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MEMORANDUM ON THE ARTICLES OF STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS AND THE UNLAWFUL AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM

The Articles of State Responsibility for Internationally Wrongful Acts ("ASR") was completed by the United Nations International Law Commission ("ILC") in 2001.[1] It was initially called Draft Articles of State Responsibility for Internationally Wrongful Acts, but as Mirka Möldner explains, "because of the wide acceptance that the ASR have met and their wide reflection of customary international law, it seems appropriate to no longer speak of Draft Articles on State Responsibility but solely of Articles on State Responsibility."[2]

The ILC began its work on the ASR in 1956 with more than thirty reports and the work of five Special Rapporteurs. The last Special Rapporteur to complete the ASR was James Crawford who also served as the President of the Arbitral Tribunal in *Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration ("PCA") from 1999-2001. The ASR sets out certain general principles:

a) that every internationally wrongful act of a State entails its international responsibility (Article 1);
b) that an internationally wrongful act exists when conduct consisting of an act or omission is attributable to a State and constitutes a breach of an international obligation owed by that State (Article 2); and
c) that characterization of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by the responsible State's internal law (Article 3).

[1] GAOR 56th Sess., Suppl. 10, Doc. A/56/10 (2001).
[2] Mirka Möldner, "Responsibility of International Organizations—Introducing the ILC's DARIO," 16 *Max Planck Yearbook of United Nations* 281, 284, n. 1 (2012).

These principles are well established under customary international law. Article 3 goes back to the *Alabama claims* arbitration where a State cannot rely on its internal law as an excuse for not performing its international obligations.

Part Two of the ASR covers the core legal consequences of an internationally wrongful act that obliges the responsible State to immediately cease the wrongful conduct (Article 30), and to make full reparation for the injury caused by the internationally wrongful act (Article 31). When there is a serious breach of a peremptory norm by an internationally wrongful act, it may entail further consequences for both the responsible State and other States. The Permanent Court of International Justice, in the *Phosphates in Morocco* case, affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States."[3] This immediate nature of international responsibility also applies to States who are made aware of a serious breach of a peremptory norm committed by another State whereby no "State shall recognize as lawful a situation created by a serious breach […] nor render aid or assistance in maintaining that situation" (Article 41(2)). The term 'shall' is a word of command that denotes an immediate obligation.

Chapter III Articles of the ASR apply to "the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law" (Article 40(1)). Only serious breaches, such as those involving "a gross or systematic failure by the responsible State to fulfil the obligation" (Article 40(2)) imposed by a peremptory norm are covered. Such breaches entail the additional consequences set out in Article 41 where States are obliged not to recognize as lawful a situation created by a serious breach of a peremptory norm (Article 41(2)). This obligation applies to all States, which includes the State responsible for the breach of a peremptory norm. The principle of the territorial integrity of a State is considered a peremptory norm in international law, which means that no State can violate or derogate from.

According to Crawford, in "international law, there are rules whose purpose is to prevent actual damage to the state or its nationals."[4] These rules are recognized as peremptory norms—*jus cogens*. One of these peremptory norms was clearly stated by the Permanent Court of International Justice, in *The Lotus* case, which is the principle of a State's territorial integrity. On this subject, the Court explained:

> 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

[3] *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28. See also S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and *id*., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.
[4] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," 96 *American Journal of International Law* 874, 878 (2002).

> cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[5]

United States Violation of the Hawaiian Kingdom's Territorial Integrity

On 18 December 1893, President Cleveland delivered a *manifesto*[6] to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government by U.S. troops. He stated that by orders of the U.S. resident Minister John Stevens, on 16 January 1893, a "detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men upwards of 160, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[7]

President Grover Cleveland stated that this "military demonstration upon the soil of Honolulu was of itself an act of war."[8] He also stated that the overthrow of the Hawaiian Government the following day, on January 17th, was also by an "act of war," and that the insurgents calling themselves the provisional government, "owes its existence to an armed invasion by the United States."[9] Therefore, the insurgents were never a *de facto* government but rather a puppet government created by the United States. "Puppet governments," according to Krystyna Marek, "are organs of the occupant and, as such form part of his legal order."[10] President Cleveland concluded:

> Thus it appears that Hawaii was taken possession of by the 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 on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.[11]

Through executive mediation between Queen Lili'uokalani and the new U.S. Minister to the Hawaiian Kingdom, Albert Willis, that lasted from 13 November through 18 December, an agreement of peace was reached at the U.S. Legation in Honolulu.[12] According to the executive

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[5] *The Case of the S.S. Lotus* (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).
[6] *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).
[7] 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).
[8] *Id*.
[9] *Id*., 454.
[10] Krystyna Marek, Identity and Continuity of States in Public International Law 114 (1968).
[11] Executive Documents, 452.
[12] *Id*., 1269 (online at https://hawaiiankingdom.org/pdf/EA_2(HI%20Claim).pdf).

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. Consequently, the insurgents remained fugitives of Hawaiian Kingdom laws.

In 1894, the puppet government changed its name from the provisional government to the so-called Republic of Hawai'i that pursued annexation by the United States. Article 32 of its so-called constitution states, "[t]he President, with the approval of the Cabinet, is hereby expressly authorized and empowered to make a Treaty of Political or Commercial Union between the Republic of Hawaii and the United States of America, subject to ratification of the Senate." A treaty between the puppet government and the United States never came to fruition. Even if a treaty did come into fruition, according Marek, it is not a "genuine international agreement[] [because] such agreement[] [is] merely decrees of the occupant disguised as [an] agreement[] which the occupant in fact concludes with himself. Their measures and laws are those of the occupant."[13]

At the height of the Spanish-American War and under the guise of an internal law called a Congressional joint resolution of annexation, U.S. troops physically reoccupied the Hawaiian Kingdom on 12 August 1898. According to the U.S. Supreme Court, though "the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States."[14] Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and "they protested annexation occurring without the consent of the governed."[15] The Supreme Court's statement that 'the islands [were] ceded with appropriate ceremonies to a representative of the United States' is false and misleading. There was no treaty of cession whereby the Hawaiian Islands were ceded to the United States.

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."[16] A disguised annexation is also a serious breach of a peremptory norm. In 1988, the U.S. Department of Justice's Office of Legal Counsel ("OLC"), opined, it is "unclear which constitutional power

[13] Marek, 114.
[14] Territory of Hawaii v. Mankichi, 190 U.S. 197, 212 (1903).
[15] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i 322 (2016). Coffman initially published this book in 1998 titled Nation Within: The Story of the American Annexation of the Nation of Hawai'i. Coffman explained, "In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation," at xvi.
[16] Marek, 110.

Congress exercised when it acquired Hawaii by joint resolution."[17] The OLC concluded that only the President, and not the Congress, possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[18]

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[19] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[20]

That the territorial sea was to be extended from three to twelve miles, under the United Nations Law of the Sea Convention, and since the United States is not a Contracting State, the OLC needed to investigate whether this could be accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the 3-mile limit. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[21]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. […] Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[22] Professor Willoughby also stated that the "incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is […] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[23]

In 1900, the Congress renamed its puppet—the Republic of Hawai'i to the Territory of Hawai'i under *An Act To provide a government for the Territory of Hawaii*.[24] Further usurping Hawaiian

[17] Douglas Kmiec, "Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238, 252 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).
[18] *Id.*, 242.
[19] *Id.*
[20] *Id.*, 262.
[21] *The Apollon*, 22 U.S. 362, 370 (1824).
[22] Kmiec, 252.
[23] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[24] 31 Stat. 141 (1900).

sovereignty, the Congress, in 1959, renamed the Territory of Hawai‘i to the State of Hawai‘i under *An Act To provide for the admission of the State of Hawaii into the Union*.[25] These Congressional laws, which have no extraterritorial effect, did not transform the puppet regime into a military government recognizable under the rules of *jus in bello*. The maintenance of the puppet also stands in direct violation of customary international law in 1893, which were later codified under the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. The governmental infrastructure of the Hawaiian Kingdom continued as the governmental infrastructure of the current State of Hawai‘i.

This extraterritorial application of American internal laws is not only in violation of a peremptory norm but is also prohibited by the rules of *jus in bello*. This subject is fully treated by Eyal Benvenisti, who explains:

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 [of the 1907 Hague Regulations] could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[26]

As an occupying State, the United States was obligated to establish a military government, whose purpose would be to provisionally administer the laws of the occupied State—the Hawaiian Kingdom—until a treaty of peace, or an agreement to terminate the occupation, has been concluded. According to U.S. Army regulations, "[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory."[27] "By military government," according to William Winthrop, "is meant that dominion exercised in war by a belligerent power over territory of the [State] invaded and occupied by him and over the inhabitants thereof."[28] In his dissenting opinion in *Ex parte Miligan*, U.S. Supreme Court Chief Justice Chase explained:

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

[25] 73 Stat. 4 (1959).
[26] Eyal Benvenisti, The International Law of Occupation 19 (1993).
[27] United States Army Field Manual 27-10, sec. 362 (1956).
[28] William Winthrop, *Military Law and Precedents* 799 (1920).

> superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President.[29]

Since 1893, there has been no military government, established by the United States under the rules of *jus in bello*, to administer the laws of the Hawaiian Kingdom as it stood prior to the overthrow of its government by an invasion of U.S. Marines.[30] Instead, what occurred was the unlawful seizure of the apparatus of Hawaiian governance, its infrastructure, and its properties—both real and personal. This was a theft of an independent State's self-government.

United States Misrepresents Hawai'i before the United Nations General Assembly

On 16 August 1946, the United States further misrepresented its relationship with Hawai'i when its *acting* Ambassador, Herschel Johnson, to the United Nations identified Hawai'i as a non-self-governing territory under the administration of the United States since 1898. Under Article 73(e) of the United Nations Charter, Hawai'i was falsely reported as a non-self-governing territory.[31] This fundamental flaw means that Hawai'i should have never been placed on this list in the first place because Hawai'i already achieved self-governance as a sovereign independent State beginning in 1843 and was acknowledged by the Permanent Court of Arbitration's Arbitral Tribunal in its 2001 Award in *Larsen v. Hawaiian Kingdom* where the arbitral tribunal stated, "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."[32]

Furthermore, this was also noted by Matthew Craven, who stated, "[a]n 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."[33] Judge Crawford also noted this in the second edition of his seminal book *The Creation of States in International Law*, where he stated, "Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States."[34]

To conceal the United States' prolonged occupation of a sovereign and independent State for military purposes, Hawai'i was deliberately treated as a non-self-governing territory or colonial possession before the United Nations. The reporting of Hawai'i as a non-self-governing territory

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[29] *Ex parte Miligan*, 71 U.S. 2, 141-142 (1866).
[30] U.S. President Cleveland's Message to the Congress (December 18, 1893) (online at http://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).
[31] Transmission of Information under Article 73e of the Charter, December 14, 1946, United Nations General Assembly Resolution 66(I).
[32] Larsen v. Hawaiian Kingdom, 581.
[33] Craven, 144.
[34] Crawford, 623, n. 83.

also coincided with the United States establishment of the military headquarters for the Pacific Command on the Island of O'ahu, which was renamed to the Indo-Pacific Combatant Command in 2018. Thus, if the United Nations had been aware of Hawai'i's continued legal status as an occupied State, Member States of the United Nations would have prevented the United States from maintaining their military presence in Hawai'i.

The initial Article 73(e) list was comprised of non-sovereign territories, under the control of sovereign States, such as Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and the United States. In addition to Hawai'i, the United States also reported its territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands as non-self-governing territories. The U.N. General Assembly, in a resolution entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter," defined self-governance in three forms: a sovereign independent State; free association with an independent State; or integration with an independent State. [35] As such, none of the territories on the list of non-self-governing territories, with the exception of Hawai'i, were recognized independent States.

To erase the history of the United States' unlawful overthrow of the Hawaiian government in 1893 and the occupation that followed, the United States reported to the United Nations Secretary General that "Hawaii has been administered by the United States since 1898. As early as 1900, Congress passed an Organic Act, establishing Hawaii as an incorporated territory in which the Constitution and laws of the United States, which were not locally inapplicable, would have full force and effect."[36] This extraterritorial application of American municipal laws is not only in violation of *The Lotus* case principle, but is also prohibited by the rules of *jus in bello*. The imposition of American laws in Hawai'i as an Occupied State is also the war crime of usurpation of sovereignty during occupation.[37]

Despite these past misrepresentations of Hawai'i, before the United Nations by the United States, two facts remain. First, inclusion of Hawai'i on the United Nations list of non-self-governing territories was an inaccurate depiction of an independent State whose rights had been violated; and, second, Hawai'i remains a sovereign and independent State despite the illegal overthrow of its government in 1893 and the prolonged occupation of its territory for military purposes that ensued thereafter.

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[35] Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter, December 15, 1960, United Nations Resolution 1541 (XV).
[36] Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America, Document no. A/4226, Annex 1, 2 (24 Sep. 1959).
[37] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Hawaiian Journal of Law and Politics* 334, 340 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).

Internationally Wrongful Acts Committed by the United States

There are four internationally wrongful acts committed by the United States against the Hawaiian Kingdom. The first is the act of violating the territorial integrity of the Hawaiian Kingdom since 1893, the second is the act—by omission—to establish a direct administration of the laws of the Hawaiian Kingdom by a military government in 1893, the third is the act of disguising the annexation in 1898 by an internal law, and the fourth is the act of falsely reporting to the United Nations in 1946 that Hawai'i was a non-self-governing territory. These acts are attributable to the United States and 'constitutes a breach of an obligation owed by that State' (Article 2). The 'characterization of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by a State's internal law (Article 3).' In other words, the United States is precluded from characterizing its acts as lawful under its internal laws.

Notwithstanding the absence of the Hawaiian Government from 1893 to 1997, States had an *erga omnes* obligation for the United States breach of peremptory norms. In the *Barcelona Traction* case, the International Court of Justice said that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[38]

Under Article 48(2) of the ASR, all States are entitled to "claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition […]; and (b) performance of the obligation of reparation." Furthermore, "[s]hould a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; [and] (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specifically affected by the breach."[39] Article 48(2) of the ASR should have precluded the United States from reporting Hawai'i as a non-self-governing territory under Article 73(ed) of the Charter of the United Nations.

What prevented Article 48(2) from arising was the deliberate concealment by the United States of the Hawaiian Kingdom's continued existence as a State, under customary international law, that

[38] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (1962-1970), Second Phase, Judgment, I.C.J Reports 1970, p. 32, para. 33; and see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).
[39] Institut de Droit International, Resolution, "Obligations *erga omnes* in international law," Article 5 (August 27, 2005) (online at https://www.idi-iil.org/app/uploads/2019/06/Annexe-1bis-Compilation-Resolutions-EN.pdf).

only lasted until arbitral proceedings were instituted on 8 November 1999 at the Permanent Court of Arbitration, in *Larsen v. Hawaiian Kingdom* where the Secretariat recognized the continued existence of the Hawaiian Kingdom as a State since the nineteenth century for purposes of its institutional jurisdiction under Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes that the United States, being a Member State of the Permanent Court of Arbitration, did not object. Since the *Larsen* case and the recent publication in 2024 by Oxford University Press of *Unconquered States: Non-European Powers in the Imperial Age* with a chapter titled "Hawai'i's Sovereignty and Survival in the Age of Empire,"[40] it is now 'widely acknowledged [of the United States] grave breach of an *erga omnes* obligation occur[red]' that affects all States.

United States Acknowledges the Hawaiian Kingdom's Continued Existence

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands, and within three generations, the national consciousness of the Hawaiian Kingdom was obliterated.[41] Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals, the Hawaiian government, in 1997, was restored in situ by an *acting* Council of Regency under Hawaiian constitutional law and the doctrine of necessity.[42] Under Hawaiian law, the *acting* Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917.

There was no legal requirement for the *acting* Council of Regency, as the government of the Hawaiian Kingdom, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to obtain recognition from the United States or any other State. The United States' recognition of the Hawaiian Kingdom as an independent State in the nineteenth century, was also the recognition of its government—a Constitutional Monarchy. Successors in office to King Kamehameha III, who at the time of the 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 Lili'uokalani in 1891, and the *acting* Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing

[40] 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) (online at https://www2.hawaii.edu/~anu/pdf/Hawaii_Sovereignty_and_Survival_(Sai).pdf).
[41] David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 114 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[42] David Keanu Sai, The Royal Commission of Inquiry, 18-23; see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).

State.[43] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, "[w]here 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."[44]

Before the arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, was formed on 9 June 2000, Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with the undersigned, as lead 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 undersigned, Larsen's counsel, Mrs. Ninia Parks, and John Crook from the U.S. Department of State.

The meeting was reduced to a formal note and mailed to Mr. Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Council of Regency to the PCA Secretariat for record that the United States was invited to join in the arbitral proceedings.[45] The note was signed off by the undersigned as "Acting Minister of Interior and Agent for the Hawaiian Kingdom." 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 undersigned that the United States, through its embassy in The Hague, notified the PCA, by note verbale, that the

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[43] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[44] *Restatement (Third)*, §203, comment c.
[45] 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).

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."[46] 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."[47]

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 an exchange of notes between the PCA and the Hawaiian Kingdom. According to Johst Wilmanns, "the 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."[48]

The United States' request to have access to 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. 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."[49] 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.

The Hawaiian Kingdom's Invocation of Responsibility by an Injured State

On 11 October 2021, the Hawaiian Foreign Ministry notified the permanent missions of the United Nations General Assembly, by note verbale, of the Hawaiian Kingdom's invocation of responsibility by an injured State. The note verbale stated:

> The Foreign Ministry of the Hawaiian Kingdom presents its compliments to all the Diplomatic Missions accredited to the United Nations in New York City and has the honor

[46] Johst Wilmanns, "Note," 9 *Encyclopedia of Public International Law* 287 (1986).
[47] *Id*.
[48] J.L. Weinstein, "Exchange of Notes," 20 *British Yearbook of International Law* 205, 207 (1952).
[49] 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).

to inform the latter that the Government of the Hawaiian Kingdom notifies all Member States of the United Nations that they have and continue to commit internationally wrongful acts against the Hawaiian Kingdom by continuing to recognize as lawful the United States of America's presence in the Hawaiian Islands, and not as a belligerent State that has not complied with international humanitarian law since 16 January 1893 when it unlawfully committed acts of war in the invasion and subsequent overthrow of the Government of the Hawaiian Kingdom. In addition to violating international humanitarian law, the Member States of Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Switzerland, Sweden, and the United States of America are in violation of their treaties with the Hawaiian Kingdom. The Government of the Hawaiian Kingdom calls upon the United States of America to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Kingdom since 17 January 1893.

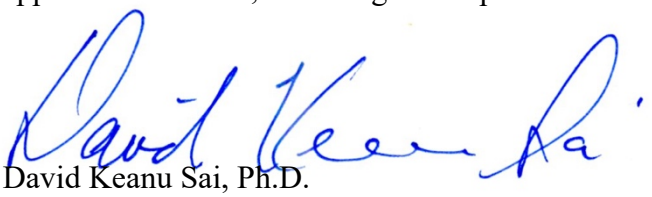
This Note Verbale serves as a notice of claim by an injured State, pursuant to Article 43 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), invoking the responsibility of all Member States of the United Nations who are responsible for the internationally wrongful act of recognizing the United States presence in the Hawaiian Kingdom as lawful to cease that act pursuant Article 30(a), and to offer appropriate assurances and guarantees of non-repetition pursuant to Article 30(b). The form of reparation under Article 31 shall take place in accordance with the provisions of Part Two—Content of the International Responsibility of a State(s).

The Hawaiian Foreign Ministry wishes to point out that the Contracting States to the 1907 Hague Convention for the Pacific Settlement of International Disputes, who are also member States of the United Nations, with the exception of Palestine and Kosovo, were aware of the Larsen v. Hawaiian Kingdom arbitral proceedings instituted on 8 November 1999, PCA Case no. 1999-01, whereby the Hawaiian Kingdom was acknowledged as a non-Contracting State to the 1907 Convention pursuant to Article 47, and the Council of Regency as its restored government. At the center of the dispute was the unlawful imposition of American municipal laws in violation of international humanitarian law.

As regards the factual circumstances of the United States of America's invasion of the Hawaiian Kingdom, an internationally recognized State since the nineteenth century, the unlawful overthrow of the Government of the Hawaiian Kingdom, and the prolonged belligerent occupation of the Hawaiian Kingdom since 17 January 1893, the Hawaiian Foreign Ministry directs the attention of the Diplomatic Missions to the Royal Commission of Inquiry's publication—Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom (2020). The ebook can be downloaded online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf. Authors include H.E. Dr. David Keanu Sai, Ph.D., Hawaiian Minister of Foreign Affairs ad interim, Professor Matthew Craven, University of London, SOAS, Professor William Schabas, Middlesex University London, and Professor Federico Lenzerini, University of

Sienna, Italy. Reports of the Royal Commission of Inquiry and treaties can be accessed online at https://hawaiiankingdom.org/royal-commission.shtml.

In its judgment on preliminary objections raised by Armenia in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, the Court noted that, according to the customary rules on State responsibility as reflected in Article 42 of the ASR, "when a State seeks to invoke the responsibility of another State, it must show that the responsible State owes the obligation allegedly breached to the claimant State."[50] According to the International Law Commission, in its comments of the ASR, "[u]nder article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State."[51]



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Minister of Foreign Affairs *ad interim*

[50] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Judgment on preliminary objections raised by Armenia, 12 November 2024, para. 52.
[51] International Law Commission, Draft articles of Responsibility of States for Internationally Wrongful Acts, with commentaries 115 (2001).