from Article 48 of the Hague Regulations: 'If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.' The fourth Geneva Convention does not address this issue. It does not appear to have been considered a war crime since its inclusion in the list of the Committee on Responsibilities in 1919 making its status as a war crime under international law rather questionable.

Deprivation of Fair and Regular Trial

Wilful deprivation of the right of fair and regular trial for a non-combatant civilian is a grave breach under the fourth Geneva Convention. It is not comprised in the list of the 1919 Commission of Responsibilities. It is a war crime listed in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court. There are a number of examples of post-Second World War prosecutions based upon the hold-

55 Rome Statute, Art. 8(2)(a)(iv).

56 *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13), Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, paras. 83-89 (16 July 2015).

ing of unfair trials,[57] including the well-known *Justice case* of Nazi jurists by a United States Military Tribunal.[58] There do not appear to have been any prosecutions under this provision by international criminal tribunals in the modern period.

It would appear that the provision applies principally to the fairness of the proceedings. In this context, detailed standards are set out in a number of international instruments, most notably in Article 14 of the International Covenant on Civil and Political Rights. It is also required that the tribunal in question be independent, impartial and regularly constituted. According to the Customary Law Study of the International Committee of the Red Cross, '[a] court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country'.[59] However, it seems clear that if the courts of the occupying power were regularly constituted under international law, the trials held before them are not inherently defective. This can be seen in Article 66 of the fourth Geneva Convention which acknowledges the right of the occupying power to subject accused persons 'to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country'.

The *actus reus* of the war crime of deprivation of the right of fair and regular trial consists of depriving one or more persons of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.

The *mens rea* requires that the accused person acted intentionally and with knowledge that the person allegedly deprived of the right to fair trial was a civilian of the occupied territory.

Unlawful Deportation or Transfer of Civilians of the Occupied Territory

'Deportation of civilians' is a war crime listed in the Report of the 1919 Commission on Responsibilities. It reflects a prohibition under customary law, set out in writing as early as the Lieber Code, which was adopted by President Lincoln during the Civil War: 'private citizens are no longer . . . carried off to distant parts'.[60] Curiously, the prohibition was not explicit in the Hague Regulations. Widespread outrage at German deportations of Belgians who were forced to work in slave-like conditions probably prompted the addition to the list by the Commission on Responsibilities. The Charter of the International Military Tribunal criminalizes 'deportation to slave labour or for any other purpose of civilian population of or in occupied territory'.[61] The grave breach of 'unlawful deportation or transfer or unlawful confinement' of a non-combatant civilian is set out in Article 147 of the fourth Geneva Convention. The prohibition on such deportation or transfer is found in Article 49 of the Convention: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'

No exception is allowed, for example, in the case of prisoners who are convicted of crimes perpetrated in the occupied territory that would allow them to be sent to serve their sentence on the territory of the occupying power. Nevertheless, the Israeli authorities have deported or transferred many Palestinian nationals from the Occupied Palestinian Territory to serve custo-

57 See the authorities cited in Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Law, Vol. I: Rules, 352, fn. 327 (2005).
58 *United States of America v. Alstötter et al.* ('The Justice case'), 3 TWC 954 (1948).
59 Henckaerts and Doswald-Beck, 355.
60 Instructions for the Government of Armies of the United States in the Field ('Lieber Code'), Art. 23.
61 Charter of the International Military Tribunal (IMT), 82 UNTS 279, Annex, Art. VI(b) (1951).

dial sentences within Israel proper. The Supreme Court of Israel has held that the prohibition of deportation or transfer in Article 49 of the Convention does not apply to the deportation of selected individuals for reasons of public order and security,[62] but this is an isolated view.

The grave breach of deporting civilians is included in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court. The Elements of Crimes of the Rome Statute specify that the crime is committed by the deportation or transfer of one or more persons 'to another State or to another location'.

The *actus reus* of the offence involves the transfer of a non-combatant civilian to another State, including the occupying State, or to another location within the occupied territory. The *mens rea* requires that the perpetrator act intentionally and that the perpetrator have knowledge of the fact that the person being deported or transferred is a non-combatant civilian.

Unlawful Transfer of Populations to the Occupied Territory

Article 49(6) of the fourth Geneva Convention reads: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' Violation of article 49(6) of the fourth Geneva Convention, 'when committed wilfully and in violation of the Conventions or the Protocol', is deemed a 'grave breach' by Additional Protocol I to the Geneva Conventions, adopted in 1977. The grave breach is incorporated into the Rome Statute, where the words 'directly or indirectly' have been added to the text of Additional Protocol I: 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.'[63] The word 'indirectly' is aimed at a situation where the occupying power does not actually organize the transfer of populations, but does not take effective measures to prevent this.[64]

According to the Commentary to the fourth Geneva Convention, the prohibition 'is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.'[65] In recent decades, there have been occurrences of such population transfers, widely condemned, in the Occupied Palestinian Territory and in Northern Cyprus. In 1980, the United Nations Security Council adopted a resolution declaring that 'Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East'.[66]

The Commentary to the Geneva Conventions notes that the words 'transfer' and 'deport' have a different meaning than they do elsewhere in article 49, in that they do not contemplate the

62 See Ruth Lapidoth, 'The Expulsion of Civilians from Areas which came under Israeli Control in 1967: Some Legal Issues', 2 *European Journal of International Law* 97, 106-108 (1990); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 46 (1989).

63 Rome Statute, Art. 8(2)(b)(viii).

64 Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, 113 (1999).

65 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 283.

66 UN Doc. S/RES/465, OP 5 (1980).

movement of protected persons but rather nationals of the occupying Power.[67] Belligerent occupation is a temporary situation and not the prelude to annexation. For this reason, the Occupying Power must not change the demographic, social and political situation in the territory it has occupied to the social and economic detriment of the population living in the occupied territory. Discussing article 49(6) of the fourth Geneva Convention, the International Court of Justice stated that the provision 'prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory'.[68]

Conclusion

This chapter has examined the application of the international law of war crimes to the United States occupation of the Hawaiian Kingdom since 17 January 1893. It has identified the sources of this body of law in both treaty and custom, and described the two elements – *actus reus* and *mens rea* – with respect to the relevant crimes.

The Elements of Crimes is one of the legal instruments applicable to the International Criminal Court. The initial draft of the Elements was prepared by the United States, which participated actively in negotiation of the final text and joined the consensus when the text was finalized. It provides a useful template for summarizing the *actus reus* and *mens rea* of international crimes. It has been relied upon in producing the following summary of the crimes discussed in this report:

> *General*
>
> With respect to the last two elements listed for each crime:
>
> 1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
> 2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;
> 3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."
>
> *Elements of the war crime of usurpation of sovereignty during occupation*
>
> 1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
> 2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
> 3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.

67 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 283.

68 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports*, 136, para. 120 (2004).

4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of compulsory enlistment

1. The perpetrator recruited through coercion, including by means of pressure or propaganda, of nationals of an occupied territory to serve in the forces of the occupying State.
2. The perpetrator was aware the person recruited was a national of an occupied State, and the purpose of recruitment was service in an armed conflict.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of denationalization

1. The perpetrator participated in the imposition or application of legislative or administrative measures of the occupying power directed at the destruction of the national identity and national consciousness of the population.
2. The perpetrator was aware that the measures were directed at the destruction of the national identity and national consciousness of the population.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of pillage

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of confiscation or destruction of property

1. The perpetrator confiscated or destroyed property in an occupied territory, be it that belonging to the State or individuals.
2. The confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
3. The perpetrator was aware that the owner of the property was the State or an individual and that the act of confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of deprivation of fair and regular trial

1. The perpetrator deprived one or more persons in an occupied territory of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.
2. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

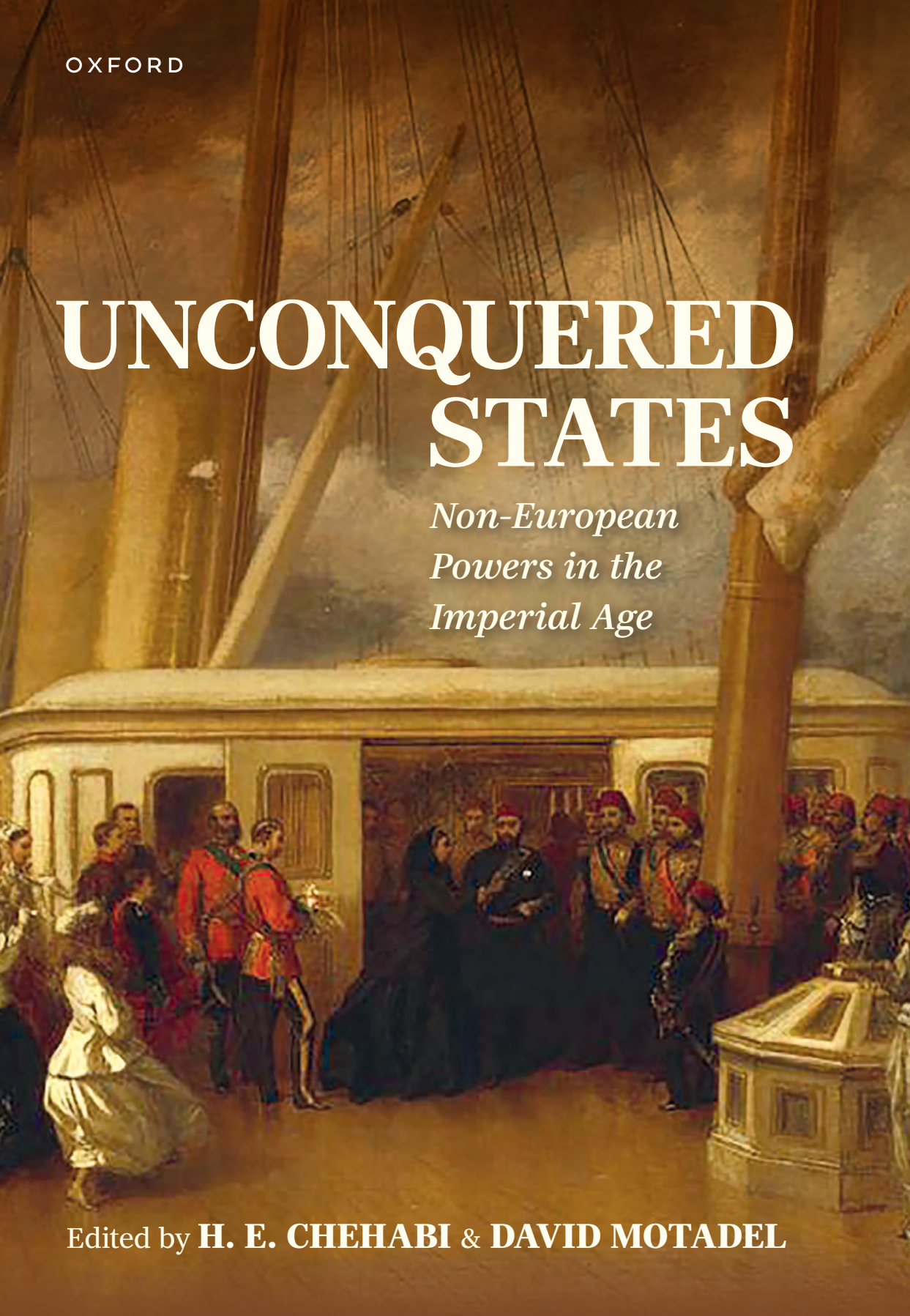
Elements of the war crime of deporting civilians of the occupied territory

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons in the occupied State to another State or location, including the occupying State, or to another location within the occupied territory, by expulsion or coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of transferring populations into an occupied territory

1. The perpetrator transferred, directly or indirectly, parts of the population of the occupying State into the occupied territory.
2. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Exhibit “F”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Non-European Powers in the Imperial Age
Edited by H. E. CHEHABI & DAVID MOTADEL

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.

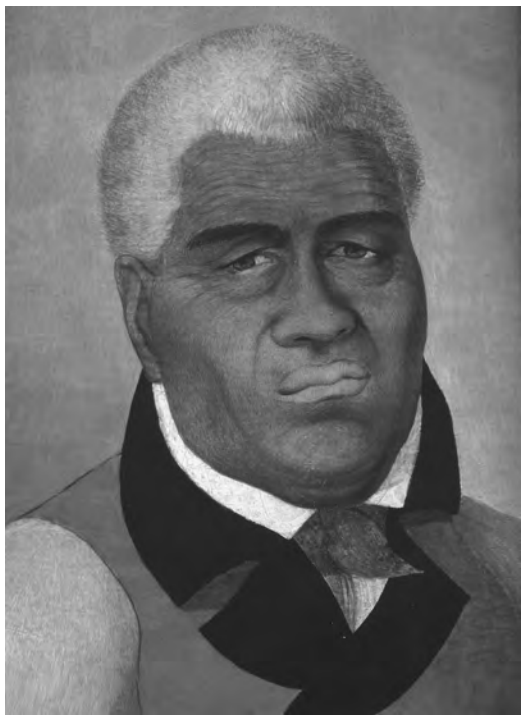

Fig. 21.1 King Kamehameha I, progenitor of the Hawaiian Kingdom, 1795–1819. (Unknown Artist) (Public Domain)

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*.

Exhibit “G”

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom

Edited by *Dr. David Keanu Sai*
HEAD, ROYAL COMMISSION OF INQUIRY

PROCLAMATION

[Provisional Laws of the Realm]

Whereas, the armed forces of the United States of America have invaded and occupied the shores of the Hawaiian Islands on two separate occasions, the first being from January 16, 1893 to April 1, 1893, and the second since August 12, 1898 to the present, whereby the latter being an illegal and prolonged occupation; and

Whereas, the armed forces of the United States of America on January 17, 1893 aided and abetted a small group of insurgents in seizing the Executive office of the Hawaiian Kingdom government and thereafter participated in the coercion of all government employees and officials in the executive and judicial branches of the government of the Hawaiian Kingdom to sign oaths of allegiance to the insurgency calling themselves the so-called provisional government; and

Whereas, United States President Grover Cleveland concluded, through a presidential investigation, that the overthrow of the Hawaiian Kingdom government was unlawful, and that the United States bears the sole responsibility for the overthrow of the government of a friendly State, and provide restitution; and

Whereas, executive mediation took place between United States Minister Plenipotentiary Albert Willis and Her Majesty Queen Lili'uokalani beginning on November 13, 1893, at the United States Legation in the city of Honolulu, and on December 18, 1893 an agreement was reached through *exchange of notes* committing the United States to reinstate the government, and thereafter the Hawaiian Kingdom to grant amnesty to the insurgents; and

Whereas, United States President Cleveland and his successors in office failed to faithfully execute the agreement and allowed the insurgency to gain power through the hiring of American mercenaries in order to seek annexation to the United States of America; and

Whereas, during the Spanish-American War, the armed forces of the United States of America unlawfully invaded and occupied the Hawaiian Islands on August 12, 1898, being a neutral State, to wage war against the Spanish colonies of the Philippines and Guam in the Pacific Ocean; and

Whereas, since the second occupation, the armed forces of the United States of America have not complied with international law, the international laws of occupation, both customary and by conventions, and international humanitarian law; and

Whereas, the armed forces of the United States of America under the guise of civilian authority seized control of the government of the Hawaiian Kingdom calling itself the so-called Republic of Hawai'i, being the successor to the provisional government, and renamed the same as the government of the Territory of Hawai'i on April 30, 1900, and then subsequently renamed as the government of the State of Hawai'i on March 18, 1959; and

Whereas, the so-called provisional government, the Republic of Hawai'i, the Territory of Hawai'i, and the State of Hawai'i have no legal basis under Hawaiian Kingdom law or the international laws of occupation; and

Whereas, the occupant State has unlawfully levied pecuniary contributions of various kinds that included taxes and the imposition of fines in violation of international law; and

Whereas, the occupant State has unlawfully seized public and private property for the construction of its government agencies and military installations from the occupied State and its inhabitants, and that restoration and compensation shall be made under *jus post liminii*; and

Whereas, the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom as it stood prior to the insurrection of July 6, 1887 has placed the Hawaiian Kingdom into a state of emergency that could lead to economic ruination and calamity; and

Whereas, war crimes have and continue to be committed as a result of the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom in accordance with the 1907 Hague Regulations and the 1949 Geneva Convention IV; and

Whereas, customary international law recognizes that the rules on belligerent occupation will also apply where a belligerent State, in the course of war, occupies neutral territory, being the territory of the Hawaiian Kingdom; and

Whereas, customary international law recognizes that when neutral territory is militarily occupied by a belligerent, the occupant State does not possess a wide range of rights with regard to the occupied State and its inhabitants as it would in occupied enemy territory; and

Whereas, customary international law recognizes that legislative power remains with the government of the occupied State during military occupation of the occupied State's territory; and

Whereas, Her late Majesty Queen Lili'uokalani died on November 11, 1917, without an heir apparent proclaimed in accordance with Article 22 of the 1864 Constitution, as amended; and

Whereas, it is provided by Article 33 of the Constitution that should a Monarch die without confirming an heir apparent in accordance with Hawaiian law, the Cabinet Council shall serve as an *acting* Council of Regency who shall administer the Government in the name of the Monarch, and exercise all the Powers which are constitutionally vested in the Monarch, until the Legislative Assembly may be assembled to elect by ballot a *de jure* Regent or Council of Regency; and

Whereas, according to Article 42 of the Constitution, the Cabinet Council consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance and the Attorney General of the Kingdom; and

Whereas, an *acting* Regency, by virtue of the offices made vacant in the Cabinet Council, was established under the doctrine of necessity by proclamation on February 28, 1997, pursuant to Article 33 of the Constitution and possesses the constitutional authority to temporarily exercise the Royal Power of the Hawaiian Kingdom under Article 32; and

Whereas, the Legislative Assembly is unable to be assembled in accordance with Title 3—Of the Legislative Department, Civil Code of the Hawaiian Islands (Compiled Laws, 1884), in order to elect by ballot a *de jure* Regent or Council of Regency as a direct result of the prolonged occupation of the Hawaiian Kingdom by the armed forces of the United States of America and the Rules of Land Warfare of the United States; and

Whereas, the public safety requires:

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 here-

by acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

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

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876);

And, We do hereby call upon the said Commander of the United States Pacific Command, and those subordinate military personnel to whom he may delegate such authority to seize control of our government, calling itself the State of Hawai'i, by proclaiming the establishment of a military government, during the present prolonged military occupation and until the military occupation has ended, to exercise those powers allowable under the international laws of occupation and international humanitarian law;

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

And, We do further require that all courts of the Hawaiian Kingdom, whether judicial or administrative, shall administer the provisional laws hereinbefore proclaimed forthwith;

And, We do further require that Consular agents of foreign States within the territory of the Hawaiian Kingdom shall comply with Article X, Chapter VIII, Title 2—Of the Administration of Government, Civil Code of the Hawaiian Islands (Compiled Laws, 1884) and the Law of Nations;

And, We do further require every person now holding any office of profit or emolument under the State of Hawai'i and its Counties, being the Hawaiian government, take and subscribe the oath of allegiance in accordance with *An Act to Provide for the Taking of the Oath of Allegiance by Persons in the employ of the Hawaiian Government* (1874).

[seal]

In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 10th day of October A.D. 2014.

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

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

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

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

Edward Halealoha Ayau, Esq.
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Counsel for Non-Party Intervenor Council of Regency of the Hawaiian Kingdom

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,
Plaintiffs,

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,
Defendant.

Case No. 1:25-cv-450-MWJS-RT

PROPOSED ORDER GRANTING NON-PARTY INTERVENOR HAWAIIAN KINGDOM'S MOTION TO INTERVENE

Before the Court is the Council of Regency of the Hawaiian Kingdom's Motion to Intervene as Limited Purpose Non-Party Intervenor and Motion to Dismiss. Having carefully reviewed the filings, it is hereby ORDERED:

1. Non-Party Intervenor Hawaiian Kingdom's Motion to Intervene is GRANTED.

2. Non-Party Intervenor Hawaiian Kingdom's request to direct the Clerk of the Court to file the attached Motion to Dismiss is GRANTED.

Dated: _____, 2026

_____

Honorable Judge Micah WJ Smith

Edward Halealoha Ayau, Esq.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,
Plaintiffs,

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,
Defendant.

Case No. 1:25-cv-450-MWJS-RT

CERTIFICATE OF COMPLIANCE

1. The Motion to Intervene filed on January 16, 2026, in the above-captioned matter, complies with the type-volume limit pursuant to Local Rule 7.4 because, this document contains 6,299 words.

2. This document complies with the typeface and type style requirements of local rules because this document has been prepared in a proportionally spaced typeface using Word, Office version 2025, in 14-point Times New Roman style type.

3. This brief has been scanned for viruses and is virus-free.

Dated this 16th of January, 2026.

By: __s/ Edward Halealoha Ayau_____

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UNITED STATES DISTRICT COURT

for the

District of Hawaii

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,

Plaintiff

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS

Defendant

Case No. 1:25-cv-450-MWJS-RT

MOTION TO APPEAR PRO HAC VICE

(Attach Declaration of Counsel in support of motion. $300.00 assessment required to be paid through Pay.gov.)

Name of Attorney:	Natali Segovia		
Firm Name:	Water Protector Legal Collective / International Association of Democratic Lawyers		
Firm Address:	P.O. Box 37053, Albuquerque, NM 87176		
Attorney CM/ECF Primary email address:	nsegovia@waterprotectorlegal.org		
Firm Telephone:	602-796-7034	Firm Fax:	
Party Represented:	Non-Party Intervenor Council of Regency of the Hawaiian Kingdom		
Name/Address of Local Counsel	Edward Halealoha Ayau, Esq. (HI 5013) LAW OFFICE OF EDWARD HALEALOHA AYAU 2 Nanea StreetHilo, HI 96720		

Pursuant to LR 83.1(e) of the Local Rules of Practice for the United States District Court for the District of Hawaii, the undersigned applies for an order permitting the above-named attorney to appear and participate as counsel pro hac vice for the above-named party in all matters in the above-captioned case or proceeding. This request is based on the declaration of the attorney seeking to appear pro hac vice.

1/16/2026	Edward Halealoha Ayau	Edward Halealoha Ayau
Dated:	Signature*	(Print name if original signature)

*If this motion is being signed by local counsel on behalf of the applicant, the signature constitutes consent to the designation as associate counsel; otherwise such consent shall be filed separately.

UNITED STATES DISTRICT COURT

for the
District of Hawaii

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,

Plaintiff

v.

TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,

Defendant

Case No. 1:25-cv-450-MWJS-RT

DECLARATION OF COUNSEL
(Attach to Motion to Appear Pro Hac Vice.)

Name of Declarant:	Natali Segovia

I am not a resident of the District of Hawaii, am not regularly employed in the District of Hawaii, and am not regularly engaged in business, professional or law-related activities in the District of Hawaii, and that:

1. The city and state of my residence and office address is:
   I reside in Phoenix, Arizona.
   My office address is: WATER PROTECTOR LEGAL COLLECTIVE
   P.O. Box 37065, Albuquerque, NM 87176

2. I have been admitted to practice in the following courts on the dates noted:
   Superior Court of Arizona (2017), Gila River Indian Community Tribal Court (2017)
   Ak Chin Indian Community Tribal Court (2017), USDC Arizona (2019), 2d Circuit (2020),
   8th Circuit (2020), USDC North Dakota (2020), USDC New Mexico (2021), USDC Hawaii (2021), Supreme Court of the United States (2024), USDC D.C. (2025)

3. I am in good standing and eligible to practice in the following courts (declarant may state "All of the courts identified in paragraph 2"):

   All of the courts identified in paragraph 2.

4. I (a) am not currently involved in disciplinary proceedings before any state bar, federal bar, or any equivalent; (b) have not in the past 10 years been suspended, disbarred, or otherwise subject to other disciplinary proceeding before any state bar, federal bar, or its equivalent; (c) have not been denied admission pro hac vice by any court or agency in the past 10 years; and (d) have not been the subject of a criminal investigation known to the attorney or a criminal prosecution or conviction in any court in the past ten (10) years.

   I certify that I am in good standing and not involved in any disciplinary actions identified in (a)-(d) above.

5. If I am concurrently making or have made within the preceding year a motion to appear pro hac vice in a case or proceeding in the District of Hawaii, the title and number of each matter is stated below, together with the date of the motion and whether the motion was granted.
Not applicable.

6. I designate the following to serve as associate counsel who is a member in good standing of the bar of the United States District Court for the District of Hawaii and maintains an office in this district, with the address, telephone and fax numbers, and e-mail address noted:
Edward Halealoha Ayau, Esq. HI 5013)
LAW OFFICE OF EDWARD HALEALOHA AYAU
2 Nanea Street Hilo, HI 96720
(808) 646-9015
halealohahapai64@gmail.com

7. CM/ECF: ***Filing documents electronically/Receiving e-mail notification.***

(●) Full participation. I am requesting a waiver of the required CM/ECF training. I am a registered user of CM/ECF in the following Bankruptcy and/or District Court(s):
USDC Arizona, USDC New Mexico, USDC North Dakota, USDC D.C.

( ) Full participation. Computer Based Training (CBT) completed. I have completed CBT modules 1 and 2 currently available on the USDC District of Hawaii website at: www.hid.uscourts.gov

a. I will abide by all orders, rules, and administrative procedures governing the use of my login and password and the electronic filing of documents in the CM/ECF system of the United States District Court for the District of Hawaii.

b. Use of my CM/ECF User login and password constitutes my signature on an electronically filed document for all purposes and shall have the same force and effect as if I had affixed my signature on a paper copy of the document being filed (full participation registrants only).

c. I may authorize one or more employees or office staff members to use my login and password for the electronic filing of a document. However, such use constitutes my signature on the electronically filed document. I will not knowingly permit use of my login and password by anyone not so authorized, I shall take steps to prevent such unauthorized use, and I shall be fully responsible for all use of the login and password whether authorized or unauthorized. If authorization to use a login and password is withdrawn (e.g., when a staff member leaves employment) or if unauthorized use of a login and password is suspected, I shall select and activate a new password for use in the CM/ECF system. I also shall immediately notify the court upon learning of any unauthorized use. I understand that failure to change the password and notify the court may result in sanctions (full participation registrants only).

d. This registration constitutes my waiver of service of a paper copy of a notice and a request in writing that, instead of notice by mail, notice be sent to me by electronic transmission through the court's CM/ECF system. This also constitutes my consent in writing to accept service of documents by e-mail through the CM/ECF system. I will maintain an active e-mail account for notice and service by electronic transmission, and will keep such e-mail account information current in my CM/ECF User account.

I declare under penalty of perjury that the foregoing is true and correct. (Attach any additional pages if any further explanation is needed)

Dated: 1/16/2026

Natali Segovia
Signature

CONSENT OF LOCAL COUNSEL
(Local counsel may sign below if consent is not recorded elsewhere.)

Dated: 1/16/2026

Edward Halealoha Ayau
Signature

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P.,	)	Case. No. 1:25-cv-450-MWJS-RT
Plaintiff,	)	ORDER GRANTING MOTION TO APPEAR PRO HAC VICE AS TO Natali Segovia
vs.	)	
TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS,	)	
Defendant.	)	

ORDER GRANTING MOTION
TO APPEAR PRO HAC VICE

The Court GRANTS the Motion of Natali Segovia to Appear Pro Hac Vice.

Name of Attorney:	Natali Segovia
Firm Name:	Water Protector Legal Collective / International Association of Democr.
Firm Address:	P.O. Box 37053, Albuquerque, NM 87176
Attorney CM/ECF Primary email address:	nsegovia@waterprotectorlegal.org
Firm Telephone:	602-796-7034
Party Represented	Non-Party Intervenor Council of Regency of the Hawaiian Kingdom

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, _____

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Counsel for Non-Party Intervenor Council of Regency of the Hawaiian Kingdom

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STUDENTS FOR FAIR ADMISSIONS; I.P., by and through her next friend and mother, B.P.; and B.P., *Plaintiffs,* v. TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP d/b/a KAMEHAMEHA SCHOOLS, *Defendant.*	Case No. 1:25-cv-450-MWJS-RT **CERTIFICATE OF SERVICE**

1. I hereby certify that on January 16, 2026, the following documents were electronically served upon the attorney(s) listed below via PACER electronic service, pursuant to Rule 5(b) Fed. R. Civ. P, as indicated:

Document(s) Served

a. Non-Party Intervenor Hawaiian Kingdom's Motion to Intervene

b. Non-Party Intervenor Hawaiian Kingdom's Memorandum of Law in Support of Motion to Intervene

c. Exhibit A - Non-Party Intervenor Hawaiian Kingdom's Proposed 12(b)(6) Motion to Dismiss

d. Exhibit B - Matthew Craven, The Continuity of the Hawaiian Kingdom as a State Under International Law, Ch. 3, 126–149 (2020)

e. Exhibit C – Dr. David Keanu Sai, The Royal Commission of Inquiry

f. Exhibit D – Federico Lenzerini, Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom, Hawaiian Journal of Law & Politics: Vol 3, (Spring 2021)

g. Exhibit E - William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom"

h. Exhibit F – Dr. 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 (2024)

i. Exhibit G - Proclamation of the Council of Regency of the Hawaiian Kingdom, October 10, 2014

2. Persons Served:

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Dated this 16th of January, 2026.

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