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August 15, 2024

Colonel Wesley K. Kawakami
Commander, 29th Infantry Brigade
Email: wesley.k.kawakami.mil@army.mil

Via electronic mail

Re: Request for a legal opinion from the Attorney General Anne E. Lopez

Colonel Kawakami:

As Title 32 troops, the Army National Guard can serve under the Governor as their Commander in Chief, or, when activated for deployment to a foreign country, the President as their Commander in Chief. There is never a situation where there are two Commander in Chiefs that the Army National Guard reports to. In other words, unless activated by the President, if the Army National Guard is within the United States, then it reports to the Governor of the State they reside. If the Army National Guard is within the territory of an Occupied State, then the Commander in Chief is the President.

In my letter to Brigadier General Stephen Logan dated August 11, 2024, I brought to his attention Hawai'i Revised Statutes §28-3, "The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department." A legal opinion is "a statement of advice by an expert on a professional matter." While you are not the head of the Department of Defense, you are implicated by the conduct of its head, Major General Kenneth Hara, in the performance of a military duty in an Occupied State. Enclosed is a legal opinion dated March 17, 2014, that was requested by the head of the Department of Hawaiian Home Lands.

In my letter to BG Logan, I brought to his attention that the legal existence of the Hawaiian Kingdom, as a State, has become a precedence in Hawai‘i judicial proceedings since 1994. This precedence places the burden on defendants, who were arguing the Hawaiian Kingdom continues to exist, that they must, according to the Hawai‘i Supreme Court, in *State of Hawai‘i v. Armitage*, “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.’”[1]

Thus, since I provided two legal opinions that ‘demonstrate a factual or legal basis’ to conclude that the Hawaiian Kingdom does exist ‘as a state in accordance with recognized attributes of a state’s sovereign nature,’ the State of Hawai‘i Attorney General Anne E. Lopez must provide a legal opinion that refutes these legal opinions. If the Attorney General is confident that the State of Hawai‘i is a lawful entity and the Hawaiian Kingdom ceases to exist, then she should have no problem providing a legal opinion that explains it. This legal opinion would determine whether your Commander in Chief is the Governor or the President.

According to §28-3, only the head of the Department of Defense can request a legal opinion, but since you have been implicated by the inaction of MG Hara to make that initial request, you can make a formal request, as the Commander of the 29th Infantry Brigade, of MG Hara, to make that initial request. If you make this request to MG Hara prior to 12 noon on August 19, 2024, then you will not be derelict in your military duty, because the Royal Commission of Inquiry will then give time for MG Hara to make a formal request for a legal opinion from the Attorney General and give time for the legal opinion to be completed.

However, should you fail to make the request of MG Hara for a legal opinion from the Attorney General by 12 noon on August 19th, you will be derelict in your duty and be the subject of a war criminal report by the RCI for the war crime by omission. For your consideration, I have enclosed a sample letter to provide to MG Hara.

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

cc: Major General Kenneth Hara, Adjutant General
(kenneth.s.hara.mil@army.mil)

[1] *State of Hawai‘i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).

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Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry
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Enclosure “1”

NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
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STATE OF HAWAII
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March 17, 2014

The Honorable Jobie M.K. Masagatani
Chairman, Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii
91-5420 Kapolei Parkway
Kapolei, Hawaii 96707

Dear Chairman Masagatani:

Re: Management and Disposition of Geothermal Resources on DHHL Lands

This letter responds to your request for an opinion regarding the management and disposition of geothermal resources on lands controlled by the Department of Hawaiian Home Lands (DHHL).

Your inquiry arises from proposed legislation that would allocate to DHHL a portion of any royalties received by the State of Hawaii from geothermal resource development on "available lands."[1] In considering the proposed legislation, questions arose as to whether DHHL is entitled to all royalties from geothermal developments on "available lands," and whether DHHL has the authority to manage and dispose of

[1] The terms "Hawaiian home lands," "DHHL lands," "lands controlled by DHHL," and "its lands" are used interchangeably throughout this opinion with the term "available lands," which consist of all the lands described in section 203 of the Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, ch. 42, 42 Stat. 108 (hereinafter referred to as the HHCA), and all other lands subsequently designated by statute to constitute "available lands."

geothermal resources on "available lands." We address these issues by answering the following questions.

I. QUESTIONS PRESENTED

A. Is DHHL entitled to 100 percent of royalties from geothermal projects on all lands controlled by DHHL?

B. Is DHHL, as opposed to the Board of Land and Natural Resources (BLNR), authorized to manage and dispose of geothermal resources on DHHL lands?

II. SHORT ANSWERS

A. Yes. Section 4 of the Admission Act[2] expressly directs that "all proceeds and income" from Hawaiian home lands must be used in carrying out the provisions of the HHCA. Article XII, sections 1 and 3, of the Hawaii Constitution similarly require all proceeds and income from Hawaiian home lands to be used in accordance with the terms of the HHCA. Royalties derived from geothermal resources development constitute "proceeds and income."

B. Yes. Section 204 of the HHCA provides that all Hawaiian home lands are to be controlled by DHHL and requires such lands to be used and disposed of only "in accordance with the provisions of this Act." And although BLNR has been designated by statute to regulate the use of natural resources on lands owned by the State, section 206 of the HHCA provides that the "powers and duties of the . . . board of land and natural resources shall not extend to lands having the status of Hawaiian home lands" (emphasis added). DHHL can and should consider, however, entering into an agreement with BLNR to have BLNR manage the technical aspects of geothermal resource development on "available lands" since BLNR has the necessary expertise in that area.

[2] Act of March 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat 4.

III. DISCUSSION

A. State Constitutional and Statutory Provisions Regarding Geothermal Resources on State Lands

Before addressing the federal and state laws specific to DHHL, it is necessary to discuss the constitutional and statutory provisions relating to natural resources on state lands generally. Article XI, sections 1 and 2, of the Hawaii Constitution direct the State to conserve and protect Hawaii's natural resources, including "minerals and energy sources." Section 1 provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

(Emphasis added).

Section 182-1, Hawaii Revised Statutes (HRS), defines "minerals" to include "all geothermal resources." Article XI, section 2, of the Hawaii Constitution provides:

> The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law . . . .

BLNR's general control over the State's geothermal resources is statutory in nature. Section 171-3, HRS, confers upon BLNR the power to manage, administer, and exercise

control over the State's interest in minerals. Section 182-2(a), HRS, authorizes BLNR to dispose of the State's reservation of mineral resources under state lands:

> All minerals in, on, or under state lands or lands which hereafter become state lands are reserved to the State; provided that the board of land and natural resources may release, cancel, or waive the reservation whenever it deems the land use, other than mining, is of greater benefit to the State as provided in section 182-4.

Section 182-1, HRS, defines "state lands" as "all public and other lands owned or in possession, use and control of the then Territory of Hawaii or the State of Hawaii, or any of its agencies and this chapter shall apply thereto."

Section 182-4(a), HRS, further authorizes BLNR to issue mining leases by public auction for minerals discovered on state lands. Similarly, section 182-5, HRS, provides that BLNR may issue mining leases by public auction for minerals on "reserved lands," which is defined by section 182-1, HRS, as "those lands owned or leased by any person in which the State or its predecessors in interest has reserved to itself expressly or by implication the minerals or right to mine minerals, or both."

Sections 182-7(c) and 182-18, HRS, deal with geothermal resources specifically. Section 182-7(c), HRS, requires that thirty percent of royalties from geothermal resource development received by the State be paid to the county in which the geothermal resources are located:

> Any other law to the contrary notwithstanding, thirty per cent of all royalties received by the State from geothermal resources shall be paid to the county in which mining operations covered under a state geothermal resource mining lease are situated.

Section 182-18, HRS, requires BLNR to promulgate administrative rules fixing payment of royalties to the State from geothermal resource development at a rate that

"encourages initial and continued production of such resources.

For the reasons set forth below, however, these state constitutional and statutory provisions are qualified, and are not applicable to geothermal resources on "available lands."

B. Federal and State Laws Relating to DHHL Lands

As a compact with the United States upon admission of Hawaii as a state, Hawaii accepted the responsibility to manage and dispose of the Hawaiian home lands under the terms of the HHCA, and adopted the HHCA as a provision of the Hawaii Constitution. See section 4 of the Admission Act. The HHCA was made a part of the state constitution in article XII, sections 1 and 3, of the Hawaii Constitution.

The Admission Act further provides that "all proceeds and income from the 'available lands', as defined by [the HHCA], shall be used only in carrying out the provisions of [the HHCA]." Id. (bracketed material added). Section 5 of the Admission Act transferred title of all "available lands" to the State.

The Hawaii Constitution mirrors the Admission Act's mandate that all proceeds from the "available lands" be used in furtherance of the HHCA in article XII, section 1:

> The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act.

Article XII, section 3, of the Hawaii Constitution mirrors the provisions of section 4 of the Admission Act and reiterates that all "proceeds and income" from "available lands" must be used only in carrying out the terms and provisions of the HHCA.

Section 204(a) of the HHCA provides that all "available lands" shall "immediately assume the status of Hawaiian home lands and be under the control of the department to be used

and disposed of in accordance with the provisions of this Act" (emphasis added).

Although the Admission Act conveyed title to Hawaiian home lands to the State, section 206 of the HHCA specifically provides that the "powers and duties of the governor and the board of land and natural resources shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title" (emphasis added).[3]

C. DHHL Is Entitled to 100 Percent of Royalties from Geothermal Resource Development on its Lands

There is an apparent conflict between section 182-7(c), HRS, which allocates a percentage of geothermal royalties to the counties, and the remainder presumably to the State (even if the development is on DHHL's lands), and section 4 of the Admission Act and article XII, sections 1 and 3, of the Hawaii Constitution, which require that all proceeds and income from Hawaiian home lands be used in accordance with the terms of the HHCA.

Under article VI, clause 2, of the United States Constitution, also known as the Supremacy Clause, a state law is preempted to the extent that it actually conflicts with any federal law. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983). Section 182-7(c), HRS, directly conflicts with section 4 of the Admission Act because it allocates royalties from geothermal developments on Hawaiian home lands to entities other than DHHL.

Similarly, when a state constitutional provision conflicts with a state statute, the constitutional provision will control. See 16 C.J.S. Constitutional Law § 107 (2014). Here, to the extent that section 182-7(c), HRS, allocates royalties to entities other than DHHL for geothermal

[3] The only unrestricted role for BLNR in the HHCA is in section 204, which provides that "available lands" under lease by the Territory of Hawaii shall not assume the status of Hawaiian home lands until such lease expires or BLNR withdraws those lands from the operation of the lease.

developments on Hawaiian home lands, it conflicts with article XII, sections 1 and 3, of the Hawaii Constitution.

Accordingly, allocating royalties from geothermal developments on DHHL lands to BLNR or the counties flatly violates section 4 of the Admission Act and article XII, sections 1 and 3, of the Hawaii Constitution. It is clear from the Admission Act and the Hawaii Constitution that the State has an obligation to manage such resources on Hawaiian home lands for the benefit of native Hawaiians pursuant to the HHCA. Allocation of royalties from geothermal developments on DHHL lands to entities other than DHHL would be violations of both the Admission Act and the Hawaii Constitution because those proceeds would not be available to DHHL to carry out the terms and conditions of the HHCA.

D. Only DHHL Is Authorized to Manage and Dispose of Geothermal Resources on its Lands

Under the terms of the HHCA, DHHL has sole authority to manage and dispose of geothermal resources on or under "available lands." Neither the equal footing doctrine nor the public trust doctrine overrides the provisions of the HHCA authorizing DHHL to manage geothermal resources on Hawaiian home lands.

1. Section 206 of the HHCA Controls Over Chapter 182, HRS

Section 206 of the HHCA (which under the Admission Act is a provision of the Hawaii Constitution) specifically provides that the powers of BLNR, as they relate to the lands of the State, shall not apply to DHHL. As a constitutional provision, section 206 of the HHCA would control over chapter 182, HRS, if the two are in conflict. See Kepoo v. Watson, 87 Haw. 91, 99, 952 P.2d 379, 387 (1998) (holding that since the HHCA is a provision of the Hawaii Constitution, it would control over a state environmental regulation statute to the extent the two conflicted.)

The Hawaii Supreme Court has opined on the scope of section 206 of the HHCA on two occasions. In State v. Jim, 80

Haw. 168, 907 P.2d 754 (1995), the court held that state and county officials have authority to enforce criminal laws on DHHL lands, despite the provisions of section 206 of the HHCA. In rendering its decision, the court distinguished laws that directly affect the management and disposition of Hawaiian home lands from laws that relate to the exercise of the State's general police powers:

> Although one of the governor's duties is to execute the laws . . . a plain reading of HHCA § 206 demonstrates that executive power only "in respect to lands of the state, shall not extend to . . . Hawaiian home lands[.]" In other words, the governor may not treat these lands, which have been set aside to fulfill the purposes of the HHCA, as any other lands held outright by the State: Hawaiian home lands are impressed with a trust whose co-trustees are the State of Hawai'i and the United States. As the trust corpus, these lands cannot serve purposes at odds with the trust purposes. Nevertheless, the limitation on executive power set out in HHCA § 206 was never intended to limit the police power of the State in the fashion envisioned by the Appellants, and they point to no authority to support their position.

Id. at 170-71, 907 P.2d at 756-57. Using very similar reasoning, the Hawaii Supreme Court has also held that laws requiring environmental impact statements for certain projects on state lands (including Hawaiian home lands) do not run afoul of section 206 of the HHCA because they are an exercise of the State's police powers and do not significantly affect the land:

> HRS ch. 343 involves EIS requirements and is therefore a type of environmental regulation. Clearly, environmental regulations are enacted for the purpose of protecting the public safety, health, and welfare. Consequently, the present case is similar to *Jim* in that HRS ch. 343, like the Hawai'i Penal Code, is a police power regulation.

. . . .

> Another aspect of this case that is similar to *Jim* is the fact that HRS ch. 343 does not significantly affect the land. HRS ch. 343 essentially requires decision makers to consider the potential impact of their projects on the environment and to prepare informational documents disclosing these effects. . . . The procedure established by HRS ch. 343 focuses on preparation of certain informational documents. The agency or applicant proposing action must prepare an EA that describes the possible environmental effects of the project . . . . Thus, it is clear that HRS ch. 343 primarily establishes procedural and informational requirements.

Kepoo at 99-100, 952 P.2d at 387-88. To contrast laws exercising general police powers from those that significantly affect the land, the court cited Attorney General Opinion Nos. 75-3 (Governor may not use executive orders to set aside Hawaiian home lands) and 72-21 (county zoning ordinances do not apply to Hawaiian home lands used for homestead purposes) as examples of actions that would run afoul of section 206 of the HHCA because they significantly affect DHHL's ability to manage and dispose of Hawaiian home lands.

Chapter 182, HRS, which designates BLNR as the entity to control leasing of state lands for natural resource exploitation, appears to be the type of law that would run afoul of section 206 of the HHCA because it significantly affects DHHL's use of its own lands. In other words, if BLNR were given exclusive authority to determine whether geothermal resources on "available lands" should be leased for development, DHHL would be deprived of the ability to manage its lands.

Although there may be an argument that chapter 182's requirements can be considered an exercise of the State's general police powers, chapter 182 goes further than the environmental regulations at issue in the Kepoo case. In Kepoo, chapter 343, HRS, only required DHHL to follow certain

procedural and informational steps before allowing developments to proceed on Hawaiian home lands. These provisions were held by the Hawaii Supreme Court to not "significantly affect the land" and, therefore, do not violate section 206 of the HHCA.

In contrast, chapter 182, HRS, gives BLNR sole discretion to release reservations of geothermal rights and issue geothermal development leases on state lands. By chapter 182's own terms, DHHL does not have any role in deciding whether a geothermal development lease can be issued on Hawaiian home lands. Such a law "significantly affects the land" because it prevents DHHL from managing and disposing of geothermal resources on its own lands, and instead places such powers in the hands of another agency. This type of regulation is prohibited by section 206 of the HHCA, as construed by the Hawaii Supreme Court in the Jim and Kepoo cases.

Accordingly, section 206 of the HHCA controls over the provisions of chapter 182, HRS, as applied to Hawaiian home lands, and DHHL has the authority to manage and dispose of geothermal resources on its lands. [4]

2. Neither the Equal Footing Doctrine nor the Public Trust Doctrine Override Section 206 of the HHCA

We have analyzed two possible arguments that could be made that BLNR, rather than DHHL, has the authority to manage and dispose of geothermal resources on DHHL lands under the equal footing and public trust doctrines. We conclude, however, that neither doctrine overrides DHHL's authority to manage and dispose of geothermal resources on its lands.

[4] We were not asked, and therefore do not address, whether DHHL must exercise a level of care relative to its neighbors when developing geothermal resources on "available lands."

a. The Equal Footing Doctrine

In general, the imposition of conditions by Congress on newly admitted states is allowable. In Ervien v. United States, 251 U.S. 41 (1919), the U.S. Supreme Court held that Congress's directive that public lands granted to New Mexico be used for specific enumerated purposes was valid:

> There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose; and to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same.
>
> . . . .
>
> [T]he United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations.

Id. at 48.

One exception to this general rule is the common law doctrine of equal footing, which provides that a newly admitted state has "the same rights, sovereignty, and jurisdiction" as those enjoyed by the thirteen original states. Knight v. United Land Ass'n, 142 U.S. 161, 183 (1891).

An argument can be made that the equal footing doctrine requires that all lands owned by the State (including "available lands") are under the control of the State, that the State has the sole authority to decide which agency shall administer such lands as an exercise of its sovereign power, and that this authority cannot be restricted by the federal government, as no such restrictions applied to the original thirteen states.

In Coyle v. Smith, 221 U.S. 559 (1911), the U.S. Supreme Court held that the equal footing doctrine prohibits the United States from restricting the powers of a newly admitted state in respect to matters which would otherwise be exclusively within the sphere of state power. Id. at 568. At issue in Coyle was whether the congressional act admitting Oklahoma as a state could require that Oklahoma's state capital be in a certain location. The court held that such a requirement denied Oklahoma "equal footing" with the other states by impermissibly restricting Oklahoma's ability to locate its capital in a place of its choosing, a power solely within the state sphere. Id. at 579. The Coyle court distinguished between impermissible restrictions of state power by Congress and conditions imposed on new states by Congress acting within its enumerated powers:

> It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation . . . touching the sole care and disposition of the public lands or reservations herein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

Id. at 574 (emphasis added).[5] See also Branson School Dist. v. Romer, 958 F. Supp. 1501, 1513-14 (D. Colo. 1997) (rejecting

[5] Article IV, section 3, of the U.S. Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

equal footing challenge to trust conditions imposed on land granted to Colorado by the federal government upon its admission because the federal government has the power to "grant something less than a fee simple interest" in lands to the new state.)

Section 4 of the Admission Act specifically states that Hawaii's adoption of the HHCA, and the conditions imposed by Congress arising from the adoption of the HHCA, relates to the "management and disposition of the Hawaiian home lands." One such condition imposed by Congress is that "all proceeds and income" from Hawaiian home lands must be used in carrying out the provisions of the HHCA. Under Coyle, such a condition does not offend the equal footing doctrine because it is within the purview of Congress's enumerated powers.[6]

Under Ervien and Coyle, then, the limitations placed by Congress on Hawaii's use of Hawaiian home lands do not violate the equal footing doctrine.

b. The Public Trust Doctrine

The public trust doctrine recognizes that states enjoy certain non-transferable rights in natural resources. This doctrine is constitutional in nature. Article XI, section 1, of the Hawaii Constitution provides that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources" and that all public natural resources are "held in trust by the State for the benefit of the people." Article XI, section 2, of the Hawaii Constitution requires the legislature to vest in one or more executive boards or commissions powers to manage natural resources owned by the State.

The Hawaii Supreme Court has held that the State has a duty to protect natural resources and regulate their use by devoting them to "public uses." State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). In

[6] The "available lands" became lands of the United States pursuant to the Newlands Resolution (Resolution No. 55 of July 7, 1898, 30 Stat. 750).

Zimring, the court held that newly created lands created by lava flows do not accrue solely to the benefit of private landowners, but instead must be held in trust by the State for public uses. Id. The Zimring court also held that the State may favor a particular public use if its importance outweighs competing public uses. Id.

Section 4 of the Admission Act, article XII, sections 1 and 3, of the Hawaii Constitution, and sections 204 and 206 of the HHCA recognize that certain lands held by the State (namely, Hawaiian home lands) are under the exclusive control of DHHL, and must be used only to carry out the provisions of the HHCA.

An argument can be made that the public trust doctrine imposes a constitutional obligation on the State, through BLNR, as provided in section 171-3, HRS, to oversee and regulate the development of geothermal resources on all lands in the State, including "available lands," for the benefit of the public at large, notwithstanding the provisions of the Admission Act and the HHCA.

We do not believe that the public trust doctrine compels the State to weigh the use of Hawaiian home lands solely for the benefit of native Hawaiians against the use of such lands for the public at large. As just explained, federal and state law provide that such lands, and the proceeds and income therefrom, are to be used solely to carry out the provisions of the HHCA. The same reasoning applies to geothermal resources located on Hawaiian home lands; section 206 of the HHCA specifically provides that BLNR's powers with respect to state lands shall not apply to Hawaiian home lands. We therefore conclude that DHHL's authority to manage and dispose of geothermal resources on its lands, which stems from the Admission Act, the Hawaii Constitution, and the HHCA, does not run afoul of the public trust doctrine.

Finally, the supremacy of the Admission Act as federal law, which required the adoption of the HHCA as a provision of the Hawaii Constitution, counsels against an interpretation of the public trust doctrine that would deny DHHL control over

geothermal resources on its lands, in contravention of the HHCA.

We are mindful that one natural resource, water, appears to enjoy heightened protections under the Hawaii Constitution. The Hawaii Supreme Court has recognized that water is a special type of natural resource because it is variable, transient, scarce, and subject to pollution and depletion. Robinson v. Ariyoshi, 65 Haw. 641, 667, 658 P.2d 287, 306 (1982). In addition, article XI, section 7, of the Hawaii Constitution obligates the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" and further requires the legislature to establish a "water resources agency" to protect ground and surface water resources by establishing procedures for identifying and regulating all uses of Hawaii's water resources.[7]

Our constitution does not include any provision for geothermal resources analogous to that afforded to water under article XI, section 7.[8] Nor is there case law holding that geothermal resources share the transient, scarce, and life-giving qualities attributable to water. In short, we are not convinced that the same level of protection and interest-balancing afforded to water resources are applicable to geothermal resources.

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[7] The Hawaii Supreme Court in In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000), notes that the State's Commission on Water Resource Management is the "primary guardian" of the public's right to water under article XI, section 7, of the Hawaii Constitution. There is no similar constitutional provision appointing a "primary guardian" over geothermal resources.

[8] While the State's geothermal resources are protected under the public trust doctrine, only water resources have been accorded additional heightened protection by the Hawaii Supreme Court.

IV. CONCLUSION

Based on this analysis, we conclude as follows: (1) DHHL is entitled to 100 percent of royalties derived from geothermal resource development on its lands; and (2) DHHL has the sole authority to manage and dispose of geothermal resources on its lands.

We emphasize that these conclusions are applicable only to the issue of geothermal resources on DHHL lands. Whether such conclusions apply to other natural resources found on Hawaiian home lands requires additional analysis.

Very truly yours,

Matthew S. Dvonch
Deputy Attorney General

APPROVED:

David M. Louie
Attorney General

Enclosure “2”

Sir:

I have been notified, by letter dated August 12, 2024, from the Royal Commission of Inquiry, that I have until 12 noon on August 19, 2024, to perform a military duty of establishing a military government of Hawai‘i. The Royal Commission of Inquiry stated that, for me not perform this duty, I should seek a legal opinion from Attorney General Anne E. Lopez, that the Hawaiian Kingdom ceases to exist under international law, thereby, rendering this existence claim frivolous.

According to Hawai‘i Revised Statute §28-3, “The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department.” As I am not the head of the Department of Defense, I am asking you to make a formal request of the Attorney General for a legal opinion because the existence or non-existence of the Hawaiian Kingdom is a question of law that I am not qualified to answer.

Proposed question for the Attorney General:

Considering the two legal opinions by Professor Matthew Craven and Professor Federico Lenzerini, that conclude the Hawaiian Kingdom continues to exist as a State under international law, which are enclosed with the request, is the State of Hawai‘i within the territory of the United States or is it within the territory of the Hawaiian Kingdom?

CONTINUITY OF THE HAWAIIAN KINGDOM

by Dr. Matthew Craven

Reader in International Law
SOAS, University of London

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

http://www.HawaiianKingdom.org

July 12, 2002

A. THE CONTINUITY OF THE HAWAIIAN KINGDOM

2. *GENERAL CONSIDERATIONS*

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

2.2 The implications of continuity in case of Hawai`i are several:

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

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

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

d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third

states, and is liable for the debts of the Hawaiian kingdom incurred prior to its occupation.

2.3 Bearing in mind the consequences elucidated in c) and d) above, it might be said that a claim of state continuity on the part of Hawai`i has to be opposed as against a claim by the US as to its succession. It is apparent, however, that this opposition is not a strict one. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one state to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a great deal in terms of their effect. Whilst State continuity certainly denies the applicability of principles of succession and holds otherwise that rights and obligations remain intact save insofar as they may be affected by the principles *rebus sic stantibus* or impossibility of performance, there is room in theory at least for a principle of universal succession to operate such as to produce exactly the same result (under the theory of universal succession).[1] The continuity of legal rights and obligations, in other words, does not necessarily suppose the continuity of the State as a distinct person in international law, as it is equally consistent with discontinuity followed by universal succession. Even if such a thesis remains largely theoretical, it is apparent that a distinction has to be maintained between continuity of personality on the one hand, and continuity of specific legal rights and obligations on the other. The maintenance in force of a treaty, for example, in relation to a particular territory may be evidence of State continuity, but it is far from determinative in itself.

2.4 Even if it is relatively clear as to when States may be said to come into being for purposes of international law (in many cases predicated upon recognition or admission into the United Nations),[2] the converse is far from being the case.[3] Beyond the theoretical circumstance in which a body politic has dissolved (for example by submergence of the territory or the dispersal of the population), it is apparent that all cases of putative extinction will arise in cases where certain changes of a material nature have occurred – such as a change in government and change in the territorial configuration of the State. The difficulty, however, is in determining when such changes are merely incidental, leaving intact the identity of the state, and when they are to be regarded as fundamental going to the heart

[1] Cf. article 34 Vienna Convention on State Succession in Respect of Treaties (1978).
[2] See on this point Crawford J., *The Creation of States in International Law* (1979); Dugard J., *Recognition and the United Nations* (1987).
[3] Ibid, p.417.

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.

2.5 It is generally held, nevertheless, that there exist several uncontroversial principles that have some bearing upon the issue of continuity. These are essentially threefold, all of which assume an essentially negative form.[6] First that the continuity of the State is not affected by changes in government even if of a revolutionary nature.[7]

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

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

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

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

> 'Mere territorial changes, whether by increase or by dimunution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties.... Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute

Secondly, that continuity is not affected by territorial acquisition or loss,[8] and finally that it is not affected by belligerent occupation (understood in its technical sense).[9] Each of these principles reflects upon one of the key incidents of statehood – territory, government and independence – making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity.[10] As Hall was to express the point, a State retains its identity

> 'so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.'[11]

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

2.6 If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that

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> principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired'.

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

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

[9] See below, paras. .

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

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

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

continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other States. It is commonly recognised that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entirety of the territory of the State, as they do in case of Hawai`i, and when they are accompanied by effective occupation to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands.

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

> 'Manifestations of sovereignty assume... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.'[13]

Thus, whilst 'the continuous and peaceful display of territorial sovereignty' remains an important measure for determining

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

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

3. *THE STATUS OF THE HAWAIIAN KINGDOM AS A SUBJECT OF INTERNATIONAL LAW*

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

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

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

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

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

war and peace, and of entering into all international relations with the other communities of the globe'.[18] These definitions, however, were not always intended to be prescriptive. Hall maintained, for example, that whilst States were subjected to international law 'from the moment... at which they acquire the marks of a state'[19] he later added the qualification that States 'outside European civilisation... must formally enter into the circle of law-governed countries'.[20] In such circumstances recognition was apparently critical. Given the trend to which this gave rise, Oppenheim was later to conclude in 1905, that 'a State is and becomes an international person through recognition only and exclusively'.[21]

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

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

This point was reiterated subsequently by President Tyler in a message to Congress.[26] In similar vein, Britain and France declared in a joint declaration in 1843 that they considered 'the Sandwich

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[18] Phillimore, *supra,* n. 4, I, p. 81.
[19] Hall, supra, n. 8, p. 21.
[20] *Ibid*, pp. 43-44.
[21] *International Law: A Treatise* (1905) I, p. 109.
[22] Declaration of Great Britain and France relative to the Independence of the Sandwich Islands, London, Nov. 28th, 1843.
[23] Ibid.
[24] Message from the President of the United States respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government, Dec. 19th 1842. The Apology Resolution of 1993, however, maintains that the US 'recognised the independence of the Hawaiian Kingdom, extended full and complete diplomatic recognition to the Hawaiian Government 'from 1826 until 1893'.
[25] Letter of Dec. 19th 1842, Moore's Digest, *supra*, n. 8, I, p. 476.
[26] Message of President Tyler, Dec. 30th 1842, Moore's Digest, *supra*, n. 8, I, pp. 476-7.

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'.[27] When later in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions 'incompatible with any just regard for the Hawaiian Government as an independent State' and calling upon France to 'desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands'.[28]

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

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

3.5 The consequences of Statehood at that time were several. States were deemed to be sovereign not only in a descriptive sense, but were also regarded as being 'entitled' to sovereignty. This entailed, amongst other things, the rights to free choice of government, territorial inviolability, self-preservation, free development of natural resources, of acquisition and of absolute jurisdiction over all persons and things within the territory of the State.[31] It was, however, admitted that intervention by another state was permissible in certain prescribed circumstances such as for purposes of self-preservation,

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

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.'[32]

A desire for simple aggrandisement of territory did not fall within these terms, and intervention for purposes of supporting one party in a civil war was often regarded as unlawful.[33] In any case, the right of independence was regarded as so fundamental that any action against it 'must be looked upon with disfavour'.[34]

4. *RECOGNISED MODES OF EXTINCTION*

4.1 In light of the evident existence of Hawai`i as a sovereign State for some period of time prior to 1898, it would seem that the issue of continuity turns upon the question whether Hawai`i can be said to have subsequently ceased to exist according to the terms of international law. Current international law recognises that a state may cease to exist in one of two scenarios: by means of that State's integration with another in some form of union (such as the GDR's accession to the FRG), or by its dismemberment (such as in case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia).[35] As will be seen, events in Hawai`i in 1898 are capable of being construed in several ways, but it is evident that the most obvious characterisation was one of annexation (whether by cession or conquest).

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

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[32] Hall, supra, n. 8, p. 298.
[33] See e.g. Lawrence, *supra,* n. 14, p. 134.
[34] Hall, *supra*, n. 8, p. 298.
[35] Jennings and Watts add one further category: when a State breaks up into parts all of which become part of other states (such as Poland in 1795), *supra*, n. 8, p. 204.

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

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness[37] (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.[38] It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.[39]

4.3 Even if the annexation of the Hawaiian Islands would be regarded as unlawful according to accepted standards today, it does not necessarily follow that US claims to sovereignty are unfounded. It is generally maintained that the legality of any act should be determined in accordance with the law of the time when it was done, and not by reference to law as it might have become at a later date. This principle finds its expression in case of territorial title, as Arbitrator Huber pointed out in the *Island of Palmas* case,[40] in the doctrine of inter-temporal law. As far as Huber was concerned, there were two elements to this doctrine – the first of which is relatively uncontroversial, the second of which has attracted a certain amount of criticism. The first, uncontroversial, element is simply that 'a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled'.[41] In the present context,

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[36] Declaration of Principles of International Law, GA Resn. 2625. See Whiteman, *Digest of International Law* (1965), V, pp. 874-965.
[37] See, Crawford, *supra*, n. 2, p. 418.
[38] Such a principle has been recognised in e.g., *Free Zones of Upper Savoy and the District of Gex* (2nd Phase), 1930, PCIJ, Series A, No. 24; *South-Eastern Territory of Greenland*, 1932, PCIJ, Series A/B, No. 48, p. 285; *Jurisdiction of the Courts of Danzig*, 1933, PCIJ, Series B, No. 15, p. 26; *Legal Status of Eastern Greenland*, 1933, PCIJ, Series A/B, No. 53, pp. 75, 95.
[39] Article 52 Vienna Convention on the Law of Treaties 1969.
[40] *Island of Palmas (Netherlands v. United States)* 2 R.I.A.A. (1928) 829
[41] *Ibid.*

therefore, the extension of US sovereignty over Hawai`i should be analysed in terms of the terms of international law, as they existed at the relevant point(s) in time. This much cannot be disputed. The second element outlined by Huber, however, is that, notwithstanding the legitimate origins of an act creating title, the continued existence of that title – its continued manifestation – 'shall follow the conditions required by the evolution of law'. The issue in consideration, here, is whether title based upon historical discovery, or conquest, could itself survive irrespective of the fact that neither is regarded as a legitimate mode of acquisition today. Whilst some have regarded this element as a dangerous extension of the basic principle,[42] its practical effects are likely to be limited to those cases in which the State originally claiming sovereignty has failed to reinforce that title by means of effective occupation (acquisitive prescription). This was evident in case of the Island of Palmas, but is unlikely to be so in other cases – particularly in light of Huber's comment that sovereignty will inevitably have its discontinuities. In any case, it is apparent that, as Huber stressed, any defect in original title is capable of being remedied by means of a continuous and peaceful exercise of territorial sovereignty and that original title, whether defective or perfect, does not itself provide a definitive conclusion to the question.

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

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

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

c) By the State's incorporation, union, or submission to another (cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886).[43]

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

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

4.5 Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently distinguished between two processes – one of which involved a voluntary act (i.e. union or incorporation), the other of which came about by non-consensual means (i.e. conquest and submission followed by annexation).[44] It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory[45] and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

4.6 Although annexation was regarded as a legitimate means of acquiring territory, it was recognised as taking a variety of forms.[46] It was apparent, to begin with, that a distinction was typically drawn between those cases in which the annexation was implemented by Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part of the annexing power. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.[47] Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,[48] title acquired in virtue of a peace treaty was considered to be essentially derivative (i.e. being transferred from one state to another).[49] There was little, in other words, to distinguish title acquired by means of a treaty of peace backed by force, and a voluntary purchase of territory: in each case the extent of rights enjoyed by the successor were determined by the agreement itself. In case of conquest absent an agreed settlement, by contrast, title was thought to derive simply from the fact of military subjugation and was complete 'from the time [the conqueror] proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act... his intention to retain it as part of his own territory'.[50] What was required, in other words, was that the conflict be complete (acquisition of sovereignty *durante bello* being clearly excluded) and that the conqueror declare an intention to annex.[51]

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

[45] Oppenheim (*supra*, n. 31, I, p. 288) remarks that '[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory'.

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

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

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

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

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

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

4.7 What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession (a point of particular importance for possessions held in foreign territory).[52] Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the state in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.[53] Title, in other words, was original, and rights of the occupants were limited to those which they possessed (perhaps under the doctrine *uti possidetis de facto*). Others, by contrast, seemed to assume some form of 'transfer of title' as taking place (i.e. that conquest gave rise to a derivative title[54]), and concluded in consequence that the conqueror 'becomes, as it were, the heir or universal successor of the defunct or extinguished State'.[55] Much depended, in such circumstances, as to how the successor came to acquire title.

4.8 It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization[56] and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that 'the principle of conquest shall not... be recognised as admissible under American public law'. It had, furthermore, later taken the lead in adopting a policy of non-recognition of 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' (the 'Stimpson Doctrine') which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

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

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

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

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

[56] 'The American continents, by the free and independent conditions which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.'

5. *US ACQUISITION OF THE ISLANDS*

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

5.2 *Acquisition of the Islands in 1898*

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

5.2.2 According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy 'was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili`uokalani which put in serious peril not only the large and preponderating interests of the United States in the Islands, but

[57] Order of Jan. 16th 1893.

all foreign interests'.[58] It was further emphasised in a report of Mr Foster to the President that the US marines had taken 'no part whatever toward influencing the course of events'[59] and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of government. This version of events was to be contradicted in several important respects shortly after.

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

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

[58] For. Rel. 1894, App. II, 198.
[59] Report of Mr Foster, Sec. of State, For. Rel. 1894, App. II, 198-205.
[60] Moore's Digest, *supra,* n . 8, I, p. 499.
[61] Ibid, pp. 498-99.
[62] Moore's Digest, *supra,* n. 8, p. 501.

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

5.2.4 It is fairly clear then, that the position of the US government in December 1893 was that its intervention in Hawai`i was an aberration which could not be justified either by reference to US law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands 'as being neither a government *de facto* nor *de iure'*. At this stage there was an implicit acknowledgement of the fact that the US intervention not only conflicted with specific US commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that '[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors') but also with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.[63]

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

5.2.6 Despite admitting the unlawful nature of its original intervention, the US, however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili-uokolani to the throne even though she had acceded to the US proposals in that regard. Rather it left control of Hawai`i in the hands of the insurgents it had effectively put in place and who clearly did not enjoy the popular support of the Hawaiian people.[64] Following a proclamation establishing the

[63] Brownlie, International Law and the Use of Force by States (1963) pp. 46-7.
[64] See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992)

Republic of Hawai`i by the insurgents in 1894 – the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United States[65] - *de facto* recognition of the Republic was affirmed by the US[66] and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili`uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai`i.[67] A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai`i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

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

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

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

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[65] Article 32 Constitution of the Republic of Hawai`i.
[66] For. Rel. 1894, pp. 358-360.
[67] XC B.F.S.P. 1897-8 (1901) 1248.
[68] President McKinley, Third Annual Message, Dec. 5th 1899, Moore's Digest, *supra,* n. 8, I, p. 511.
[69] See, Moore's Digest, *supra,* n. 8, I, pp. 504-9.

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

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

5.2.8.2 Such a thesis overlooks two facts. First of all, whilst the Republic of Hawai`i had certainly sponsored the adoption of a treaty of cession, the failure by the US to ratify that instrument meant that no legally binding commitments in that regard were ever created. This is not to say that the US actions in this regard were therefore to be regarded as unlawful for purposes of international law. Even if doubts exist as to the constitutional competence of US Congress to extend the jurisdiction of the United States in the manner prescribed by the Resolution,[74] this in itself does not prevent the acts in question from being effective for purposes of international law.[75] Indeed, as suggested above it was widely recognised that, for purposes of international law, annexation need not be accomplished by means of a treaty of peace and could equally take the form of a unilateral declaration of annexation. The significance of the failure to ratify, however, does suggest that the acquisition was achieved, if at all, by unilateral act on the part of the United States rather than being governed by the terms of the bilateral

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[70] See e.g. Verzijl, *supra,* n. 6.
[71] *Ibid*, I, p. 129.
[72] Message of President McKinley to the Senate, June 16th 1987, Moore's Digest, *supra*, n. 8, I, p. 503.
[73] Some type of recognition was provided by Great Britain in 1894, however.
[74] See, Willoughby W., *The Constitutional Law of the United States* (2nd ed. 1929) I, p. 427.
[75] Article 7 of the ILC Articles on State Responsibility (2001) provides, for example, that '[t]he conduct of an organ of a State… shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

agreement. Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sahib v.Chief Commissioner Pondicherry*[76] in which it was held that Pondicherry was not to be considered as part of India, despite India's administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.[77]

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

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

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

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

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

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

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 will or acquiescence of the people',[80] stands in marked contrast to its willingness to offer such recognition to the government of the Republic of Hawai`i in remarkably similar circumstances. Given the precipitous recognition of the government of the Republic – itself an act of unlawful intervention - it seems unlikely that the US could legitimately rely upon the fact of its own recognition as a basis for claiming that its acquisition of sovereignty over Hawai`i issued from a valid expression of consent.

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

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

5.2.9.2 The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not

[80] Mr Buchanan to Mr Rush. Moore's Digest, *supra*, n. 8, I, p. 124.

subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.[81] Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai`i.[82] It could not easily be construed, in other words, merely as an instrument of US government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

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

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

5.2.9.3 Ultimately, one might conclude that there are certain doubts, albeit not necessarily overwhelming, as to the

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[81] See, Hackworth G., *Digest of International Law*, (1940) I, pp. 333-338.
[82] Moore's Digest, *supra*, n. 8, I, p. 500.
[83] Bindschedler R., 'Annexation', in *Encylopedia of Public International Law*, III, 19, p. 20.
[84] Brownlie, *supra*, n. , pp. 26-40.

legitimacy of the US acquisition of Hawai`i in 1898 under the terms of international law as it existed at that time. It neither possessed the hallmarks of a genuine 'cession' of territory, nor that of forcible annexation (conquest). If, however, the US neither came to acquire the Islands by way of treaty of cession, nor by way of conquest, the question then remains as to whether the sovereignty of the Hawaiian Kingdom was maintained intact. The closest parallel, in this regard, is to be found in the law governing belligerent occupation.

5.2.10 *Belligerent Occupation and Occupation Pacifica*

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

[85] See e.g. de Vattel *supra*, n. 6, III, s. 196.
[86] Graber believes this was the case following the Franco-Prussian war. Graber D., *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (1968) 40-41.
[87] President Polk's Second Annual Message, 1846, Moore's Digest, *supra*, n. 8, I, p. 46.
[88] President Polk's Special Message, July 24th, 1848. Moore's Digest, *supra*, n. 8, I, pp. 46-7.
[89] *US v. Rice*, US Supreme Court, 1819, 4 Wheat. 246 (1819)

various Manuals on the Laws of War.[91] The general idea was subsequently recognised in Conventional form in article 43 of the 1907 Hague Regulations,[92] and in the US Military Manual of 1914.[93]

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

5.2.10.3 Until the adoption of common article 2 of the 1949 Geneva Conventions,[95] however, the doctrine of

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

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

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

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

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

[95] Common Article 2 of the 1949 Geneva Conventions 75 U.N.T.S. 31 reads:

> 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

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

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> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

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

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

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

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

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

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

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

the 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.[102]

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

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

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

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

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

conclusion is of course dependent upon the validity and strength of subsequent bases for the claim to sovereignty on the part of the US.

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

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

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

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

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

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

5.3.3 An initial point in question here is whether Hawai`i should have been listed as a Non-Self-Governing Territory at all for such purposes. Article 73 of the Charter refers to peoples 'who have not yet attained a full measure of self-government' – a point which is curiously inapplicable in case of Hawai`i. That being said, the regime imposed was designed, primarily, to foster decolonisation after 1945 and it was only with some reluctance that the United States agreed to include Hawai`i on the list at all. The alternative would have been for Hawai`i to remain under the control of the United States and deprived of any obvious means by which it might re-obtain its independence. The UN Charter may be seen, in that respect, as having created a general but exclusive system of entitlements whereby only those non-State entities regarded as either Non-Self-Governing or Trust Territories would be entitled to independence by way of self-determination absent the consent of the occupying power.[107] It may be emphasised, furthermore, that to regard Hawai`i as being a territory entitled to self-determination was not entirely inconsistent with its claims to be the continuing State. The substance of self-determination in its external form as a right to political independence may be precisely that which may be claimed by a State under occupation. Indeed, the General Assembly Declaration on

[104] This follows by implication from the terms of article 74 UN Charter.
[105] ICJ Rep. (1971), 31, para. 51.
[106] ICJ Rep (1975) 12, p. 32.
[107] For a review of the practice in this regard see Crawford J., 'State Practice and International Law in Relation to Secession', 69 B.Y.I.L (1998) 85.

Friendly Relations (Resn. 2625) makes clear that the right is applicable not simply in case of colonialism, but also in relation to the 'subjection of peoples to alien subjugation, domination and exploitation'. Crawford points out, furthermore, that self-determination applies with equal force to existing states taking 'the well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government'.[108] The international community's subsequent recognition of the applicability of self-determination in case of the Baltic States, Kuwait and Afghanistan, for example, would appear merely to emphasise this point.[109] One may tolerate, in other words, the placing of Hawai`i on the list of non-self-governing territories governed by article 73 only to the extent that the entitlement to self-determination under that article was entirely consonant with the general entitlements to 'equal rights and self-determination' in articles 1(2) and 55 of the Charter.

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

5.3.5 Turning then to the question whether the Hawaiian people can be said to have exercised self-determination following

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[108] Crawford, *supra*, n. 2, p. 100.
[109] See Cassese A., *Self-Determination of Peoples: A Legal Reappraisal* (1995) pp. 94-5.
[110] Crawford, *supra*, n. 2, pp. 363-4; Shaw, *Title to Territory in Africa*, pp. 149 ff.

the holding of a plebiscite on June 27th 1959. The facts themselves are not in dispute. On March 18th 1959 the United States Congress established an *Act to Provide for the admission of the State of Hawai`i into the Union* setting down, in section 7(b) the terms by which this should take place. This specified that:

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

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

5.3.6 Two particular concerns may be raised in this context. First, the plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them. This was certainly an extraordinary situation when compared with other cases with which the UN was dealing at the time, and has parallels with one other notoriously difficult case, namely the Falkland Islands/ Malvinas (in which the entire population is of settler origin). There is certainly nothing in the concept of self-determination as it is known today to require an administering power to differentiate between two categories of residents in this respect, and indeed in many cases it might be treated as illegitimate.[111] By the same token, in some cases a failure to do so may well disqualify a vote where there is evidence that the administering state had encouraged settlement as a way of manipulating the

[111] See, Hannum H., 'Rethinking Self-Determination', 34 Va.J.I.L. (1993) 1, p. 37.

subsequent result.[112] This latter point seems to be even more clear in a case such as Hawai`i in which the holders of the entitlement to self-determination had presumptively been established in advance by the fact of its (prior or continued) existence as an independent State. In that case, one might suggest that it was only those who were entitled to regard themselves as nationals of the Kingdom of Hawaii (in accordance with Hawaiian law prior to 1898), who were entitled to vote in exercise of the right to self-determination.

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

5.3.7 An important point, here, as is evident from the discussion above, is that most of the salient resolutions by which the General Assembly 'developed' the law relating to decolonisation post-dated the plebiscite in Hawai`i, and the organisation's practice in that respect changed quite radically following the establishment of the Committee of Twenty-Four in 1961 (Resn. 1700 (XVI)). Up until that point, many took the view that Non-Self-Governing Territories were merely entitled to 'self-government' rather than full political independence, and that self-determination was little more than a political principle being, at best, *de lege farenda*.[114] There was, in other words, no clear obligation as far as UN practice at the time was concerned,

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[112] Cf. the case of Israeli settlements in the Occupied Territories, Cassese, *supra,* n. 97, p. 242.

[113] Similar points have been made as regards the disputed integration of West Irian into Indonesia.

[114] See, Jennings R., *The Acquisition of Territory in International Law* (1963) pp. 69-87.

for the decision made in 1959 to conform to the requirements later spelled out in relation to other territories – practice was merely crystallising at that date. The US made clear, in fact, that it did not regard UN supervision as necessary for purposes of dealing with its Non-Self-Governing Territories such as Puerto Rico, Alaska or Hawai`i.[115] Whilst such a view was, perhaps, defensible at the time given the paucity of UN practice, it does not itself dispose of the self-determination issue. It might be said, to begin with, that in light of the subsequent development of the principle, it is not possible to maintain that the people of Hawai`i had in reality exercised their right of self-determination (as opposed to having merely been granted a measure of self-government within the Union). Such a conclusion, however, is debatable given the doctrine of inter-temporal law. More significant, however, is the fact that pre-1960 practice did not appear to be consistent with the type of claim to self-determination that would attach to independent, but occupied, States (in which one would suppose that the choice of full political independence would be the operative presumption, rebuttable only by an affirmative choice otherwise). As a consequence, there are strong arguments to suggest that the US cannot rely upon the fact of the plebiscite alone for purposes of perfecting its title to the territory of Hawai`i.

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

5.4.1 As pointed out above, it cannot definitively be supposed that the US did acquire valid title to the Hawaiian Islands in 1898, and even if it did so, the basis for that title may now be regarded as suspect given the current prohibition on the annexation of territory by use of force. In case of the latter, the second element of the doctrine of inter-temporal law as expounded by Arbitrator Huber in the *Island of Palmas case* may well be relevant. Huber distinguishes in that case between the acquisition of rights on the one hand (which must be founded in the law applicable at the relevant date) and their existence or continuance at a later point in time which must 'follow the conditions required by the evolution of the law'. One interpretation of this would be to suggest that title may be lost if a later rule of international law were to arise by reference to which the original title would no longer be lawful. Thus, it might be said that since annexation is no longer a legitimate means by which title may be established,

[115] US Department of State Bulletin, (1952) p. 270.

US annexation of Hawai`i (if it took place at all) would no longer be regarded as well founded. Apart from the obvious question as to who may be entitled to claim sovereignty in absence of the United States, it is apparent that Huber's *dictum* primarily requires that 'a State must continue to maintain a title, validly won, in an effective manner – no more no less.'[116] The US, in other words, would be entitled to maintain its claim over the Hawaiian Islands so long as it could show some basis for asserting that claim other than merely its original annexation. The strongest type of claim in this respect is the 'continuous and peaceful display of territorial sovereignty'.

5.4.2 The emphasis given to the 'continuous and peaceful display of territorial sovereignty' in international law derives in its origin from the doctrine of occupation which allowed states to acquire title to territory which was effectively *terra nullius*. It is apparent, however, and in line with the approach of the ICJ in the *Western Sahara Case*,[117] that the Islands of Hawai`i cannot be regarded as *terra nullius* for purpose of acquiring title by mere occupation. According to some, nevertheless, effective occupation may give rise to title by way of what is known as 'acquisitive prescription'.[118] As Hall maintained, '[t]itle by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.'[119] Johnson explains in more detail:

> 'Acquisitive Prescription is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor...) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or

[116] Higgins R., 'Time and the Law: International Perspectives on an Old Problem', 46 I.C.L.Q. (1997) 501, p. 516.
[117] Supra n. 94.
[118] For a discussion of the various approaches to this issue see Jennings and Watts, *supra,* n. 8, pp. 705-6.
[119] Hall W., *A Treatise on International Law* (Pearce Higgins, 8th ed 1924) p. 143.

> international tribunal or – exceptionally in cases where no such action was possible – have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.'[120]

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,[121] and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case[122] found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,[123] the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*[124] and in the *Island of Palmas Arbitration.*[125]

5.4.3 If a claim as to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indica* have to be considered including, for example, the length of time of effective and peaceful occupation, the extent of opposition to or acquiescence in, that occupation and, perhaps, the degree of recognition provided by third states. As Jennings and Watts confirm, however, 'no general rule [can] be laid down as regards the length of time and other circumstances which are necessary to create such a title by prescription. Everything [depends] upon the merits of the individual case'.[126] As regards the temporal element, the US could claim to have peacefully and continuously exercised governmental authority in relation to Hawai`i for over a century. This is somewhat more than was required for purposes of prescription in the *British Guiana-Venezuela Boundary Arbitration,* for example,[127] but it is clear that time alone is certainly not determinative. Similarly, in terms of the attitude of third states, it is evident that apart from the initial protest of the Japanese Government in 1897, none has opposed the extension of US jurisdiction to the Hawaiian Islands. Indeed the majority of States may be said to have acquiesced in its claim

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[120] Johnson, 27 B.Y.I.L. (1950) 332, pp. 353-4.
[121] Prescription may be said to have been recognised in the *Chamizal Arbitration*, 5 A.J.I.L. (1911) 785; the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*, supra n. 13.
[122] ICJ Rep. 1960, p. 6.
[123] ICJ Rep. 1953 47
[124] ICJ Rep. 1951 116.
[125] *Supra*, n. 13.
[126] *Supra*, n. , p. 706.
[127] The arbitrators were instructed by their treaty terms of reference to allow title if based upon 'adverse holding or prescription during a period of 50 years'. 92 BFSP (1899-1900) 160.

to sovereignty in virtue of acceding to its exercise of sovereign prerogatives in respect of the Islands (for example, in relation to the policing of territorial waters or airspace, the levying of customs duties, or the extension of treaty rights and obligations to that territory). It is important, however, not to attach too much emphasis to third party recognition. As Jennings points out, in case of adverse possession '[r]ecognition or acquiescence on the part of third States... must strictly be irrelevant'.[128]

5.4.4 More difficult, in this regard, is the issue of acquiescence/ protest. In the *Chamizal Arbitration*[129] it was held that the US could not maintain a claim to the Chamizal tract by way of prescription in part because of the protests of the Mexican government. The Mexican government, in the view of the Commission, had done 'all that could be reasonably required of it by way of protest against the illegal encroachment'. Although it had not attempted to retrieve the land by force the Commission pointed out that:

> 'however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.'[130]

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

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

[128] Jennings, *supra,* n. 102, p. 39.
[129] US v. Mexico (1911), 5 A.J.I.L. (1911) 782.
[130] Ibid.

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

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

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

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

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.

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