

- Arbitration, PCA Case Repository (2013);
- RCI War Criminal Report No. 22-0001;
 - RCI War Criminal Report No. 22-0005; and
 - RCI War Criminal Report No. 23-0001.

The subject of the meeting were the factual circumstances that established the existence of the United States military occupation of the Hawaiian Kingdom since January 17, 1893, and the omission by the United States to comply with customary international law by establishing a military government to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty had been entered into between the Hawaiian Kingdom and the United States of America. This customary international law was later codified under Article 43 of the 1899 Hague Convention, IV, and later superseded by Article 43 of the 1907 Hague Regulations. There is no peace treaty.

On November 28, 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.¹ The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.² By 1893, the Hawaiian Kingdom maintained over ninety Legations and Consulates throughout the world.

Driven by the desire to attain naval superiority in the Pacific, U.S. troops, without cause, invaded the Hawaiian Kingdom on January 16, 1893, and unlawfully overthrew its Hawaiian government and replaced it with their puppet the following day with the prospect of militarizing the islands. The State of Hawai'i today is the successor to this puppet government. However, despite the unlawful overthrow of its government, the Hawaiian Kingdom as a State would continue to exist as a subject of international law and come under the regime of international humanitarian law and the law of occupation. The military occupation is now at 130 years.

According to Professor Oppenheim, once recognition of a State is granted, it “is incapable of withdrawal”³ by the recognizing State, and that “recognition estops the State which has

¹ David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

² International Treaties with the Hawaiian Kingdom (online at <https://hawaiiankingdom.org/treaties.shtml>).

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

recognized the title from contesting its validity at any future time.”⁴ And the “duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be ‘derecognized.’”⁵

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there “is a presumption that the State continues to exist, with its rights and obligations [...] despite a period in which there is no, or no effective, government,”⁶ and belligerent occupation “does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”⁷ Addressing the presumption of the German State’s continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.⁸

“If one were to speak about a presumption of continuity,” explains Professor Craven, “one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.”⁹ Evidence of “a valid demonstration of legal title, or sovereignty, on the part of the United States” would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*¹⁰

⁴ Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” 51(2) *American Journal of International Law* 308, 316 (1957).

⁵ Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.

⁶ James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

⁷ *Id.*

⁸ Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

⁹ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

¹⁰ 9 Stat. 922 (1848).

and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.¹¹

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.¹² As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.¹³ International law does not permit annexation of territory of another state.¹⁴

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.¹⁵ The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."¹⁶ As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"¹⁷ and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."¹⁸ Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution.

¹¹ 30 Stat. 1754 (1898).

¹² 30 Stat. 750 (1898).

¹³ There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

¹⁴ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

¹⁵ Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).

¹⁶ *Id.*, 242.

¹⁷ *Id.*, 242.

¹⁸ *Id.*

Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”¹⁹ That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by the President’s proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the “laws of no nation can justly extend beyond its own territories.”²⁰

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the “constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. [...] Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it.”²¹ Professor Willoughby also stated, the “incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is...essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts.”²²

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands and within three generations the national consciousness of the Hawaiian Kingdom was obliterated.²³ Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals and nationals of countries of the world, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in 1997.²⁴ Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili‘uokalani who died on November 11, 1917.

¹⁹ *Id.*, 262.

²⁰ *The Apollon*, 22 U.S. 362, 370 (1824).

²¹ Kmiec, 252.

²² Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

²³ David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 114 (2020).

²⁴ David Keanu Sai, “The Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili‘uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States’ recognition of the Hawaiian Kingdom as an independent State on July 6, 1844,²⁵ was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili‘uokalani in 1891, and the Council of Regency in 1997.

The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.²⁶ Successors to King Kamehameha III were not established through “extra-legal changes,” but rather under the constitution and laws of the Hawaiian Kingdom. “Where a new administration succeeds to power in accordance with a state’s constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed.”²⁷

On November 8, 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration (“PCA”) in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.²⁸ Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes that brought the dispute under the auspices of the PCA. I served as lead agent for the Hawaiian Kingdom in this arbitration so I am very familiar with this case and the role of the PCA in verifying the Hawaiian Kingdom as a State before the arbitral tribunal was formed.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States. Professor Lenzerini concluded that “according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In

²⁵ U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

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

²⁷ *Restatement (Third)*, §203, comment c.

²⁸ *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at <https://pca-cpa.org/en/cases/35/>).

fact, in the event of illegal annexation, ‘the legal existence of [...] States [is] preserved from extinction,’ since ‘illegal occupation cannot of itself terminate statehood.’”²⁹

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that “States can act only by and through their agents and representatives.”³⁰ As Professor Talmon states, the “government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile.”³¹

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a “State” and a “private entity” in its case repository.³² Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai‘i.

Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency (“Hawaiian Kingdom”) on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).³³

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This

²⁹ Lenzerini, 322.

³⁰ *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.

³¹ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

³² Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at <https://pca-cpa.org/en/cases/35/>).

³³ *Id.*

agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on June 9, 2000.³⁴

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative policies of the Occupying State over the territory of the Occupied State.

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Article 43 is the codification of customary international law that existed on January 17, 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the Bolshevik hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and administration ousted;” “Taxes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);” “Prohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;;” “Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”³⁵

³⁴ Sai, *The Royal Commission of Inquiry*, 25-26.

³⁵ *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this “rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.”³⁶ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, “there do not appear to have been any prosecutions for that crime by international criminal tribunals.”³⁷ However, the war crime of *usurpation of sovereignty during military occupation* is a war crime under “particular” customary international law. According to the International Law Commission, “[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”³⁸ In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission’s position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.

The RCI views *usurpation of sovereignty during military occupation* as a war crime under “particular” customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the Hawaiian situation, *usurpation of sovereignty during military occupation* serves as a source for the commission of secondary war crimes within the territory of an occupied State, *i.e.* *compulsory enlistment, denationalization, pillage, destruction of property,*

³⁶ *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

³⁷ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 156 (2020).

³⁸ Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

deprivation of fair and regular trial, deporting civilians of the occupied territory, and transferring populations into an occupied territory. The reasoning for the prohibition of imposing extraterritorial prescriptions or measures of the occupying State is addressed by Professor Eyal Benvenisti:

The occupant may not surpass its limits under international law through extra-territorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.³⁹

In the situation of Hawai‘i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State’s proxies such as the State of Hawai‘i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai‘i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists’ accommodations collected by the State of Hawai‘i and the Counties.

The Counties have recently added 3% surcharges to the State of Hawai‘i’s 10.25% transient accommodations tax. Added with the State of Hawai‘i’s general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American

³⁹ Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

duties on goods that are imported to the United States destined to Hawai‘i. These duty rates are collected by the United States according to the United States Tariff Act of 1930, as amended, and the Trade Agreements Act of 1979.

The Council of Regency’s strategic plan entails three phases.⁴⁰ Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*,⁴¹ Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the I entered the political science graduate program and received a master’s degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since January 17, 1893. This prompted other master’s theses, doctoral dissertations, peer and law review articles, and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i*,⁴² to *Nation Within—The History of the American Occupation of Hawai‘i*.⁴³ Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book’s subtitle, the word Annexation has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

⁴⁰ Council of Regency’s Strategic Plain (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).

⁴¹ David Keanu Sai, “Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001),” 4 *Haw. J.L. Pol.* 133-161 (2022).

⁴² Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i* (1998).

⁴³ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, “The challenge for ... the fields of political science, history, and law is to distinguish between the rule of law and the politics of power.” In the history of the Hawai‘i, the might of the United States does not make it right.⁴⁴

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva, Switzerland, to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i dated February 25, 2018.⁴⁵ Dr. deZayas stated:

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

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁴⁶ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁴⁷

⁴⁴ *Id.*, xvi.

⁴⁵ Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

⁴⁶ Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at <https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf>).

⁴⁷ National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/>).

In a letter to Governor David Ige, Governor of the State of Hawai‘i, dated November 10, 2020, the NLG called upon the governor to begin to comply with international humanitarian law by administering the laws of the occupied State. The NLG letter concluded:

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency’s proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency’s proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On February 7, 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization (NGO) of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and accredited to participate in the Human Rights Council’s sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁴⁸ In its resolution, the IADL also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

⁴⁸ International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at <https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/>).

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council’s sessions, sent a joint letter dated March 3, 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁴⁹ In its joint letter, the IADL and the AAJ also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

On March 22, 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council (“HRC”) at its 49th session in Geneva. The oral statement read:

The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence “concerns a consent tacitly

⁴⁹ International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at <https://iadllaw.org/2022/03/iadl-and-aa-j-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/>).

conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for.”⁵⁰ Silence conveys consent. Since they “did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*”⁵¹

At the United Nations World Summit in 2005, the *Responsibility to Protect* was unanimously adopted.⁵² The principle of the *Responsibility to Protect* has three pillars: (1) every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; (2) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; and (3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. In 2009, the General Assembly reaffirmed the three pillars of State’s Responsibility to Protect their populations from war crimes and crimes against humanity.⁵³ And in 2021, the General Assembly passed a resolution on “The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity.”⁵⁴ The third pillar, which may call into action State intervention, can become controversial.⁵⁵ The Council of Regency acknowledges its duty and responsibility under the first pillar.

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”⁵⁶ This “rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general.”⁵⁷

⁵⁰ Nuno Sérgio Marques Antunes, “Acquiescence”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).

⁵¹ See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

⁵² 2005 World Summit Outcome A/60/L.1

⁵³ G.A. Resolution 63/308 The responsibility to protect, A/63/308.

⁵⁴ G.A. Resolution 75/277 The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277.

⁵⁵ Marjorie Cohn, “The Responsibility to Protect – the Cases of Libya and Ivory Coast,” *Truthout* (16 May 2011) (online at <https://truthout.org/articles/the-responsibility-to-protect-the-cases-of-libya-and-ivory-coast/>).

⁵⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

⁵⁷ *Id.*, 608.

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by *Proclamation* on April 17, 2019,⁵⁸ established the RCI in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War “to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.”⁵⁹ Professor Federico Lenzerini from the University of Siena, Italy, serves as its Deputy Head.

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai‘i, which includes President Joseph Biden Jr., Governor David Ige, Hawai‘i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua‘i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and subject to prosecution. All of the named perpetrators have met the requisite element of *mens rea*.⁶⁰ In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. “It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result.”⁶¹

Professor Schabas states three elements of the war crime of *usurpation of sovereignty during military occupation* are:

1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

With respect to the last two elements of war crimes, Professor Schabas explains:

⁵⁸ Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

⁵⁹ *Violation of the Laws and Customs of War*, 69 (1919).

⁶⁰ Website of the Royal Commission of Inquiry at <https://hawaiiankingdom.org/royal-commission.shtml>.

⁶¹ Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535 (2013).

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
3. There is only a requirement for the awareness of the factual circumstance that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”⁶²

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators’ own pleadings and the rulings by the court in a United States federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT. The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves “State action or policy or the action or policies of an occupying State’s proxies” and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.⁶³

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. With the exception of the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the

⁶² *Id.*, 167.

⁶³ United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).

Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the State of Hawai‘i complies with Article 43 of the 1907 Hague Regulations and administer the laws of the Occupied State—the Hawaiian Kingdom. The State of Hawai‘i and not the Federal government is in effective control of the majority of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation being the longest occupation in the history of international relations and war crimes continue to be committed with impunity.

As you are aware, the State of Hawai‘i Legislature met from January 18, 2023 to May 4, 2023, enacting American laws to be executed by Governor Josh Green. This war crime of *usurpation of sovereignty during military occupation* continues to be committed with impunity even after Attorney General Anne E. Lopez was notified that she and others were the subject of the RCI War Criminal Report No. 23-0001 and subject to prosecution, which you have in your possession.

In our meeting at the Grand Naniloa Hotel, I recommended that you have your Staff Judge Advocate do his due diligence regarding the information I provided you. His task would be to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. Considering the severity of the situation, I am allowing three weeks from this date for your Staff Judge Advocate to complete his due diligence by June 1, 2023. If an extension is required, we can discuss this subject further.

Sincerely,



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

cc: Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry

enclosures

Enclosure “1”

THE ROYAL COMMISSION OF INQUIRY:

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



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

THE ROYAL COMMISSION OF INQUIRY:

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

Edited by

Dr. David Keanu Sai

HEAD, ROYAL COMMISSION OF INQUIRY

JANUARY 2020

HAWAIIAN KINGDOM

MINISTRY OF THE INTERIOR

Hawaiian Kingdom

P.O. Box 2194
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Dedicated to Her late Majesty
Queen Lili‘uokalani
(1838-1917)



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

—Lili‘uokalani, *Hawai‘i’s Story by Hawai‘i’s Queen* 373 (1898).

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PART I

INVESTIGATING WAR CRIMES
AND HUMAN RIGHTS
VIOLATIONS COMMITTED
IN THE HAWAIIAN KINGDOM

PROCLAMATION

By virtue of the prerogative of the Crown provisionally vested in us in accordance with Article 33 of the 1864 Constitution, and to ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom, it is hereby ordered as follows:

Article 1

Head of the Royal Commission of Inquiry and terms of the investigation

His Excellency David Keanu Sai, Ph.D., *Acting* Minister of the Interior and Chairman of the Council of Regency, because of his recognized expertise in international relations and public law, is hereby appointed head of the Royal Commission of Inquiry, hereinafter “Royal Commission,” on the consequences of the belligerent occupation of the Hawaiian Kingdom by the United States of America since January 17, 1893.

The purpose of the Royal Commission shall be to investigate the consequences of the United States’ belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission.

The results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report.

The head of the Royal Commission shall be responsible for the implementation of the inquiry. He shall determine, with complete independence, the procedures and working methods of the inquiry, and the content of the report referred to in paragraph 3.

The head of the Royal Commission shall take the following oath:

“The undersigned, a Hawaiian subject, being duly sworn, upon his oath, declares that as head of the Royal Commission of Inquiry duly constituted on April 17, 2019, I will act correctly, truly and faithfully, and without favor to or prejudice against anyone.”

Article 2

Financing

All costs incurred by the Royal Commission shall be borne by the Hawaiian Government, by its Council of Regency, and that the latter has granted on this day \$15,000.00 (USD) for initial expenditures of the Royal Commission.

The management of the expenditures of the Royal Commission shall be subject to contracts between the head of the Royal Commission and the *Acting* Minister of Finance.

The head of the Royal Commission shall be accountable to the *Acting* Minister of Finance for all expenditures.

Article 3
Composition of the Royal Commission of Inquiry

The composition of the Royal Commission shall be decided by the head and shall be comprised of recognized experts in various fields.

Article 4
Entry into effect and expiration

This decision shall take effect on the day of its adoption and shall expire on the day that the head is satisfied that the mandate of the Royal Commission has been completed.

[seal] In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 17th day of April A.D. 2019.

[signed]

David Keanu Sai, Ph.D.
Chairman of the Council of Regency
Acting Minister of the Interior

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

[signed]

Kau‘i P. Sai-Dudoit,
Acting Minister of Finance

[signed]

Dexter Ke‘eaumoku Ka‘iama, Esq.,
Acting Attorney General

THE ROYAL COMMISSION OF INQUIRY

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

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THE ROYAL COMMISSION OF INQUIRY

Dr. David Keanu Sai
Head, Royal Commission of Inquiry

Introduction

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

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.²

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

The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. ...

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to a feeble but independent State by an abuse of

1 United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95*, 451 (1895) (hereafter “Executive Documents”) (online at [https://hawaiiiankingdom.org/pdf/Cleveland's_Message_\(12.18.1893\).pdf](https://hawaiiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf)).

2 *Id.*, 586.

3 *Id.*, 568.

the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.⁴

On 18 December 1893, President Cleveland delivered a manifesto⁵ to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government. The President concluded that the “military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.”⁶ He also determined “that the provisional government owes its existence to an armed invasion by the United States.”⁷ Finally, the President admitted that by “an act of war...the Government of a feeble but friendly and confiding people has been overthrown.”⁸

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

Five years later, at the height of the Spanish-American War, President Cleveland’s successor, William McKinley, signed a congressional joint resolution of annexation on 7 July 1898, unilaterally seizing the Hawaiian Islands. The legislation of every State, including the United States of America and its Congress, are not sources of international law. In *The Lotus* case, the Permanent Court of International Justice stated that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”⁹ According to Judge Crawford, derogation of this principle will not be presumed.¹⁰

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

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

4 *Id.*, 462-463.

5 *Manifesto* is defined as a “formal written declaration, promulgated by...the executive authority of a state or nation, proclaiming its reasons and motives for...important international action.” Black’s Law 963 (6th ed., 1990).

6 *Id.*, 452.

7 *Id.*, 454.

8 *Id.*, 454.

9 *Lotus*, PCIJ Series A, No. 10, 18 (1927).

10 James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).

11 Jean S. Pictet, *Commentary—The Geneva Conventions of 12 August 1949* 275 (1958).

12 Jean Bodin, *Six Books of the Commonwealth* 56 (1955).

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

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

From a State of Peace to a State of War

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

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

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

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

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

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

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

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

Jus Cogens—War Crimes and their Prosecution under Universal Jurisdiction

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

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

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

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

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

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

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

22 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 *Id.*

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

34 *Id.*, 157

35 *Id.*

36 *Id.*, 167

37 *Id.*, 168

38 *Id.*, 167

39 Lenzerini, Chapter 5, 208.

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

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

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

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

40 *Id.*

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

42 As a *jus cogens*—peremptory norm, customary international law prohibits any statute of limitation for war crimes. See also GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); and GA Res. 3074 (XXVIII).

43 Schabas, Chapter 4, 155.

44 Einarsen, 23.

45 Noah Feldman, “Cosmopolitan Law,” 116 *Yale L. J.* 1022, 1065 (2007).

46 Anthony Sammons, “The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts,” 21 *Berkeley J. Int’l L.* 111, 115 (2003).

47 Andrew Altman & Christopher Heath Wellman, “A Defense of International Criminal Law,” 115 *Ethics* 35, 46 (2004).

48 R. A. Duff, *Criminal Responsibility, Municipal and International* 25 (unpublished manuscript) (online at <http://www.trinitinture.com/documents/duff.pdf>).

49 Einarsen, 65.

The Restoration of the Hawaiian Kingdom Government

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

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

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

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

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

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

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

53 Black's Law, 26.

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

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

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

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

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

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

54 “Hawaiian Constitution” (1864). Part III, 219.

55 Black’s Law, 1282.

56 Hawaiian Kingdom Trust Company articles of agreement (15 Dec. 1995) (online at [http://hawaiiankingdom.org/pdf/HKTC_\(12.15.1995\).pdf](http://hawaiiankingdom.org/pdf/HKTC_(12.15.1995).pdf)).

57 *Id.*

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

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

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

To accomplish this, the author would relinquish, by a deed of conveyance in both companies, his entire one-half (50%) interest to Lewis, after which, Lewis would convey a redistribution of interest to Nai’a-Ulumaimalu, then the former would hold a ninety-nine percent (99%) interest in the two companies and the latter a one percent (1%) interest in the same. In order to have these two transactions take place simultaneously, without affecting the standing of the two partnerships, both deeds of conveyance took place on the same day but did not take effect until the following day, on 28 February 1996.⁶¹ On 1 March 1996, the Trustees of HKTC appointed the author as *acting* Regent.⁶²

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

58 Thomas Cooley, *A Treatise on the Law of Taxation* 185 (1876).

59 *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

60 *The King v. Ah Lin*, 5 Haw. 59, 61 (1883).

61 Deed from David Keanu Sai to Donald A. Lewis (27 Feb. 1996) (online at http://hawaiiankingdom.org/pdf/Sai_to_Lewis_Deed.pdf), Deed of Donald A. Lewis to Nai’a-Ulumaimalu’s (27 Feb. 1996) (online at http://hawaiiankingdom.org/pdf/Nai%E2%80%98a_to_Lewis_Deed.pdf).

62 Notice of appointment of Regent by Hawaiian Kingdom Trust Company (1 Mar. 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Appt_Regent.pdf).

63 Hawaiian Kingdom Trust Company’s notice of proclamation no. 1 by the Regent (1 Mar. 1996) (online at [http://hawaiiankingdom.org/pdf/Proc_\(3.1.1996\).pdf](http://hawaiiankingdom.org/pdf/Proc_(3.1.1996).pdf)).

partnership on or about 30 June 1996.⁶⁴

On 28 February 1997, a proclamation by the *acting* Regent announcing the restoration of the provisional Hawaiian government was printed in the Honolulu Sunday Advertiser on 9 March 1997.⁶⁵ The international law of occupation allows for an occupied State's government and the occupying State to co-exist within the same territory. According to Marek, "it is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the [occupying] State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the [occupying] State and that of the occupied State...is not one of delegation, but of co-existence."⁶⁶

On 7 September 1999, the *acting* Regent, commissioned Peter Umialiloa Sai, a Hawaiian subject, as *acting* Minister of Foreign Affairs, and Mrs. Kau'i P. Goodhue, later to be known as Mrs. Kau'i P. Sai-Dudoit, a Hawaiian subject, as *acting* Minister of Finance.⁶⁷ On 9 September 1999, the *acting* Regent commissioned Gary Victor Dubin, Esquire, a Hawaiian denizen, as *acting* Attorney General.⁶⁸ Dubin resigned on 21 July 2013, and was replaced by Dexter Ka'iama, Esquire, on 11 August 2013.⁶⁹ The *acting* Council of Regency ("Council of Regency") was established on 26 September 1999, by resolution whereby the author would resume the office of *acting* Minister of the Interior and serve as Chairman of the Council.⁷⁰

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

64 Deed from Hawaiian Kingdom Trust Company to Regent (15 May 1996) (online at http://hawaiiankingdom.org/pdf/HKTC_Deed_to_Regent.pdf).

65 Proclamation by the Regent, Honolulu Advertiser newspaper (28 Feb. 1997) Part III, 227-228.

66 Marek, 91.

67 Hawaiian Minister of Foreign Affairs commission—Peter Umialiloa Sai (5 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Umi_Sai_Min_Foreign_Affairs.pdf), and the Hawaiian Minister of Finance commission—Kau'i P. Goodhue (Sep. 5, 1999) (online at http://hawaiiankingdom.org/pdf/Kau_Min_of_Finance.pdf).

68 Hawaiian Attorney General commission—Gary V. Dubin (9 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Dubin_Att_General.pdf).

69 Hawaiian Attorney General commission—Dexter Ke'eaumoku Ka'iama (11 Aug. 2013) (online at https://www.hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf).

70 Privy Council Resolution establishing a Council of Regency (26 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Council_of_Regency_Resolution.pdf).

71 Council of Regency, Proclamation of Minister of Foreign Affairs *ad interim* (11 Nov. 2019), Part III, 235.

72 *Rex v. C. W. Kanaau*, 3 Haw. 669, 670 (1876).

73 *Id.*, 670-671.

Doctrine of Necessity and the Constitutional Order of the State

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

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

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

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

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

74 Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).

75 *Id.*

76 F.W. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l. L.* 568, 581 (1942).

77 See *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 732 (1969). See also *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokotso v. HM King Moshoeshoe II*, LRC (Const) 24, 132 (1989).

78 *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

79 *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88–89 (1986).

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

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

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

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

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

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

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

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

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

Lance Larsen v. Hawaiian Kingdom—Permanent Court of Arbitration

The first allegation of the war crime of usurpation of sovereignty,⁸⁴ was made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian Kingdom* at the Permanent Court of Arbitration (“PCA”), whereby the claimant alleged that the Council of Regency was legally liable “for allowing the unlawful imposition of American municipal laws” over him within Hawaiian territory.⁸⁵ The war crime of usurpation of sovereignty consist of the “imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation.”⁸⁶

In order to ensure that the dispute is international, the PCA must possess jurisdiction, as an institution, first,⁸⁷ before it can form *ad hoc* tribunals. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties. International disputes, capable of being accepted under the PCA’s institutional jurisdiction, include disputes between: any two or more States; a State and an international organization (i.e. an intergovernmental organization); two or more international organizations; a State and a private party; and an international organization and a private entity.⁸⁸ The PCA accepted the case as a dispute between a State and a private party, and acknowledged the Hawaiian Kingdom to be a non-Contracting Power under Article 47 of the Hague Convention for the Pacific Settlement of International Disputes, I (“Convention, I”) in its annual reports from 2001 to 2011.⁸⁹ Oral hearings were held at the PCA on 7, 8 and 11 December 2000.

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

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

84 Memorial of Lance Paul Larsen (22 May 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, at para. 62-64, “Despite Mr. Larsen’s efforts to assert his nationality and to protest the prolonged occupation of his nation, [on] 4 October 1999, Mr. Larsen was illegally imprisoned for his refusal to abide by the laws of the State of Hawaii by State of Hawaii. At this point, Mr. Larsen became a political prisoner, imprisoned for standing up for his rights as a Hawaiian subject against the United States of America, the occupying power in the prolonged occupation of the Hawaiian islands... While in prison, Mr. Larsen did continue to assert his nationality as a Hawaiian subject, and to protest the unlawful imposition of American laws over his person by filing a Writ of Habeas [sic] Corpus with the Circuit Court of the Third Circuit, Hilo Division, State of Hawaii.... Upon release from incarceration, Mr. Larsen was forced to pay additional fines to the State of Hawaii in order to avoid further imprisonment for asserting his rights as a Hawaiian subject,” (online at http://www.alohaquest.com/arbitration/memorial_larsen.htm).

Article 33, 1949 Geneva Convention, IV, “Pillage is prohibited. Reprisals against protected persons and their property are prohibited;” Article 147, 1949 Geneva Convention, IV, “Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: ...unlawful confinement of a protected person,... wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention;” see also International Criminal Court, *Elements of War Crimes* (2011), at 16 (Article 8 (2) (a) (vi)—War crime of denying a fair trial), 17 (Article 8 (2) (a) (vii)-2—War Crime of unlawful confinement), and 26 (Article 8 (2) (b) (xvi)—War Crime of pillaging).

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

86 Schabas, chapter 4, 157.

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

88 *Id.*

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

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

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

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

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

United States Invited to Join in the Arbitration

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

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

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

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

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

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

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

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

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

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

94 Johst Wilmanns, "Note," in 9 *Encyclopedia of Public International Law* 287 (1986).

95 *Id.*

96 J.L. Weinstein, "Exchange of Notes," 20 *Brit. Y.B. Int'l L.* 205, 207 (1952).

97 Cendric van Assche, "1969 Vienna Convention," *The Vienna Conventions on the Law of Treaties, A Commentary*, Vol. I, Corten & Klein, eds., vol. 1 261 (2011).

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

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

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

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

The Tribunal, however, stated:

At one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for fact-finding, both as between States and otherwise.¹⁰⁰

The Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.¹⁰¹

Part III of each of the Hague Conventions of 1899 and 1907 provide for International Commissions of Inquiry. The PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry.¹⁰²

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

98 David Bederman & Kurt Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii," 95 *Am. J. Int'l L.* 927, 928 (2001).

99 *Larsen v. Hawaiian Kingdom*, 119 *Int'l L. Rep.* 566, 596 (2001) ("Larsen Award").

100 *Id.*, 597.

101 *Id.*

102 *Id.*, n. 28.

Meeting with the Rwandan Government in Brussels

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

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

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

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

103 Video of the oral hearings in *Larsen v. Hawaiian Kingdom* (7, 8, 11 Dec. 2000) (online at <https://www.youtube.com/watch?v=tmpXy2okJlg&t=10s>).

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

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

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

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

Exposure of the Hawaiian Kingdom through the Medium of Academic Research

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

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

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

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

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

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

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

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

111 *Larsen Award*, 598-610.

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

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

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

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

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

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

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

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

114 Crawford, 623, n. 83.

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

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

117 Craven, Chapter 3, 128.

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

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

120 Larsen Award, 581.

- b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.
- c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principle *rebus sic 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.¹²¹

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

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

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

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

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

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

121 Craven, Chapter 3, 126.

122 Lenzerini, Chapter 5, 215.

ognize and deal with its takeover of Hawai‘i. In the book’s subtitle, the word *Annexation* has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since definition of international law there was no annexation, we are left with the word *occupation*.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, “The challenge for...the fields of political science, history, and law is to distinguish between the rule of law and the politics of power.” In the history of Hawai‘i, the might of the United States does not make it right.¹²³

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

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

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

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

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

123 Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* xvi (2016).

124 Dennis Riches, “This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation,” *Center for Glocal Studies*, Seijo University 81, 89 (2016).

125 NEA New Business Item 37 (2017) (online at <https://ra.nea.org/business-item/2017-nbi-037/>).

126 Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NEA Today (2 Apr. 2018) (online at <http://neatoday.org/2018/04/02/the-illegal-overthrow-of-the-hawaiian-kingdom-government/>).

127 Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom*, NEA Today (1 Oct. 2018) (online at <http://neatoday.org/2018/10/01/the-u-s-occupation-of-the-hawaiian-kingdom/>).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

130 Annyssa Bellal, *The War Report: Armed Conflicts in 2017* 22 (2018) (online at <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf>).

131 Oppenheim, *International Law*, vol. II, 237 (6th ed., 1921).

132 Pictet, 276.

133 *Id.*, 276.

134 31 Cong. Rec. 6635 (1898).

135 33 Cong. Rec. 2391 (1900).

136 *Id.*

137 *Id.*

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

Rights of Protected Persons under International Humanitarian Law

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

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

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

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

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

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

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

140 Pictet, 303.

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

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

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

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

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

2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.

3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.

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

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

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

The State of Hawai'i and its Counties are a Private Armed Force

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

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

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

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

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

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

143 Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

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

145 *The Apollon*, 22 U.S. 362, 370 (1824).

146 Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.

147 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I 14 (2009).

148 *Id.*, 5.

149 *Id.*

150 *State of Hawai'i v. Dennis Kaulia*, 128 Haw. 479, 486 (2013).

151 *Id.*, 487.

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

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

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

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

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

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

152 Henckaerts and Doswald-Beck, 354.

153 *Id.*, 355.

154 David J. Bederman, "Article II Courts," 44 *Mercer L. Rev.* 825, 826 (1992-1993).

155 *King v. Moresi*, 64 So. 2d 841, 843 (1953).

156 §8, *Civil Code*, Compiled Laws of the Hawaiian Kingdom (1884).

157 Marek, 102.

158 1907 Hague Convention, IV, Article 42. See Part III, 320.

159 Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law," 94 (885) *Int'l Rev. Red Cross* 133, 134 (Spring 2012).

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

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

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

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

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

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

160 *State of Hawai'i v. Lorenzo*, 77 Haw. 219, 220; 883 P.2d 641, 642 (1994).

161 *Id.*, 221, 643.

162 *State of Hawai'i v. Fergerstrom*, 106 Haw. 43, 55; 101 P.3d 652, 664 (2004).

163 *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).

164 *Lorenzo case*, 220, 642.

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

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

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

Sai v. Trump—Petition for Writ of Mandamus

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

165 Kmiec, 252.

166 American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States*, §102 (1987).

167 *Lorenzo case*, fn. 2.

168 *Id.*

169 Executive Documents, 454.

170 Black’s Law, 1574.

171 American Law Institute, *Restatement of the Law Second, Judgments*, §7, comment f, 45 (1942).

172 Karen Nelson Moore, “Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments,” 66 *Cornell Law Review* 534, 537 (1981).

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

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

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

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

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

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

173 *Sai v. Trump*, Petition for Writ of Mandamus (25 June 2018) (online at https://hawaiiankingdom.org/pdf/Petition_for_Mandamus.pdf).

174 *Sai v. Trump*, Order (11 Sep. 2018) (online at: https://hawaiiankingdom.org/pdf/Order_Mandamus.pdf).

175 *Sai v. Trump*, Minute Order (11 Sep. 2018) (online at https://hawaiiankingdom.org/pdf/Minute_Order_Mandamus.pdf).

176 Cornell Law School, Legal Information Institute, *Political Question Doctrine* (online at https://www.law.cornell.edu/wex/political_question_doctrine).

177 *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008).

otherwise familiar task.”¹⁷⁸

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

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

State of Hawai‘i Official Reports War Crimes

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

Council member Ruggles formally requests that you, in your capacity as the Office of Corporation Counsel to assure her that she is not incurring criminal liability under international humanitarian law and United States Federal law as a Council member for:

1. Participating in legislation of the Hawai‘i County Council that would appear to be in violation of Article 43 of the Hague Regulations and Article 64 of the Geneva Convention which require that the laws of the Hawaiian Kingdom be administered instead of the laws of the United States;
2. Being complicit in the collection of taxes, or fines, from protected persons that stem from legislation enacted by the Hawai‘i County Council, appear to be in violation of Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging;
3. Being complicit in the foreclosures of properties of protected persons for delinquent property taxes that stem from legislation enacted by the Hawai‘i County Council, which would appear to violate Articles 28 and 47 of the Hague Regulations and Article

178 *Lin v. United States*, 561 F.3d 506 (2009).

179 Text of the Draft Articles on Diplomatic Protection (2006) 2 *Y.B. Int’l L. Comm’n* 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 1.

180 *Elettronica Sicula S.P.A.* (ELSI), Judgment, I.C.J. Reports, para. 59 (1989).

181 *Id.*, art. 15, cmt. 2.

182 Letter from Laudig to Kamelamela (21 Aug. 2018) (online at <https://jenruggles.com/wp-content/uploads/Stephen-Laudigs-Letter-to-Corporation-Counsel-8-21-18.pdf>).

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

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

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

At the Council Committee meeting held on Monday, August 21, 2018 at the West Hawai'i Civic Center, you announced that you “will be refraining from participating in the proposing and enacting of legislation” until county lawyers will assure you in writing that you will not incur “criminal liability under international humanitarian law and U.S. law.”

In response to your inquiry, we opine that you will not incur any criminal liability under state, federal and international law. See Article VI, Constitution of the United States of America (international law cannot violate federal law).¹⁸³

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

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

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

Ruggles reported war crimes committed by the Queen's Hospital, in violation of 18 U.S.C. §2441 and §1091, and war crimes committed by thirty-two Circuit Judges of the State of Hawai'i, in violation of 18 U.S.C. §2441.¹⁸⁸ She also reported additional war crimes of pillaging

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

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

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

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

187 Brena Kerr, “Hawaii politician stops voting, claiming islands are ‘occupied sovereign country,’” *The Guardian* (30 Nov. 2018) (online at <https://www.theguardian.com/us-news/2018/nov/29/hawaii-politician-jennifer-ruggles-sovereign-country>).

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

committed by State of Hawai'i tax collectors, in violation of §2441,¹⁸⁹ the war crime of unlawful appropriation of property by the President of the United States and the Internal Revenue Service, in violation of §2441,¹⁹⁰ and the war crime of destruction of property by the State of Hawai'i on the summit of Mauna Kea, in violation of §2441.¹⁹¹

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

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

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

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

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

Reporting_to_FBI_10.11.18.pdf).

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

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

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

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

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

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

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

Unlawful Presence of Foreign Consulates

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

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

§458. It shall be incumbent upon all foreign consuls-general, consuls, vice-consuls, and consular agents, to present their commissions through the diplomatic agents of their several nations, if such exist, and if not, direct to the Minister of Foreign Affairs, who, if they are found to be regular, shall, unless otherwise directed by the King, give them exequaturs under the seal of his department; and it shall be the duty of said minister to cause all such exequaturs to be published in the Government Gazette.

§459. No foreign consul, or consular or commercial agent shall be authorized to act as such, or entitled to recover his fees and perquisites in the courts of this Kingdom, until he shall have received his exequatur.

§460. It shall be incumbent upon every diplomatic agent, coming accredited to the King, to notify the Minister of Foreign Affairs of his arrival, and to request an audience of the King, for the purpose of presenting his credentials. Said minister, upon receipt of such notice, with copy of his credentials, shall take His Majesty's orders in regard thereto, and communicate the same to such agent.

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

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

196 Schabas, Chapter 4, 157.

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

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

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

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

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

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

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

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

197 Part III, 236-310.

198 U.S. Army FM 27-10, section 362.

199 *Id.*, section 368.

200 Winston Churchill, *The Second World War*, v. 137 (1954).

addresses authority and not government. Talmon points out:

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

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

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

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

Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai‘i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize the State of Hawai‘i and its Counties, for

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

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

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

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

international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;

And, We do hereby further proclaim that the State of Hawai'i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law.²⁰⁵

The State of Hawai'i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the "laws in force in the country," which includes the 2014 decree of provisional laws by the Council of Regency in accordance with Article 43. "During the occupation," according to Benvenisti, "the ousted government would often attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority or both. One way to accomplish such goals is to legislate for the occupied population."²⁰⁶ Furthermore, the "occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local laws, most notably in matters of personal status."²⁰⁷ The decree of 10 October 2014, stated:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

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

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).²⁰⁸

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

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

207 *Id.*

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

List of War Crimes Under Customary Law Committed in the Hawaiian Kingdom

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

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

With respect to the last two elements listed for each crime:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”

Elements of the war crime of usurpation of sovereignty during occupation

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of compulsory enlistment

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

209 Schabas, Chapter 4, 167-169.

Elements of the war crime of denationalization

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

Elements of the war crime of pillage

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

Elements of the war crime of confiscation or destruction of property

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

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

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

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

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

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

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

Conclusion: Royal Commission of Inquiry

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

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

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

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

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

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

2. The purpose of the Royal Commission shall be to investigate the consequences of the United States’ belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission.

3. The results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report.

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

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

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

213 Restatement Third, §103(2)(a).

214 Black’s Law, 1313.

PART II

THE PROLONGED OCCUPATION
OF THE HAWAIIAN KINGDOM

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CHAPTER 1
HAWAIIAN CONSTITUTIONAL GOVERNANCE

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HAWAIIAN CONSTITUTIONAL GOVERNANCE

Dr. David Keanu Sai

Introduction

Hawaiian constitutionalism was an eclectic process drawing on political ideas and experiments of other countries as well as from the trials and tribulations of Hawaiian rulers. Hopkins observed that the first Hawaiian constitution in 1840 appeared to be a combination of “the Pentateuch, the British government, and the American Declaration of Independence.”¹ While it is true that Hawaiian constitutionalism may have drawn from British and American political experience, its history and circumstances are unique. Hawai‘i did not undergo the firebrand of revolution that escalated to regicide in Great Britain and France, and Hawaiian history finds no comparison to Locke and Rousseau’s social contract theory recognizing popular sovereignty residing in the people. What is apparent, though, was that the political leadership borrowed and/or was influenced by legal cultures throughout Europe and the United States, especially in the formative years of its transformation from autocratic rule to constitutional governance.

Cooley’s 1868 treatise on *Constitutional Limitations*, often cited in Hawaiian Kingdom court decisions,² distinguishes between a *constitution* and a *constitutional government*. According to Cooley, a *constitution* is “that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.”³ But a *constitutional government* applies “only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights and shield them against the exercise of arbitrary power.”⁴ Therefore, all nations have constitutions, in which some leading principles have “prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded.”⁵ But not all nations have constitutional governments.

From Absolute Constitution to Constitutional Government

The history from absolute *constitution* to a *constitutional government* is a narrative of the interplay of internal and external forces that shaped the government of the Hawaiian Kingdom. Throughout nineteenth century Europe, there were two main strands of constitutional development—liberalizing a monarchy as advocated in Great Britain, and enlightening despotism that took place on the European continent.⁶ Both strands sought to limit the monarch’s authority, and monarchs rarely were willing participants. And to this Hawai‘i can add a third

1 Manley Hopkins, *Hawaii: The Past, Present and Future of its Island Kingdom* 478 (1869).

2 *Hyman Brothers v. John M. Kapena, Collector-General of Customs*, 7 Haw. 76 (1887); *The King v. Young Tang*, 7 Haw. 49 (1887); *Harriet A. Coleman v. Charles C. Coleman*, 5 Haw. 300 (1885); *Aliens and Denizens*, 5 Haw. 167 (1884); *C.T. Gulick, Minister of the Interior, v. William Flowerdew*, 6 Haw. 414 (1883); *In re Petition Clarence W. Ashford, for admission to the Bar*, 4 Haw. 614 (1883); *The King v. Tong Lee*, 4 Haw. 335 (1880); *A.S. Cleghorn v. Bishop and Al., Administrators of the Estate of His Late Majesty Kamehameha V*, 3 Haw. 483 (1873); *In re Wong Sow on Habeas Corpus-Appeal from Decree of Hartwell, J.*, 3 Haw. 503 (1873); *James A. Burdick v. Godfrey Rhodes and James S. Lemon, Executors, &c.*, 3 Haw. 250 (1871); *In re Gip Ah Chan*, 6 Haw. 25 (1870).

3 Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* 2 (1868).

4 *Id.*, 3.

5 *Id.*, 2.

6 John A. Hagwood, *Modern Constitutions Since 1787* 2 (1939).

strand of constitutional development—paragon of virtue. Neither the threat of internal revolt nor the curtailing of powers was the driving force of Hawaiian constitutionalism. Rather, it was the collective endeavor of the Chiefs, under the sanction of Kamehameha III and the tutelage of their instructor of political science, William Richards, to establish a constitutional government whereby all people, whether Chiefs or commoners, were equal before the law. Both foreign intervention and the threat thereof served as a driving force for government reform, but reform itself was a national matter and ultimately left to the deliberations and work of the King and Chiefs.

With the implied recognition of the autonomy of the Hawaiian Kingdom by the United States in 1826 and the French in 1839, Great Britain could no longer assert its claim of “sovereignty not only by discovery, but by a direct and formal Cession by the Natives,”⁷ without attracting trouble for itself from the United States and France. It was during this time that the Hawaiian Kingdom began to evolve from absolute rule under a multi-tiered feudal system of governance to a unitary State under a constitutional monarchy. During this period three constitutions can be identified, namely in the years of 1840, 1852 and 1864, but it would be unwise to treat each constitution as if it were entirely separate and distinct from the others. This would infer a severance in the chain of *de jure* governance and complicate matters. Instead, these constitutions were crucial links in an evolutionary chain—a *de jure* progression of constitutionalism that culminated into eighty articles in the 1864 constitution.

Government Reform

Kamehameha III’s government stood upon the crumbling foundations of a feudal autocracy that could no longer handle the weight of geo-political and economic forces sweeping across the islands. Uniformity of law across the realm and the centralization of authority had become a necessity. Foreigners were the source of many of these difficulties that centered on questions relating to their entry into “the country, to reside there, to engage in business (trade, agriculture, missionary work, etc.), to acquire house lots and land by lease or otherwise, to build houses on the land so acquired, and to transfer their property either by sale, lease, will, or inheritance.”⁸ Just as Great Britain was forced to adjust its old governing order to the new social system brought about by the industrial revolution in the First Reform Act of 1832, for example, the governing order of the Hawaiian Kingdom would also have to adjust to the change in its social system as a result of increased commercial trade and resident foreigners. In 1831, General William Miller, an Englishman, made the following observation about the Hawaiian governing order.

If then the natives wish to retain the government of the islands in their own hands and become a nation, if they are anxious to avoid being dictated to by any foreign commanding officer that may be sent to this station, it seems to be absolutely necessary that they should establish some defined form of government, and a few fundamental laws that will afford security for property; and such commercial regulations as will serve for their own guidance as well as for that of foreigners; if these regulations be liberal, as they ought to be, commerce will flourish, and all classes of people will be gainers.⁹

7 "Secret Instructions to Lord Byron," *Report of the Historical Commission of the Territory of Hawaii for the two years ending December 31, 1826* 19 (14 Sep. 1824).

8 Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, Vol. I 137 (1938).

9 *Id.*, 122.

In order to address such vexing problems, Kamehameha III turned to his religious advisors—the missionaries—for advice on the matter. William Richards, one of the missionaries, volunteered to travel to the United States in search of someone who would instruct the Chiefs on government reform. Unable to secure an instructor in this way, Richards committed himself at the urging of Kamehameha III to instruct the Chiefs on political economy and governance. Commenting on the change in Great Britain brought about by the Industrial Revolution, Smellie states, that when “population was so rapidly increasing and when trade and industry were expanding faster than they had ever done before, two problems were always to the fore: to understand the scope and nature of the changes which were taking place, and to adjust the machinery of government to a new social order.”¹⁰ Richards, who had no formal education in political science, relied on the work of Francis Wayland, President of Brown University. Wayland was interested in “defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members.”¹¹

Richards developed a curriculum based upon Hawaiian translations of Wayland’s two books, “Elements of Moral Science (1835)” and “Elements of Political Economy (1837).” According to Richards, the “lectures themselves were mere outlines of general principles of political economy, which of course could not have been understood except by full illustration drawn from Hawaiian custom and Hawaiian circumstances.”¹² Through his instruction, Richards sought to theorize governance from a foundation of *natural rights* within an agrarian society based upon capitalism that was not only cooperative in nature, but also morally grounded in Christian values. In Richards translation of Wayland’s *Elements of Political Economy*, he stated, “[p]eace and tranquility are not maintained when righteousness is not maintained. The righteousness of the chiefs and the people is the only basis for maintaining the laws of the government.”¹³

From the premise that governance could be formed and established to acknowledge and protect the rights of all the people and their property, it was said to follow that laws should be enacted to maintain a society for the benefit of all and not the few. Richards asserted, “God did not establish man as servants for the government leaders and as a means for government leaders to become rich. God provided for the occupation of government leaders in order to bless the people and so that the nation benefits.”¹⁴ Wayland’s theory of cooperative capitalism, which presupposed private ownership of land and a free market as the foundation of political economy, was hindered at the time because the Kingdom was still in a feudal state of ownership as it had been since Kamehameha I. So the full application of Wayland’s political economy, at this point, could not be fully realized until the people could possess freehold titles, e.g. fee-simple and life estates. In the meantime, personal property and agriculture formed the basis of the Hawaiian economy. According to an 1840 statute, making direct reference to Richards’ 1839 instructional book that translated Wayland’s *Political Economy* into the Hawaiian language:

The business of the Governors, and land agents [Konohiki], and tax officers of the general tax gatherer, is as follows: to read frequently this law to the people on all days of public work, and thus shall the landlords do in the presence of their

10 K.B. Smellie, *A Hundred Years of English Government* 8 (1950).

11 Juri Mykkänen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* 154 (2003).

12 William Richards, “William Richards’ Report to the Sandwich Islands Mission on His First Year in Government Service, 1838-1839,” *Fifty-first Annual Report of the Hawaiian Historical Society for the Year 1942* 66 (1943).

13 William Richards, *No ke Kalaiaina* 123 (1840). “Aole hoi e mau ka malu ana a me ka kuapapa nui ana o ka aina ke malama ole ia ka pono. O ka pono o na ‘lii a me na kanaka, o ia wale no ke kumu e paa ai na kanawai a me ke aupuni.” Translation by Keao NeSmith, University of Hawai‘i at Mānoa.

14 *Id.*, 64. “Aole i hoonoheho mai ke Akua in a kanaka i poe hana na na ‘lii a i mea e waiwai ai na ‘lii. Ua haawi mai ke Akua i ka oihana alii mea e pomaikai ai na kanaka i mea hoi e pono ai ka aina.” Translation by Keao NeSmith, University of Hawai‘i at Manoa.

tenants on their working days. Let every one also put his own land in a good state, with proper reference to the welfare of the body, according to the principles of Political Economy. The man who does not labor enjoys little happiness. He cannot obtain any great good unless he strives for it with earnestness. He cannot make himself comfortable, not even preserve his life unless he labor for it. If a man wish to become rich, he can do it in no way except to engage with energy in some business. Thus Kings obtain kingdoms by striving for them with energy.¹⁵

1840 Constitution

On 7 June 1839, Kamehameha III proclaimed an expanded uniform code of laws for the kingdom that was preceded by a "Declaration of Rights." The Declaration formally acknowledged and vowed to protect the *natural rights* of life, limb, and liberty for both chiefs and people. The code provided that "no chief has any authority over any man, any farther than it is given him by specific enactment, and no tax can be levied, other than that which is specified in the printed law, and no chief can act as a judge in a case where he is personally interested, and no man can be dispossessed of land which he has put under cultivation except for crimes specified in the law."¹⁶ The following year on 8 October, Kamehameha III granted the first Constitution incorporating the Declaration of Rights as its preamble.

The purpose of a written constitution "is to lay down the general features of a system of government and to define to a greater or less extent the powers of such government, in relation to the rights of persons on the one hand, and on the other...in relation to certain other political entities which are incorporated in the system."¹⁷ The first constitution did not provide for separation of powers, e.g. executive, legislative and judicial, and the prerogatives of the Crown permeated every facet of governance. The Crown's duty was to execute the laws of the land, serve as chief judge of the Supreme Court, and sit as a member of the House of Nobles who would enact laws together with representatives chosen from the people. The granting of the first constitution by Kamehameha III was not a limitation, per se, of abusive power, but an incorporation of sharing power. By that instrument he "declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government."¹⁸ According to Justice Robertson, on behalf of the entire Supreme Court,

King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed.¹⁹

The role of the Prime Minister established by Kamehameha I in 1795 was for all intents and

15 William Richards, *Translation of the Constitution and Laws of the Hawaiian Islands, established in the reign of Kamehameha III* 28 (1842). The quoted text is a translation from the Hawaiian text of Richards' *No Ke Kalaaina*, 127.

16 *Id.*, 68.

17 Edward S. Corwin, "Constitution v. Constitutional Theory," 19(2) *Am. Political Sci. Rev.* 290, 291 (1925).

18 *In re the Estate of His Majesty Kamehameha IV*, 3 Haw. 715, 720 (1864).

19 *Rex v. Joseph Booth*, 3 Haw. 616, 630 (1863).

purposes a misnomer. There were no other ministers that ran government by direction of a primary minister appointed by the Crown until 1845, when a cabinet ministry was established for the first time by statute.²⁰ Prior to 1845, Hawaiian governance did not experience, as the British did, the function of ministers in administering government separate from the Crown. According to Carter, the first prototype of the modern Prime Minister emerged during reigns of the first two Hanoverian Kings, George I and II.²¹ George I had little interest in English politics nor a grasp of the English language, and often returned to Hanover and left the country to be run by his cabinet ministers who were led by Sir Robert Walpole and Lord Townsend. Shortly after the ascension of George II, Townsend resigned, and Walpole was able to gain full control of the cabinet ministry, thereby creating the “office of Prime Minister” that “made possible the evolution of the modern system of ministerial responsibility.”²² The role of the Hawaiian Prime Minister (Kālimoku) under Kamehameha I, was primarily as an agent at will of the Crown on matters of national governance. It was an idiosyncrasy of Hawaiian governance, that the title Prime Minister would be replaced with Premier (Kuhina Nui) after the death of Kamehameha I. According to the First Act of Kamehameha III passed by the Hawaiian Legislature in 1845, the Premier, in addition to the duties enumerated in the constitution, headed the cabinet ministry as Minister of the Interior and from this point on was a prime minister in the truest sense of the title. The duties of the Premier, as provided by constitutional provision include:

All business connected with the special interests of the kingdom, which the King wishes to transact, shall be done by the Premier under the authority of the King. All documents and business of the kingdom executed by the Premier, shall be considered as executed by the King’s authority. All government property shall be reported to him (or her) and he (or she) shall make it over to the King. The Premier shall be the King’s special counselor in the great business of the kingdom. The King shall not act without the knowledge of the Premier, nor shall the Premier act without the knowledge of the King, and the veto of the King on the acts of the Premier shall arrest the business. All important business of the kingdom which the King chooses to transact in person, he may do it but not without the approbation of the Premier.²³

Hawaiian Independence and the Question of British Sovereignty

After the temporary occupation by French troops under the command of Captain Laplace in 1839, a member of the British House of Commons, Lord Ingestre, called upon the Secretary of State for Foreign Affairs, Lord Palmerston, to provide an official response on the matter. He also “desired to be informed whether those islands which, in the year 1794, and subsequently in the year 1824, . . . had been declared to be under the protection of the British Government, were still considered . . . to remain in the same position.”²⁴ In response, Lord Palmerston acknowledged there was no report on the situation with the French, and with regard to the protectorate status of the Islands “he was non-committal and seemed to indicate that he knew very little about the subject.”²⁵ To the Hawaiian government, Lord Palmerston’s report polit-

20 "Statute Laws of His Majesty Kamehameha III," *Hawaiian Kingdom*, Vol. 1 2 (1846).

21 Bryum Carter, *The Office of Prime Minister* 22 (1956).

22 A. Berriedale Keith, *The King and the Imperial Crown: The Powers and Duties of His Majesty* 64 (1936).

23 "Hawaiian Consitution" (1840).

24 Kuykendall, *The Hawaiian Kingdom: 1778-1854*, 185. In an agreement with Captain George Vancouver on 25 February 1794, King Kamehameha I ceded his Kingdom of Hawai'i to King George III in order to be a British protectorate. Kamehameha I, his chiefs and people considered themselves British subjects.

25 *Id.*

ically dispelled the notion of British dependency and admitted Hawaiian independence.²⁶ A clearer British policy toward the Hawaiian Islands by Lord Palmerston's successor, Lord Aberdeen, two years later reinforced the position of the Hawaiian government. In a letter to the British Admiralty on 4 October 1842, Viscount Canning, on behalf of Lord Aberdeen, wrote:

Lord Aberdeen does not think it advantageous or politic, to seek to establish a paramount influence for Great Britain in those Islands, at the expense of that enjoyed by other Powers. All that appears to his Lordship to be required, is, that no other Power should exercise a greater degree of influence than that possessed by Great Britain.²⁷

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent State under international law. He sought the formal recognition of Hawaiian independence from the three naval powers in the Pacific at the time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys, Timoteo Ha'alilio, William Richards, and Sir George Simpson, a British subject. Of all three powers, it was the British that had a legal claim over the Hawaiian Islands through cession by Kamehameha I in 1794, but for political reasons could not openly exert its claim over and above the other two naval powers. Due to the islands prime economic and strategic location in the middle of the north Pacific, the political interest of all three powers was to ensure that none would have a greater interest than any other. This caused Kamehameha III "considerable embarrassment in managing his foreign relations, and...awakened the very strong desire that his Kingdom shall be formally acknowledged by the civilized nations of the world as a sovereign and independent State."²⁸

While the envoys were on their diplomatic mission, a British Naval ship, HBMS *Carysfort*, under the command of Lord Paulet, entered Honolulu harbor on 11 February 1843, making outrageous demands on the Hawaiian government. Basing his actions on certain complaints made to him in letters from the British Consul Richard Charlton, who was absent from the kingdom at the time, Paulet eventually seized control of the Hawaiian government on 25 February 1843, after threatening to level Honolulu with cannon fire.²⁹ Kamehameha III was forced to surrender the kingdom but did so under written protest and pending the outcome of the mission of his diplomats in Europe. News of Paulet's action reached Admiral Thomas of the British Admiralty, and the latter sailed from the Chilean port of Valparaíso and arrived in the islands on 26 July 1843. After a meeting with Kamehameha III, Admiral Thomas determined that Charlton's complaints did not warrant a British takeover and ordered the restoration of the Hawaiian government, which took place in a grand ceremony on 31 July 1843.³⁰ At a thanksgiving service after the ceremony, Kamehameha III proclaimed before a large crowd, "ua mau ke ea o ka 'āina i ka pono" (the life of the land is perpetuated in righteousness). The King's statement became the national motto of the country and recognized by the Hawaiian courts as a legal maxim.³¹

By 1843, the Hawaiian envoys succeeded in their mission of securing international recognition of the Hawaiian Islands "as a sovereign and independent State." Great Britain and France explicitly and formally recognized Hawaiian independence on 28 November 1843 by joint

26 Robert C. Wyllie, "Report of the Minister of Foreign Affairs," *Foreign Affairs, Hawaiian Kingdom* 7 (1845).

27 Historical Commission, *Report of the Historical Commission of the Territory of Hawaii for the two years ending December 31, 1824*, Historical Commission, Territory of Hawai'i 36 (1925).

28 United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 42 (1895) (hereafter "Executive Documents").

29 Kuykendall, *The Hawaiian Kingdom: 1778-1854*, 214.

30 *Id.*, 220.

31 *Shillaber v. Waldo*, 1 Haw. 31, 32 (1847).

proclamation at the Court of London, and the United States followed on 6 July 1844 by letter of Secretary of State John C. Calhoun to the Hawaiian envoys.³² The Hawaiian Kingdom was the first Polynesian nation to be recognized as an independent and sovereign State. The Anglo-French proclamation stated:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands [Hawaiian Islands] of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands [Hawaiian Islands] as an *Independent State*, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed (emphasis added).³³

As a recognized State, 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,³⁴ 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.³⁵ Regarding the United States, the Hawaiian Kingdom entered into four treaties: 1849 Treaty of Friendship, Commerce and Navigation;³⁶ 1875 Treaty of Reciprocity;³⁷ 1883 Postal Convention Concerning Money Orders;³⁸ and the 1884 Supplementary Convention to the 1875 Treaty of Reciprocity.³⁹ The Hawaiian Kingdom was also recognized within the international community as a neutral State as expressly stated in treaties with the Kingdom of Spain in 1863, the Swedish-Norwegian Kingdom in 1852, and Germany in 1879. Article XXVI of the 1863 Hawaiian-Spanish treaty, for example, provides:

All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, *in time of war the neutrality of the Hawaiian Islands*, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands.⁴⁰ (emphasis added)

The British government lauded Admiral Thomas' action and by its act of formal recognition of Hawaiian independence, the British government relinquished any and all legal claims over the Hawaiian Islands, whether by discovery or by formal cession from Kamehameha I. As an independent State, the Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with the rapidly changing political, social and economic tides that showed no signs of receding from its shores.

32 Wyllie, *Report of the Minister of Foreign Affairs*, 4.

33 *Executive Documents*, 120. Reprinted in *1 Haw. J.L. & Pol.* 114 (2004).

34 "Diplomatic and Consular Representatives of Hawaii Abroad," Printed broadsheet dated June 1, 1887, Miscellaneous Foreign 1890, FO&Ex, Hawai'i State Archives; Hawaiian Almanac and Annual, "Hawaiian Register and Directory for 1893," *Hawaiian Almanac and Annual*, 140 (1892).

35 Part III, 236-310

36 9 U.S. Stat. 977. Reprinted at *1 Haw. J.L. & Pol.* 115 (2004). See also Part III, 305-310

37 19 U.S. Stat. 625. Reprinted at *1 Haw. J.L. & Pol.* 126 (2004).

38 23 U.S. Stat. 736. Reprinted at *1 Haw. J.L. & Pol.* 129 (2004).

39 25 U.S. Stat. 1399. Reprinted at *1 Haw. J.L. & Pol.* 134 (2004).

40 Part III, 294.

Formalizing Hawaiian Law

In 1845 Kamehameha III refocused his attention toward domestic affairs and the organization and maintenance of the newly established constitutional monarchy. This was a critical time for the Kingdom to maintain its independence. On 29 October of that year, he commissioned Robert Wyllie of Scotland to be Minister of Foreign Affairs, G.P. Judd, a former missionary, as Minister of Finance, William Richards as Minister of Education, and John Ricord, the only attorney in the kingdom, as Attorney General. All were granted patents of naturalization as Hawaiian subjects prior to their appointments. These appointments, with the exception of Wyllie who received a patent of denization that allowed him to retain his British nationality, sparked controversy in the kingdom and renewed concerns of foreign takeover. Responding to a slew of appeals to remove these foreign advisors who replaced native Chiefs, Kamehameha III penned the following letter that was communicated throughout the realm—a letter that speaks to the time and circumstance the kingdom faced:

Kindly greetings to you with kindly greetings to the old men and women of my ancestors' time. I desire all the good things of the past to remain such as the good old law of Kamehameha that "the old women and the old men shall sleep in safety by the wayside," and to unite with them what is good under these new conditions in which we live. That is why I have appointed foreign officials, not out of contempt for the ancient wisdom of the land, but because my native helpers do not understand the laws of the great countries who are working with us. That is why I have dismissed them. I see that I must have new officials to help with the new system under which I am working for the good of the country and of the old men and women of the country. I earnestly desire to give places to the commoners and to the chiefs as they are able to do the work connected with the office. The people who have learned the new ways I have retained. Here is the name of one of them, G.L. Kapeau, Secretary of the Treasury. He understands the work very well, and I wish there were more such men. Among the chiefs Leleiohoku, Paki, and John Young [Keoni Ana] are capable of filling such places and they already have government offices, one of them over foreign officials. And as soon as the young chiefs are sufficiently trained I hope to give them the places. But they are not now able to become speakers in foreign tongues. I have therefore refused the letters of appeal to dismiss the foreign advisors, for those who speak only the Hawaiian tongue.⁴¹

John Ricord arrived in the Hawaiian Islands in 1844 from Oregon and was retained as Special Law Advisor to Kamehameha III. He was an attorney by trade and by all accounts very able and professional and well versed in both the civil law of continental Europe and the common law of both Britain and the United States. Later, Chief Justice Albert Francis Judd stated that Ricord "seems to have been learned in the civil as well as the common law, as a consequence, no doubt, of his residence in Louisiana."⁴² When Ricord arrived in the Islands, the kingdom was only in its fourth year of constitutional governance and the shortcomings of the first constitution began to show. One of his first tasks was establishing a diplomatic code for Kamehameha III and the Royal Court, based on the principles of the 1815 Vienna Conference. "Besides prescribing rank orders," according to Mykkänen, "the mode of applying for royal audience, and the appropriate dress code, the new court etiquette set the Hawaiian standard for practically everything that constituted the royal symbolism."⁴³

41 Samuel M. Kamakau, *Ruling Chiefs of Hawaii* 401 (1992).

42 A.F. Judd, "Early Constitution of the Judiciary of the Hawaiian Islands," *Hawaiian Almanac and Annual for 1889*, 65 (1888)

43 Juri Mykkänen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* 161 (2003).

His second and more important task was to draft a code that better organized the executive and judicial departments, which was submitted to the Legislature for sanction and approval. In a report to the Legislature, Ricord concluded that, “there is an almost total deficiency of laws, suited to the Hawaiian Islands as a recognized nation in reciprocity with others so mighty, so enlightened and so well organized as Great Britain, France, the United States of America, and Belgium. These Powers having received His Majesty into fraternity, it will become your duty to prepare [the King’s] Government to concert in some measure with theirs.”⁴⁴ Ricord observed that, “the Constitution had not been carried into full effect [and] its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective.”⁴⁵ The underlying issue, however, was what system of law should one “prepare the King’s Government” under? France’s and Belgium’s government were based on a civil or Roman law tradition, while the tradition in Great Britain and the United States was the common law. On this topic, Kamakau recounted Ricord’s view:

The laws of Rome, that government from which all other governments of Europe, Western Asia and Africa descended, could not be used for Hawai‘i, nor could those of England, France or any other country. The Hawaiian people must have laws adapted to their mode of living. But it is right to study the laws of other peoples, and fitting that those who conduct laws offices in Hawai‘i should understand these other laws and compare them to see which are adapted to our way of living and which are not.⁴⁶

Complying with the resolution of the legislature, Attorney General Ricord “submitted at intervals portions of the succeeding code to His Majesty in cabinet council of ministers, where they have first undergone discussion and careful amendment; they have next been transferred to the Rev. William Richards, for faithful translation into the native language, after which, as from a judiciary committee, they have been reported to the legislative council for criticism, discussion, amendment, adoption or rejection.”⁴⁷ These organic laws were based on a hybrid of both civil and common law principles that spanned four hundred forty seven pages and subdivided into parts, chapters, articles and sections. Because the Hawaiian Islands sat at the international crossroads of trade and commerce that spanned across the Pacific Ocean, merchants, from both the civil and common law countries, had influenced the evolution of Hawaiian law since Kamehameha I. Governmental organization leaned toward the principles of English and American common law, infused with some civil law reasoning, but at the very core the system was to be Hawaiian.

Military Force

In 1845, the Hawaiian Kingdom organized its military under the command of the Governors of the several islands of Hawai‘i, Maui, O‘ahu and Kaua‘i but subordinate to the Monarch. According to the statute, “[a]ll male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective islands where they have their most usual domicil, whenever so required by proclamation of the governor thereof.”⁴⁸ Those exempt from military duty included ministers of religion of every denomination, teachers, members of the Privy Council of State, executive department heads, members of the House of Nobles and Representatives when in session, judges, sheriffs, notaries public, registers of

44 John Ricord, *Report of the Attorney General Read Before His Majesty, to the Hawaiian Legislature*, Attorney General, Hawaiian Kingdom 5 (1845).

45 *Id.*, 3.

46 Kamakau, 402.

47 "Statute Laws of His Majesty Kamehameha III," *Hawaiian Kingdom*, Vol. I 6 (1846).

48 *Id.*, 69.

wills and conveyances, collectors of customs, poundmasters and constables.⁴⁹ The Hawaiian military was not a regular force, but a force that could be called to duty when determined by the governors.

The Legislature, in 1886, enacted *An Act to Organize the Military Forces of the Kingdom*, “for the purpose of more complete military organization in any case requiring recourse to arms and to maintain and provide a sufficient force for the internal security and good order of the Kingdom, and being also in pursuance of Article 26th of the Constitution.”⁵⁰ The Act established “a regular Military and Naval force, not exceed two hundred and fifty men, rank and file,” and the “term of enlistment shall be for five years, which term may be extended from time to time by re-enlistment.”⁵¹ This military force was renamed the King’s Royal Guard in 1890.⁵² Complementing the regular force was the call for duty of the civilian population under the 1845 statute. The insurgency, in 1893, renamed the King’s Royal Guard to the National Guard.⁵³

Land Reform

There is a distinction between title to the territory of a State and title to real property. Title to territory, according to Grotius, is what jurists called *dominium*, being the origin of property or ownership.⁵⁴ And to the State, says Walker, is “reserved the *dominium* and ultimate property in the lands, and the grantee [of real property] acquired only the use and profits.”⁵⁵ This common law maxim derived from the principle that the “state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign.”⁵⁶ Real property, on the other hand, derived from the feudal law, whereby the King granted out the use and profits of the land to his vassals on certain conditions, but retained ownership over them. Any breach of the conditions would cause dispossession and the land would be reallocated to someone else. These feudal possessions came to be known as real property—i.e. fee-simple, life estate and leasehold—and the conditions imposed on real property by the person of the King were gradually replaced by legislative enactments of a modern State—e.g. allegiance, taxes, eminent domain. According to Hawaiian constitutional law, the *dominium* was described as follows.

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. *It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.* Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom (emphasis added).⁵⁷

49 *Id.*, 70.

50 *An Act to Organize the Military Forces of the Kingdom*, Laws of His Majesty Kalakaua I 37 (1886).

51 *Id.*

52 *An Act to Provide for a Military Force to be Designated as the “King’s Royal Guard,”* Laws of His Majesty Kalakaua I 107 (1890).

53 *An Act to Authorize the Formation of a National Guard*, Laws of the Provisional Government of the Hawaiian Islands 8 (1893).

54 Hugo Grotius, *Grotius on the Rights of War and Peace*, trans. William Whewell 69 (1853).

55 James M. Walker, *The Theory of the Common Law* 13 (1852).

56 William M. McKinney and Burdett A. Rich, *Ruling Case Law as Developed and Established by the Decisions and Annotations*, Vol. XX 13 (1915).

57 “Hawaiian Constitution” (1840).

By statute in 1846, this constitutional provision was interpreted as establishing “three classes of persons having vested rights in the lands—1st, the government, 2nd, the landlord [Konohiki], and 3rd, the tenant [native commoner], it next [became] necessary to ascertain the proportional rights of each.”⁵⁸ When rights are constitutionally vested “they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.”⁵⁹ Fully recognizing this doctrine, Hawaiian Attorney General John Ricord explains:

New laws or amendments of the old, cannot divest rights previously acquired, and, as in other countries, so in this, the repealed ordinances must be resorted to in numerous cases accruing before the repeal or modification. Means and remedies may be altered, but the rights themselves, if vested, cannot be constitutionally disturbed. This is one admitted doctrine of civilized jurisprudence.⁶⁰

The government held both the *dominium* and original fee-simple title to all the lands, subject to the vested undivided rights of the chiefly and native tenant classes. In order to verify private claims to property since the reign of Kamehameha I, a Board of Commissioners to Quiet Land Titles (“Land Commission”) was established on 10 December 1845 to investigate, confirm or reject all private claims to fee-simple titles, life estates or leases acquired prior to the to date of the establishment of the Land Commission to the reign of Kamehameha I.⁶¹ If the title was confirmed to have been lawfully acquired from Kamehameha I, his successors or agents, whether in fee, for life or for years, it received a Land Commission Award subject to the rights of native tenants.

In 1848, the King in Privy Council initiated the Great Mahele (Division), or land division, in order to “ascertain the proportional rights” of the government, chiefly and native tenant classes. It was agreed upon that in lieu of quitclaiming their undivided right in the *dominium*, each Chief would receive a freehold life estate, capable of being converted into a fee-simple, from the government over large tracts of land called ahupua‘a and ‘ili kūpono.⁶² During this division, it was understood that the King would participate in his private capacity and not as head of the government. This was reflected in the Privy Council minutes, where it notes the “King now claims to be Konohiki (Chief) of a great portion of the lands. He therefore makes known to the other Konohikis, that they are only holders of Lands under him, but he will only take a part and leave them a part. . . .subject only to the rights of the Tenants.”⁶³ On 18 December 1847, the following resolution was unanimously passed by the Privy Council, which would not only guide the division process, but also contractually bind the King and the Konohikis to adhere to the rules of the division.⁶⁴

58 “Statute Laws of His Majesty Kamehameha III,” *Hawaiian Kingdom* 83 (1847).

59 Black’s Law 1564 (6th ed., 1990).

60 “Statute Laws of His Majesty Kamehameha III,” *Hawaiian Kingdom*, Vol. I 4 (1846).

61 *Id.*, 107.

62 W.D. Alexander, “A Brief History of Land Titles in the Hawaiian Kingdom,” Interior Department, Appendix to Surveyor General’s Report to the Hawaiian Legislature 4-5 (1882). An ahupua‘a varies in size and shape, but a typical ahupua‘a “is a long narrow strip, extending from the sea to the mountain, so that its chief may have his share of all the various products of the *uka* or mountain region, the cultivated land, and the *kai* or sea.” And an ‘ili kūpono held the same traits as an ahupua‘a despite its origin.

63 “Privy Council Minutes,” *Hawaiian Kingdom* 87 (11 Dec. 1847).

64 *Id.*, 129. Before the chiefs received lands they had to first relinquish all claims to lands previously held by them in the following form and signed. “Ke ae aku nei au i keia mahele, ua maikai. No ka Moi na Aina i kakau ia maluna. Aohe ou kuleana maloko.” Translation: “I consent to this division, it is good. Belonging to the King the lands written above. I have no more rights within.” The signature of the Konohiki signified the evidence of consent and bound the Konohiki and his successors to the rules and conditions of the division

Whereas, it has become necessary to the prosperity of our Kingdom and the proper physical, mental and moral improvement of our people that the undivided rights at present existing in the lands our Kingdom, shall be separated, and distinctly defined;

Therefore, We Kamehameha III., King of the Hawaiian Islands and His Chiefs, in Privy Council Assembled, do solemnly resolve, that we will be guided in such division by the following rules:

1—His Majesty, our Most Gracious Lord and King, shall in accordance with the Constitution and Laws of the Land, retain all his private lands, as his own individual property, subject only to the rights of the Tenants, to have and to hold to Him, His heirs and successors forever.

2—One-third of the remaining lands of the Kingdom shall be set aside, as the property of the Hawaiian Government subject to the direction and control of His Majesty, as pointed out by the Constitution and Laws, one-third to the chiefs and Konohiki(s) in proportion to their possessions, to have and to hold, to them, their heirs and successors forever, and the remaining third to the Tenants, the actual possessors and cultivators of the soil, to have and to hold, to them, their heirs and successors forever.

3—The division between the Chiefs or Konohiki(s) and their Tenants, prescribed by Rule 2nd shall take place, whenever any Chief, Konohiki or Tenant shall desire such division, subject only to confirmation by the King in Privy Council.

4—The Tenants of His Majesty's private lands, shall be entitled to a fee-simple title to one-third of the lands possessed and cultivated by them; which shall be set off to the said Tenants in fee-simple, whenever His Majesty or any of said Tenants shall desire such division.

5—The division prescribed in the foregoing rules, shall in no wise interfere with any lands that may have been granted by His Majesty or His Predecessors in fee-simple, to any Hawaiian subject or foreigner, nor in any way operate to the injury of the holders of unexpired leases.

6—It shall be optional with any Chief or Konohiki, holding lands in which the Government has a share, in the place of setting aside one-third of the said lands as Government property, to pay into the Treasury one-third of the unimproved value of said lands, which payment shall operate as a total extinguishment of the Government right in said lands.

7—All the lands of His Majesty shall be recorded in a Book entitled "Register of the lands belonging to Kamehameha III., King of the Hawaiian Islands," and deposited with the Registry of Land Titles in the Office of the Minister of the Interior, and all lands set aside, as the lands of the Hawaiian Government, shall be recorded in a Book entitled "Register of the lands belonging to the Hawaiian Government," and fee-simple titles shall be granted to all other allottees upon the Award of the Board of Commissioners to quiet Land Titles.

After assigning life estates to the other Konohikis and requiring them to submit their claims with the Board of Commissioners to Quiet Land Titles for Government sanction, Kamehameha III, as the highest in the Konohiki class, retained nearly 2.5 million acres of land for himself, which he acknowledged that the Government still possessed the fee-simple title in his life estate. Therefore, in order to extinguish the government's interest, he bypassed the Board of Commissioners to Quiet Land Titles and proceeded to go directly before the Legislative Assembly to commute the Government's remainder interest in his lands. According to the Hawaiian Supreme Court *In the matter of the Estate of His Majesty Kamehameha IV* in 1864, the

between themselves and the Government as well as the division with the native tenants.

lands held by Kamehameha III after assigning lands to the other Konohikis “were not regarded as his private property strictly speaking. Even before his division with the landlords, a second division between himself and the Government was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the Government in like manner with the lands of the chiefs.”⁶⁵ The Court continued to state that the “records of the discussion in Council show plainly His Majesty’s anxious desire to free his lands from the burden of being considered public domain, and as such subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his property.”⁶⁶

On 7 June 1848, the Hawaiian Legislature passed an *Act relating to the lands of His Majesty the King and of the Government*, whereby Kamehameha III relinquished any claim as a Konohiki to nearly 1.5 million acres that remained in his name after the Mahele to the Government and the Government thereby released its claim to the remaining 1 million acres of lands of Kamehameha III. This process of commuting the Government’s fee-simple interest effectively converted Kamehameha III’s life estate to nearly one million acres into fee-simple, but subject to the rights of native tenants. The action by Kamehameha III of commuting the Government’s interest for large tracts of land also served as the precedent as to how the other Konohikis would calculate commutation on their life estates.

The granting of freeholds in fee or for life to the Konohiki class did not diminish the government’s title to the *dominium* that remained with the State. The *dominium*, however, no longer possessed the undivided vested rights of the chiefly class, but now only the vested rights of the native tenant class.⁶⁷ Native tenants who desired a fee-simple title to land and sought to divide their interest out of the *dominium* could approach the King, in his private capacity as a Konohiki, any other Konohiki whenever they “desire such division” as prescribed by rules 3 and 4, or the Government through the Minister of the Interior. By virtue of the 1850 Kuleana Act, the Land Commission was empowered by the Government and Konohiki class to grant fee-simple titles to native tenants who were encouraged to submit their claims to divide out their interest when the Mahele was being discussed in Privy Council.⁶⁸ This Act also defined the division for native tenants to be one quarter acre for a house lot and whatever lands lie in actual cultivation.⁶⁹ When the Land Commission statutorily ceased to exist in 1854, the duty of dividing out native tenant rights was resumed by the Government and Konohikis, including the Crown. For those native tenants who were unable to file a claim with the Land Commission, they could divide out their interest on lands held by the Government “in lots from one to fifty acres, in fee-simple” by applying to special agents appointed by the Minister of the Interior.⁷⁰ Division between native tenants and the Konohikis, which included the Crown, were not regulated by statute as were Government lands, but were prescribed as a condition of

65 *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722 (1864).

66 *Id.*

67 For an expanded discussion on the Great Mahele and the vested rights of native tenants, see Alexander, *Surveyor General’s Report*; Umi Perkins, *Teaching Land and Sovereignty 2 Haw. J.L. & Pol.* 97 (2006); Sai, book review of *Review of Kahana: How the Land Was Lost*, by Robert H Stauffer. 17(1) *The Contemporary Pacific* 237-40 (2005).

68 Donovan Preza, “The Emperical Writes Back: Re-examining Hawaiian Dispossession Resulting from the Mahele of 1848” 138 (MA thesis, University of Hawai’i at Manoa, 2010). By Privy Council resolution, 21 December 1849, the Government and Konohiki classes waived their commutation fee of one-third of the unimproved value that would have been payable by the native tenant class in order to acquire their fee-simple title to their entire lands claimed, as well as authorizing the Land Commission to act on their behalf in the division as prescribed by the Mahele rules 3 and 4.

69 “An Act Confirming Certain Resolutions of the King and Privy Council, passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges,” *Hawaiian Statutes* (6 Aug. 1850), section 5 & 6.

70 *Id.*, Section 4; and, “An Act to Provide for the Appointment of Agents to Sell Government Lands to the People,” *Hawaiian Statutes* (16 June 1851).

title when the Konohikis received their lands under and by virtue of Privy Council resolution of 18 December 1847. The prescribed division was regulated by rule 5. In other words, a native tenant could not divide out their interest within lands already conveyed by the Government or Konohikis, whether in fee, for life or for years, unless the lands have reverted to the same by treason,⁷¹ remainder,⁷² or want of heirs.⁷³

According to the registry book there were only two hundred fifty-three recognized Konohikis, who bound themselves and their successors to the rules and conditions of the Great Mahele. As a class, the Konohikis made up a finite number affixed to those who were recognized chieftains in the Hawaiian Kingdom, but the native tenant class is ever increasing and is comprised of all natives who were not Konohikis. Native tenants who divided out their interests from the dominium did not affect the vested rights of native tenants who did not divide; *a priori* the right is vested in a class and not a finite number of individuals like the Konohiki class. Therefore, the rights of native tenants exist in perpetuity, and according to Chief Justice William Lee, these rights are “secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself.”⁷⁴ This is the reason why all conveyances in the Hawaiian Islands have the uniform clause in deeds “reserving the rights of native tenants,” or in the Hawaiian language, “koe nae na kuleana o na Kanaka ma loko.” By 1893, native tenants had acquired 167,290.45 acres of land by purchase of government grants pursuant to the 1850 Kuleana Act.⁷⁵ In fact, the Surveyor General reported to the Legislative Assembly that between “the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives.”⁷⁶

Non-aboriginal Hawaiian subjects were able to acquire freehold estates and leases through government grants and awards by the Land Commission, or by purchase from freeholders themselves. Foreign nationals were initially barred from acquiring fee-simple titles under the 1845 Organic Acts, but this law was later repealed under the “Alien Disability Act” 10 July 1850. All titles to real property were subject to the following conditions:

1. To punish for high treason by forfeiture, if so the law decrees.
2. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.
3. To encourage and even enforce the usufruct of lands for the common good.
4. To provide public thoroughfares and easements, by means of roads, bridges, streets, &c., for the common good.
5. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.⁷⁷

These acts effectively brought to a close the feudal state of land tenure in the Hawaiian Islands, and Richards’ teachings laid the foundation for a new political economy and constitutional change.

71 “Penal Code of the Hawaiian Islands,” *Hawaiian Kingdom* section 9, chapter VI (1869): “Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.”

72 A remainderman is a person who inherits the property in fee upon the death of the owner of a life estate.

73 “Compiled Laws of the Hawaiian Kingdom (Civil Code)” 477 (1884): “Upon the decease of any person owning, possessed of, or entitled to any estate of inheritance or kuleana in any land or lands in this Kingdom, leaving no kindred surviving, all such land and lands shall thereupon escheat and revert to the owner of the Ahupuaa, Ili or other denomination of land, of which such escheated kuleana had originally formed a part.”

74 *Kekiekie v. Dennis*, 1 Haw. 69 (1851); see also *Kukiiahu v. William Gill*, 1 Haw. 90 (1851).

75 Preza, 138.

76 Alexander, *Surveyor General’s Report*, 24.

77 Statute Laws (vol. I), 85.

The Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim.⁷⁸

1852 Constitution

In 1851, the Legislature passed a resolution calling for the appointment of three commissioners, one to be chosen by the King, one by the Nobles, and one by the Representatives, to revise the Constitution of 1840. The commission, headed by William Lee from the House of Representatives, followed the structure and organization provided for by the Massachusetts Constitution of 1780. The Massachusetts constitution was the most advanced of any constitutions of the time and was organized into four parts: a preamble; a declaration of rights; a framework of government describing the legislative, executive and judicial organs; and an amendment article. The draft of the revised Constitution was submitted to the Legislature and approved by both the House of Nobles and the House of Representatives and signed into law by the King on 14 June 1852.⁷⁹

The amended constitution did not have a preamble, but was organized in the same manner as the Massachusetts constitution, with the exception of the order of the form of government: a declaration of rights; a framework of government that described the functions of the executive (subdivided into five sections), the legislative, and judicial powers; and an article describing the mode of amending the constitution. According to Hegel's theory of a constitutional monarchy, the "three powers of a modern [constitutional monarchy] have distinct functions but are not completely separate. As part of an interdependent whole, each power is defined not only by its own particular function, but also by the other powers which limit and interact with it."⁸⁰ The constitution, though, retained remnants of absolutism as a carryover of the former constitution. In other words, by constitutional provision, the Crown was capable of altering the constitution or even of ceding the kingdom to a foreign State without legislative approval. These provisions would allow the King to act swiftly in a dire situation should circumstances demand. In particular, these provisions of the 1852 constitution included:

Article 39. The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can, place the whole Kingdom, or any part of it under martial law; and he can ever alienate it, if indispensable to free it from the insult and oppression of any foreign power.

Article 45. All important business for the Kingdom which the King chooses to transact in person, he may do, but not without the approbation of the Kuhina Nui. The King and Kuhina Nui shall have a negative on each other's public acts.

78 *Id.*, 86.

79 Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* 36 (1918).

80 Bernard Yack, "The Rationality of Hegel's Concept of Monarchy," *74(3) Am. Pol. Science Rev.* 713 (1880)

These provisions were retained particularly because there had been tenuous relations with France since 1839, when French Captain Laplace exacted \$20,000.000 from Kamehameha III as surety to prevent the persecution of Catholics. Laplace also forced the King to sign another treaty imposing jury selection benefits to Frenchmen and a fixed duty on French wine and brandies. On 23 March 1846, French Rear Admiral Hamelin who arrived in the islands on the 22nd on the frigate *Virginie*, returned the four boxes containing the \$20,000.00 to the Hawaiian government.⁸¹ Three days later, Kamehameha III reluctantly signed two identical treaties with the French and British that reiterated the Laplace treaty's provision of jury selection and a cap on duties on "wines, brandies, and other spirituous liquors" from both countries. These treaties superseded the British 1836 treaty and the French 1839 treaty, and contained "two objectionable clauses, which proved to be a fruitful source of trouble in subsequent years."⁸² The following provisions were eventually repealed under the 1851 treaty with Britain and the 1857 treaty with France.

ARTICLE III. No British [French] subject accused of any crime whatever shall be judged otherwise than by a jury composed of native or foreign residents, proposed the British [French] Consul and accepted by the Government of the Sandwich Islands.

ARTICLE VI. British [French] merchandise or goods recognized as coming from the British [French] dominions, shall not be prohibited, nor shall they be subject to an import duty higher than five per cent ad valorem. Wines, brandies, and other spirituous liquors are however excepted from the stipulation, and shall be liable to such reasonable duty as the Hawaiian Government may think; fit to lay upon them, provided always that the amount of duty shall not be so high as absolutely to prohibit the importation of the said articles.

Tension again arose with the French in August 1849, when Consul Dillon accused the Hawaiian government of violating the 1846 French treaty. Admiral De Tromelin, who arrived in the islands on 12 August on board the French frigate *Poursuivante*, "sent the king a peremptory dispatch containing ten demands which had been drawn up by Mr. Dillon."⁸³ These again centered on the treatment of Catholics, the duty on spirituous liquors, and the unequal treatment of Frenchmen. The Hawaiian government sent a courteous, yet firm, reply explaining that it had not violated the treaty and that if any rights of French citizens have been violated,

the courts of the kingdom were open for the redress of all such grievances, and that until justice had been denied by them there could be no occasion for diplomatic interference. The government offered to refer any dispute to the mediation of a neutral power, and informed the admiral that no resistance would be made to the force at his disposal, and that in any event the persons and property of French residents would be scrupulously guarded.⁸⁴

Undeterred by reason and fairness, De Tromelin landed a fully armed force in Honolulu and took possession of the government fort, "the customhouse and other government buildings, and seized the king's yacht, together with seven merchant vessels in port."⁸⁵ The fort had previously been abandoned and the Hawaiian government provided no opposition to the landing

81 W.D. Alexander, *A Brief History of the Hawaiian People* 261 (1891).

82 *Id.*

83 *Id.*, 266.

84 *Id.*, 267.

85 *Id.*, 268.

of French troops. By proclamation of the Admiral on the 30th, the ten-day occupation and the destruction of the fort was justified under France's international right of reprisal, but private property would be restored. The two French warships left Honolulu for San Francisco on 5 September 1849, with the French consul Dillon and his family. Louis Perrin replaced Dillon as French consul and arrived in Honolulu on 13 December 1850. To the government's surprise, the French consul presented the same demands as had Dillon and resumed his "policy of an annoying diplomatic interference with the internal affairs of the kingdom."⁸⁶ As a result, the King and Premier placed the kingdom temporarily under the protection of the United States, which greatly diminished the annoyance exhibited by the French consul.⁸⁷

Death of Kamehameha III

These events and other threats to the safety of the kingdom caused great trepidation amongst the King and other governmental officials and constituted the driving force behind the prospect of ceding the Hawaiian Islands to the United States. By 1853, the topic of annexation to the United States was a subject of serious deliberation by the King who "was tired of demands made upon him by foreign powers, and of threats by filibusters from abroad and by conspirators at home to overturn the government."⁸⁸ On 16 February 1854, the King "commanded Mr. Wyllie [Minister of Foreign Affairs] to ascertain on what terms a treaty of annexation could be negotiated, to be used as a safeguard to meet any sudden emergency."⁸⁹ Negotiations between Wyllie and the American commissioner David L. Gregg were not successful and the prospect of annexation came to a close upon the death of Kamehameha III on 15 December 1854. Despite open threats to the kingdom, Kamehameha III successfully transformed Hawaiian governance from a feudal autocracy to the edifice of constitutional government that recognized a uniform rule of law and acknowledged and protected the rights of its citizenry.

The age of Kamehameha III was that of progress and of liberty—of schools and of civilization. He gave us a Constitution and fixed laws; he secured the people in the title to their lands, and removed the last chain of oppression. He gave them a voice in his councils and in the making of the laws by which they are governed. He was a great national benefactor, and has left the impress of his mild and amiable disposition on the age for which he was born.⁹⁰

Ascension of King Kamehameha IV

Alexander Liholiho succeeded to the throne as Kamehameha IV. He was the adopted son of the King, and was confirmed successor on 6 April 1853, in accordance with Article 25 of the Constitution of 1852.⁹¹ Article 25 provided that the "successor [of the Throne] shall be the person whom the King and the House of Nobles shall appoint and publicly proclaim as such, during the King's life." The first year of his reign he approved an Act to separate the office of Kuhina Nui from that of Minister of Interior Affairs. The legislature reasoned that the "Kuhina Nui is invested by the Constitution with extraordinary powers, and whereas the public exigencies may require his release from the labor, and responsibilities of the office of Minister of Interior Affairs, now by law imposed upon him."⁹²

86 *Id.*, 270.

87 *Id.*

88 *Id.*, 277.

89 *Id.*, 278.

90 Kamehameha IV, *Speeches of His Majesty Kamehameha IV to the Hawaiian Legislature* 5 (1861).

91 Lydecker, *Roster Legislatures*, 49.

92 "An Act to Separate the Office of Kuhina Nui from that of Minister of Interior Affairs," *Hawaiian Statutes* (6

For the first time in its relatively short legislative history, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget in its 1855 session. Kamehameha IV explained, “the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about \$200,000, which Bill we could not sanction.”⁹³ After the House of Nobles “repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed in Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people in the Kingdom.”⁹⁴

An election of new Representatives the following month was called for by the King “for the special and only purpose of voting the Supplies necessary to the administration of Our Government, without oppressing Our faithful Subjects with unreasonable taxes.” Between 30 July and 12 August 1855, the Legislature met in extraordinary session and the appropriation bill was passed and signed into law on 13 August 1855.⁹⁵ If this situation occurred in the United States Congress, the President would not be able to have done what Hawaiian constitutional law allows for its constitutional monarch. Under the United States constitution, the branches of government are separate and equal as a means for creating checks and balances, while the branches of the Hawaiian government are separate but they are coordinate.

In 1855, the Department of Public Instruction was established, by statute, replacing the ministry of Public Instruction whose minister formerly served as a member of the Cabinet Council. This independent department was headed by a President who presided over a five member Board of Education that was “superintended and directed by a committee of the Privy Council.”⁹⁶ From this point, the cabinet consisted of the Minister of the Interior, Minister of Finance, Minister of Foreign Affairs, and the Attorney General.⁹⁷ It was also the “duty of the Board of Education, every sixth year, counting from the year 1860, to make a complete census of the inhabitants of the Kingdom, to be laid before the King and Legislature for their consideration.”⁹⁸ The constitution was also amended in 1856, which changed legislative sessions from annual to biennial. Regarding those sovereign prerogatives of absolutism retained in the constitution, Kamehameha IV sought to rid these prerogatives by constitutional amendment, but was unsuccessful. The responsibility for such change would fall on his successor and brother, Lot Kapuāiwa.

Ascension of King Kamehameha V

On 30 November 1863, Kamehameha IV died unexpectedly, and left the kingdom without a successor.⁹⁹ On the very same day, the Premier, Victoria Kamāmalu, in Privy Council, proclaimed Lot Kapuāiwa to be the successor to the Throne in accordance with Article 25 of

Jan. 1855).

93 Lydecker, Roster Legislature, 62

94 *Id.*

95 *Id.*, 65.

96 Compiled Laws, 199.

97 After John Ricord left the kingdom in 1847, the office of Attorney General was not filled until 1862 with the appointment of Charles C. Harris. During this period the District Attorneys throughout the islands performed the functions of the office.

98 Compiled Laws, 211.

99 On 3 October 1859, in an Extraordinary Session of the House of Nobles, Kamehameha IV received confirmation from the Nobles that his minor son, Prince Albert, was to be the successor of the Hawaiian Throne in accordance with Article twenty-five of the 1852 constitution. The young Prince died August 19th 1862, leaving the Kingdom without a successor to the throne.

the Constitution of 1852, and received confirmation by the Nobles. He was thereafter styled Kamehameha V. Article 47, of the Constitution of 1852, provided that “whenever the throne shall become vacant by reason of the King's death the Kuhina Nui shall perform all the duties incumbent on the King, and shall have and exercise all the powers, which by this Constitution are vested in the King.” In other words, Victoria Kamehameha provided continuity for the office of the Crown pending the appointment and confirmation of Kapuāiwa. Upon his ascension, Kamehameha V refused to take the oath of office until the 1852 Constitution was altered in order to remove those sovereign prerogatives that ran contrary to the principles of a constitutional monarchy, namely Articles 45 and 94.¹⁰⁰

Apparently, Kamehameha V knew that his refusal to take the oath was constitutionally authorized by Article 94 of the Constitution, which provided that the “King, after approving this Constitution, shall take the following oath.” This provision implied a choice as to whether to take the oath, which Kamehameha V felt should be constitutionally altered and made mandatory. Kamehameha V was convinced that these anomalous provisions, which needed altering, were not just problematic to him, but also a source of great difficulty for his late brother Kamehameha IV and the Legislative Assembly. If he did take the oath, he would have bound himself to the constitution whereby any change or amendment to the constitution was vested solely with the Legislative Assembly. By not taking the oath, he reserved to himself the responsibility of change, which ironically was authorized by the very constitution he sought to amend.

1864 Constitution

Kamehameha V and his predecessor recognized Articles 39, 45 and 94 as a hindrance to responsible government, and this formed the main basis for the King to convene the first constitutional convention whose duty was to draft a new constitution. In Privy Council, the King resolved to look into the legal means of convening the first Constitutional Convention under Hawaiian law, and on 7 July 1864 the convention convened.¹⁰¹ Between 7 July and 8 August, each article in the proposed Constitution was read and discussed until the convention arrived at Article 62. In this article, the King and Nobles wanted to insert property qualifications for representatives and their electorate, but the elected delegates refused. After days of debate over this article, the Convention arrived at an absolute deadlock. The elected delegates could not come to agree on this article. As a result, Kamehameha V dissolved the convention and exercising his sovereign prerogative by virtue of Article 45, he annulled the 1852 constitution and proclaimed a new constitution on 20 August 1864.

In his speech at the opening of the Legislative Assembly of 1864, Kamehameha V explained his action of abrogating the 1852 Constitution and proclaiming a new constitution by making specific reference to the “forty-fifth article [that] reserved to the Sovereign the right to conduct personally, in cooperation with the Kuhina Nui (Premier), but without the intervention of a Ministry or the approval of the Legislature, such portions of the public business as he might choose to undertake.”¹⁰² The constitution proclaimed was not new, but rather the same draft that was before the convention with the exception of the property qualifications for representa-

100 Lydecker, *Roster Legislatures*, 99.

101 *Id.*

102 *Id.*

tives¹⁰³ and their electorate.¹⁰⁴ The legislature later repealed the property qualifications in 1874, but maintained literacy as the only qualification.

The office of Premier was eliminated, and the constitution provided that no act of the Monarch was valid unless countersigned by a responsible Minister from the Cabinet, who was answerable to the Legislative Assembly regarding matters of removal by vote of a lack of confidence or impeachment proceedings. The function of the Privy Council was greatly reduced, and a Regency replaced the function of Premier should the King die, leaving a minor heir, who would “administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King.”¹⁰⁵

The Crown, by constitutional provision, was bound to take the oath of office upon ascension to the throne, and the sole authority to amend or alter the constitution was the Legislative Assembly, which was now a unicameral body comprised of appointed Nobles and Representatives elected by the people sitting together. The constitution also provided that the “Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial; these shall always be preserved distinct.”¹⁰⁶ No doubt, the change from bicameral to unicameral was a result of the refusal by the House of Representatives to meet with the House of Nobles on the Appropriation Bill of 1855.

The constitution, and the method by which it came about, has been erroneously labeled as a *coup d'état* that sought to increase the power of the Crown.¹⁰⁷ Nothing could be further from the truth. In fact, the 1864 Legislative Assembly appointed a special committee, which was comprised of Godfrey Rhodes, John ʻĪi, and J.W.H. Kauwahi to respond to Kamehameha V's speech opening the new legislature. The committee recognized the constitutionality of the King's prerogative under the former constitution and acknowledged that this “prerogative converted into a right by the terms of the [1852] Constitution, Your Majesty has now parted with, both for Yourself and Successors, and this Assembly thoroughly recognizes the sound judgment by which Your Majesty was actuated in the abandonment of a privilege, which, at some future time might have been productive of untold evil to the nation.”¹⁰⁸ In other words, the Crown was not only authorized by law to do what had been done, but the action of Kamehameha V further limited his own authority under the former constitution. He was the last Monarch to have exercised a remnant of absolutism.

103 "Hawaiian Constitution" Article 61 (1864): "No person shall be eligible for a Representative of the People, who is insane or an idiot; nor unless he be a male subject of the Kingdom, who shall have arrived at the full age of Twenty-One years—who shall know how to read and write—who shall understand accounts—and shall have been domiciled in the Kingdom for at least three years, the last of which shall be the year immediately preceding his election; and who shall own Real Estate, within the Kingdom, of a clear value, over and above all incumbrances, of at least Five Hundred Dollars; or who shall have an annual income of at least Two Hundred and Fifty Dollars; derived from any property, or some lawful employment." Part III, 224.

104 "Hawaiian Constitution" Article 62 (1864): "Every male subject of the Kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall be possessed of Real Property in this Kingdom, to the value over and above all incumbrances of One Hundred and Fifty Dollars or of a Lease-hold property on which the rent is Twenty-five Dollars per year—or of an income of not less than Seventy-five Dollars per year, derived from any property or some lawful employment, and shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters of his District as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that District. Provided, however, that no insane or idiotic person, nor any person who shall have been convicted of any infamous crime within this Kingdom, unless he shall have been pardoned by the King, and by the terms of such pardon have been restored to all the rights of a subject, shall be allowed to vote." Part III, 224.

105 "Hawaiian Constitution" Article 33 (1864).

106 "Hawaiian Constitution" Article 20 (1864).

107 Kuykendall, *The Hawaiian Kingdom: 1854-1874*, Twenty Critical Years, Vol. II 133 (1953). 133.

108 John ʻĪi, J.W.H. Kauwahi and Godfrey Rhodes, "Reply to His Majesty's 1864 Address at the Opening of the Legislature" (Hawaiian Legislature).

Election of King Lunalilo and King Kalākaua

On 11 December 1872, Kamehameha V died without naming a successor to the Throne, and the Legislative Assembly, being empowered to elect a new Monarch in accordance with the 1864 constitution, elected William Charles Lunalilo on 8 January 1873. The Hawaiian Kingdom's first elected King died a year later without a named successor, and the Legislature once again convened in special session and elected David Kalākaua as King on 12 February 1874. On 14 February 1874, King Kalākaua appointed his younger brother, Prince William Pitt Leleiohōkū, his successor, but he died 10 April 1877. The next day he appointed his sister, Princess Lili'uokalani, as heir apparent and received confirmation from the Nobles. When Kalākaua was elected, a new *stirps* replaced the Kamehameha *stirps* which comprised of Princess Lili'uokalani, heir-apparent, Queen Kapi'olani, Princess Virginia Kapo'oloku Po'omaikelani, Princess Kinoiki, Princess Victoria Kawekiu Kai'ulani Lunalilo Kalaninuiāhilapalapa, Prince David Kawānanakoa, Prince Edward Abner Keli'iahonui, and Prince Jonah Kūhiō Kalaniana'ole.

On 9 August 1880, a Board of Genealogists of Hawaiian Chiefs was established by statute to “collect from genealogical books, and from the knowledge of old people the history and genealogy of the Hawaiian chiefs, and shall publish a book of the doings of such Board.”¹⁰⁹ The Board was also tasked with the duty of “establishing the arms and insignia of chief families, searching for ancient relics which have been lost or concealed in places of concealment, and for ascertaining and preserving from violation the ancient places of sepulture of the chiefs.”¹¹⁰ In the preamble of the statute it states, “[w]hereas, it is provided by the 22d article of the Constitution that the Kings of Hawaii shall be chosen from the native chiefs of the Kingdom; and whereas, at the present day it is difficult to ascertain who are the chiefs, as contemplated by said article of the Constitution, and it is proper that such genealogies of the Kingdom be perpetuated, and also the history of the chiefs and kings from ancient times down to the present day, which would also be a guide to the King in the appointment of Nobles in the Legislative Assembly.”¹¹¹ Between 20 April and 30 November 1896, the Board published the genealogies of Chiefs living at the time in the *Ka Makaainana* newspaper under the heading “Mookuauhau Alii.” Those chiefs and their direct descendants are Chiefs of the realm and capable of serving as an elected Monarch should the Kalākaua *stirps* come to an end, as well as serving as Nobles in the Legislative Assembly.

1887 Revolution

During the summer of 1887, while the Legislature remained out of session, a minority of subjects of the Hawaiian Kingdom and foreign nationals met to organize a takeover of the political rights of the native population who held the majority of the voting block. The driving motivation for these revolutionaries was their perverted and unfounded belief that the “native [was] unfit for government and his power must be curtailed.”¹¹² A local volunteer militia, whose members were predominantly United States citizens, called themselves the Hawaiian League, and held a meeting on 30 June 1887 in Honolulu at the Armory building of the Honolulu Rifles. Before this meeting, large caches of arms were brought in by the League from San Francisco and dispersed amongst its members.¹¹³

The group made certain demands on Kalākaua and called for an immediate change of the

109 Compiled Laws, 638.

110 *Id.*, 639.

111 *Id.*, 638.

112 Executive Documents, 574.

113 *Id.*, 579.

King's cabinet ministers. Under threat of violence, the King reluctantly agreed on 1 July 1887 to have this group form a new cabinet ministry made up of league members. The purpose of the league was to seize control of the government for their economic gain, and to neutralize the power of the native vote. On that same day the new cabinet comprised of William L. Green as Minister of Finance, Godfrey Brown as Minister of Foreign Affairs, Lorrin A. Thurston as Minister of the Interior, and Clarence W. Ashford as Attorney General, took "an oath to support the Constitution and Laws, and faithfully and impartially to discharge the duties of [their] office."¹¹⁴ Under strict secrecy and unbeknownst to Kalākaua, the new ministry also invited two members of the Supreme Court, Chief Justice Albert F. Judd and Associate Justice Edward Preston, "to assist in the preparation of a new constitution,"¹¹⁵ which now implicated the two highest ranking judicial officers in the revolution.

Hawaiian constitutional law provided that any proposed change to the constitution must be submitted to the "Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof"¹¹⁶ it would be deferred to the next Legislative session for action. Once the next legislature convened, and the proposed amendment or amendments have been "agreed to by two-thirds of all members of the Legislative Assembly, and be approved by the King, such amendment or amendments shall become part of the Constitution of this country."¹¹⁷ As a minority, these individuals had no intent of submitting their draft constitution to the legislature, which was not scheduled to reconvene until 1888. Instead, they embarked on a criminal path of treason. The Hawaiian Penal Code defines *treason* "to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King's government... the same being done by a person owing allegiance to this kingdom. Allegiance is the obedience and fidelity due to the kingdom from those under its protection."¹¹⁸ The statute goes on to state that in order to

constitute the levying of war, the force must be employed or intended to be employed for the dethroning or destruction of the King or in contravention of the laws, or in opposition to the authority of the King's government, with an intent or for an object affecting some of the branches or departments of said government generally, or affecting the enactment, repeal or enforcement of laws in general, or of some general law; or affecting the people, or the public tranquility generally; in distinction from some special intent or object affecting individuals other than the King, or a particular district.¹¹⁹

The Bayonet Constitution

The draft constitution was completed in just five days. The King was forced to sign on 6 July and, thereafter, the 1887 Constitution illegally replaced the former constitution and was declared to be the new law of the land. It is important to note that Kalākaua did not have the same authority when Kamehameha V promulgated the 1864 Constitution without legislative approval. The King's sister and heir-apparent, Lili'uokalani, discovered later that her brother had signed the constitution "because he had every assurance, short of actual demonstration, that the conspirators were ripe for revolution, and had taken measures to have him assassinated if he refused."¹²⁰ Gulick, who served as Minister of the Interior from 1883 to 1886, also concluded:

114 Compiled Laws, 8.

115 Merze Tate, *The United States and the Hawaiian Kingdom: A Political History* 91 (1980).

116 "Hawaiian Constitution" Article 80 (1864).

117 *Id.*

118 "Penal Code of the Hawaiian Islands," *Hawaiian Kingdom* 8 (1869).

119 *Id.*, 9

120 Lili'uokalani, *Hawaii's Story by Hawaii's Queen* 181 (1964).

The ready acquiescence of the King to their demands seriously disconcerted the conspirators, as they had hoped that his refusal would have given them an excuse for deposing him, and a show of resistance a justification for assassinating him. Then everything would have been plain sailing for their little oligarchy, with a sham republican constitution.¹²¹

This so-called constitution has since been known as the *bayonet* constitution and was never submitted to the Legislative Assembly or to a popular vote of the people. It was drafted by a select group of twenty-one individuals¹²² that effectively placed control of the Legislature and Cabinet in the hands of individuals who held foreign allegiances. The constitution reinstated a bi-cameral legislature and an election of Nobles replaced appointments by the King. Property qualifications were reinstated for candidates of both Nobles and Representatives. And the cabinet could only be removed by the legislature on a question of want of confidence. The new property qualifications had the purpose of ensuring that Nobles remained in the hands of non-natives, which would serve as a controlling factor over the House of Representatives. Blount reported:

For the first time in the history of the country the number of nobles is made equal to the number of representatives. This furnished a veto power over the representatives of the popular vote to the nobles, who were selected by persons mostly holding foreign allegiance, and not subjects of the Kingdom. The election of a single representative by the foreign element gave to it the legislature.¹²³

So powerful was the native vote that resident aliens of American or European nationality were allowed to cast their vote in the election of the new legislature without renouncing their foreign citizenship and allegiance. Included in this group were the contract laborers from Portugal's Madeira and Azores Islands who emigrated to the kingdom after 1878 under labor contracts for the sugar plantations. League members owned these plantations. Despite the fact that very few, if any, of these workers could even read or write, league members utilized this large voting block specifically to neutralize the native vote. According to Blount:

These ignorant laborers were taken before the election from the cane fields in large numbers by the overseer before the proper officer to administer the oath and then carried to the polls and voted according to the will of the plantation manager. Why was this done? In the language of the Chief Justice Judd, "to balance the native vote with the Portuguese vote." This same purpose is admitted by all persons here. Again, large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote...¹²⁴

Leading up to the elections that were to be held on 12 September, there was public outcry on the manner in which the constitution was obtained through the King and not through the Legislature as provided for by the 1864 constitution.¹²⁵ On 30 August 1887, British Consul James Wodehouse reported to the British Government the new Cabinet's response to these

121 Executive Documents, 760.

122 In the William O. Smith Collection at the Hawaiian Archives there is a near finished version of the 1887 draft with the following endorsement on the back that read: "Persons chiefly engaged in drawing up the constitution were—L.A. Thurston, Jonathan Austin, S.B. Dole, W.A. Kinney, W.O. Smith, Cecil Brown, Rev. [W.B.] Oleson, N.B. Emerson, J.A. Kennedy, [John A.] McCandless, Geo. N. Wilcox, A.S. Wilcox, H. Waterhouse, F. Wundenberg, E.G. Hitchcock, W.E. Rowell, Dr. [S.G.] Tucker, C.W. Ashford." Added to this group of individuals were Chief Justice A.F. Judd and Associate Justice Edward Preston.

123 Executive Documents, 579.

124 *Id.*

125 Ralph S. Kuykendall, *The Hawaiian Kingdom: 1874-1893, The Kalakaua Dynasty* 407 (1967).

protests. He wrote, “[t]he new Administration which was dictated by the ‘Honolulu Rifles’ now 300 strong does not give universal satisfaction, and...Attorney General Ashford is reported to have said ‘that they, the Administration, would carry the elections if necessary at the point of the bayonet.’”¹²⁶ The election “took place with the foreign population well armed and the troops hostile to the crown and people.”¹²⁷ James Blount also concluded that foreign ships anchored in Honolulu harbor during this time “must have restrained the native mind or indeed any mind from a resort to physical force,” and the natives’ “means of resistance was naturally what was left of political power.”¹²⁸

Revolution and the Rule of Law

If it was a rebellion, or as Judd stated a “successful revolution,”¹²⁹ what was the measurement of its success or its failure? According to Reid, “it is [international law] which defines the conditions under which a government should be recognized *de jure* or *de facto*, and it is a matter of judgment in each particular case whether a regime fulfills the conditions.”¹³⁰ He continues to state that the “conditions under international law for the recognition of a new regime as the *de facto* government of a state are that the new regime has in fact effective control over most of the state’s territory and that this control seems likely to continue.” According to Beadle, there are two parts in the definition of *de facto* and *de jure* governments.

The first part requires that a regime should be “in effective control over the territory” and this requisite is common to both a *de facto* and a *de jure* Government. The second part of the definition deals with the likelihood of the regime continuing in “effective control.” If it “seems likely” so to continue, then it is a *de facto* Government. When, however, it is “firmly established,” it becomes a *de jure* Government.¹³¹

A successful revolution creates a *de facto* government, but the success of the revolution is measured by the maintenance of effective control and not merely the fact of effective control. In other words, success is time sensitive whereby the law breaker has been transformed into a law creator by virtue of effective permanency. This space of time is the revolution itself where the opposing forces between lawful and criminal are engaging, and determination of the victor is a pure question of fact and not law. In order to answer the second condition of “seems likely to continue” in the affirmative, Beadle states that the likelihood of

continuing in effective control of the territory depends on the likelihood of its being “overthrown,” and “overthrown” here means being *displaced*, and not merely being *replaced* by another Government elected in terms of the new revolutionary Constitution. It is the new Constitution which must be overthrown, not merely the persons who govern by virtue of it. This is so because a mere change of the personnel of the Government, if that change is effected in terms of the revolutionary Constitution, still leaves a revolutionary Government in control.¹³²

126 "Wodehouse to FO, no. 29, political and confidential," *BPRO, PO 58/220* (Hawai'i Archives, 30 Aug. 1887).

127 Executive Documents, 579.

128 *Id.*, 580.

129 *Id.*, 576. As a participant in the revolution, Chief Justice Judd cannot serve as a judge of his own crime. Article 10 of the 1864 constitution provides, “No person shall sit as a judge...in any case...which the said judge...may have...any pecuniary interest”—*nemo iudex in causa sua* (no one can be a judge in his own cause).

130 *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.*, 2 All ER 536 (1966).

131 *Judgment of the High Court of Rhodesia, Appellate Division*, 39 ILR 184 (1970).

132 *Id.*, 225.

Kelson states that if “the revolutionaries fail, if the order they have tried to establish remains inefficacious, then on the other hand, their undertaking is interpreted, not as legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution.”¹³³ According to Hackworth, a successful revolution must fulfill three factual conditions: (1) possess the machinery of the State; (2) operate with the assent of the people and without substantial resistance to its authority; and (3) fulfill international obligations.¹³⁴ Olivecrona explains that the “victory of the revolution corresponds to the constitutional form in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is functioning again, more or less different in regard to the aims and the means of those in power.”¹³⁵ Lloyd further expounds on the second condition of “assent of the people” and no “substantial resistance.” He states:

Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system, for without this there will be anarchy or confusion rather than a reign of legality. And where revolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate *de facto* power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity.¹³⁶

From a municipal law standpoint, the terms *de jure* and *de facto* are not applied to revolution or civil war, but rather to offices in government. According to Cooley, an “officer *de jure* is one who not only is invested with the office, but who has been lawfully appointed or chosen, and therefore has a right to retain the office and receive its perquisites and emoluments. An officer *de facto* is defined to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.”¹³⁷ He further explains that a *de facto* officer “comes in by claim and color of right, or he exercises the office with such circumstances of acquiescence on the part of the public, as at least afford a strong presumption of right, but by reason of some defect in his title, or of some informality, omission or want of qualification, or by reason of the expiration of his term of service, he is unable to maintain his possession.”¹³⁸

A *de facto* officer is recognizable under municipal law, and according to Chief Justice Steere, the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned.”¹³⁹ If a person seizes office and is neither *de jure* or *de facto*, Cooley calls him a usurper or intruder, which he defined “as one who attempts to perform the duties of an office without authority of law, and without support of public acquiescence.” He adds that “no one is under an obligation to recognize or respect the acts of an intruder, and for all legal purposes

133 Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg 118 (1945).

134 Green Haywood Hackworth, *Digest of International Law*, Vol. I 175 (1940).

135 Karl Olivecrona, *Law as Fact* 66 (1971).

136 Dennis Lloyd, *The Idea of Law* 162 (1966).

137 Thomas Cooley, *A Treatise on the Law of Taxation* 185 (1876).

138 *Id.*

139 *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

they are absolutely void.”¹⁴⁰ And “the party himself who had usurped a public office,” states Cooley, “is never allowed to build up rights, or to shield himself from responsibility on no better basis than his usurpation.”¹⁴¹

Throughout the revolution, there was active opposition to the minority of revolutionaries by the Hawaiian citizenry that ranged from peaceful organized resistance to an unsuccessful armed attack against the usurpers. On 22 November 1888, the Hawaiian Political Association (Hui Kālai‘āina) was established with the purpose of the “restoration of the constitutional system existing before June 30, 1887.”¹⁴² For the next five years this organization would be the most persistent and influential group opposing the small group of revolutionaries by maintaining that the constitution of 1864, as amended, was the legal constitution of the country. During this period, the Hawaiian Kingdom was in a state of revolution, whereby the insurgents could neither claim success *de facto* under international law nor as *de facto* officers under municipal law.

A Failed Attempt of Citizen’s Arrest

In June 1889, another organization was formed as a secret society called the Liberal Patriotic Association, whose purpose was “to restore the former system of government and the former rights of the king.”¹⁴³ The following month on 30 July, the organization’s leader, Robert Wilcox, with eighty men, led an unsuccessful armed attack against the so-called cabinet ministry on the grounds of ‘Iolani Palace. Wilcox was initially indicted for treason, “but it became clear that...no native jury would convict him of that crime. The treason charge was dropped and he was brought to trial on an indictment for conspiracy.”¹⁴⁴ He was tried by a native jury, which found him not guilty. Their verdict represented the native sentiment throughout the kingdom, which comprised 84% of the Hawaiian citizenry. In a dispatch to U.S. Secretary of State Blaine on 4 November 1889, U.S. Minister John Stevens from the American legation in Honolulu acknowledged the significance of the verdict. Stevens stated:

This preponderance of native opinion in favor of Wilcox, as expressed by the native jury, fairly represented the popular native sentiment throughout these islands in regard to his effort to overthrow the present ministry and to change the constitution of 1887, so as to restore to the King the power he possessed under the former constitution.¹⁴⁵

There is a strong argument that the actions taken by Wilcox and other members of the Liberal Patriotic Association fell under the law as an unsuccessful citizen’s arrest, and not a counter-revolution as called by the so-called cabinet ministry. In theory, a counter-revolution can only take place if the original revolution was successful. But if the original revolution was not successful, or in other words, the country was still in a state of revolution or unlawfulness, any actions taken to apprehend or to hold to account the original perpetrators is not a violation of the law, but rather compliance with the law. Under the common law, every private “person that is present when any felony is committed, is bound by the law to arrest the felon.”¹⁴⁶ According to the Hawaiian Penal Code, the “terms felony and crime, are...synonymous, and

140 Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, 7th ed. 898 (7th ed., 1903).

141 *Auditors of Wayne Co. v. Benoit*, 20 Michigan 176 (1870).

142 Kuykendall, *The Hawaiian Kingdom: 1874-1893*, 448.

143 *Id.*, 425.

144 *Id.*, 429.

145 *Id.*, 298.

146 William Blackstone, *Commentaries of the Laws of England*, vol. 4 289 (1979)

mean such offenses as are punishable with death,” which makes treason a felony. Therefore, Wilcox’s attack should be considered a failed attempt to apprehend revolutionaries who were serving in the cabinet ministry. Wilcox reinforced the theory of citizen’s arrest, himself, when he lashed out at Lorrin Thurston on the floor of the Legislative Assembly in 1890. Thurston, being one of the organizers of the 1887 revolution, was an insurgent and served at the time as the so-called Minister of the Interior. Wilcox argued:

Yes, Mr. Minister, with your heart ever full of venom for the people and country which nurtured you and your fathers, I say, you and such as you are the murderers. The murderers and the blood of the murdered should be placed where it belongs, with those who without warrant opened fire upon natives trying to secure a hearing of their grievances before their King. . . . Our object was to restore a portion of the rights taken away by force of arms from the King. . . . Before the Living God, I never felt this action of mine to be a rebellion against my mother land, her independence, and her rights, but (an act) for the support and strengthening of the rights of my beloved race, the rights of liberty, the rights of the Throne and the good of the beautiful flag of Hawai’i; and if I die as a result of this my deed, it is a death of which I will be most proud, and I have hope I will never lack the help of the Heavens until all the rights are returned which have been snatched by the self-serving migrants of America.¹⁴⁷

Judicial Remedies Available

According to Blount, “none of the legislation complained of would have been considered a cause for revolution in any one of the United States, but would have been used in the elections to expel the authors from power. The alleged corrupt action of the King could have been avoided by more careful legislation and would have been a complete remedy for the future.”¹⁴⁸ Reinforcing Blount’s observation that there were judicial remedies available to the ordinary citizen under Hawaiian law to hold to account government officials, if they violated the law as alleged, was clearly pointed out by the Hawaiian Supreme Court in *Castle vs. Kapena, Minister of Finance*.¹⁴⁹ The plaintiffs in this case were W.R. Castle, Sanford B. Dole, and William O. Smith who were also the leaders of the 1887 insurgency. These individuals sought to “enjoin the Minister [of Finance] from taking silver half-dollars for gold par bonds” by petitioning for a writ of mandamus. Although the court denied the writ on substantive grounds, it did maintain the remedy for tax-paying citizens to hold to account governmental officials at the seat of government. The proper remedy was mandamus or injunction, which could be applied for by tax paying citizens in any court of equity in the Kingdom, and, if the circumstances were warranted, private citizens could “bring it in the name of the Attorney-General, and permission to do so [by the court] is accorded as of course.”¹⁵⁰ The court also declared that:

the Constitution provides that the Ministers are responsible. It would be an intolerable doctrine in a constitutional monarchy, to extend the inviolability of the Sovereign to his Ministry; to claim that what is directed to be done by the King in Cabinet Council, and is done by any of his Ministers, is to be treated as the personal act of the Sovereign. Art. 42. “No act of the King shall have any effect unless it be counter-signed by a Minister, who by that signature makes himself responsible.”¹⁵¹

147 Robert Wilcox, "Speech before the Hawaiian Legislative Assembly," *Hawaiian Kingdom* (10 June 1890).

148 Executive Documents, 574.

149 *Castle v. Kapena*, 5 Haw. 27 (1883).

150 *Id.*, 34.

151 *Id.*, 36.

The principle of necessity legitimizes a revolutionary act—otherwise a capital crime of treason—and renders lawful what would otherwise be unlawful. Williams states that in order to legitimize a revolutionary act under the principle of necessity there “must be a transient and proportionate response to the crisis,” and the response “may be invoked only to uphold the rule of law and the existing legal order, and, therefore, cannot be applied to uphold the legality of a new revolutionary regime.”¹⁵² Necessity cannot be applied in this case, because the revolutionaries sought to consolidate their power devoid of any rule of law or maintenance of the existing legal order in order to benefit a “little oligarchy, with a sham republican constitution.”¹⁵³ Where a written constitution is the supreme law of the land, the doctrine of necessity calls for its temporary suspension and not its termination, for the necessity principle is designed to uphold the rule of law and the existing constitution, and not to abrogate it. Hawaiians had long understood this principle as evidenced in a resolution read before the 1864 constitutional convention by Delegates Parker and Gulick:

We do not deny that there may occur a crisis in a nation’s history, when Revolution is justifiable, when a Constitution may be violated, and a government resolved back into its constituent elements. But this doubtful and dangerous right is to be exercised only in those terrible emergencies, when the very existence of a nation is at stake, and when all Constitutional methods have been tried and found wanting.¹⁵⁴

Ascension of Queen Lili‘uokalani

At the close of this tumultuous 1890 legislative session, where Hawaiian subjects stated their objections, the King’s health had deteriorated. On 25 November he departed for San Francisco on board the *USS Charleston* for a period of respite and designated Lili‘uokalani, his heir apparent, as Regent during his absence. King Kalakaua died in San Francisco on 20 January 1891, and his body returned to Honolulu on board the *USS Charleston* on the 29th.

In a meeting of the Privy Council that afternoon, Lili‘uokalani took the oath of office, where she swore “in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.” Chief Justice Albert F. Judd administered the oath and Lili‘uokalani was thereafter proclaimed Queen.

The legislative and judicial branches of government had been compromised by the insurgency. The Nobles became an elected body of men whose allegiance was to the foreign population, and three of the Justices of the Supreme Court, including the Chief Justice, participated in the insurgency by drafting the bayonet constitution. The Queen was prevented from legally confirming her niece, Ka‘iulani Cleghorn, as heir-apparent, because the Nobles had not been in the Legislative Assembly since 1887. Article 22 of the Constitution provides that “the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King’s life.”

Nevertheless, Ka‘iulani, by nomination of the Queen, could be considered a *de facto* heir apparent, subject to confirmation by the Nobles when they reconvened. Despite the ongoing political turmoil in the Hawaiian Kingdom, preparations were being made to celebrate fifty years of Hawaiian independence. The year 1893 marked the fiftieth anniversary of Hawai‘i as an internationally recognized independent and sovereign State.

152 George Williams, “The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji,” 1 *Oxford University Commonwealth Law Journal* 80 (2001).

153 Executive Documents, 760.

154 Mr. Parker: Mr. Gulick, “Resolution read before the Constitutional Convention,” *The Convention* (1864).

Conclusion –The Hawaiian Constitutional Order

Unlike Kamehameha V, Kalākaua, as the executive monarch, did not have the constitutional authority to abrogate and then subsequently promulgate a new constitution without legislative approval. The constitution of 1864 no longer had the sovereign prerogative—Article 45, and, furthermore, the enactment of law, whether organic or statutory, resided solely with the Legislative Assembly together with the Crown. The 1864 Constitution, as amended, the Civil Code, Penal Code, and the Session laws of the Legislative Assemblies enacted before the 1887 revolution, comprise the legal order of the Hawaiian State. Article 78 of the 1864 Constitution provided that all “laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws heretofore enacted, or that may hereafter be enacted, which are contrary to this Constitution, shall be null and void.” For the next four years, the insurgents would struggle to maintain their control of the seat of government over the protests and opposition of Hawaiian subjects organized into political organizations. Notwithstanding the state of revolution, the legal order of the Hawaiian Kingdom remained intact and continues to serve as the basis of Hawaiian constitutional law.

Territory

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

I have the honor to make known to you that that the following islands, &c., are within the domain of the Hawaiian Crown, viz:

Hawai‘i, containing about, 4,000 square miles;
Maui, 600 square miles;
O‘ahu, 520 square miles;
Kaua‘i, 520 square miles;
Molokai, 170 square miles;
Lāna‘i, 100 square miles;
Ni‘ihau, 80 square miles;
Kaho‘olawe, 60 square miles;
Nihoa, known as Bird Island,
Molokini)
Lehua) Islets, little more than barren rocks:
Ka‘ula)
and all Reefs, Banks and Rocks contiguous to either of the above,
or within the compass of the whole.¹⁵⁵

Four additional Islands were annexed to the Hawaiian Kingdom under the doctrine of discovery since the above announcement. Laysan Island was annexed to the Hawaiian Kingdom by discovery of Captain John Paty on 1 May 1857.¹⁵⁶ Lisiansky Island also was annexed by discovery of Captain Paty on 10 May 1857.¹⁵⁷ Palmyra atoll, a cluster of low islets, was taken possession of by Captain Zenas Bent on 15 April 1862, and proclaimed as Hawaiian Territory.¹⁵⁸ And Ocean Island, also called Kure atoll or Moku Pāpapa, was acquired 20 September

155 A.P. Taylor, "Islands of the Hawaiian Domain" 5 (Hawai‘i Archives, 10 Jan. 1931).

156 *Id.*, 7.

157 *Id.*

158 *Id.*

1886, by proclamation of Colonel J.H. Boyd.¹⁵⁹

According to Article 47 of the 1982 *United Nations Convention on the Law of the Sea*, which has become customary international law, a State whose territory is comprised of islands is recognized as an archipelagic State and has a straight archipelagic baseline “joining the outermost points of the outermost islands and drying reefs...[which] shall not exceed 100 nautical miles.”¹⁶⁰ Article 3 provides that, “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles,” and Article 57 provides for an exclusive economic zone that “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”¹⁶¹

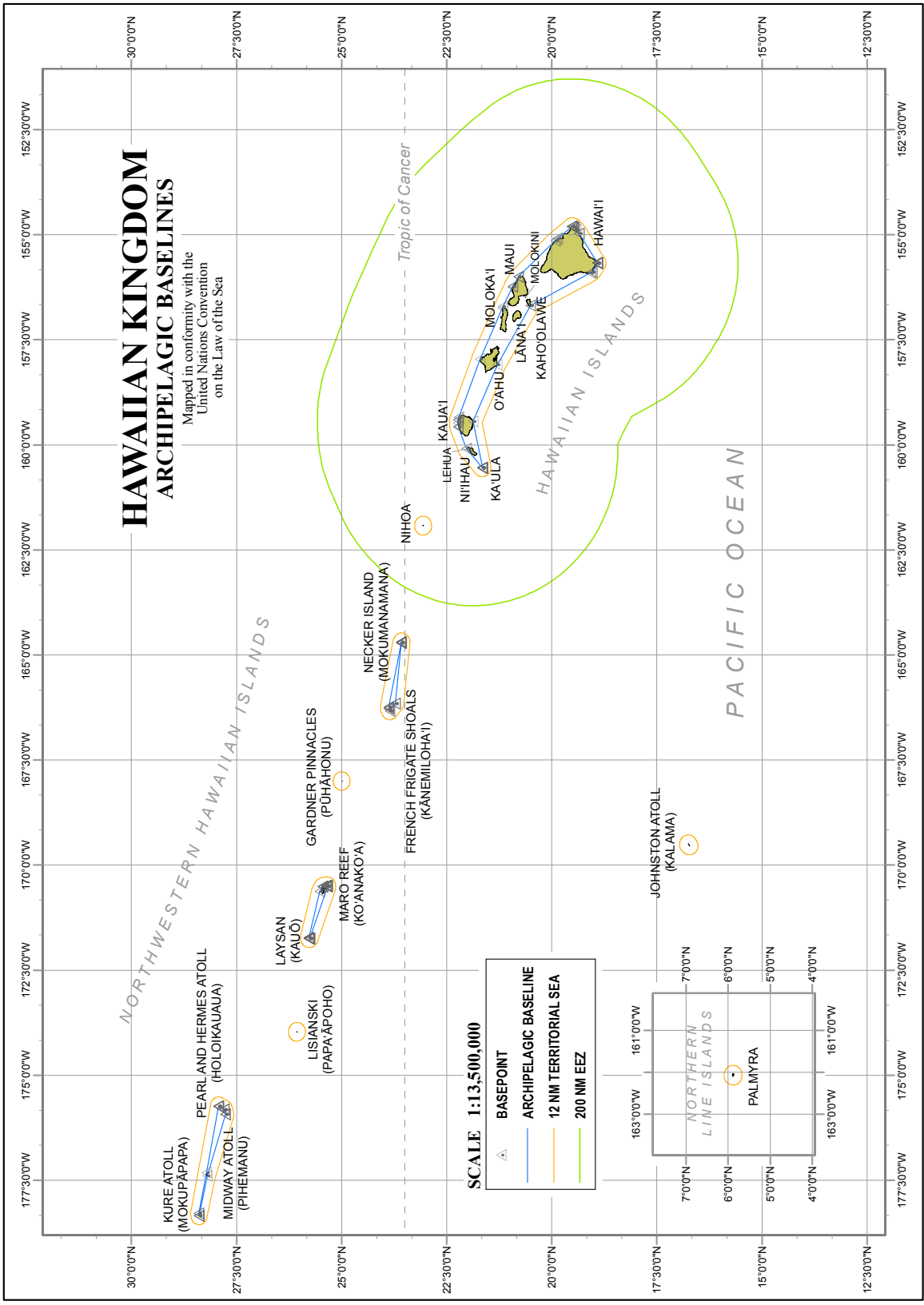
The Islands that comprise the territory of the Hawaiian Kingdom are located in the North Pacific Ocean.

Island:	Location:	Square Miles/Acreage:
Hawai'i	155°31'0.506"W 19°35'30.587"N	4,028.2 / 2,578,048
Maui	156°19'59.627"W 20°46'45.556"N	727.3 / 465,472
Molokini	156°29'45.432"W 20°37'54.49"N	0.04 / 25.6
Kaho'olawe	156°36'41.856"W 20°32'48.295"N	44.6 / 28,544
Molokai	156°59'58.124"W 21°7'49.05"N	260.0 / 166,400
Lāna'i	156°55'19.727"W 20°49'36.877"N	140.6 / 89,984
O'ahu	157°58'30.208"W 21°28'31.128"N	597.1 / 382,144
Kaua'i	159°31'39.562"W 22°3'12.681"N	552.3 / 353,472
Lehua	160°5'43.795"W 22°1'16.582"N	0.4 / 256
Ni'ihau	160°9'12.122"W 21°53'57.2"N	69.5 / 44,480
Ka'ula	160°32'25.391"W 21°39'14.554"N	0.2 / 128
Nihoa	161°55'19.454"W 23°3'39.022"N	0.3 / 192
Necker ^{162*}	164°42'0.7"W 23°34'34.198"N	.07 / 45
French Frigate Shoals*	166°13'17.92"W 23°48'23.599"N	.096 / 61
Gardner Pinnacles*	167°59'58.394"W 24°59'56.537"N	.009 / 5.9
Maro Reef*	170°34'27.999"W 25°25'43.924"N	746 / 478,000
Laysan	171°43'58.532"W 25°46'9.952"N	1.6 / 1,024
Lisiansky	173°57'58.655"W 26°3'46.062"N	0.6 / 384
Pearl and Hermes Atoll*	175°49'0.409"W 27°49'31.244"N	.19 / 80
Midway Atoll	177°22'39.208"W 28°12'34.869"N	2.4 / 1,536
Kure Atoll	178°17'36.609"W 28°23'32.226"N	0.4 / 256
Palmyra Atoll	162°4'35.49"W 5°52'54.126"N	4.6 / 2,944
Kalama (Johnston) Atoll	169°32'0.019"W 16°43'45.017"N	1.03 / 832

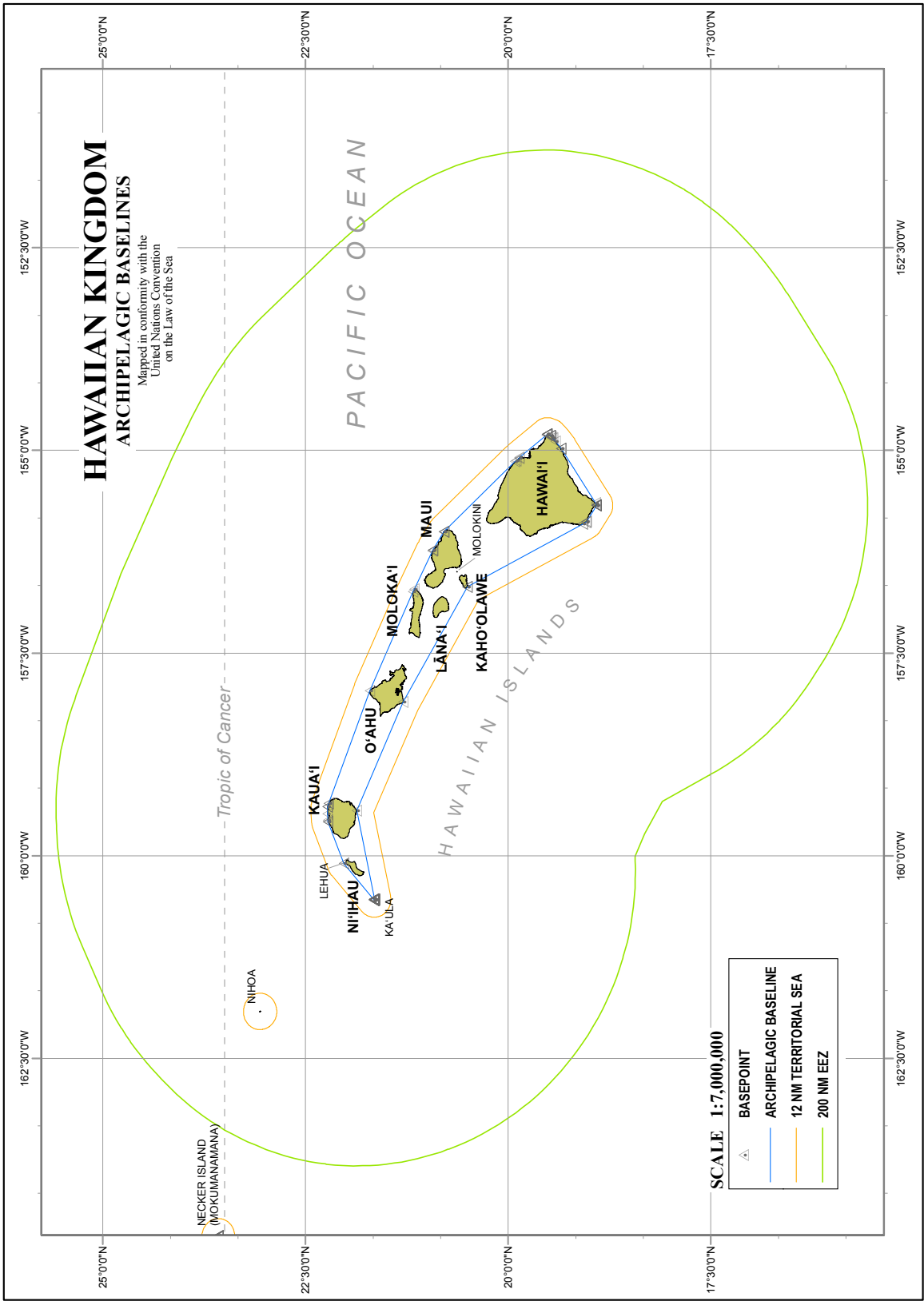
160 Article 47 (1) and (2), United Nations Convention on the Law of the Sea (1982).

161 *Id.*, Articles 3 and 57.

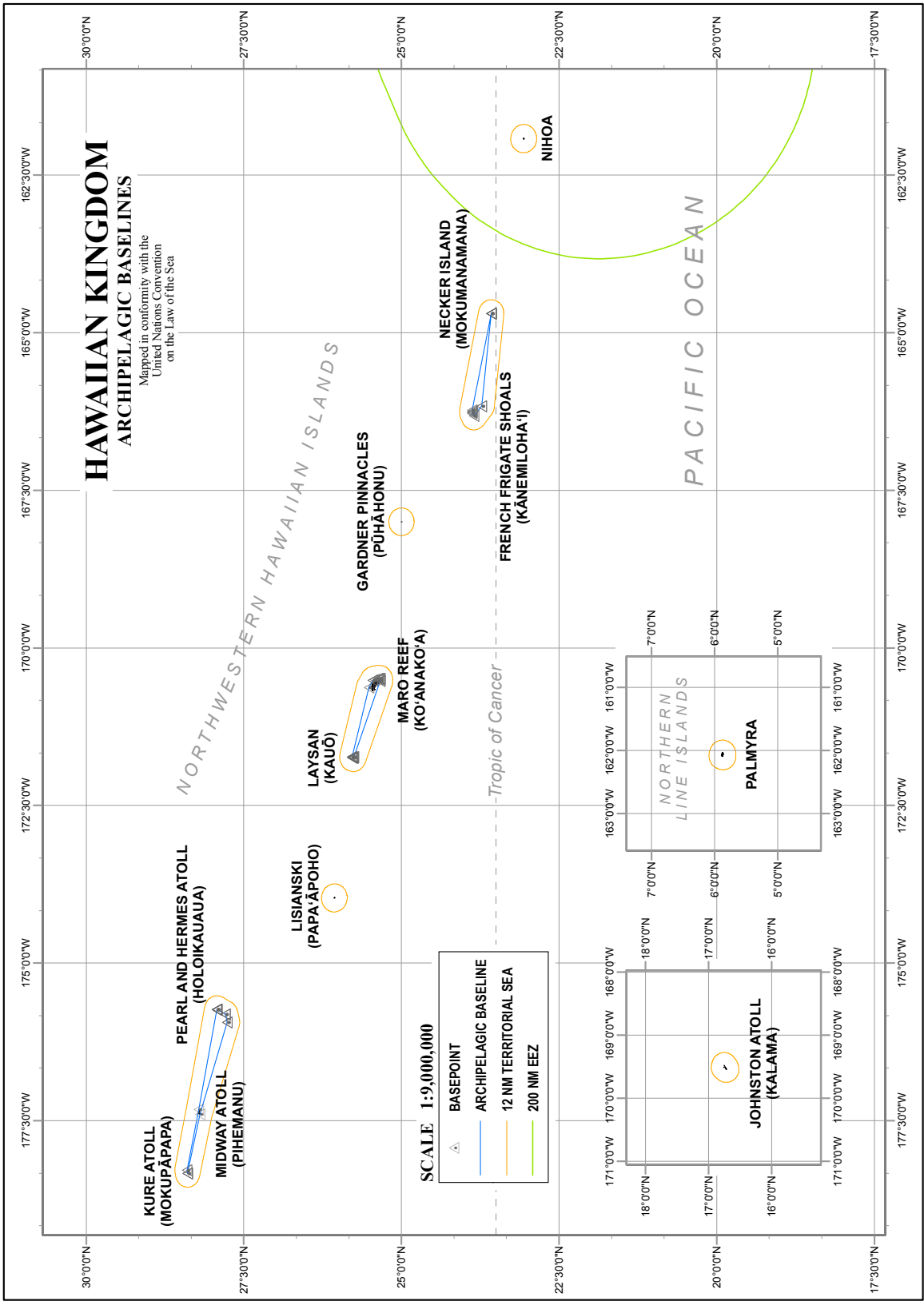
162 * These islands were acquired for the provisional government after 17 January 1893. Necker island was taken possession on 27 May 1894 and French Frigate Shoals taken possession on 13 July 1895. Dates of possession are not known for Gardner Pinnacles, Maro Reef, and Pearl and Hermes Atoll, but they were considered territory held by the insurgents. These islands constitute the territory of the Hawaiian Kingdom by virtue of the executive agreement, by exchange of notes, between the President Cleveland and Queen Lili'uokalani on 18 December 1893. Although the Queen was not restored, the Council of Regency consider it is bound by the agreement so long as those provisions do not violate Hawaiian law. In particular, “to assume all the obligations created by the Provisional Government, in the proper course of administration.” Executive Documents, 1269-1270.



Data provided by Hawaii's State Office of Planning, Geospatial Data Portal, National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service, GCS WGS 1984.



Data provided by Hawai'i State Office of Planning, Geospatial Data Portal, National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service. GCS WGS 1984.



Data provided by Hawaii's State Office of Planning, Geospatial Data Portal, National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service, GCS WGS 1984.

Citizenship

On 21 January 1868, Ferdinand Hutchison, Hawaiian Minister of the Interior, stated the criteria for Hawaiian nationality. He announced that “[i]n the judgment of His Majesty’s Government, no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents, (either native or naturalized) during their temporary absence from the kingdom, or unless having been the subject of another power, he becomes a subject of this kingdom by taking the oath of allegiance.” According to the law of naturalization, the Minister of the Interior:

shall have the power in person upon the application of any alien foreigner who shall have resided within the Kingdom for five years or more next preceding such application, stating his intention to become a permanent resident of the Kingdom, to administer the oath of allegiance to such foreigner, if satisfied that it will be for the good of the Kingdom, and that such foreigner owns without encumbrance taxable real estate within the Kingdom, and is not of immoral character, nor a refugee from justice of some other country, nor a deserting sailor, marine, soldier or officer.¹⁶³

The Monarch

The executive authority was vested in the Crown, who was advised by a Cabinet of Ministers and a Privy Council of State. The Crown exercised executive powers upon the advice of his Cabinet and Privy Council of State, and no act of the Crown would have any effect unless countersigned by a Cabinet Minister, who made himself responsible. With the advice of the Privy Council, the Crown had the power to grant reprieves and pardons, after conviction, for all offences, except in cases of impeachment. The Crown was also represented by an appointed Governor on each of the main islands of Hawai‘i, Maui, O‘ahu, and Kaua‘i. The Crown opened each new session of the Legislature by reading a Speech from the Throne, which set out the vision of the government for the country and the policies and actions it plans to undertake. No law could be enacted without the signature of the Crown and countersigned by one of the Ministers of the Cabinet.

CABINET. The Cabinet consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom. The Cabinet is the Monarch’s Special Advisers in the Executive affairs of the Kingdom, and are *ex officio* members of the Privy Council of State. The Ministers are appointed and commissioned by the Monarch, and hold office during the Monarch’s pleasure, subject to impeachment. No act of the Monarch has any effect unless countersigned by a Minister, who by that signature makes himself responsible. Each member of the Cabinet keeps an office at the seat of Government, and is accountable for the conduct of his/her deputies and clerks. The Ministers also hold seats *ex officio*, as Nobles, in the Legislative Assembly. On the first day of the opening of the Legislative Assembly, the Minister of Finance presents the Financial Budget in the Hawaiian and English languages.

PRIVY COUNCIL OF STATE. The Monarch, by Royal Letters Patent, can appoint any of his subjects, who have attained the age of majority, a member of the Privy Council of State. Every member of the Privy Council of State, before entering upon the discharge of his/her duties as such, takes an oath to support

163 Compiled Laws, 104.

the Constitution, to advise the Monarch honestly, and to observe strict secrecy in regard to matters coming to his/her knowledge as a Privy Counselor. The duty of every Privy Counselor is: to advise the Monarch according to the best of his knowledge and discretion; to advise for the Monarch's honor and the good of the public, without partiality through friendship, love, reward, fear or favor; and, finally, to avoid corruption—and to observe, keep, and do all that a good and true counselor ought to observe, keep, and do to his Sovereign.

Legislative Assembly

The Legislative Department of the Kingdom is composed of the Monarch, the Nobles, and the Representatives, each of whom has a negative on the other, and in whom is vested full power to make all manner of wholesome laws. They judge for the welfare of the nation, and for the necessary support and defense of good government, provided it is not repugnant or contrary to the Constitution. The Nobles sit together with the elected Representatives of the people in what is referred to as the House of the Legislative Assembly.

NOBLES. The Nobles sit together with the elected Representatives of the people and cannot exceed thirty in number. Nobles also have the sole power to try impeachments made by the Representatives. Nobles are appointed by the Monarch for a life term and serve without pay. A person eligible to be a Noble must be a Hawaiian subject or denizen, resided in the Kingdom for at least five years, and attained the age of twenty-one years. Nobles can introduce bills and serve on standing or special Committees established by the Legislative Assembly. Each Noble is entitled to one vote in the Legislative Assembly.

REPRESENTATIVES. The Representatives sit together with the appointed Nobles and cannot exceed forty in number. Each Representative is entitled to one vote in the Legislative Assembly. Representatives have the sole power to impeach any Cabinet Minister, officer in government or Judge, but the Nobles reserve the power to try and convict an impeached officer. A person eligible to be a Representative of the people must be a Hawaiian subject or denizen, at least twenty-five years, must know how to read and write, understand accounts, and have resided in the Kingdom for at least one year immediately preceding his election. The people elect representatives from twenty-five districts in the Kingdom. Elections occur biennially on even numbered years, and each elected Representative has a two-year term. Unlike the Nobles, Representatives are compensated for their term in office. Representation of the People is based upon the principle of equality and is regulated and apportioned by the Legislature according to the population, which is ascertained from time to time by the official census.

PRESIDENT OF THE LEGISLATIVE ASSEMBLY. The President is the Chair for conducting business in the House of the Legislative Assembly. He is elected by the members of the Legislative Assembly at the opening of the Session and appoints members to each of the select or standing committees. The President preserves order and decorum, speaks to points of order in preference to other members, and decides all questions of order subject to an appeal to the House by any two members.

The Judiciary

The judicial power of the Kingdom is vested in one Supreme Court and in such inferior courts as the Legislature may, from time to time, establish. The Supreme Court is the highest court in the land. It is the final court of appeal at the top of the Hawaiian Kingdom's judicial system. The Supreme Court considers civil, criminal and constitutional cases, but normally only after the cases have been heard in appropriate lower circuit, district or police courts. The Supreme Court consists of a Chief Justice and four (4) Associate Justices. All judges are appointed by the Monarch upon advice of the Privy Council of State. Any person can have their case heard by the Supreme Court, but first, permission or leave must be obtained from the court. Leave is granted for cases that involve a matter of public importance, or a law or fact concerning the Hawaiian Constitution. The Supreme Court sits for four terms a year on the first Mondays in the months of January, April, July and October. The Court may however hold special terms at other times, whenever it shall deem it essential to the promotion of justice. Decisions by the Court are decided by majority.

Rule of Law

Hawaiian governance is based on respect for the Rule of Law. Hawaiian subjects rely on a society based on law and order and are assured that the law will be applied equally and impartially. Impartial courts depend on an independent judiciary. The independence of the judiciary means that Judges are free from outside influence, and notably from influence from the Crown. Initially, the first constitution of the country in 1840 provided that the Crown serve as Chief Justice of the Supreme Court, but this provision was ultimately removed by amendment in 1852 in order to provide separation between the executive and judicial branches. Article 65 of the 1864 Constitution of the country provides that only the Legislative Assembly, although partially appointed by the Crown, can remove Judges by impeachment. The Rule of Law precludes capricious acts on the part of the Crown or by members of the government over the just rights of individuals guaranteed by a written constitution. According to Hawaiian Supreme Court Justice Alfred S. Hartwell:

The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null and void.¹⁶⁴

Separation of Powers

Although the constitution provided that the executive, legislative and judicial branches be distinct, they are nevertheless component agencies of a constitutional monarchy that exercises, together the "Supreme Power of the Kingdom." Unlike the United States theory of separation of power where the branches of government are assumed independent of each other with "cer-

164 *In Re Gip Ah Chan*, 6 Haw. 25 (1870).

tain discretionary rights, privileges, prerogatives,"¹⁶⁵ the Hawaiian theory views the branches as coordinate in function, but distinct in form. Hawaiian constitutional law provides the following interactions of the three powers in the administration of governance.

The King "shall never proclaim war without the consent of the Legislative Assembly;"¹⁶⁶ the "King has the power to make Treaties," but when treaties involve "changes in the Tariff or in any law of the Kingdom [it] shall be referred for approval to the Legislative Assembly;"¹⁶⁷ the King's "Ministers are responsible,"¹⁶⁸ and "hold seats ex officio, as Nobles, in the Legislative Assembly;"¹⁶⁹ the "Legislative power of the Three Estates of this Kingdom is vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together;"¹⁷⁰ the Chief Justice of the Supreme Court "shall be ex officio President of the Nobles in all cases of impeachment, unless when impeached himself;"¹⁷¹ and the "King, His Cabinet, and the Legislative Assembly, shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions."¹⁷²

165 Charles Haines, "Ministerial Responsibility Versus the Separation of Powers," 16(2) *Am. Political Sci. Rev.* 194, 199 (1922).

166 "Hawaiian Constitution" (1864), Article 26. Part III, 221.

167 *Id.*, Article 29. Part III, 221.

168 *Id.*, Article 31. Part III, 221.

169 *Id.*, Article 43. Part III, 222.

170 *Id.*, Article 45. Part III, 223.

171 *Id.*, Article 68. Part III, 225.

172 *Id.*, Article 70. Part III, 225.

CHAPTER 2

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OF THE HAWAIIAN KINGDOM

Dr. David Keanu Sai

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UNITED STATES BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM

Dr. David Keanu Sai

Introduction

To quote the *dictum* of the *Larsen v. Hawaiian Kingdom* Tribunal, “in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”¹ As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.² According to Westlake, in 1894, the *Family of Nations* comprised, “First, all European States.... Secondly, all American States.... Thirdly, a few Christian States in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State.”³

To preserve its political independence, should war break out in the Pacific Ocean, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. As a result, provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway (1852)⁴, Spain (1863)⁵ and Germany (1879).⁶ “A nation that wishes to secure her own peace,” says Vattel, “cannot more successfully attain that object than by concluding treaties

- 1 *Larsen v. Hawaiian Kingdom*, 119 *Int'l L. Reports* 566, 581 (2001) (hereafter “Larsen case”).
- 2 The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate States), 18 June 1875; Belgium, 4 Oct. 1862; Bremen (succeeded by Germany), 27 Mar. 1854; Denmark, 19 Oct. 1846; France, 8 Sept. 1858; French Tahiti, 24 Nov. 1853; Germany 25 Mar. 1879; New South Wales (now Australia), 10 Mar. 1874; Hamburg (succeeded by Germany), 8 Jan. 1848; Italy, 22 July 1863; Japan, 19 Aug. 1871, 28 Jan. 1886; Netherlands & Luxembourg, 16 Oct. 1862 (William III was also Grand Duke of Luxembourg); Portugal, 5 May 1882; Russia, 19 June 1869; Samoa, 20 Mar. 1887; Spain, 9 Oct. 1863; Sweden-Norway (now separate States), 5 Apr. 1855; and Switzerland, 20 July 1864; the United Kingdom of Great Britain and Ireland, now Northern Ireland) 26 Mar. 1846; and the United States of America, 20 Dec. 1849, 13 Jan. 1875, 11 Sept. 1883, and 6 Dec. 1884. See also Part III, 236-310.
- 3 John Westlake, *Chapters on the Principles of International Law*, 81 (1894). In 1893, there were 44 other independent and sovereign States in the *Family of Nations*: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Hawaiian Kingdom, Haiti, Honduras, Italy, Liberia, Liechtenstein, Luxembourg, Netherlands, Mexico, Monaco, Montenegro, Nicaragua, Orange Free State that was later annexed by Great Britain in 1900, Paraguay, Peru, Portugal, Romania, Russia, San Domingo, San Salvador, Serbia, Spain, Sweden-Norway, Switzerland, Turkey, United States of America, Uruguay, and Venezuela. In 1945, there were 46, and today there are 197.
- 4 Article XV states, “All vessels bearing the flag of Sweden and Norway in time of war shall receive every possible protection, short of actual hostility, within the ports and waters of His Majesty the King of the Hawaiian Islands; and His Majesty the King of Sweden and Norway engages to respect in time of war the neutral rights of the Hawaiian Kingdom, and to use his good offices with all other powers, having treaties with His Majesty the King of the Hawaiian Islands, to induce them to adopt the same policy towards the Hawaiian Kingdom.” Part III, 299.
- 5 Article XXVI states, “All vessels bearing the flag of Spain shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, in time of war the neutrality of the Hawaiian Islands, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands.” Part III, 294.
- 6 Article VIII states, “All vessels bearing the flag of Germany or Hawaii shall in times of war receive every possible protection, short of actual hostility, within the ports and waters of the two countries, and each of the High Contracting Parties engages to respect under all circumstances the neutral rights of the flag and the dominions of the other.” Part III, 267.

[of] neutrality.”⁷

Under customary international law, in force in the nineteenth century, the territory of a neutral State could not be violated. This principle was codified by Article 1 of the 1907 Hague Convention, V, stating that the “territory of neutral Powers is inviolable.” According to Politis, “[t]he law of neutrality, fashioned as it had been by custom and a closely woven network of contractual agreements, was to a great extent codified by the beginning of the [20th] century.”⁸ As such, the Hawaiian Kingdom’s territory could not be trespassed or dishonored, and its neutrality “constituted a guaranty of independence and peaceful existence.”⁹

An Illegal War—United States Invasion of the Hawaiian Kingdom

“Traditional international law was based upon a rigid distinction between the state of peace and the state of war,” says Judge Greenwood.¹⁰ “Countries were either in a state of peace or a state of war; there was no intermediate state.”¹¹ This distinction is also reflected by the renowned jurist of international law, Lassa Oppenheim, who separated his treatise on *International Law* into two volumes, Vol. I—*Peace* and Vol. II—*War and Neutrality*. In the nineteenth century, war was recognized as lawful if justified under *jus ad bellum*. War, however, could only be waged to redress a State’s injury. As Vattel stated, “[w]hatever strikes at [a sovereign State’s] rights is an injury, and a just cause of war.”¹²

The Hawaiian Kingdom enjoyed a state of peace with all States. This state of peace was violently interrupted on 16 January 1893 when United States troops invaded the Hawaiian Kingdom. This invasion transformed the state of peace into a state of war. The following day, Queen Lili’uokalani, as the executive monarch of a constitutional government, in response to military action taken against the Hawaiian government, made the following protest and a conditional surrender of her authority to the United States. She proclaimed:

I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom.

That I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said provisional government.

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.¹³

7 Emerich De Vattel, *The Law of Nations* 333 (6th ed., 1844).

8 Nicolas Politis, *Neutrality and Peace* 27 (1935).

9 *Id.*, 31.

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

11 *Id.*

12 Vattel, 301.

13 United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai’i: 1894-

Under international law, the landing of United States troops, without the consent of the Hawaiian government, was an act of war. For an act of war, not to transform the state of affairs to a state of war, that act must be justified or lawful under international law, e.g. the necessity of landing troops to secure the protection of the lives and property of United States citizens in the Hawaiian Kingdom. According to Wright, “[a]n act of war is an invasion of territory... and so normally illegal. Such an act if not followed by war gives grounds for a claim which can be legally avoided only by proof of some special treaty or necessity justifying the act.”¹⁴ The quintessential question then is whether or not the United States troops were landed to protect American lives or were they landed to wage war against the Hawaiian Kingdom?

“The right of war, as an aspect of sovereignty,” according to Brownlie, “which existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights, was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defense, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity.”¹⁵ The United States had no dispute with the Hawaiian Kingdom that would have warranted an invasion and overthrow of the Hawaiian government.

In 1993, the United States Congress enacted a joint resolution offering an apology for the overthrow that occurred 100 years prior.¹⁶ Of significance in the resolution was a particular preamble clause, which stated: “in a message to Congress on December 18, 1893, President Grover Cleveland reportedly fully and accurately on the illegal acts of the conspirators, described such acts as an ‘act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress,’ and acknowledged that by such acts the government of a peaceful and friendly people was overthrown.”¹⁷

At first read of this preamble, it would appear that the “conspirators” were the subjects that committed the “act of war,” but that is misleading because, first, under international law, only a State can commit an “act of war,” whether through its military and/or its diplomat; and, second, conspirators within a country can only commit the high crime of treason, not “acts of war.” These two concepts are reflected in the terms *coup de main* and *coup d’état*. The former is a surprise invasion by a foreign State’s military force, while the latter is a successful internal revolt, which was also referred to in the nineteenth century as a revolution.

In a petition to President Grover Cleveland from the Hawaiian Patriotic League dated 27 December 1893, its leadership, comprised of Hawaiian statesmen and lawyers, clearly articulated the difference between a “*coup de main*” and a “revolution.” The petition read:

Last January [1893], a political crime was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole of the Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government. This was done by a *coup de main* of U.S. Minister Stevens, in collusion with a cabal of conspirators, mainly faithless sons of missionaries and local politicians angered by continuous political defeat, who, as revenge for being a hopeless minority in the country, resolved to “rule or ruin” through foreign help. The facts of this “revolution,” as it is improperly called, are now a matter of history.¹⁸

95, 586 (1895) (hereafter “Executive Documents”).

14 Quincy Wright, “Changes in the Concept of War,” 18 *Am. J. Int’l. L.* 755, 756 (1924).

15 Ian Brownlie, *International Law and the Use of Force by States* 41 (1963).

16 107 Stat. 1510 (1993).

17 *Id.*, 1511.

18 Executive Documents, 1295. Petition of the Hawaiian Patriotic League (online at http://hawaiiankingdom.org/pdf/HPL_Petition_12_27_1893.pdf).

Whether by chance or design, the 1993 Congressional apology resolution did not accurately reflect what President Cleveland stated in his message to the Congress in 1893. Cleveland stated:

And so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an *act of war* (emphasis added).¹⁹

He further stated that “the military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.”²⁰

As part of this plan, the U.S. diplomat, John Stevens, would prematurely recognize the small group of insurgents on 17 January 1893 as if the insurgents were successful revolutionaries thereby giving them a veil of *de facto* status. In a private note to Sanford Dole, head of the insurgency, however, and written under the letterhead of the United States legation on 17 January 1893, Stevens penned, “Judge Dole: I would advise not to make known of my recognition of the *de facto* Provisional Government until said Government is in possession of the police station.”²¹ For the insurgents not to be in “possession of the police station” admits they are not a government through a successful revolution, but rather a puppet of the U.S. diplomat. This is intervention, which is prohibited under international law.

A government created through intervention is a puppet regime of the intervening State, and, as such, has no lawful authority. “Puppet governments,” according to Marek, “are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements [because] such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.”²²

Customary international law recognizes a successful revolution when insurgents secure complete control of all governmental machinery and have the acquiescence of the population. U.S. Secretary of State Foster acknowledged this rule in a dispatch to Stevens on 28 January 1893: “Your course in recognizing an unopposed *de facto* government appears to have been discreet and in accordance with the facts. The rule of this government has uniformly been to recognize and enter into relation with any actual government in full possession of effective power with the assent of the people.”²³ The United States policy at the time was that recognition of successful revolutionaries must include the assent of the people. According to President Cleveland:

While naturally sympathizing with every effort to establish a republican form of government, it has been settled policy of the United States to concede to people of foreign countries the same freedom and independence in the management of their domestic affairs that we have always claimed for ourselves; and it has been

19 *Id.*, at 451. Cleveland’s Message (online at [http://hawaiiankingdom.org/pdf/Cleveland's_Message_\(12.18.1893\).pdf](http://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf)).

20 *Id.*, 452.

21 Letter from United States Minister, John L. Stevens, to Sanford B. Dole, 17 January 1893, W. O. Smith Collection, HEA Archives, HMCS, Honolulu, (online at <http://hmha.missionhouses.org/items/show/889>).

22 Marek, 114.

23 Executive Documents, 1179.

our practice to recognize revolutionary governments as soon as it became apparent that they were supported by the people. For illustration of this rule I need only to refer to the revolution in 1889 when our Minister was directed to recognize the new government “if it was accepted by the people”; and to the revolution in Venezuela in 1892, when our recognition was accorded on condition that the new government was “fully established, in possession of the power of the nation, and accepted by the people.”²⁴

According to Lauterpacht, “[s]o long as the revolution has not been successful, and so long as the lawful government...remains within national territory and asserts its authority, it is presumed to represent the State as a whole.”²⁵ With full knowledge of what constituted a successful revolution, Cleveland provided a blistering indictment in his message to the Congress:

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety...declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister’s recognition of the provisional government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen’s troops were quartered), though the same had been demanded of the Queen’s officers in charge.²⁶

I believe that a candid and thorough examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States. Fair-minded people with the evidence before them will hardly claim that the Hawaiian Government was overthrown by the people of the islands or that the provisional government had ever existed with their consent.²⁷

“Premature recognition is a tortious act against the lawful government,” explains Lauterpacht, which “is a breach of international law.”²⁸ And according to Stowell, a “foreign state which intervenes in support of [insurgents] commits an act of war against the state to which it belongs, and steps outside the law of nations in time of peace.”²⁹ Furthermore, Stapleton concludes, “[o]f all the principles in the code of international law, the most important—the one which the independent existence of all weaker States must depend—is this: no State has a right FORCIBLY to interfere in the internal concerns of another State.”³⁰

Cleveland then explained to the Congress the egregious effects of war that led to the Queen’s conditional surrender to the United States:

Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her

24 *Id.*, 455.

25 E. Lauterpacht, *Recognition in International Law* 93 (1947).

26 Executive Documents, 453.

27 *Id.*, 454.

28 E. Lauterpacht, 95.

29 Ellery C. Stowell, *Intervention in International Law* 349, n. 75 (1921).

30 Augustus Granville Stapleton, *Intervention and Non-Intervention* 6 (1866). It appears that Stapleton uses all capitals in his use of the word ‘forcibly’ to draw attention to the reader.

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.... In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice.³¹

Obligations of the United States Under Jus In Bello

The President's finding that the United States embarked upon a war with the Hawaiian Kingdom, in violation of international law, unequivocally acknowledged that a state of war in fact exists since 16 January 1893. According to Lauterpacht, an illegal war is "a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy."³² However, despite the President's admittance that the acts of war were not in compliance with *jus ad bellum* (justifying war), the United States was still obligated to comply with *jus in bello* (rules of war) when it occupied Hawaiian territory.

In the *Hostages Trial* (the case of *Wilhelm List and Others*), the Tribunal rejected the prosecutor's view that, since the German occupation arose out of an unlawful use of force, Germany could not invoke the rules of belligerent occupation. The Tribunal explained:

The Prosecution advances the contention that since Germany's war against Yugoslavia and Greece were aggressive wars, the German occupant troops were there unlawfully and gained no rights whatever as an occupant.... [W]e accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime.... At the outset, we desire to point out that international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in the occupied territory.³³

As such, the United States remained obligated to comply with the laws of occupation despite it being an illegal war. As the Tribunal further stated, "whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, [and what] may be done."³⁴ According to Wright, "[w]ar begins when any state of the world manifests its intention to make war by some overt act, which may take the form of an act of war."³⁵ In his review of customary international law in the nineteenth century, Brownlie found "that in so far a 'state of war' had any generally accepted meaning it was a situation regarded by one or both parties to a conflict as constituting a 'state of war.'"³⁶ Thus, Cleveland's determination that by an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been over-

31 Executive Documents, 453.

32 H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 *Brit. Y.B. Int'l L.* 206 (1953).

33 *United States v. William List et al.* (Case No. 7), *Trials of War Criminals before the Nuremberg Military Tribunals* (hereafter "Hostages Trial"), Vol. XI, 1247 (1950).

34 *Id.*

35 Wright, 758.

36 Brownlie, 38.

thrown,”³⁷ means the action was not justified, but a state of war nevertheless ensued. According to customary international law, “military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.”³⁸

What is significant is that Cleveland referred to the Hawaiian people as “friendly and confiding,” not “hostile.” This is a clear case of where the United States President admits to an illegal war. According to United States constitutional law, the President is the sole representative of the United States in foreign relations—not the Congress or the courts. In the words of Marshall, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”³⁹ Therefore, the President’s political determination, that by an act of war the government of a friendly and confiding people was unlawfully overthrown, would not have only produced resonance with the members of the Congress, but to the international community as well, and thus the duty of third States to invoke neutrality.

Furthermore, in a state of war, the principle of effectiveness, that one would otherwise have during a state of peace, is reversed because of the existence of two legal orders in one and the same territory. Marek explains that in “the first place: of these two legal orders, that of the occupied State is regular and ‘normal,’ while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is... strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness.”⁴⁰ Therefore, belligerent occupation “is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.”⁴¹

Cleveland told the Congress that he initiated negotiations with the Queen “to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned.”⁴² What Cleveland did not know at the time of his message to the Congress was that the Queen, on the very same day in Honolulu, had accepted the conditions for settlement in order to return the state of affairs to a state of peace. The executive mediation began on 13 November 1893 between the Queen and U.S. diplomat Albert Willis and an agreement was reached on 18 December 1893.⁴³ The President was not aware of this agreement until after he delivered his message.⁴⁴ Despite being unaware, President Cleveland’s political determination in his message to the Congress was nonetheless conclusive that the United States was in a state of war with the Hawaiian Kingdom and was directly responsible for the unlawful overthrow of the Hawaiian government.

37 Executive Documents, 456.

38 See, Section 358—Occupation Does Not Transfer Sovereignty, U.S. Army Field Manual 27-10.

39 10 *Annals of Cong.* 613 (1800).

40 Marek, 102.

41 *Id.*

42 Executive Documents, 458.

43 David Keanu Sai, “A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice Today,” 10 *J. L. & Soc. Challenges* (2008) 68, 119-127.

44 Executive Documents, 1283. In this dispatch to U.S. Diplomat Albert Willis from Secretary of State Gresham on 12 January 1894, he stated, “Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President’s decision. The matter now being in the hands of the Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you.” The state of war ensued.

Once a state of war ensued between the Hawaiian Kingdom and the United States, “the law of peace ceased to apply between them and their relations with one another became subject to the laws of war, while their relations with other states not party to the conflict became governed by the law of neutrality.”⁴⁵ This outbreak of a state of war between the Hawaiian Kingdom and the United States would “lead to many rules of the ordinary law of peace being superseded... by rules of humanitarian law.”⁴⁶ A state of war “automatically brings about the full operation of all the rules of war and neutrality,” which includes the law of occupation.⁴⁷ And, according to Venturini, “[i]f an armed conflict occurs, the law of armed conflict must be applied from the beginning until the end, when the law of peace resumes in full effect.”⁴⁸ “For the laws of war,” according to Koman, “continue to apply in the occupied territory even after the achievement of military victory, until either the occupant withdraws or a treaty of peace is concluded which transfers sovereignty to the occupant.”⁴⁹

In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia indicated that the laws of war—international humanitarian law—applies from “the initiation of ... armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”⁵⁰ Only by an agreement between the Hawaiian Kingdom and the United States could a state of peace be restored, without which a state of war ensues.⁵¹ An attempt to transform the state of war to a state of peace was made by executive agreement on 18 December 1893. President Cleveland, however, was unable to carry out his duties and obligations under this agreement to restore the situation that existed before the unlawful landing of American troops, due to political wrangling in the Congress.⁵² Consequently, the state of war continued.

Distinguishing Between a Declaration of War and a State of War

International law distinguishes between a “declaration of war” and a “state of war.” According to McNair and Watts, “the absence of a declaration... will not of itself render the ensuing conflict any less a war.”⁵³ In other words, since a state of war is based upon concrete facts of military action, there is no requirement for a formal declaration of war to be made other than providing formal notice of a State’s “intention either in relation to existing hostilities or as a warning of imminent hostilities.”⁵⁴ In 1946, a United States Court had to determine whether a naval captain’s life insurance policy, which excluded coverage if death came about as a result of war, covered his demise during the Japanese attack of Pearl Harbor on 7 December 1941. It was argued that the United States was not at war at the time of his death because the Congress did not formally declare war against Japan until the following day.

45 Greenwood, 45.

46 *Id.*, 46.

47 Myers S. McDougal and Florentino P. Feliciano, “The Initiation of Coercion: A Multi-temporal Analysis,” 52 *Am. J. Int’l. L.* 241, 247 (1958).

48 Gabriella Venturini, “The Temporal Scope of Application of the Conventions,” in Andrew Clapham, Paola Gaeta, and Marco Sassòli, eds., *The 1949 Geneva Conventions: A Commentary* 52 (2015).

49 Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* 224 (1996).

50 ICTY, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), § 70 (2 October 1995).

51 Under United States municipal laws, there are two procedures by which an international agreement can bind the United States. The first is by a treaty whose entry into force can only take place after two-thirds of the United States Senate has given its advice and consent under Article II, section 2, Clause 2 of the U.S. Constitution. The second is by way of an executive agreement entered into by the President that does not require ratification by the Senate. See *United States v. Belmont*, 301 U.S. 324, 326 (1937); *United States v. Pink*, 315 U.S. 203, 223 (1942); *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003).

52 Sai, A Slippery Path, 125-127.

53 Lord McNair and A.D. Watts, *The Legal Effects of War* 7 (1966).

54 Brownlie, 40.

The Court denied this argument and explained that “the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor.”⁵⁵ Therefore, the conclusion reached by President Cleveland that the United States committed acts of war against the Hawaiian Kingdom⁵⁶ was a “political determination of the existence of a state of war,” and that a formal declaration of war by the Congress was not essential. The “political determination” by President Cleveland, regarding the actions taken by the military forces of the United States since 16 January 1893, was the same as the “political determination” by President Roosevelt regarding actions taken by the military forces of Japan on 7 December 1941. Both political determinations of acts of war by these Presidents created a state of war for the United States under international law.

Foremost, the overthrow of the Hawaiian government did not affect, in the least, the continuity of the Hawaiian State, being the subject of international law. Wright asserts that “international law distinguishes between a government and the state it governs.”⁵⁷ Cohen also posits that “[t]he state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law.”⁵⁸ As Judge Crawford explains, “[t]here is a presumption that the State continues to exist, with its rights and obligations ... despite a period in which there is ... no effective, government.”⁵⁹ Crawford further concludes that “[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”⁶⁰

The Duty of Neutrality by Third States

When the state of peace was transformed to a state of war, all other States were under a duty of neutrality. “Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further such injuries to the one as benefit the other.”⁶¹ The duty of a neutral State, not a party to the conflict, “obliges him, in the first instance, to prevent with the means at his disposal the belligerent concerned from committing such a violation,” e.g. to deny recognition of a puppet regime unlawfully created by an act of war.⁶²

Twenty States violated their obligation of neutrality by recognizing the so-called Republic of Hawai‘i and consequently became parties to the war on the side of the United States.⁶³ These

55 *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (C.C.A. 10th, 1946), 41(3) *Am. J. Int'l L.* 680, 682 (1947).

56 Executive Documents, 456.

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

58 Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* 17 (1989).

59 Crawford, 34.

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

61 L. Oppenheim, *International Law*, vol. II—War and Neutrality 401 (3rd ed., 1921).

62 *Id.*, 496.

63 Greenwood, 45.

States include: Austria-Hungary,⁶⁴ Belgium,⁶⁵ Brazil,⁶⁶ Chile,⁶⁷ China,⁶⁸ France,⁶⁹ Germany,⁷⁰ Guatemala,⁷¹ Italy,⁷² Japan,⁷³ Mexico,⁷⁴ Netherlands,⁷⁵ Norway-Sweden,⁷⁶ Peru,⁷⁷ Portugal,⁷⁸ Russia,⁷⁹ Spain,⁸⁰ Switzerland,⁸¹ and the United Kingdom.⁸²

“If a neutral [State] neglects this obligation,” states Oppenheim, “he himself thereby commits a violation of neutrality, for which he may be made responsible by a belligerent who has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by him.”⁸³ The recognition of the so-called Republic of Hawai‘i did not create any legality or lawfulness of the puppet regime, but rather serves as the indisputable evidence that these States violated their obligation to be neutral during a state of war. Diplomatic recognition of governments occurs during a state of peace and not during a state of war, unless for providing recognition of belligerent status. These recognitions were not recognizing the Republic as a belligerent in a civil war with the Hawaiian Kingdom, but rather under the false pretense that the republic succeeded in a so-called revolution and therefore was the new government of Hawai‘i during a state of peace.

- 64 Austria-Hungary’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-austro-hungary/>).
- 65 Belgium’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-belgium/>).
- 66 Brazil’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-brazil/>).
- 67 Chile’s recognition of the Republic of Hawai‘i (online at: <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-chile/>).
- 68 China’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-china/>).
- 69 France’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-france/>).
- 70 Germany’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-germanyprussia/>).
- 71 Guatemala’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-guatemala/>).
- 72 Italy’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-italy/>).
- 73 Japan’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/05/27/recognition-of-the-republic-of-hawaii-japan/>).
- 74 Mexico’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-mexico/>).
- 75 The Netherlands’ recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-netherlands/>).
- 76 Norway-Sweden’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-swedennorway/>).
- 77 Peru’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-peru/>).
- 78 Portugal’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-portugal/>).
- 79 Russia’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-russia/>).
- 80 Spain’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-spain/>).
- 81 Switzerland’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/06/recognition-of-the-republic-of-hawaii-switzerland/>).
- 82 The United Kingdom’s recognition of the Republic of Hawai‘i (online at <https://historymystery.kenconklin.org/2008/04/05/recognition-of-the-republic-of-hawaii-britain/>).
- 83 Oppenheim, 497.

Belligerent Occupation is a Question of Fact

In the absence of an agreement that would have transformed the state of affairs back to a state of peace, the state of war prevails over what *jus in bello* calls belligerent occupation. Article 41 of the 1880 Institute of International Law's *Manual on the Laws of War on Land* declared that a "territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there." The phrase "in fact" signifies that a "situation of occupation must be assessed based on the relevant facts. The existence of the necessary factual conditions alone triggers the application of the law of occupation, no proclamation nor acknowledgment of occupation is required of the belligerents."⁸⁴

This definition was later codified under Article 42 of the 1899 Hague Convention, II, and then superseded by Article 42 of the 1907 Hague Convention, IV ("HC IV"), which provides that territory "is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Thus, effectiveness is at the core of belligerent occupation. Crawford explains:

Pending a final settlement of the conflict, belligerent occupation does not affect the continuity. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the 'actual independence' rule but an exception to it...pending a settlement of the conflict by a peace treaty or its equivalent.⁸⁵

In the *Hostages* trial, the U.S. Military Tribunal of Nuremberg affirmed this position when it stated that "whether an invasion has developed into an occupation is a question of fact."⁸⁶ U.S. Army Field Manual 27-10 also affirms this position where it states that "military occupation is a question of fact."⁸⁷ According to Ferraro, "the definition of occupation, as set forth in Article 42 of the Hague Convention, does not rely on a subjective perception of the prevailing situation by the parties to the armed conflict, but on an objective determination based on a territory's *de facto* submission to the authority of hostile foreign armed forces."⁸⁸

According to Ferraro, "Article 42 of the Hague Convention can be regarded as the only legal basis on which the determination of the existence of a state of occupation can be made."⁸⁹ What has emerged as the constitutive elements that fulfill the requisite elements of Article 42 include, "the unconsented-to foreign military presence, the foreign force's ability to exercise authority over the areas in lieu of the territorial sovereign, and the related inability of the latter to exert their authority over the territory."⁹⁰ President Cleveland's message to the Congress on 18 December 1893 clearly meets the three constitutive factual elements of the United States belligerent occupation of the Hawaiian Kingdom.

84 Marco Longobardo, "The Occupation of Maritime Territory under International Humanitarian Law," 95 *International Law Studies* 322-361, 325 (2019).

85 James Crawford, *The Creation of States in International Law* 73 (2nd ed., 2006).

86 *Hostages* Trial, 1243.

87 Section 355, U.S. Army Field Manual 27-10.

88 Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law," 94 (885) *International Review of the Red Cross* 133-163, 135 (2012).

89 Ferraro, 139.

90 *Id.*, 143.

First element of the unconsented-to foreign military presence:

“This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the bona fide purpose of protecting the imperiled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government. In point of fact the existing government instead of requesting the presence of an armed force protested against it.”⁹¹

Second and third elements of the foreign force’s ability to exercise authority over the areas in lieu of the territorial sovereign, and the related inability of the latter to exert their authority over the territory:

“When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*. . . . Nevertheless this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and 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, while the Committee of Safety, by actual search, had discovered that there were but few arms in Honolulu that were not in the service of the Government. In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Accordingly, some hours after the recognition of the provisional government by the United States Minister, the palace, the barracks, and the police station, with all the military resources of the country, were delivered up by the Queen upon representation made to her that her cause would thereafter be reviewed at Washington, and while protesting that she surrendered to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support the provisional government, and that she yielded authority to prevent collision of armed forces and loss of life and only until such time as the United States, upon the facts being presented to it, should undo the action of its representative and reinstate here in the authority she claimed as the constitutional sovereign of the Hawaiian Islands.”⁹²

Obligation of the United States to Administer Hawaiian Kingdom laws

When territory is “effectively” occupied, international law obligates the occupying State to administer the laws of the occupied State. This is reflected in Articles 2 and 3 of the 1874 Brussels Declaration where, “[the occupying State] shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [and] shall maintain the laws which were in force in the country in peacetime, and shall not modify, suspend or replace them unless

91 Executive documents, 451.

92 *Id.*, 453-454.

necessary.” Although the Declaration failed to be signed off by the European States it did have scholarly approval. The *Institut de droit international* (IDI) in 1875 declared:

[A]lthough there was room for improvement, the new rules on occupation as suggested by the 1874 Brussels Declaration were essentially more favorable to peaceful citizens and public and private ownership in occupied territories than what had been provided by practice thus far and by the teaching of most scholars. The IDI subsequently adopted the same rules in its Oxford Manual on Land Warfare (1880).⁹³

Article 43 of the HC IV provides that “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The “text of Article 43,” according to Benvenisti, “was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law.”⁹⁴ Graber also states, that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”⁹⁵ The United States government also recognizes that this principle is customary international law that predates the Hague Conventions. In a 1943 legal opinion, the United States stated:

The Hague Convention clearly enunciated the principle that the laws applicable in an occupied territory remain in effect during the occupation, subject to change by the military authorities within the limits of the Convention. Article 43: ... This declaration of the Hague Convention amounts only to a reaffirmation of the recognized international law prior to that time.⁹⁶

The administration of occupied territory is set forth in the Hague Regulations, being Section III of the HC IV. According to Schwarzenberger, “Section III of the Hague Regulations...was declaratory of international customary law.”⁹⁷ Also, consistent with what was generally considered the international law of occupation, in force at the time of the Spanish-American War, the “military governments established in the territories occupied by the armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials.”⁹⁸ Many other authorities also viewed the Hague Regulations as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and subsequent occupation.⁹⁹ Commenting on the occupation of the Hawaiian Kingdom, Dumberry states,

93 Eyal Benvenisti, “Origins of the Concept of Belligerent Occupation,” 26(3) *Law and History Review* 645 (2008)

94 Eyal Benvenisti, *The International Law of Occupation* 8 (1993).

95 Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914* 143 (1949).

96 Opinion on the Legality of the Issuance of AMG (Allied Military Government) Currency in Sicily, 23 Sept. 1943, reprinted in *Occupation Currency Transactions: Hearings Before the Committees on Appropriations Armed Services and Banking and Currency, U.S. Senate, 80th Congress, First Session, 73, 75* (17-18 Jun. 1947).

97 Georg Schwarzenberger, “The Law of Belligerent Occupation: Basic Issues,” 30 *Nordisk Tidsskrift Int’l Ret* 11 (1960).

98 Munroe Smith, “Record of Political Events,” 13(4) *Pol. Sci. Q.* 745, 748 (1898).

99 Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 95 (1957); David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* 57 (2002); Ludwig von Kohler, *The Administration of the Occupied Territories*, vol. I, 2 (1942); United States Judge Advocate General’s School Text No. 11, *Law of Belligerent Occupation* 2 (1944), (stating that “Section III of the Hague Regulations is in substance a codification of customary law and its principles are binding signatories and non-signatories alike”).

[T]he 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.¹⁰⁰

The hostile army, in this case, included not only United States armed forces, but also its puppet regime that was disguising itself as a “provisional government.” President Cleveland concluded that the “provisional government owes its existence to an armed invasion by the United States.” As an entity created through intervention, this puppet regime existed as an armed militia that worked in tandem with the United States armed forces under the direction of the U.S. diplomat John Stevens. Furthermore, under the rules of *jus in bello*, the occupant does not possess the sovereignty of the occupied State and therefore cannot compel allegiance.¹⁰¹ To do so would imply that the occupied State, as the subject of international law and whom allegiance is owed, was cancelled and its territory unilaterally annexed into the territory of the occupying State. International law would allow this under the doctrine of *debellatio*.

Debellatio, however, does not apply to the Hawaiian situation because President Cleveland determined that the overthrow of the Hawaiian government was unlawful and, therefore, this determination does not meet the test of *jus ad bellum*. Failure to meet the test of *jus ad bellum* is evidenced by the President’s admission that “the military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.”¹⁰² As an illegal war, the doctrine of *debellatio* was precluded from arising. That is to say, *debellatio* is conditioned on a legal war. According to Schwarzenberger, “[i]f, as a result of legal, as distinct from illegal, war, the international personality of one of the belligerents is totally destroyed, victorious Powers may ... annex the territory of the defeated State or hand over portions of it to other States.”¹⁰³ Furthermore, as Craven states:

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 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

100 Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continuity as an Independent State under International Law” 1(2) *Chinese J. Int’l L.* 655, 682 (2002).

101 Article 45, 1899 Hague Convention, II, “Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited;” see also Article 45, 1907 Hague Convention, IV, “It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.” On 24 January 1895, the puppet regime calling itself the Republic of Hawai’i coerced Queen Lili’uokalani to abdicate the throne and to sign her allegiance to the regime in order to “save many Royalists from being shot” (William Adam Russ, Jr., *The Hawaiian Republic (1894-98) And Its Struggle to Win Annexation* 71 (1992)). As the rule of *jus in bello* prohibits inhabitants of occupied territory to swear allegiance to the hostile Power, the Queen’s oath of allegiance is therefore unlawful and void.

102 Executive Documents, 452.

103 Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*. Vol. II: The Law of Armed Conflict 167 (1968).

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.¹⁰⁴

When United States troops were removed from Hawaiian territory on 1 April 1893, by order of President Cleveland's Special Commissioner, James Blount, he was not aware that the provisional government was a puppet regime. As such, they remained in full power where, according to the Hawaiian Patriotic League, the "public funds have been outrageously squandered for the maintenance of an unnecessary large army, fed in luxury, and composed *entirely* of aliens, mainly recruited from the most disreputable classes of San Francisco."¹⁰⁵

After the President determined the illegality of the situation and entered into an agreement with Queen Lili'uokalani to reinstate the executive monarch, the puppet regime refused to give up its power. Due to the President's failure to carry out the agreement of reinstatement and to ultimately transform the state of affairs to a state of peace, the Hawaiian situation remained a state of war and the rules of *jus in bello* continued to apply.

When the provisional government was formed, through intervention, it only replaced the executive monarch and her cabinet with insurgents calling themselves an executive and advisory councils. All other government officials remained in place. With the oversight of United States troops, all Hawaiian government officials who remained in place were coerced into signing oaths of allegiance to the new regime.¹⁰⁶ This continued when the American puppet changed its name to the so-called Republic of Hawai'i on 4 July 1894 with alien mercenaries having replaced American troops.

Extraterritorial Application of United States Municipal Laws

During the Spanish-American War, under the guise of a Congressional joint resolution of annexation, United States armed forces physically reoccupied the Hawaiian Kingdom on 12 August 1898. According to the U.S. Supreme Court, though "the [annexation] resolution was passed July 7, [1898] the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States."¹⁰⁷ Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and "they protested annexation occurring without the consent of the governed."¹⁰⁸

104 Craven, Chapter 3, 134.

105 Executive Documents, 1296.

106 *Id.*, 211, "All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named person: Queen Liliuokalani, Charles B. Wilson, Marshal, Samuel Parker, Minister of Foreign Affairs, W.H. Cornwell, Minister of Finance, John F. Colburn, Minister of the Interior, Arthur P. Peterson, Attorney-General, who are hereby removed from office. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils."

107 *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

108 Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* 322 (2016). Coffman initially published this book in 1998 titled *Nation Within: The Story of the American Annexation of the Nation of Hawai'i*. Coffman explained, "In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation," at xvi.

Marek asserts that, “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”¹⁰⁹ Even the U.S. Department of Justice in 1988, opined, it is “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution.”¹¹⁰ Then in 1900, the Congress renamed the Republic of Hawai‘i to the Territory of Hawai‘i under *An Act To provide a government for the Territory of Hawaii*.¹¹¹

Further usurping Hawaiian sovereignty, the Congress, in 1959, renamed the Territory of Hawai‘i to the State of Hawai‘i under *An Act To provide for the admission of the State of Hawaii into the Union*.¹¹² These Congressional laws, which have no extraterritorial effect, did not transform the puppet regime into a military government recognizable under the rules of *jus in bello*. The maintenance of the puppet also stands in direct violation of customary international law in 1893, the HC IV, and the 1949 Geneva Convention, IV (“GC IV”). The governmental infrastructure of the Hawaiian Kingdom continued as the governmental infrastructure of the current State of Hawai‘i.

It is also important to note, for the purposes of *jus in bello*, that the United States never made an international claim to the Hawaiian Islands through *debellatio*. Instead, the United States, in 1959, failed to mention its military occupation and unlawful overthrow of the Hawaiian government in 1893 when it reported to the United Nations Secretary General that “Hawaii has been administered by the United States since 1898. As early as 1900, Congress passed an Organic Act, establishing Hawaii as an incorporated territory in which the Constitution and laws of the United States, which were not locally inapplicable, would have full force and effect.”¹¹³ This extraterritorial application of American municipal laws is not only in violation of *The Lotus* case principle,¹¹⁴ but is also prohibited by the rules of *jus in bello*. This subject is fully treated by Benvenisti, who states:

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.¹¹⁵

As an occupying State, the United States was obligated to establish a military government, whose purpose would be to provisionally administer the laws of the occupied State—the Hawaiian Kingdom—until a treaty of peace, or an agreement to terminate the occupation, has been done. “Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory.”¹¹⁶ “By military government,” according to Winthrop, “is meant that dominion exercised in war by a belligerent power over

109 Marek, 110.

110 Douglas Kmiec, “Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” 12 *Op. O.L.C.* 238, 252 (1988).

111 31 Stat. 141 (1900).

112 73 Stat. 4 (1959).

113 United Nations, *Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America*, Document no. AJ4226, Annex 1, 2 (24 Sep. 1959).

114 *Lotus*, PCIJ Series A, No. 10, p. 18 (1927). The Permanent Court of International Justice stated that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”

115 Benvenisti, 19.

116 United States Army Field Manual 27-10, sec. 362 (1956).

territory of the [State] invaded and occupied by him and over the inhabitants thereof.”¹¹⁷ In his dissenting opinion in *Ex parte Miligan*, U.S. Supreme Court Chief Justice Chase explained:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during a rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. . . . the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President.¹¹⁸

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

Denationalization through Americanization

In 1906, the Territory of Hawai‘i intentionally sought to “Americanize” the school children throughout the Hawaiian Islands. To accomplish this, they instituted a policy of denationalization. Under the policy titled “Programme for Patriotic Exercises in the Public Schools,” the national language of Hawaiian was banned and replaced with the American language of English.¹¹⁹ Young students who spoke the Hawaiian language in school were severely disciplined. One of the leading newspapers for the insurgents, who were now officials in the territorial regime, printed a story on the plan of denationalization. The *Hawaiian Gazette* reported:

As a means of *inculcating* patriotism in the schools, the Board of Education [of the territorial government] has agreed upon a plan of patriotic observance to be followed in the celebration of notable days in American history, this plan being a composite drawn from the several submitted by teachers in the department for the consideration of the Board. It will be remembered that at the time of the celebration of the birthday of Benjamin Franklin, an agitation was begun looking to a better observance of these notable national days in the schools, as tending to inculcate patriotism in a school population that needed that kind of teaching, perhaps, more than the mainland children do [emphasis added].¹²⁰

It is important here to draw attention to the word “inculcate.” As a verb, the term imports force such as to convince, implant, and indoctrinate. Brainwashing is its colloquial term. When a reporter from the American news magazine, *Harper’s Weekly*, visited the Ka‘iulani Public School in Honolulu in 1907, he reported:

At the suggestion of Mr. Babbitt, the principal, Mrs. Fraser, gave an order,

117 William Winthrop, *Military Law and Precedents* 799 (1920).

118 *Ex parte Miligan*, 71 U.S. 2, 141-142 (1866).

119 *Programme for Patriotic Exercises in the Public Schools*, Territory of Hawai‘i, adopted by the Department of Public (1906) (online at: http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf).

120 *Patriotic Program for School Observance*, *Hawaiian Gazette* 5 (3 Apr. 1906) (online at http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf).

and within ten seconds all of the 614 pupils of the school began to march out upon the great green lawn which surrounds the building... Out upon the lawn marched the children, two by two, just as precise and orderly as you find them at home. With the ease that comes of long practice the classes marched and counter-marched until all were drawn up in a compact array facing a large American flag that was dancing in the northeast trade-wind forty feet above their heads... "Attention!" Mrs. Fraser commanded. The little regiment stood fast, arms at side, shoulders back, chests out, heads up, and every eye fixed upon the red, white and blue emblem that waived protectingly over them. "Salute!" was the principal's next command. Every right hand was raised, forefinger extended, and the six hundred and fourteen fresh, childish voices chanted as one voice: "We give our heads and our hearts to God and our Country! One Country! One Language! One Flag!"¹²¹

Dismantling Universal Health Care

On 31 July 1901 an article was published in *The Pacific Commercial Advertiser* in Honolulu.¹²² It is a window into a time of colliding legal systems and the Queen's Hospital would soon become the first Hawaiian health institution to fall victim to the unlawful imposition of American laws. The *Advertiser* reported:

The Queen's Hospital was founded in 1859 by their Majesties Kamehameha IV and his consort Emma Kaleleonalani. The hospital is organized as a corporation and by the terms of its charter the board of trustees is composed of ten members elected by the society and ten members nominated by the Government, of which the President of the Republic (now Governor of the Territory) shall be the presiding officer. The charter also provides for the "establishing and putting in operation a permanent hospital in Honolulu, with a dispensary and all necessary furniture and appurtenances for the reception, accommodation and treatment of indigent sick and disabled Hawaiians, as well as such foreigners and other who may choose to avail themselves of the same."

Under this construction all native Hawaiians have been cared for without charge, while for others a charge has been made of from \$1 to \$3 per day. The bill making the appropriation for the hospital by the Government provides that no distinction shall be made as to race; and the Queen's Hospital trustees are evidently up against a serious proposition.

Queen's Hospital was established as the national hospital for the Hawaiian Kingdom and that health care services for Hawaiian subjects of aboriginal blood was at no charge. The Hawaiian Head of State would serve as the *ex officio* President of the Board together with twenty trustees, ten of whom were from the Hawaiian government.

Since the hospital's establishment in 1859 the legislature of the Hawaiian Kingdom subsidized the hospital along with monies from the Queen Emma Trust. With the unlawful imposition of the 1900 Organic Act that formed the Territory of Hawai'i, American law did not allow public monies to be used for the benefit of a particular race. 1909 was the last year Queen's Hospital

121 William Inglis, "Hawai'i's Lesson to Headstrong California: How the Island Territory has solved the problem of dealing with its four thousand Japanese Public School children," *Harper's Weekly* 227 (16 Feb. 1907).

122 Hawaiian Kingdom Blog, *Queen's Hospital First Hawaiian Health Institution to Fall Victim to the Unlawful Occupation* (9 Sep. 2018) (online at <https://hawaiiankingdom.org/blog/queens-hospital-first-hawaiian-health-institution-to-fall-victim-to-the-unlawful-occupation/>).

received public funding and it was also the same year that the charter was unlawfully amended to replace the Hawaiian Head of State with an elected president from the private sector and reduced the number of trustees from twenty to seven, which did not include government officers. These changes to a Hawaiian quasi-public institution is a direct violation of the laws of occupation, whereby the United States was and continues to be obligated to administer the laws of the occupied State—the Hawaiian Kingdom. This requirement comes under Article 43 of the HC IV, and Article 64 of the GC.

Article 55 of the HC IV provides, “[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the [occupied] State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” The term “usufruct” is to administer the property or institution of another without impairing or damaging it.

Despite these unlawful changes, aboriginal Hawaiian subjects, whether pure or part, are to receive health care at Queen’s Hospital free of charge. This did not change, but through denationalization there was an attempt of erasure. Aboriginal Hawaiian subjects are protected persons as defined under international law, and as such, the prevention of health care by Queen’s Hospital constitutes war crimes. Furthermore, there is a direct nexus of deaths of aboriginal Hawaiians as “the single racial group with the highest health risk in the State of Hawai‘i [that] stems from...late or lack of access to health care” to the crime of genocide.

Population Transfer during Belligerent Occupation

Once a State is occupied, international law preserves the *status quo ante* of the occupied State as it was before the occupation began. To preserve the nationality of the occupied State from being manipulated by the occupying State to its advantage, international law only allows individuals born within the territory of the occupied State to acquire the nationality of their parents—*jus sanguinis*. To preserve the *status quo*, Article 49 of the GC IV mandates that the “Occupying Power shall not ... transfer parts of its own civilian population into the territory it occupies.” For individuals, who were born within Hawaiian territory, to be a Hawaiian subject, they must be a direct descendant of a person or persons who were Hawaiian subjects prior to 17 January 1893. All other individuals born after 17 January 1893 to the present are aliens who can only acquire the nationality of their parents. According to von Glahn, “children born in territory under enemy occupation possess the nationality of their parents.”¹²³

According to the 1890 government census, Hawaiian subjects numbered 48,107, with the aboriginal Hawaiian, both pure and part, numbering 40,622, being 84% of the national population, and the non-aboriginal Hawaiians numbering 7,485, being 16%. Despite the massive and illegal migrations of foreigners to the Hawaiian Islands since 1898, the population of which, according to the State of Hawai‘i, numbered 1,302,939 in 2009,¹²⁴ the *status quo ante* of the national population of the Hawaiian Kingdom is maintained. Therefore, under the international laws of occupation, the aboriginal Hawaiian population of 322,812 in 2009 would continue to be 84% of the Hawaiian national population, and the non-aboriginal Hawaiian population of 61,488 would continue to be 16%. The balance of the population in

123 Gehard von Glahn, *Law Among Nations* 780 (6th ed., 1992). See also Willy Daniel Kaipō Kauai, “The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai‘i” (PhD dissertation, University of Hawai‘i at Manoa, 2014).

124 State of Hawai‘i. Department of Health, Hawai‘i Health Survey (2009) (online at <http://www.ohadatabook.com/F01-05-11u.pdf>); see also David Keanu Sai, *American Occupation of the Hawaiian State: A Century Gone Unchecked*, 1 *Haw. J.L. & Pol.* 46, 63-65 (Summer 2004).

2009, being 918,639, are aliens who were illegally transferred, either directly or indirectly, by the United States as the occupying Power, and therefore their presence constitutes war crimes. According to United Nations Special Rapporteur Awn Shawkat Al-Khasawneh of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, population “transfers engage both state responsibility and the criminal liability of individuals.”¹²⁵ “The remedy, in case of breach of the prohibition,” states Ronen, “is reversion to the status quo ante, *i.e.* the occupying power should remove its nationals from the occupied territory and repatriate them. ... At any rate, since the occupying power cannot grant what it does not have, the settler population could not acquire status in the territory during the period of occupation.”¹²⁶ As to a remedy for the breach, Special Rapporteur Al-Khasawneh states that:

according to the principle *ubi jus, ibi remedium* (where there is a law, there is a remedy), it is important that certain remedies are available to the survivors and that victims of population transfers are entitled to appropriate remedies [by the transferring State]. The heading under which such remedies can consider is *restitutio in integrum* which aims, as far as possible, at eliminating the consequences of the illegality associated with particular acts such as population transfer and the implantation of settlers.¹²⁷

Reversion to the *status quo ante* stems from the principle *ex injuria jus non oritur* (unjust acts cannot create law) where a situation must align itself with the law.

The Principles of Ex Injuria jus Non Oritur and Ex Factis jus oritur

Opposite of *ex injuria jus non oritur* is the principle *ex factis jus oritur* (law arises from the facts). This principle is applied when certain acts of an illegal regime will have legal effect despite that the fact these acts stem from an unlawful entity. In case of a breach of international law, which it serves to prohibit, international law also simultaneously protects the victim or victims of the breach. Unlike municipal laws where a victim of a crime can reach out to law enforcement and seek redress through prosecution and/or reparations, victims of the breach of international humanitarian law cannot do the same until mechanisms are established. In the meantime, victims’ rights are protected under international law despite the lack of immediate enforcement.

The First Gulf War (Iraq—Kuwait) in 1990 illustrates this point. When Saddam Hussein invaded Kuwait on 2 August 1990, the invasion was not justified under the rules of *jus in bello*. The Iraqis quickly secured effective control of Kuwait City and soon thereafter secured the entire territory of Kuwait under Iraqi control. Prior to the invasion, the Emir of Kuwait and members of his government fled their country and established a government-in-exile in Saudi Arabia. On 8 August, Hussein unilaterally pronounced the annexation of Kuwait, and then on 28 August, declared Kuwait to be a province of Iraq. Iraq’s occupation lasted just over seven months, when Iraqi forces were driven out of Kuwaiti territory at the start of Operation Desert Storm on 17 January 1991. By February 1991, the Iraqis were expelled.

Under paragraph 16 of Security Council Resolution 687 (3 April 1991), the United Nations reaffirmed that “Iraq... is liable under international law for any direct loss, damage, ... or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and

125 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and Population Transfer: Final Report of the Special Rapporteur*, Mr. Al-Khasawneh E/CN.4/Sub.2/1997/23, para. 60.

126 Yael Ronen, “Status of Settlers Implanted by Illegal Regimes under International Law,” *International Law Forum of the Hebrew University of Jerusalem Law Faculty* (Dr. Tomer Broude, ed.) 38 (3 Oct. 2008).

127 Human Rights and Population Transfer: Final Report of the Special Rapporteur, para. 60.

occupation of Kuwait.” Together with this resolution and Security Council Resolution 692 (20 May 1991), the United Nations Compensation Commission (“UNCC”) was established to resolve the claims of victims of the Iraqi invasion and occupation. According to the UNCC, the “Commission received approximately 2.7 million claims and concluded its review of all claims in 2005. Approximately \$52.4 billion was awarded to over 100 Governments and international organizations for distribution to 1.5 million claims in all claim categories.”¹²⁸

Aside from reparations, the law of occupation not only provides for the maintenance of the *status quo ante* of the occupied State’s institutions, legal order and territorial integrity, but also protects the rights of the population of the occupied State by acknowledging the balance between the principles of *ex injuria jus non oritur* and *ex factis jus oritur*. In the *Namibia* Advisory Opinion, the International Court of Justice (“ICJ”) addressed these two principles. The ICJ concluded:

In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

The United States Supreme Court also recognized the principle of *ex factis jus oritur* in *Texas v. White* (1869),¹²⁹ when the Court had to address the effects of acts made by the insurgency calling itself the Confederate State of Texas upon the civilian population during the American Civil War. The Court stated:

that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government, and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

As Ronan explains, “the general invalidity of domestic acts carried out under an illegal regime is qualified where such invalidity would act to the detriment of the inhabitants of the territory. This is the *Namibia* exception.”¹³⁰ To this can be added the *Texas v. White* exception. Both exceptions, however, were declared by a higher authority after the acts were committed. In the case of *Namibia* it was the International Court of Justice on behalf of the United Nations, and in the case of *Texas*, it was the U.S. Supreme Court on behalf of the United States. For the Hawaiian situation, the exception would need to be proclaimed by an entity representing the Hawaiian Kingdom. In 2014, the Council of Regency proclaimed this exception.¹³¹

128 *United Nations Compensation Commission Pays Out US \$250 Million*, United Nations Compensation Commission Press Release (22 Oct. 2019).

129 *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

130 Ronan, 39.

131 Sai, *Royal Commission of Inquiry*, 48.

Protected Persons

According to the International Committee of the Red Cross, “[t]he Geneva Conventions and their Additional Protocols form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. They protect people not taking part in hostilities and those who are no longer doing so.”¹³² Coverage of the Geneva Conventions also apply to occupied territories where there is no actual fighting.

Internationally, “protected persons” is a legal term under international humanitarian law that refers to specific protections afforded to civilians in occupied territory whose rights are protected under the GC IV, and its Additional Protocol. According to Article 4 of the GC IV, “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

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

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

Fifty years later, however, this definition of protected persons was expanded to include the citizenry of the occupying State. This was an evolution of international criminal law ushered in by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The case was the prosecution and conviction of Duško Tadić who was a Bosnian Serb. After being arrested in Germany in 1994, he faced among other counts, twelve counts of grave breaches of the GC IV. On 7 May 1997, he was convicted by the trial court on 11 counts but this did not include the counts of grave breaches of the GC IV.

In its judgment, the trial court found that Tadić was not guilty of eleven counts of grave breaches because the civilian victims possessed the same Yugoslavian citizenship as Tadić who represented the occupying Power in the war. The prosecutors appealed this decision and it was not only reversed by the Appeal Chamber of the ICTY, but it also expanded the definition of protected persons in occupied territory under international criminal law. In its judgment in 1999, the Appeals Chamber concluded:

the primary purpose [of Article 4] is to ensure the safeguards afforded by the [Geneva] Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State

132 The Geneva Conventions of 1949 and their Additional Protocols, International Committee of the Red Cross (online at <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>)

in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not their legal characterisation as such. ... Hence, even if in the circumstances of the case the perpetrators and the victim were to be regarded as possessing the same nationality, Article 4 [Geneva Convention] would still be applicable.¹³³

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

Under Hawaiian Kingdom law there is specific wording that covers allegiance. It is found in the Hawaiian Penal Code under sections 2 and 3 of Chapter VI for the crime of treason.

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

By expanding the scope and application of protected persons to American citizens residing in the Hawaiian Kingdom, they, along with all other nationalities of foreign States as well as Hawaiian subjects, are afforded equal protection under the Geneva Convention and can be considered victims of grave breaches or war crimes committed against them by those in the service of the Occupying State in violation of the HC IV and the GC IV.

Conclusion

The recent Iraqi conflict and subsequent occupation has greatly enhanced the political and legal climate of the international community. The conflict has triggered open discussion, at every level, of States rights as defined by the international laws of war and occupation. This dialogue of States rights has now made the HC IV and the GC IV a common language spoken worldwide. Second, Hawai'i played a major role in the Iraqi conflict, because a large number of the U.S. military engaged in the fighting in Iraq came out of the United States Pacific Command, headquartered in Hawai'i, and attached to the United States Central Command for combat operations. These included sixty thousand troops from the 1st Marine Expeditionary Force, and forty-seven warships,¹³⁴ nine of which were based at Pearl Harbor, Hawai'i.¹³⁵

Given the prolonged occupation of the Hawaiian Kingdom and the presumed continuity of the Hawaiian State, in the absence of any evidence to the contrary, the United States has continuously violated Hawaiian sovereignty and its neutrality in many major conflicts to date and has utilized Hawaiian territory and its seaports to become the superpower it is today. Hawaiian

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

134 See GlobalSecurity.org, "U.S. Forces Order of Battle," (online at https://www.globalsecurity.org/military/ops/iraq_orbat_toe.htm).

135 These ships include four Submarines (USS Honolulu, USS Cheyenne, USS Columbia, and the USS Pasadena), two Destroyers (USS Fletcher and the USS Paul Hamilton), one Cruiser (USS Chosin), and two Frigates (USS Cromelin and the USS Reuben James).

territory not only serves as the headquarters for the largest and oldest of the nine unified military commands of the U.S. Department of Defense in the world, now called the Indo-Pacific Command, it also reluctantly serves as a prime target for military strike. Under the international laws of occupation, the emphasis is always directed upon the regime of the occupying State and not upon the nationals of the occupied State. This reasoning is to ensure the occupier's compliance with the laws of occupation—a compliance that has gone unchecked for over a century.

Scheffer asserts that the victim or victims of an occupier's violation of international law "could bring an action in U.S. federal courts against officials of the [occupying State] under the Alien Tort Statute provided that the occupying power is the alleged responsible party and the jurisdictional requirements of that law are satisfied."¹³⁶ The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹³⁷ In *Ex parte Quirin*, the U.S. Supreme Court explained that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of...individuals."¹³⁸

136 David J. Scheffer, "Beyond Occupation Law," 97 *Am. J. Int'l. L.* 842, 858 (2003).

137 28 U.S.C. §1350.

138 *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

CHAPTER 3

CONTINUITY OF THE HAWAIIAN KINGDOM AS A STATE UNDER INTERNATIONAL LAW

Professor Matthew Craven

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CONTINUITY OF THE HAWAIIAN KINGDOM AS A STATE UNDER INTERNATIONAL LAW

Professor Matthew Craven

Introduction

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

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

- a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.
- b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.
- c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibus* or impossibility of performance.
- d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian Kingdom incurred prior to its occupation.

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

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

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

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

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

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

3 *Ibid.*, p.417.

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

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

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

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

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

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

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

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

- 7 For early versions of this principle see, Grotius, *De Jure Belli ac Pacis* Bk. II, c. xvi, 418. See also, S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* B. VIII, c. xii, s.1, 1360 (1688, trans Oldfather C. and Oldfather W., 1934); Rivier, *Principes du Droit des Gens* I, 62 (1896); F. De Martens, *Traité de Droit International* 362 (1883); J. Westlake, *International Law* I, 58 (1904); Q. Wright, ‘The Status of Germany and the Peace Proclamation’, 46 *Am. J. Int’l. L.* 299, 307 (1952); A. McNair, ‘Aspects of State Sovereignty’, *Brit. Y.B. Int’l L.* 8 (1949). Jennings and Watts (Oppenheim’s *International Law*, 146 (9th ed., 1996)) declare that: ‘Mere territorial changes, whether by increase or by diminution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties. Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired’. See also, *United States v. Curtiss Wright Export Corp. et al* 299 U.S. 304, 316 (1936) (J. Sutherland): ‘Rulers come and go; governments end and forms of government change; but sovereignty survives.’
- 8 Westlake, 59; Pradier-Fodéré, s. 148, p. 252; W. Hall, *A Treatise on International Law*, 4th ed. 23 (1895); Phillimore, I, 202-3; Rivier, I, 63-4; Marek, 15-24; Article 26, Harvard Research Draft Convention on the Law of Treaties 1935, 29 *Am. J. Int’l. L. Supp.* 655 (1935). See also, *Katz and Klump v. Yugoslavia* [1925-1926] A. D. 3 (No. 24); *Ottoman Debt Arbitration* [1925-26] A. D. 3; *Roselius and Co. v. Dr Karsten and the Turkish Republic intervening*, [1925-6] A. D. (No. 26); *In re Ungarische kriegsproduktien Aktiengesellschaft*, [1919-22] A.D. (No. 45); *Lazard Brothers and Co v. Midland Bank*, [1931-32] A.D. (No. 69). For State practice see e.g. Great Britain remained the same despite the loss of the American Colonies; France, after the loss of territory in 1814-15 and 1871; Austria after the cession of Lombardy in 1859 and Venice in 1866; Prussia after the Franco-Prussian Peace Treaty at Tilsit, 1807. See generally, J. Moore, *A Digest of International Law* 248 (1906).
- 9 Crawford points out that ‘the presumption—in practice a strong one—is in favour of the continuance, and against the extinction, of an established state’, Crawford, 417.
- 10 Hall, 22.
- 11 See e.g. Marek.

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

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

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

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

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

Whilst the Montevideo criteria¹³ (or versions of) are now regarded as the definitive determinants of statehood, the criteria governing the ‘creation’ of states in international law in the 19th Century were somewhat less clear.¹⁴ The rise of positivism and its rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many to posit international law less in terms of a ‘universal’ law of nations and more in terms of an international public

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

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

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

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

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

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

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

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

17 Phillimore, I, 81.

18 Hall, 21.

19 *Id.*, 3-44.

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

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

22 *Id.*

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

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

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

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

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

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

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

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

25 Message of President Tyler, 30 Dec. 1842, Moore's Digest, I, 476-7.

26 For. Rel. 1894, App. II, 64.

27 Letter of 19 June 1851, For. Rel. 1894, App. II, 97.

28 For confirmation of this fact see e.g. Rivier, I, 54.

29 *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, para. 7.4. (2001).

30 Phillimore, I, p. 216.

31 Hall, 298.

32 See e.g. Lawrence, 134.

33 Hall, 298.

Recognized Modes of Extinction

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

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

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

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness³⁶ (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.³⁷ It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.³⁸

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

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

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

36 See, Crawford, 418.

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

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

39 *Island of Palmas*, 829.

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

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

- a) By the destruction of its territory or by the extinction, dispersal or emigration of its population (a theoretical disposition).
- b) By the dissolution of the corpus of the State (cases include the dissolution of the German Empire in 1805-6; the partition of the Pays-Bas in 1831 or of the Canton of Bale in 1833).
- c) By the State's incorporation, union, or submission to another (cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886).⁴²

Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently distinguished between two processes – one of which involved a voluntary act (i.e. union or incorporation), the other of which came about by non- consensual means (i.e. conquest and submission followed by annexation).⁴³ It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory⁴⁴ and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

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

40 *Id.*

41 Jessup, 22 *Am. J. Int'l. L.* 735 (1928).

42 See e.g. Pradier-Fodéré, I, 251; Phillimore, I, 201; *de Martens Traite de Droit International*, I, 367-370 (1883).

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

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

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

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

What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession (a point of particular importance for possessions held in foreign territory).⁵¹ Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the state in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.⁵² Title, in other words, was original, and rights of the occupants were limited to those which they possessed (perhaps under the doctrine *uti possidetis de facto*). Others, by contrast, seemed to assume some form of 'transfer of title' as taking place (i.e. that conquest gave rise to a derivative title⁵³), and concluded in consequence that the conqueror 'becomes, as it were, the heir or universal successor of the defunct or extinguished State'.⁵⁴ Much depended, in such circumstances, as to how the successor came to acquire title.

It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization⁵⁵ 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 'Stimson Doctrine') which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

46 See e.g. Lawrence, 165-6 ('Title by conquest arises only when no formal international document transfers the territory to its new possessor'.)

47 Now article 52 Vienna Convention on the Law of Treaties (1969).

48 See e.g. Rivier, 176.

49 S. Baker, *Halleck's International Law* 468 (3rd ed., 1893).

50 This point was of considerable importance following the Allied occupation of Germany in 1945.

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

52 Rivier, 182.

53 Phillimore, I, p. 328.

54 Baker, 495.

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

United States Acquisition of the Hawaiian Islands

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

Acquisition of the Hawaiian Islands in 1898

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

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

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

56 Order of 16 Jan. 1893.

57 For. Rel. 1894, App. II, 198.

58 Report of Mr. Foster, Sec. of State, For. Rel., App. II, 198-205 (1894).

59 Moore's Digest, I, 499.

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

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

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

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

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

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

60 *Id.*, 498-99.

61 *Id.*, 501.

62 I. Brownlie, *International Law and the Use of Force by States* 46-7 (1963).

63 See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992).

States⁶⁴ - *de facto* recognition of the Republic was affirmed by the US⁶⁵ and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili'uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai'i.⁶⁶ A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai'i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

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

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

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

The Cession of the Hawaiian Islands to the United States

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

64 Article 32 Constitution of the Republic of Hawai'i.

65 For. Rel. 1894, 358-360.

66 XC B.F.S.P. 1897-8 1248 (1901).

67 President McKinley, Third Annual Message, 15 Dec. 1899, Moore's Digest, I, 511.

68 See, Moore's Digest, I, 504-9.

69 See e.g. Verzijl, 118.

70 *Id.*, 129.

71 Message of President McKinley to the Senate, Moore's Digest, I, 503 (16 June 1897).

72 Some type of recognition was provided by Great Britain in 1894, however.

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

Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sabib v. Chief Commissioner Pondicherry*⁷⁵ in which it was held that Pondicherry was not to be considered as part of India, despite India's administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.⁷⁶

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

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

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

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

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

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

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

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

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

The Annexation of the Hawaiian Islands by the United States

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

The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.⁸⁰ Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai'i.⁸¹ It could not easily be construed, in other words, merely as an instrument of US government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

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

79 Mr. Buchanan to Mr. Rush. Moore's Digest, 124.

80 See, Hackworth G., *Digest of International Law*, I, 333-338 (1940).

81 Moore's Digest, 500.

82 R. Bindschedler, 'Annexation', in *Encyclopedia of Public International Law*, III, 19, 20 (1992).

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

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

Belligerent Occupation and Occupation Pacifica

From the time of Vattel onwards it was frequently been held that the mere occupation of foreign territory did not lead to the acquisition of title of any kind until the termination of hostilities.⁸⁴ During the course of the 19th Century, however, this became not merely a doctrinal assertion, but a firmly maintained axiom of international law.⁸⁵ Up until the point at which hostilities were at an end, the control exercised over territory was regarded as a 'belligerent occupation' subject to the terms of the laws of war. The hallmark of belligerent occupation being that the occupant enjoyed *de facto* authority over the territory in question, but that sovereignty (and territorial title) remained in the hands of the displaced government. As President Polk noted in his annual message of 1846 'by the law of nations a conquered territory is subject to be governed by the conqueror during his military possession and until there is either a treaty of peace, or he shall voluntarily withdraw from it.'⁸⁶ In such a case '[t]he sovereignty of the enemy is in such case "suspended", and his laws can "no longer be rightfully enforced" over the occupied territory and that "[b]y the surrender, the inhabitants pass under a temporary allegiance to the conqueror."⁸⁷ The suspensory, and provisional, character of belligerent occupation was further confirmed in US case law of the time,⁸⁸ in academic doctrine⁸⁹ and in various Manuals on the Laws of War.⁹⁰ The general idea was subsequently recognised in Conventional

83 Brownlie, 26-40.

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

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

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

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

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

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

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

form in article 43 of the 1907 Hague Regulations,⁹¹ and in the US Military Manual of 1914.⁹² In essence, the doctrine of belligerent occupation placed certain limits on the capacity of the occupying power to acquire or dispose of territory *durante bello*. By inference, sovereignty remained in the hands of the occupied power and, as a consequence it was generally assumed that until hostilities were terminated, title to territory would not pass and the extinction of the state would not be complete. This doctrine was subsequently elaborated during the course of the First and Second World Wars to the effect that States would not be regarded as having been lawfully annexed even when the entirety of the territory was occupied and the government forced into exile, so long as the condition of war persisted, albeit on the part of allied States. The general prohibition on the threat or use of armed force in the Charter era since 1945 has further reinforced this regime to the point at which it might be said that ‘effective control by foreign military force can never bring about by itself a valid transfer of sovereignty’.⁹³

Until the adoption of common article 2 of the 1949 Geneva Conventions,⁹⁴ however, the doctrine of belligerent occupation applied primarily to time of war or armed conflict where military intervention met armed resistance. Indeed, the absence of resistance would not infrequently be construed either as an implicit acceptance of the fact of occupation, or as a signal that the original sovereign had been effectively extinguished in virtue of *debellatio*. It is evident, however, that by the turn of the century a notion of peacetime occupation (*occupatio pacifica*) was coming to be recognised.⁹⁵ This concept encompassed not merely occupation following the conclusion of an agreement between the parties, but also non-consensual occupation occurring outside armed conflict (but normally following the threatened use of force).⁹⁶ Practice in the early 20th Century suggests that even though the Hague Regulations were themselves limited to occupations *pendente bello*, their provisions should apply to peacetime occupations such as the British occupation of Egypt in 1914-18,⁹⁷ the Franco- Belgian occupation of the Ruhr in 1923-5⁹⁸ and the occupation of Bohemia and Moravia by Germany in 1939.⁹⁹ Indeed, the Arbitral Tribunal in the *Coenca Brothers v. Germany Arbitration Case*¹⁰⁰ took the view that

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

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

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

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

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

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

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

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

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

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

the Allied occupation of Greece in 1915 was governed by the terms of the law of belligerent occupation notwithstanding the fact that Greece was not a belligerent at that time, but had merely invited occupation of Salonika in order to protect the Serbian State. Similarly, in the *Chevreau Case* the Arbitrator intimated that the laws of belligerent occupation would apply to the British forces occupying Persia under agreement with the latter in 1914.¹⁰¹

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

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

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

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

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

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

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

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

102 Jones, 159.

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

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

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

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

103 This follows by implication from the terms of Article 74 UN Charter.

104 ICJ Rep. 31, para. 51 (1971).

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

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

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

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

105 ICJ Rep. 12, 32 (1975).

106 For a review of the practice in this regard see J. Crawford, 'State Practice and International Law in Relation to Secession', 69 *Brit. Y.B. Int'l L.* 85 (1998).

107 Crawford, *Creation of States*, 100.

108 See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 94-5 (1995).

109 Crawford, *Creation of States*, 363-4; Shaw, *Title to Territory in Africa*, 149.

‘At an election designated by proclamation of the Governor of Hawai‘i ... there shall be submitted to the electors, qualified to vote in said election, for adoption or rejection, the following propositions:

1. Shall Hawai‘i immediately be admitted into the Union as a State?...’

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

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

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

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

110 See, H. Hannum, ‘Rethinking Self-Determination’, 34 *Va. J. Int’l. L.* 1, 37 (1993).

111 The case of Israeli settlements in the Occupied Territories, Cassese, 242.

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

113 See, R. Jennings, *The Acquisition of Territory in International Law* 69-87 (1963).

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

Acquisition of Title by Reason of Effective Occupation / Acquisitive Prescription

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

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

114 United States Department of State Bulletin, 270 (1952).

115 R. Higgins, ‘Time and the Law: International Perspectives on an Old Problem’, 46 *Int. Comp. Law Q.* 501, 516 (1997).

116 ICJ Rep., 12, 32 (1975).

117 For a discussion of the various approaches to this issue see Jennings and Watts, 705-6.

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

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

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,¹²⁰ and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case¹²¹ found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,¹²² the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*¹²³ and in the *Island of Palmas Arbitration*.¹²⁴

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

118 W. Hall, *A Treatise on International Law*, Pearce Higgins, 143 (8th ed., 1924).

119 Johnson, 27 *Brit. Y.B. Int'l L.* 332, 353–4 (1950).

120 Prescription may be said to have been recognized in the *Chamizal Arbitration*, 5 A.J.I.L. 785 (1911); the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*.

121 ICJ Rep. 6 (1960).

122 ICJ Rep. 47 (1953)

123 ICJ Rep. 116 (1951).

124 *Island of Palmas Case*, 829

125 *Jennings and Watts*, 706.

126 The arbitrators were instructed by their treaty terms of reference to allow title if based upon ‘adverse holding or prescription during a period of 50 years’. 92 B.F.S.P 160 (1899-1900).

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

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

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

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

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

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

127 Jennings, *The Acquisition of Territory*, 39.

128 United States v. Mexico, 5 *Am. J. Int'l L.* 782 (1911).

129 *Id.*

130 Jennings, *The Acquisition of Territory*, 39.

131 Jennings and Watts, 707.

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

CHAPTER 4

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

Professor William Schabas

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

Professor William Schabas

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

Temporal issues

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

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

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

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

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

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

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

Specific Crimes

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

Usurpation of Sovereignty during Occupation

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

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

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

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

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

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

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

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

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

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

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

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

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

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

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

criminal tribunals.

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

On the assumption that it is an ongoing crime, the *actus reus* of the offence of 'usurpation of sovereignty' would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power may therefore cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.¹⁴ The occupying power may also cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

Compulsory Enlistment of Soldiers

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

12 *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

13 Elements of Crimes, Crimes Against Humanity, Art. 7(1)(i).

14 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

15 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, 17-18.

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

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

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

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

16 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, Art. 2(e).

17 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 8(2)(a)(v) (2002).

18 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 293.

19 *Id.*, 294.

20 Elements of Crimes, Art. 8(2)(a)(v).

21 Knut Dörmann, 'Paragraph 2(a)(v): Compelling a protected person to serve in the hostile forces', in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 329-331, 330 (3rd ed., 2015).

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

Denationalization

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

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

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

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

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

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

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

international crime – a crime against the very foundations of the Community of Nations’.²⁵

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

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

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

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

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

25 Preliminary Report by the Chairman of Committee III, UNWCC Doc. C/148, p. 3

26 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 90 (1944).

27 *Id.*, 80.

28 *United States v. Greifelt et al.*, 13 LRTWC 1, 42 (1948).

29 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 488 (1948).

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

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

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

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

Pillage

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

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

30 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

31 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, 17-18.

32 Rome Statute, Art. 8(2)(b)(xvi).

33 *Prosecutor v. Blaškić* (IT-95-14-A) Judgment, para. 147 (29 July 2004); *Prosecutor v. Delalić* (IT-96-21-A), Judgment, para. 591 (20 February 2001); *Prosecutor v. Kordić et al.* (IT-95-14/2-A), Judgment, para. 77 (17 December 2004).

34 *Prosecutor v. Brima et al.* (SCSL-04-16-T), Judgment, para. 751 (20 June 2007).

35 UN Doc. S/RES/827 (1993).

36 Oscar, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 226.

37 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, Annex, Art. 4(f) (1994).

38 Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, paras. 1-3; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, paras. 1-3.

of pillaging’.

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

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

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

39 *Prosecutor v. Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 317 (15 June 2009).

40 *Id.*

41 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 908 (7 March 2014).

42 *Id.*

43 *Prosecutor v. Gotovina* (IT-06-90-T), Judgment, para. 1778 (15 April 2011).

44 *Prosecutor v. Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, para. 329 (30 September 2008).

45 *Id.*, fn. 430.

46 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 907 (7 March 2014).

47 *Prosecutor v. Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, para. 330 (30 September 2008).

48 *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, para. 905 (7 March 2014).

49 See Andreas Zimmermann, ‘Pillage’, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 238 (1999).

50 Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2; Elements of Crimes,

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

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

Confiscation and Destruction of Property

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

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

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

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

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

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

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

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

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

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

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

Exaction of Illegitimate or Exorbitant Contributions

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

Deprivation of Fair and Regular Trial

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

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

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

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

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

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

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

Unlawful Deportation or Transfer of Civilians of the Occupied Territory

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

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

57 See the authorities cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, Vol. I: Rules, 352, fn. 327 (2005).

58 *United States of America v. Alstötter et al.* ('The Justice case'), 3 TWC 954 (1948).

59 Henckaerts and Doswald-Beck, 355.

60 Instructions for the Government of Armies of the United States in the Field ('Lieber Code'), Art. 23.

61 Charter of the International Military Tribunal (IMT), 82 UNTS 279, Annex, Art. VI(b) (1951).

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

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

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

Unlawful Transfer of Populations to the Occupied Territory

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

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

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

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

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

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

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

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

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

Conclusion

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

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

General

With respect to the last two elements listed for each crime:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”

Elements of the war crime of usurpation of sovereignty during occupation

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.

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

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

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

Elements of the war crime of compulsory enlistment

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

Elements of the war crime of denationalization

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

Elements of the war crime of pillage

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

Elements of the war crime of confiscation or destruction of property

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

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

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

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

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

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

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

CHAPTER 5

INTERNATIONAL HUMAN RIGHTS LAW AND SELF-DETERMINATION OF PEOPLES RELATED TO THE UNITED STATES OCCUPATION OF THE HAWAIIAN KINGDOM

Professor Federico Lenzerini

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INTERNATIONAL HUMAN RIGHTS LAW AND SELF-DETERMINATION OF PEOPLES RELATED TO THE UNITED STATES OCCUPATION OF THE HAWAIIAN KINGDOM

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Introduction

As emphasized in the Preamble of the 1993 *Vienna Declaration and Programme of Action*, “all human rights derive from the dignity and worth inherent in the human person, and [...] the human person is the central subject of human rights and fundamental freedoms”.¹ Human rights are therefore inherent in all human beings—for the sole reason of them being *human*—and their effective achievement is essential to allow that the level of wellbeing of persons is consistent with the minimum conditions for human dignity to be realized. In other words, human rights constitute an essential prerequisite for allowing human beings to give realization to their basic aspirations and wishes, which are at the basis of a good and enjoyable life. In synthesis, human rights may be considered the basic rights and freedoms belonging to every person living in the world, from the initial to the final instant of her existence. In principle, human rights never abandon the person, although the actual enjoyment of most of them may be subject to certain conditions and may be restricted when some circumstances come to existence. As will be better illustrated later in this chapter, a very limited core of human rights are however non-derogable, and, therefore, no restriction, derogation or suspension of their enjoyment is allowed. Non-derogable human rights include the right to life, the prohibition of torture and inhuman and degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of retroactive application of criminal law, as well as the judicial guarantees attached to the said human rights standards.

International Development of Human Rights Standards

While a few international treaties concerning specific violations of human rights were adopted before the 1940s,² the development of modern international law on human rights basically constituted a reaction to the absolute lack of consideration for the value of human dignity, and the ensuing horrifying abuses of the human person suffered by millions of individuals during World War II. Protection of human rights was included among the purposes of the United Nations, established in San Francisco. Article 1 para. 3 of the U.N. Charter affirms that one of the main purposes of the United Nations is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”, while Article 55 specifies that the Organization shall promote “universal respect for, and observance of, human rights

1 See *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> (accessed on 2 August 2019), second recital of the preamble; see also *International Covenant on Civil and Political Rights* (ICCPR), 1966, 999 UNTS 171, second recital of the preamble.

2 See, for instance, the *Slavery Convention*, adopted in 1926, 60 LNTS 254.

3. 78 UNTS 277.

and fundamental freedoms for all without distinction as to race, sex, language, or religion”. In 1948—when the wounds determined by the conflict were still wide and deep—the U.N. General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*³ and, on 10 December, the *Universal Declaration on Human Rights* (UDHR).⁴ The latter emphasizes in its preamble how “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”,⁵ while “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁶ It therefore notes that “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”.⁷

The UDHR includes 30 articles, which start from the assumption that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁸ The UDHR recognizes a wide list of human rights ranging from civil and political rights to economic, social and cultural rights. While, as a *declaration*, the UDHR was not binding for States at the time of its adoption, it undoubtedly represented the basis of the subsequent developments of international human rights law, and all the human rights standards enshrined by the Declaration have successively evolved into rules of customary international law, hence binding for all States in the world irrespective of the pertinent international treaties they have ratified.

The development of human rights protection at the U.N. level continued with the adoption, in 1966, of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁹ which at the moment of this writing count, respectively, 173¹⁰ and 170¹¹ States parties. The two UN Covenants represent the main parameters of reference of contemporary international human rights law, although the development of human rights standards at the regional level, as will be specified *infra* in this paragraph, started well before their adoption. In consideration of the different nature of the rights enshrined in the two Covenants, they adopt a different approach in establishing the level of effectiveness of their protection that should be guaranteed by States parties. In fact, while Article 2 ICCPR establishes that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, as well as “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”, Article 2 ICESCR provides for the duty of States parties to undertake “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. However, the Committee on Economic, Social and Cultural Rights has clarified that, “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized

3 78 UNTS 277.

4 General Assembly Resolution 217 A (III) (10 Dec. 1948).

5 See second recital.

6 See first recital.

7 See second recital.

8 See Article 1.

9 993 UNTS 3.

10 See <<http://indicators.ohchr.org/>> (accessed on 12 September 2019).

11 Ibid.

in the [ICESCR]”.¹²

The two Covenants also established two monitoring bodies—respectively the Human Rights Committee (HRC) and the just mentioned Committee on Economic, Social and Cultural Rights—having similar competences. In particular, both Covenants request States parties to regularly submit reports concerning how they implement the obligations established by them; the two committees receive such reports, examine them and address their concerns and recommendations to the State party concerned in the form of “concluding observations”. Also, the two committees periodically elaborate documents concerning the interpretation of the provisions of the Covenant of their competence, defined as “general comments”. Last but not least, it is notable that the HRC may receive, consider and examine both inter-State complaints and, in particular, individual complaints concerning alleged violations of the ICCPR by one or more States parties; the latter competence, however, may only be exercised with regard to the States parties to the *Optional Protocol to the International Covenant on Civil and Political Rights*, also adopted in 1966,¹³ which at the moment of this writing are 116 (not including the United States of America)¹⁴.

Similarly, the Committee on Economic, Social and Cultural Rights, in addition to considering inter-State complaints, has the competence to receive communications from individuals claiming violations of their rights as established by the ICESCR, but only with respect to the States which are parties to the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* of 2008,¹⁵ entered into force in 2013, which at present counts only 24 States parties (not including the United States of America).¹⁶ In any event, even in the context of individual communications the two Committee do *not* possess the competence of enacting any measure of binding character for the State(s) part(ies) concerned.

The U.N. action in the field of human rights protection is also characterized by the existence of a number of important sectorial conventions, which include the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) of 1965,¹⁷ the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979,¹⁸ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984,¹⁹ the *Convention on the Rights of the Child* (CRC) of 1989,²⁰ the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* of 1990,²¹ the *International Convention for the Protection of all Persons from Enforced Disappearance* of 2006,²² as well as the *Convention on the Rights of Persons with Disabilities*, also adopted in 2006.²³ Most of these conventions are also complemented by optional protocols aimed at improving the level

12 See General comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant), 1990, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> (accessed on 12 Sep. 2019), para. 2.aspx?Lang=en&TreatyID=9&DocTypeID=11> (accessed on 12 September 2019), para. 2.

13 999 *UNTS* 171.

14 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en> (accessed on 12 September 2019).

15 Available at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>> (accessed on 12 Sep. 2019).

16 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en> (accessed on 12 Sep. 2019).

17 660 *UNTS* 195.

18 1249 *UNTS* 13.

19 1465 *UNTS* 85.

20 1577 *UNTS* 3.

21 2220 *UNTS* 3.

22 2716 *UNTS* 3.

23 2515 *UNTS* 3.

and effectiveness of protection granted by the instruments concerned.²⁴ All the conventions just mentioned establish monitoring bodies with competences similar to those of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Most of them are entitled to receive and consider individual complaints presented against those States parties which have explicitly accepted this competence through making an ad-hoc declaration or ratifying an optional protocol to the convention concerned.²⁵

Human rights standards have also notably evolved—in a parallel way with the development within the UN—at the regional level. In this respect, the first treaty of general character was adopted already in 1950, which is the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights—ECHR),²⁶ concluded within the framework of the Council of Europe. Since the time of the adoption of the ECHR, the system of protection established by such a treaty has notably evolved, today being characterized by the presence of 16 protocols. More in general, the Council of Europe has so far adopted 225 treaties, most of which concern topics related to human rights protection.²⁷ Still with regard to the European continent, human rights—as defined by the *Charter of Fundamental Rights of the European Union*²⁸—represent a priority of the European Union. According to Article 6 of the *EU Treaty*²⁹, “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the [EU] Treaties”,³⁰ while “[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.³¹

As far as the American continent is concerned, the main regional system of human rights protection is the one which has developed in the context of the Organization of American States, and its structure is characterized by the *American Declaration of the Rights and Duties of Man*, adopted in 1948,³² plus 12 treaties,³³ the most important of which is undoubtedly the *American Convention on Human Rights* (ACHR), concluded in 1969.³⁴ The ACHR, however, has not been ratified by Canada and the United States.³⁵

In Africa 12 treaties on human rights exist at present,³⁶ adopted in the framework of the African Union (previously Organization of African Unity). The main treaty is the *African Charter on Human and Peoples’ Rights*, adopted in 1981,³⁷ which is characterized by the fact of including in the list of protected rights not only rights of individual nature—consistent with the approach prevailing in the U.N. and within the other regional treaties—but also of *collective*

24 For the full list of such protocols and the status of ratification of all relevant treaties see <<http://indicators.ohchr.org/>> (accessed on 12 Sep. 2019).

25 For the list and explanation of the competences of such monitoring bodies see <<https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>> (accessed on 12 Sep. 2019).

26 CETS No. 005.

27 See <<https://www.coe.int/en/web/conventions/full-list>> (last visited on 12 September 2019).

28 *Official Journal of the European Union* C 326 of 26 October 2012, p. 391.

29 *Id.*, 13.

30 See para. 1.

31 See para. 3.

32 Available at <<http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>> (accessed on 12 Sep. 2019).

33 For the full list and links to all such treaties see <http://www.oas.org/dil/treaties_subject.htm>

34 *OAS Treaty Series* No. 36.

35 See <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> (accessed on 12 Sep. 2019).

36 See <<https://au.int/treaties>> (accessed on 12 Sep. 2019).

37 1 21 ILM 58 (1982).

character,³⁸ as well as a list of duties,³⁹ consistent with the African tradition and understanding of rights and social relations, based on the value of solidarity.

The regional systems of human rights protection established by the treaties just listed present at least two clear advantages in comparison with the conventions adopted at the U.N. level. The first is represented by the fact that, to a certain extent, they include specific provisions aimed at addressing the specific characters and needs of the regional realities in which they are incorporated, therefore being more responsive to the concrete necessities of the people to whom they apply. Secondly—and particularly important—they are much more effective in allowing the actual enjoyment of protected rights by human beings, thanks to the presence of regional courts with the competence (according to relatively different conditions and procedures established by the relevant treaties) of receiving individual claims against States and of deciding on such claims through releasing *proper* judgments of binding character, which the States concerned have an international obligation to comply with. These courts are the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (ACtHPR). An important role is also played by the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, which in their respective areas of competence may adopt decisions concerning the violation of protected rights by the States which are not subjected to the jurisdiction of the corresponding courts; these decisions, however, are not binding for the States concerned, although they undoubtedly have a strong moral force and legal significance. For a number of reasons, in present times the regional human rights system characterized by the highest level of effectiveness is the European one, in light of the higher rate of compliance by States with the judgments of the ECtHR in comparison with the other two regional systems; however, prolonged non-implementation of the said judgments continues to be a concern in a number of European countries.⁴⁰

Treaty Law and Customary International Law

Those indicated in the previous paragraph only represent the most significant examples of the many international treaties which compose the very sophisticated and advanced network of human rights protection at the international level. Virtually all countries in the world are subject to treaty obligations in the human rights field, although the number of treaties concluded and/or ratified by each of them, and, particularly, the effective degree of compliance with them, is very heterogeneous. However, ratification of relevant treaties does *not* constitute an indispensable condition for States to be subjected to international legal obligations in the human rights field. In fact, it is universally recognized that all main human rights standards are today enshrined and protected by rules of customary international law, which are in themselves binding for all States in the world, irrespective of whether or not they have ratified any international treaties relating to the same subject. Of course, ratifying the relevant treaties remains important for a number of reasons, including the fact that written rules provide more certainty about the contents and scope of the relevant obligations than provisions of customary international law, which are by their own nature of oral character. More significantly, the circumstance of being part to a human rights treaty exposes the State to the jurisdiction of the monitoring bodies established by the convention, which—as seen in the previous paragraph—in some cases translates into the competence of enacting decisions concerning individual claims of human rights violations, including (at the regional level) proper judgments of binding character for the State

38 See Articles 19-24.

39 See Articles 27-29.

40 See Council of Europe, “Non-implementation of the Court’s judgments: our shared responsibility” (23 Aug. 2016), available at <<https://www.coe.int/it/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility>> (accessed on 12 Sep. 2019).

concerned. Therefore, in general treaty provisions guarantee more effectiveness of protection than rules of customary international law. Nevertheless, this does not preclude the latter from establishing real international obligations that States are bound to fully comply with them and internationally responsible for their violations.

Main Human Rights Standards

The most important human rights standards, as recognized by the UDHR and the relevant treaties at the U.N. and regional levels, are the following: right to life, liberty and security of the person; freedom from slavery, servitude and forced labour; freedom from torture or cruel, inhuman or degrading treatment or punishment; right to recognition as a person before the law; freedom from discrimination based on any ground; right to a fair trial, to an effective remedy for human rights violations and, more generally, to judicial protection; right not to be punished without law (i.e., prohibition of retroactive application of criminal law); right to liberty and freedom from arbitrary arrest or detention; right to private and family life, including the right to the integrity of home, correspondence, personal honour and reputation; right to freedom of movement; right not to be deported to countries where the fundamental rights of the person would be endangered (*non-refoulement*); right to nationality; right to establishment and protection of the family; right to property; right to education, consistent with one's (or, for children, parents') own convictions; right to freedom of thought, conscience and religion; right to freedom of opinion and expression; right to freedom of peaceful assembly and association; right to participation in the national government; right to social security; right to enjoy one's own culture and to participation in cultural life; right to the highest attainable standards of health; right to protection of fundamental rights at work, which include the rights to just and favourable conditions of work, to protection against discrimination in respect of employment and occupation, to protection against unemployment, to just and favourable remuneration, to equal pay for equal work, to form and to join trade unions, freedom of association to collective bargaining, as well as freedom from forced or compulsory labour and from child labour. As may be easily noted, all the rights just listed are of individual character. As far as collective rights are concerned, the only one which is traditionally recognized as a fundamental human right is the right of peoples to self-determination,⁴¹ although in recent times the international community has agreed on the existence of a number of collective rights in favour of indigenous peoples, enshrined by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted in 2007.⁴²

The list just provided includes rights characterized by a heterogeneous degree of "cogency". While some of them are considered absolutely non-derogable in whatever circumstances—particularly right to life, freedom from slavery and servitude, freedom from torture or similar treatment or punishment, right to recognition as a person before the law, freedom from discrimination, right not to be punished without law, and the judicial guarantees attached to such rights—others may be legitimately suspended in time of public emergency.

A third "category" of rights (e.g. right to private and family life, right to freedom of thought, conscience and religion, right to freedom of opinion and expression, and right to freedom of peaceful assembly and association) may be the object of limitations, derogations or restrictions when certain conditions are met, usually consisting in the requirements that the restrictive or derogatory measure is prescribed by (non-discriminatory) law and that it is necessary for the

41 See below in this chapter.

42 General Assembly Res. 61/295 (13 Sep. 2007). For an explanation of the most important rights recognized in favour of indigenous peoples see International Law Association's Resolution No. 5/2012, available at <<http://www.ila-hq.org/index.php/committees>> (accessed on 12 Sep. 2019).

realization of certain values pursued in the interest of the national society, e.g. national security, public safety, prevention of disorder or crime, protection of health or morals, and protection of the rights of others. The rights which cannot be the object of derogation in any circumstances may be defined as *fundamental* (or “basic”) human rights,⁴³ which, in addition of being non-derogable, cannot be disposed by their holders. The latter aspect implies that the consent possibly given by the victim of a violation of one of the rights in point is not capable of removing the illicit character of the breach, since it is considered as an offence to human dignity which is intolerable for humanity as a whole.

Fundamental Human Rights as Rules of Jus Cogens

Consistently with the remarks developed at the end of the previous paragraph, it is worth noting that the provisions of customary international law protecting the most fundamental human rights are today uniformly considered as rules of *jus cogens*, i.e. peremptory norms of general international law. According to Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT)⁴⁴, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. The peremptory nature of fundamental human rights is indirectly confirmed by Article 4, para. 2, ICCPR, Article 15, para. 2, ECHR, and Article 27, para. 2, ACHR, which, as will be better explained below, establish that the most fundamental human rights provided for by the relevant treaties cannot be the object of any suspension even in time of war or other public emergency which threatens the integrity or security of the State concerned. It is however to be specified that the exact list of human rights which may be considered of peremptory character remains controversial, as demonstrated by the fact that the number of rights considered as absolutely non-derogable by the above treaty provisions does not exactly correspond.

Human Rights Obligations as Obligations Erga Omnes and Erga Omnes Partes

In its famous 1970 judgment concerning the *Barcelona Traction* case, the ICJ clarified that

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law”.⁴⁵

As defined by the Institut de Droit International, an obligation *erga omnes* is “an obligation

43 It is to be clarified that, in the context of relevant international practice, different meanings may be attributed to the expression “fundamental rights”. While the most common tendency reflects the approach described in this chapter, others are also followed; for instance, in the context of the European Union, as shown above in this chapter, the expression in point refers to all human rights standards.

44 1155 *UNTS* 331.

45 See *Barcelona Traction, Light and Power Company, Limited*, judgment of 5 February 1970, *I.C.J. Reports*, paras. 33-34 (5 Feb. 1970).

under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action”.⁴⁶ In this respect, the International Law Commission (ILC) has clarified that “in certain situations, all States may have [...] an interest [in invoking responsibility and ensuring compliance with obligations *erga omnes*], even though none of them is individually or specially affected by the breach”.⁴⁷

Consistently, Article 48 of the ILC’s *Articles on State Responsibility* provides for the possibility that State responsibility is invoked by a State other than an injured State when “the obligation breached is owed to the international community as a whole”.⁴⁸ This provision clearly refers to the obligations *erga omnes*, although, as explained by the ILC itself, the use of this expression is avoided because it would convey “less information than the [...] reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty”.⁴⁹ In fact “obligations protecting a collective interest [...] may derive from multilateral treaties [...] Such obligations have sometimes been referred to as ‘obligations *erga omnes partes*’”,⁵⁰ which may be defined as obligations “under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action”.⁵¹ The latter are also particularly relevant to the purposes of this chapter, because the obligations arising from multilateral human rights treaties are exactly to be considered as obligations *erga omnes partes*. Irrespective of whether human rights obligations derive from customary international law (obligations *erga omnes* in the proper sense of the term) or from a multilateral treaty (obligations *erga omnes partes*), in case of their breach the responsibility of the State concerned may be invoked by States other than the injured State. In the case of obligations *erga omnes partes* this prerogative is reserved to all other States which are parties to the treaty concerned, while, as regards obligations *erga omnes* arising from customary international law, all members of the international community may invoke such a responsibility. In the words of the ILC, “[e]ach State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations”.⁵²

In the human rights field this is particularly important, because in most cases of human rights violations there is *no* injured State, since breaches are often perpetrated by governments to the prejudice of their own citizens; in all these cases only States other than the injured one may invoke the responsibility of the State author of the violation. All States (or all States parties to a multilateral treaty) are consequently entitled to “claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition [...]; and (b) performance of the obligation of reparation”.⁵³ Furthermore, “[s]hould a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; [and] (c) are entitled to take non-forcible counter-measures under conditions anal-

46 See Resolution of 27 Aug. 2005, “Obligations *erga omnes* in international law”, available at <http://www.idi-ii.org/app/uploads/2017/06/2005_kra_01_en.pdf> (accessed on 12 Sep. 2019), Article 1(a).

47 *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, adopted by the International Law Commission at its fifty-third session, 116 (2001), available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed on 23 Aug. 2019).

48 *Id.*, Article 48, para. 1(a).

49 *Id.*, p. 127.

50 *Id.*, p. 126.

51 See Institut de Droit International, Resolution, “Obligations *erga omnes* in international law”, Article 1(b) (27 Aug. 2005).

52 See *Draft articles on Responsibility of States*, 127.

53 *Id.*, Article 48, para. 2.

ogous to those applying to a State specially affected by the breach”.⁵⁴ As previously emphasized, these rules apply in particular to human rights violations; indeed, as noted by the HRC, “the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations [which], as indicated in the fourth preambular paragraph of the [ICCPR], [determine] a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms”.⁵⁵

State Responsibility in the Field of Human Rights Protection

Human rights obligations imply the existence of a multilayered responsibility for States. In particular, States are required “to respect and to ensure [human] rights to all persons who may be within their territory and to all persons subject to their jurisdiction”.⁵⁶ In addition, “States [must] take the necessary steps to give effect to [human] rights in the domestic order. It follows that, unless [human] rights are already protected by their domestic laws or practices, States [...] are required [...] to make such changes to domestic laws and practices as are necessary to ensure their conformity with the [the rights concerned]”.⁵⁷ Furthermore, “States [...] must ensure that individuals also have accessible and effective remedies to vindicate [human] rights”,⁵⁸ and are requested to “make reparation to individuals whose [human] rights have been violated”.⁵⁹

The various layers of State obligations in the human rights field have been egregiously categorized by the African Commission on Human and Peoples’ Rights, which has affirmed that “[i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties”.⁶⁰ The “obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action”.⁶¹ The obligation to protect “requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms”.⁶² As far as the obligation to promote is concerned, it presupposes a duty of the State to “make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures”.⁶³ Finally, the obligation to fulfil consists “more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights”.⁶⁴

54 See Institut de Droit International, Article 5.

55 See General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 2 (26 May 2004).

56 *Id.*, para. 10.

57 *Id.*, para. 13.

58 *Id.*, para. 15.

59 *Id.*, para. 16.

60 See Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 44 (13-27 Oct. 2001).

61 *Id.*, para. 45.

62 *Id.*, para. 46.

63 *Id.*

64 *Id.*, para. 47.

The multilayered characterization of State responsibility in the human rights field just described is generally accepted at the international level. While the existence of an obligation to promote the rights may sometimes not be mentioned in the practice of some human rights monitoring bodies, the existence of a tripartite responsibility by States to guarantee the effective realization of human rights—composed by the obligations to respect, protect and fulfil—is beyond question.

Finally, each time that a human rights violation is committed, the victim is entitled to receive *appropriate redress* for the wrongs suffered; consistently, an additional profile of State responsibility arises, materializing into an obligation to grant adequate and prompt reparation in favour of the victim(s) of human rights breaches. Depending on the circumstances of the case, such reparation may take different forms—particularly restitution, compensation, rehabilitation, satisfaction, other forms of non-monetary redress, or a combination of two or more of such means; what is important, is that the form(s) of reparation chosen is/are actually capable of making the victim(s) feel effectively redressed for the wrongs suffered.⁶⁵

Human Rights Violations and Domestic Remedies

Violations of human rights cannot be considered, under international law, to be definitively finalized when the State allegedly responsible of the violation provides the victim(s) with adequate domestic remedies, until such remedies have been exhausted. The rule of the *prior exhaustion of domestic remedies* applies to all existing international human rights monitoring bodies—either of judicial or non-judicial character—and even according to customary international law a State cannot be considered internationally responsible of a breach of human rights until the alleged victim has not unsuccessfully exhausted—or has done everything that was reasonably possible to exhaust—available domestic remedies, if any. The rationale of this rule is mainly grounded on two reasons. First, it appears fair—and practically advisable—to offer domestic courts the opportunity to decide on claims of human rights breaches before they are brought to an international forum. More generally, a State should be given the opportunity to remove an alleged violation before being considered responsible of an internationally wrongful act. Secondly, international instances of recourse for human rights violations cannot be treated as courts of first instance, for evident practical reasons of sustainability of their work.

However, it is uniformly recognized that, in order for the rule of the prior exhaustion of domestic remedies to be effectively applicable, the relevant remedies must be *available, effective and sufficient*. “A remedy is considered available if the petitioner can pursue it without [practical] impediment, it is deemed effective if it offers a [reasonable] prospect of success, and it is found sufficient if it is capable of redressing the complaint”.⁶⁶ A remedy must allow the competent domestic authority “to deal with the substance of an ‘arguable complaint’ [...] and to grant appropriate relief”,⁶⁷ and must be “available to the applicant in theory and in practice, that is to say, [...] accessible, [and] capable of providing redress and offered reasonable pros-

65 See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Res. 60/147 (16 Dec. 2005) (although this document formally refers to “gross violations” of human rights only, its basic principles may be considered as generally applicable to human rights violations). See also Dina Shelton, *Remedies in International Human Rights Law* (3rd ed., 2015). Finally, see Federico Lenzerini, “Reparations for Indigenous Peoples in International and Comparative Law: An Introduction”, in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives 3* (2008).

66 See African Commission on Human and Peoples’ Rights, *Dawda Jawara v. Gambia*, Communications Nos. 147/95 and 149/96, para. 32 (11 May 2000).

67 See ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment, para. 288 (21 Jan. 2011).

pects of success”.⁶⁸ In the words of the HRC,

“domestic remedies must not only be available but also effective, and [...] the term ‘domestic remedies’ must be understood as referring primarily to judicial remedies. The Committee considers that the effectiveness of a remedy also depends to some extent on the nature of the alleged violation. In other words, if the alleged offence is particularly serious, such as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. This conclusion applies in particular in situations where [...] the victims or their families may not be party to and not even intervene in the proceedings before military jurisdictions, thereby precluding any possibility of obtaining redress before these jurisdictions in consideration of the specific circumstances of the case”.⁶⁹

An equivalent approach is followed by the Inter-American Commission and the IACtHR, according to which a remedy must be *adequate*, i.e. “suitable to address an infringement of a legal right”,⁷⁰ and *effective*, i.e. “capable of producing the result for which it was designed”.⁷¹

It follows that, in addition to the cases when they are completely non-existing, domestic remedies cannot be considered available, adequate or effective, for instance, when one of the following situations occurs: existing remedies have no reasonable concrete chances of success;⁷² existing remedies are merely formalistic; existing remedies are unduly prolonged;⁷³ existing remedies are not obligatory but have an extraordinary character; existing remedies are granted at the discretion of a State authority; existing remedies are hindered by financial impediments;⁷⁴ access to courts is unreasonably arduous; procedural rules bar the applicant from pursuing the remedy; the reparation granted by the existing remedies is inadequate; the case is settled through unreasonable, unbalanced settlements concluded in an unfavorable context;⁷⁵ there is lack of due process; the judicial body entrusted to take care of the existing remedies is not independent or impartial (this is presumed, for instance, where in the organization of the State there is no effective separation of powers); or when the activity of a court is hindered by legislative provisions or measures taken by the executive power. In all these and other equivalent cases, the alleged victim of a human rights breach, as a matter of exception, is no longer obliged to try to exhaust domestic remedies and may directly use the avenues available at the international level in order to obtain justice.

68 See ECtHR, *McFarlane v. Ireland*, Appl. No. 31333/06, judgment, para. 114 (10 Sep. 2010).

69 See *Jose Vicente and Amado Villafaña Chaparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo v. Colombia*, Communication No. 612/1995, para. 5.3 (14 Mar. 1996).

70 See *Velasquez Rodriguez v. Honduras*, Series C No. 4, judgment (Merits), para. 64 (29 July 1988).

71 *Id.*, para. 66.

72 See, e.g., HRC, *Earl Pratt and Ivan Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, Views, para. 12.3 (6 Apr. 1989); Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, Communication No. 42/2008, Views, para. 6.5 (15 Sep. 2009); Committee on the Rights of Persons with Disabilities, *Noble v. Australia*, Views, para. 7.7 (23 Aug. 2016); ECtHR, *Case of Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, judgment, para. 105 (7 July 2011); Inter-American Commission on Human Rights, Admissibility Report No. 43/10, Petition 242-05, *Mossville Environmental Action Now (United States)*, para. 32 (17 Mar. 2010).

73 See, e.g., HRC, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, Views, para. 6.1 (5 Sep. 2006); Committee on the Elimination of Racial Discrimination, *Durmic v. Serbia and Montenegro*, Communication No. 29/2003, Views, para. 6.5 (6 March 2006); Committee Against Torture, *Ali v. Tunisia*, Communication No. 291/2006, Views, para. 7.2 (26 Nov. 2008).

74 See, e.g., HRC, *Quelch v. Jamaica*, Communication No. 292/1988, Views of 23 October 1992, para. 8.2; ECtHR, *Case of Airey v. Ireland*, Appl. No. 6289/73, judgment, para. 24 (9 Oct. 1979).

75 See Inter-American Commission on Human Rights, Admissibility Report No. 134/11, Petition 1190-06, *Undocumented Workers (United States)*, para. 28 (20 Oct. 2011).

Also, in principle there is no requirement for a victim of a human rights violation to pursue multiple ways to seek a remedy,⁷⁶ unless, in the presence of multiple avenues to avail him/herself of a remedy, the applicant has unsuccessfully made recourse to a particular remedy while another exists which has a higher likelihood of success.⁷⁷

Finally, it is uniformly agreed by human rights monitoring bodies that, when doubts exist on whether or not domestic remedies have been effectively pursued, the burden of proof rests with the State, which must demonstrate that domestic remedies actually existed which were available, adequate and effective, and that the alleged victim of the violation did not make recourse—or made wrong recourse—to them.

Human Rights and Intertemporal Law

A well-established rule in international law, which also applies to human rights, is that of *intertemporal law*. This rule was famously expressed by Judge Max Huber in the well-known *Island of Palmas* arbitration, stating that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.⁷⁸ This rule has been subsequently generally accepted and applied in the context of international law. For instance, it was used by the International Court of Justice (ICJ) in the case of *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, when the Court had to establish the meaning and extent of the consular jurisdiction granted to the United States by two treaties concluded in 1787 and 1836; in that occasion the Court concluded that “[i]t is necessary to take into account the meaning of the word ‘dispute’ at the times when the two treaties were concluded”.⁷⁹

This rule is expressed for treaties in Article 28 VCLT—stating that, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”. No doubt, however, that it is equally applicable to obligations existing under customary international law. In principle, therefore, a violation may be considered as having been produced only whether and to the extent that the act, fact or omission from which the supposed breach originated *was prohibited by the law in force at the time when it was held or took place*. It follows—again, in principle—that the application of the rule on *intertemporal law* to human rights implies that the human rights standards concerned cannot be applied *retroactively*; consequently, a State cannot be held responsible of a violation of human rights when the act, fact or omission committed by that State which would potentially give rise to the violation was done at a time when such State was not (yet) bound to respect the right concerned.

Concept of Continuing International Wrongful Acts

A very significant expression used by Article 28 VCLT is the one referring to the fact that—for the principle of intertemporal law to apply—it is necessary that the relevant situation “took

76 See, e.g., Committee Against Torture, *Osmani v. Serbia*, Communication No. 261/2005, Views, para. 5.2 (25 May 2009); Inter-American Commission on Human Rights, Admissibility Report No. 43/10, Petition 242-05, *Mossville Environmental Action Now (United States)*, para. 32.

77 See Committee on the Elimination of Racial Discrimination, *Sadic v. Denmark*, Communication No. 25/2002, Views, paras. 6.2–6.7 (19 Mar. 2003).

78 *Island of Palmas case (Netherlands, USA)*, *Reports of International Arbitral Awards*, Vol. II, 829, 845 (4 Apr. 1928).

79 Judgment, *I.C.J. Reports*, 176, 189 (27 Aug. 1952).

place or [...] *ceased to exist*” before the relevant international obligation came into existence. In this respect, the term *situation* is to be considered as comprising all different elements composing a juridical fact which may translate into a potential violation, from the material fact or act producing it to, particularly, its *legal effects*. A given situation cannot be considered as having *ceased to exist* when it *continues to produce wrongful effects*, irrespective of the time when the “primary” material fact, act or omission from which such effects started to be produced took place. The “precise meaning of [the] retroactivity principle is not as clear as it may seem. Facts or acts can occur once or repeatedly and situations can continue to exist. All of these may be relevant factors in ascertaining whether the retroactivity principle forms a bar against taking them into account”.⁸⁰ It is a general principle of international law on State responsibility the one according to which—as specified by Article 14(2) of the ILC’s Articles on State Responsibility—“[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”. As clarified by the ILC Special Rapporteur Sir Humphrey Waldock, in cases of continuing violations, the relevant rule

“does not, strictly speaking, apply to a fact, act or situation falling partly within and partly outside the period during which it is in force; it applies only to the fact, act or situation which occurs or exists after [such a rule has entered] in[to] force. This may have the result that prior facts, acts or situations are brought under consideration for the purpose of the application of the [rule]; but it is only because of their causal connexion with the subsequent facts, acts or situations to which alone in law the [rule] applies”.⁸¹

As examples of “continuing wrongful acts” the ILC mentions

“the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent”.⁸²

It is important to correctly identify the constitutive element of a continuing violation. As noted, again, by the ILC, a violation cannot be considered of having a continuing character merely because its (material) consequences “extend in time [...] The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed”.⁸³ Therefore, “[i]t must be the wrongful act as such which continues”.⁸⁴ The reality of the contemporary world, however, is that “many [human rights] abuses continue today and violate existing human rights norms binding on all States”.⁸⁵ Needless to say that, of course,

“[a] continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example

80 See Antoine Buyse, “A Lifeline in Time – Non-retroactivity and Continuing Violations under the ECHR”, 75 *Nordic Journal of International Law*, 63, 65 (2006).

81 See Sir Humphrey Waldock, “Sixth Report on the Law of Treaties”, in *Yearbook of the International Law Commission*, vol. 2, 51, 63, para. 3 (1966).

82 See *Draft articles on Responsibility of States*, 60, para. 3.

83 *Id.*, para. 6.

84 *Id.*

85 Shelton, 48.

by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue”.⁸⁶

However, even when a wrongful act has ceased, its material “consequences are the subject of the secondary obligations of reparation, including restitution [...] The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable, [although] [t]hey do not [...] entail that the breach itself is a continuing one”.⁸⁷

Continuing Human Rights Violations

The concept of “continuing violation” is extensively applied in the human rights field. Many examples may be provided in this respect. The Human Rights Committee (HRC), established by Article 28 of the ICCPR, has clarified in many cases that it is not entitled to consider alleged violations of the Covenant which occurred before the Optional Protocol⁸⁸ through which a State party may accept its competence to receive individual communications has entered into force for the respondent State. This rule, however, is subject to exception in the cases with respect to which “the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party”.⁸⁹ Hence, the HRC is allowed to consider a communication related to acts, facts or omissions occurred before the entry into force of the Optional Protocol for the State concerned which “continued to have effects which themselves constitute a violation of the Covenant *after* that date”.⁹⁰ For instance, in *Sandra Lovelace v. Canada*, the HRC considered the situation of a woman who had lost her status of being a member of an Indian tribe in 1970, after marrying a non-Indian, and complained that the Canadian Act which established such a rule was discriminatory on the ground of sex and violated several articles of the ICCPR. The Committee affirmed that it

“must also take into account that the Covenant has entered into force in respect of Canada on 19 August 1976, several years after the marriage of Mrs. Lovelace. She consequently lost her status as an Indian at a time when Canada was not bound by the Covenant. The Human Rights Committee has held that it is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date”.⁹¹

The HRC accordingly found that, “[s]ince the author of the communication is ethnically an Indian, some persisting effects of her loss of legal status as an Indian may, as from the entry into force of the Covenant for Canada, amount to a violation of rights protected by the Covenant”,⁹² concluding that “to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other

86 See *Draft articles on Responsibility of States*, 60, para. 5.

87 *Id.*, p. 60, para. 6.

88 See n. 13 above.

89 See Simunek, Hastings, *Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992, para. 4.5 (31 July 1995).

90 See James A. Sweeney, “The Elusive Right to Truth in Transitional Human Rights Jurisprudence”, 67 *International and Comparative Law Quarterly* 353, 363 (2018).

91 See *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) 166 (1981), available at <<http://hrlibrary.umn.edu/undocs/session36/6-24.htm>> (accessed on 15 Aug. 2019), para. 7.3

92 *Id.*, para. 7.4.

provisions referred to”.⁹³

Subsequently, in *S.E. v. Argentina*, the HRC warned the respondent government that “it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependents”,⁹⁴ although the Committee eventually held that no substantive violations had been committed in the instant case. In *Sarma v. Sri Lanka* the HRC also held that enforced disappearance determined by illegal detention entailed a continuing violation of Article 9 (right to liberty and security of the person) and 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) ICCPR, the latter with regard to the author’s son and the author’s family,⁹⁵ on account of “the anguish and stress caused to the author’s family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts”.⁹⁶ Last but not least, in *Mariam Sankara and others v. Burkina Faso*, the HRC found that the assassination in 1987 of Thomas Sankara, president of Burkina Faso, although perpetrated well before the entry into force of the Optional Protocol for the State concerned (1999), determined a violation of Article 7 ICCPR due to

“the anguish and psychological pressure which Ms. Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried. Thomas Sankara’s family have the right to know the circumstances of his death, and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities. In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara’s death certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the State party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of article 7 of the Covenant”.⁹⁷

While the competence of the HRC to consider individual communications is limited to the States that have ratified the Optional Protocol, which do not include the United States,⁹⁸ all States parties to the ICCPR are obviously bound to respect the rights protected by the Covenant. On its part, the HRC is the body to which the ICCPR attributes the competence to interpret its articles and define the conditions according to which they should be implemented and, *a fortiori*, the situations when a State party is to be considered responsible of their breach. It follows that even the States parties which have not ratified the Optional Protocol—although they cannot be the object of scrutiny by the HRC in the context of individual communications—are anyway to be considered internationally responsible of continuing violations of the

93 *Id.*, para. 17. Article 27 ICCPR reads as follows: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

94 See *S.E. v. Argentina*, Communication No. 275/1988, decision, U.N. Doc. CCPR/C/38/D/275/1988, para. 5.4 (26 Mar. 1990).

95 See *Sarma v. Sri Lanka*, Communication No. 950/2000, Views, U.N. Doc. CCPR/C/78/D/950/2000, para. 9.5 (16 July 2003).

96 *Id.*

97 See *Mariam Sankara and others v. Burkina Faso*, Communication No. 1159/2003, Views, U.N. Doc. CCPR/C/86/D/1159/2003, para. 12.2 (28 Mar. 2006).

98 See <<http://indicators.ohchr.org/>> (accessed on 12 Sep. 2019).

ICCPR for situations originating before the date of the entry into force of the Covenant for them which continue to produce wrongful effects *after* such a date. The United States ratified the ICCPR on 8 June 1992.⁹⁹ Pursuant to Article 49, para. 2, ICCPR, the Covenant has entered into force for the US “three months after the date of the deposit of its own instrument of ratification or instrument of accession”.

The ECtHR has also widely recognized the existence of continuing violations of the rights protected by the ECHR and its protocols. While “[t]he Court’s jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent State[,] [f]rom the ratification date onwards, all the State’s alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court’s jurisdiction even where they are merely extensions of an already existing situation”.¹⁰⁰ For example, in the *Case of Papamichalopoulos and Others v. Greece*, the Court found Greece responsible of the violation of the right to property of the applicant—established by Article 1 of Protocol 1 to the ECHR—on account of seizure of property not resulting in formal expropriation; in fact, “the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions”.¹⁰¹ While the seizure of the property concerned had occurred about eight years before Greece recognized the competence of the Court to receive individual applications, the Court noted that “the applicants’ complaints relate to a continuing situation, which still obtains at the present time”.¹⁰²

Also, in the *Case of Loizidou v. Turkey*, taking place in the context of the occupation of the Northern part of Cyprus by Turkey (through the puppet government of the Turkish Republic of Northern Cyprus (TRNC)) since 1974, the ECtHR considered that “the Court’s jurisdiction extends only to the applicant’s allegations of a continuing violation of her property rights subsequent to 22 January 1990”, because Turkey had accepted the jurisdiction of the Court on that date.¹⁰³ In the examination of the merits, the Court concluded that Turkey had prevented the applicant from accessing her property for sixteen years, “gradually [...] affect[ing] the right of the applicant as a property owner and in particular her right to a peaceful enjoyment of her possessions, thus constituting a continuing violation of Article 1 [of Protocol 1]”.¹⁰⁴ In the interstate case ensuing from the same events, *Cyprus v. Turkey*, the ECtHR found Turkey responsible of *continuing* violations of the following provisions of the ECHR: a) Article 2 (right to life), “on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances”;¹⁰⁵ b) Article 5 (right to liberty and security), “by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared”;¹⁰⁶ c) Article 3 (prohibition of torture), since “the authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons [causing] the relatives of persons who went missing during the events of July

99 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed on 16 Aug. 2019).

100 See *Maria Hutten-Czapska v. Poland*, Appl. No. 35014/97, decision on admissibility (16 Sep. 2003).

101 See *Case of Papamichalopoulos and Others v. Greece*, Appl. No. 14556/89, judgment, para. 45 (24 June 1993).

102 *Id.*, para. 40.

103 See *Case of Loizidou v. Turkey (Preliminary Objections)*, Appl. 15318/89, judgment, para. 102 (23 Mar. 1995).

104 See *Case of Loizidou v. Turkey (Merits)*, judgment, para. 60 (18 Dec. 1996).

105 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 136 (10 May 2001). For a more comprehensive assessment of the jurisprudence of the ECtHR on continuing violations see Loukis G. Loucaides, *The European Convention on Human Rights. Collected Essays*, 25 (2007); Buyse.

106 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 150 (10 May 2001).

and August 1974 [to be] condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time”;¹⁰⁷ d) Article 8 (right to private and family life), “by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus”;¹⁰⁸ e) Article 1 of Protocol 1 (protection of property), “by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights”.¹⁰⁹

An analogous approach is followed by the IACtHR. For instance, in the *Case of Blake v. Guatemala* the Court held that forced disappearance of a person is a crime characterized by the fact that its “effects could be deemed to be continuing until such time as the victims’ fate or whereabouts were determined”.¹¹⁰ As a consequence, the IACtHR considered “Mr. Nicholas Blake’s disappearance as marking the beginning of a continuing situation, and will decide about the actions and effects subsequent to the date on which Guatemala accepted the competence of the Court”,¹¹¹ finding Guatemala responsible of the violation of Articles 8(1) (right to a fair hearing) and 5 (right to humane treatment) ACHR, both to the detriment of the relatives of Mr. Nicholas Chapman Blake. Later, in the *Case of the Moiwana Community v. Suriname*, concerning a massacre perpetrated by members of the armed forces of Suriname against the N’djuka Maroon village of Moiwana on 29 November 1986, while the respondent State accepted the jurisdiction of the Court on 12 November 1987, the IACtHR confirmed that, “in the case of a continuing or permanent violation, which begins before the acceptance of the Court’s jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects”.¹¹² Relying on this principle, the IACtHR found that Suriname violated Articles 5(1), 22 (right to freedom of movement and residence), 21 (right to property), as well as the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 ACHR. The same principle was reiterated by the Court more recently, again with respect to forced disappearances.¹¹³

The Inter-American Commission on Human Rights stands along the same lines of the IACtHR. In all aforementioned and other cases, the Commission has constantly urged the Court to consider the alleged breaches of the ACHR as continuing violations. The position of the Inter-American Commission is relevant for the reason that it has jurisdiction over the violations committed by the United States under the *American Declaration of the Rights and Duties of Man* of 1948.¹¹⁴ While the provisions of this Declaration are not binding in themselves, and, consequently, the reports of the Commission do not entail any literal obligations for the States concerned to comply with them, this does not mean that the State is not subject to an international obligation to respect the relevant human rights and to guarantee their enjoyment to the persons subject to its jurisdiction. This holds true in light of the fact that today virtually all the provisions of the American Declaration (to a similar extent of the UDHR) correspond to obligations existing under customary international law. As a consequence, although the violations of the Declaration committed by a State cannot be sanctioned by a monitoring body, once the Commission, as the body competent of interpreting the provisions of the Declaration, has

107 *Id.*, para. 157.

108 *Id.*, para. 175.

109 *Id.*, para. 189.

110 See *Case of Blake v. Guatemala*, Series C No. 36, judgment, para. 54 (24 Jan. 1998).

111 *Id.*, para. 67.

112 See *Case of the Moiwana Community v. Suriname*, Series C No. 124, judgment, para. 39 (15 June 2005).

113 See *Case of Gomes Lund and Others (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219, judgment, paras. 17 and 110-111 (24 Nov. 2010)..

114 The text of the American Declaration is available at <https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf> (accessed on 16 Aug. 2019).

ascertained that the latter has been breached, in most cases the State concerned is responsible of a breach of the rules of customary international law corresponding to the relevant provisions of the Declaration.

The ACtHPR has equally affirmed, in several cases, its competence to deal with violations of the ACHPR arising from facts, acts or omissions occurred before the State concerned has accepted its jurisdiction, when such violations are continuing after the date of acceptance.¹¹⁵

A case of interest is also provided by the practice of the International Labour Organization (ILO). It is a case of a representation submitted in 2001 against Denmark by an indigenous community living in Greenland, under the the *Indigenous and Tribal Peoples Convention No. 169* of 1989,¹¹⁶ claiming that the relocation of the community concerned from its traditional lands in 1953, a long time before the Convention entered into force for Denmark (22 February 1997), gave rise to a violation of certain articles of the treaty concerned. Facing the argument of the respondent State, according to which the Convention could not be applied retroactively, the Committee observed that

“the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. [...] the Convention only came into force for Denmark on 22 February 1997. The Committee considers that the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether the appropriate consultations were held in 1953 with the peoples concerned. However, the Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to [a number of] Articles [...] of the Convention [...], despite the fact that the relocation was carried out prior to the entry into force of the Convention. These provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State”.¹¹⁷

In sum, it is evident that the principle of State responsibility for human rights breaches of continuing character corresponds to a crystallized rule of general international law. In this respect, “‘the passage of time’ does not reduce, but adds to, the severity of continuing violations [...] continuing illegalities, such as continuing usurpation of properties [...] continuing illegal detention, etc., cannot be subject to prescription or exculpation through lapse of time, because they call for a remedy for as long as they last”.¹¹⁸ For a continuing violation of human rights

115 See *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Appl. No. 013/2011, order, paras. 76-77 (23 Aug. 2012); *Peter Joseph Chacha v. The United Republic of Tanzania*, Appl. No. 003/2012, judgment, para. 126 (28 Mar. 2014); *Wilfred Onyango Nganyi & 9 others v. The United Republic of Tanzania*, Appl. No. 006/2013, judgment, para. 66 (18 Mar. 2016).

116 Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:P12100_ILO_CODE:C169> (accessed on 14 Sep. 2019).

117 See *Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK)*, Decision, 2001, available at <https://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en:NO> (accessed on 23 Aug. 2019), para. 29.

118 See Loukis G. Loucaides “Is the European Court of Human Rights Still a Principled Court of Human Rights After the Demopoulos Case?”, 24 *Leiden Journal of International Law* 435, 444 (2011).

to exist – as a matter of treaty law but also of customary international law – it is necessary and sufficient to ascertain that a *situation* determined by an act, fact, or, in some cases, omission (e.g. when a State fails to take the necessary measures to allow a person to effectively enjoy a property to which she is entitled) —i.e. its *legal effects*—was continuing to exist at the moment when the State concerned started to be bound by an international obligation not to produce the effects continuing to be determined by that act, fact or omission. The conduct of the said State began to be wrongful—and to generate its international responsibility—exactly from that precise moment.

State Jurisdiction and Extraterritorial Applicability of Human Rights

Most human rights treaties of general character establish that States parties are bound to guarantee the enjoyment of those rights to all human beings subject to, or within, their *jurisdiction*.¹¹⁹ According to traditional international law, the concept of jurisdiction is linked to the State territory; as noted by the Permanent Court of International Justice in the *Lotus* case,

“the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [...] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.¹²⁰

However, in more recent times the meaning of *State jurisdiction* has positively evolved, especially in the field of human rights protection, to include all situations with respect to which a State exercises its *effective control*, irrespective of the territory where such a control is exercised. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ observed that, “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions”;¹²¹ hence, the Court concluded that “the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.¹²²

Consistently, in its General Comment No. 31[80], the HRC emphasized that “States Parties are required by article 2, paragraph 1 [ICCPR], to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, *even if not situated within the territory of the State Party*”.¹²³ In a communication concerning Uruguay, the HRC had previously held that “Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, but it does not imply that the State party concerned cannot be held accountable for violations of

119 See Article 2, para. 1, ICCPR; Article 1 ECHR; Article 1, para. 1, ACHR.

120 See *The Case of the S.S. “Lotus”, judgment, Publications of the Permanent Court of International Justice, Collection Of Judgments, Series A, No. 70, 18 (7 Sep. 1927)* Generally on this issue see Arthur Lenhoff, “International Law and Rules on International Jurisdiction”, 50 *Cornell Law Quarterly* 5 (1964).

121 *I. C. J. Reports*, 136, para. 109 (2004).

122 *Id.*, para. 111.

123 See General Comment No. 31 [80], para. 10 (emphasis added).

rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it".¹²⁴ In similar terms, the Committee against Torture, in a communication concerning the United Kingdom, manifested its concern for

“the State party’s limited acceptance of the applicability of the [CAT] to the actions of its forces abroad, in particular its explanation that ‘those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq’; the Committee observes that the [CAT] protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party’s authorities”.¹²⁵

Furthermore, in its General Comment No. 4, concerning the principle of *non-refoulement* enshrined in Article 3 CAT, the Committee made it clear that

“[e]ach State party must apply the principle of non-refoulement in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law. As the Committee noted in its General Comment No. 2, ‘the concept of “any territory under its jurisdiction” ... includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of the State party”’.¹²⁶

The approach just described is confirmed by the uniform practice of regional human rights monitoring bodies. The ECtHR, in particular, has developed a jurisprudence in the context of which the extraterritorial jurisdiction of ECHR’s States parties has been affirmed in a number of different circumstances of “acts of their authorities producing effects outside their own territory”.¹²⁷ These situations include the acts of diplomatic and consular agents “abroad and on board craft and vessels registered in, or flying the flag of, that State[, with respect to whom,] [...] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State”;¹²⁸ the acts committed when a State, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Gov-

124 See *Lopez Burgos v. Uruguay, Delia Saldias de Lopez (on behalf of Lopez Burgos) v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1, para. 12.3 (1984). See also *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979, para. 10.3 (1981).

125 See Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland – Dependent Territories. 10/12/2004, U.N. Doc. CAT/C/CR/33/3, para. 4(b) (10 Dec. 2004). See also Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture. United States of America, U.N. Doc. CAT/C/USA/CO/2, para. 15 (25 July 2006).

126 See General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22 (2017), available at <<https://www.refworld.org/docid/5a903de84.html>> (accessed on 23 Aug. 2019), para. 10.

127 See *Case of Drozd and Janousek v. France and Spain*, Appl. No. 12747/87, judgment, para. 91 (26 June 1992).

128 See *Banković and Others v. Belgium and Others*, Appl. No. 52207/99, Grand Chamber decision as to the admissibility, para. 73 (12 Dec. 2001).

ernment”;¹²⁹ the cases when the use of force by a State’s agent operating outside its territory brings an individual under his/her control, for instance where an individual is taken into the custody of State agents abroad;¹³⁰ the interception of a foreign boat by a vessel of the State navy, in international waters, and the forcible transfer of its passengers to a foreign country;¹³¹ as well as the situations occurring “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory”.¹³² With respect to the latter case—which is particularly significant for the situations of military occupation—

“[a]ccording to the relevant principles of international law, a State’s responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration [...] It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned”.¹³³

The practice of the Inter-American Commission on Human Rights is, finally, especially significant. In particular, in *Saldaño v. Argentina*, the Commission expressed its position on the meaning of the term “jurisdiction” under Article 1, para. 1, ACHR, holding as follows:

“[t]he Commission does not believe [...] that the term ‘jurisdiction’ in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory. This position finds support in the decisions of European Court and Commission of Human Rights which have interpreted the scope and meaning of Article 1 of the [ECHR]”.¹³⁴

In *Coard et Al. v. United States* the Commission went even further, reiterating its position according to which “the American Declaration [of the Rights and Duties of the Man] is a source of international obligation for members states not party to the American Convention, and [...] its Statute authorizes [the Commission] to examine complaints under the Declaration and requires it to pay special attention to certain core rights”.¹³⁵ The Commission then concluded that,

“[w]hile the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-

129 *Id.*, para. 71.

130 See *Case of Öcalan v. Turkey*, Appl. No. 46221/99, judgment (Grand Chamber), para. 91 (12 May 2005).

131 See *Case of Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, judgment, para 81 (23 Feb. 2012).

132 See, among others, *Case of Chiragov and Others v. Armenia*, Appl. No. 13216/05, judgment (Merits), para. 106 (16 June 2015).

133 See *Issa and others v. Turkey*, Appl. No. 31821/96, judgment, paras. 69-70 (16 Nov. 2004).

134 See *Report No. 38/99, Petition, Victor Saldaño v. Argentina*, (11 March 1999), available at <<http://cidh.org/annualrep/98eng/Inadmissible/Argentina%20Salda%C3%B1o.htm>> (accessed on 12 September 2019), para. 17.

135 Report No. 109/99, Case 10.951, *Coard et al. v. United States* (29 Sep. 1999), available at <<https://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>> (accessed on 12 Sep. 2019), para. 9.

territorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—‘without distinction as to race, nationality, creed or sex.’ Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control”.¹³⁶

Suspension (Derogation) of Human Rights Guarantees in Times of Public Emergency

Human rights treaties of general character—with the only exception of the ACHPR—include a derogation clause, applicable in times of public emergency. Article 4, para. 1, ICCPR, establishes that, “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

Similarly, Article 15, para. 1, ECHR, provides that, “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. To an equivalent extent, Article 27, para. 1, ACHR, states as follows: “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin”. The three provisions are equivalent with each other in allowing States parties to the relevant treaties to suspend the human rights guarantees in times of public emergencies.

However, the application of the said clauses is not unconditioned. In particular, as emerges from their formulation, the public emergency must be “officially proclaimed”. In this respect, Article 4, para. 3, ICCPR, dictates that “[a]ny State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”. A substantially identical provision is enshrined by Article 15, para. 3, ECHR (which obviously refers to the Secretary General of the Council of Europe, who must be kept “fully informed of the measures which [the State concerned] has taken and the reasons therefor”, and must be informed “when such measures have ceased to operate and the provisions of the Convention are again being fully executed”).

136 *Id.*, para. 37.

Finally, Article 27, para. 3, ACHR, establishes that “[a]ny State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”. The provisions just reproduced make it clear that any measures of derogation of the rights established by the treaties in discussion, applied by a State without officially proclaiming a state of emergency or duly informing the other States parties, is to be considered unlawful (unless the derogation is otherwise justified by the specific provision contemplating the right which is the specific object of derogation).

As clarified by the HRC with specific respect to Article 4 ICCPR, “[b]efore a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.¹³⁷ Consistently, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted the following:

“Israel made use of its right of derogation under [Article 4 ICCPR] by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991: ‘Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision’”.¹³⁸

As a consequence, according to the Court, since “the derogation so notified concerns only Article 9 [ICCPR], which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention”, “[t]he other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory”.¹³⁹

Furthermore, the faculty of States to suspend the human rights guarantees provided for by the relevant treaties, even in situations of public emergency, is not unlimited as regards the rights which may be the object of derogation. In fact, according to para. 2 of Article 4 IC-

137 See General Comment No. 29, State of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 2 (31 Aug. 2002). The statement reproduced in the text seems to reverse a more flexible approach previously followed by the HRC; in particular, in *Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patron Zeballos, Niurka Sala Fernandez and Rafael Guarga Ferro v. Uruguay*, Communication No. 34/1978, Views (8 April 1981), the Committee had declared that, “[a]lthough the substantive right to take derogatory measures *may not depend on a formal notification* being made pursuant to article 4 (3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4 (1) of the Covenant” (see para. 8.3, emphasis added).

138 See para. 127.

139 *Id.*

CPR, “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”. In the context of the ICCPR, the following rights are therefore considered non-derogable even in times of public emergency: right to life; protection against torture or cruel, inhuman or degrading treatment or punishment; protection against slavery and servitude; right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; protection against retroactive application of criminal law; right to recognition everywhere as a person before the law; right to freedom of thought, conscience and religion.

Opting for a more restrictive approach, Article 15, para. 2, ECHR establishes that “[n]o derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and inhuman or degrading treatment or punishment], 4 (paragraph 1) [prohibition of slavery and servitude] and 7 [prohibition of retroactive application of criminal law] shall be made under this provision”. More in favour of human rights is instead Article 27, para. 2, ACHR, according to which “[t]he [...] provision [of paragraph 1] does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights”. As may be easily noted, only the latter provision makes explicit reference to the “judicial guarantees essential for the protection” of non-derogable rights as also being non-derogable.

However, the judicial guarantees indispensable for the protection of non-derogable rights are to be considered implicitly included among the latter also in the context of the other two treaties under consideration, particularly the ICCPR. According to the HRC, while the obligation for the States parties to the ICCPR to provide remedies for any violation of the provisions of the Covenant “is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, [...] it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation [...] to provide a remedy that is effective”.¹⁴⁰ Therefore, “[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights [...] the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”.¹⁴¹

In addition, according to the HRC, other rights not explicitly mentioned in Article 4, para. 2, ICCPR, are to be added to the list of those considered non-derogable also in times of public emergency. Among such rights is first of all to be included the prohibition of death penalty for the States which have ratified the Second Optional Protocol to the ICCPR.^{142 143} Also absolutely non-derogable are the right of “[a]ll persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person”,¹⁴⁴ the “prohibitions against taking of hostages, abductions or unacknowledged detention”,¹⁴⁵ the prohibition of

142 *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 1989, 1642 UNTS 414.

143 See General Comment No. 29, para. 7.

144 *Id.*, para. 13(a).

145 *Id.*, para. 13(b).

genocide and other “elements” attached to “the rights of persons belonging to minorities”,¹⁴⁶ the prohibition of “deportation or forcible transfer of population without grounds permitted under international law”,¹⁴⁷ the prohibition of “propaganda for war, or [...] advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”.¹⁴⁸

A situation of armed conflict or military occupation undoubtedly represents one of the most typical cases of national emergency. However, it is important to clarify that Article 4 ICCPR cannot be automatically invoked for the sole fact of the existence of a situation of armed conflict or military occupation. In fact, “even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation”;¹⁴⁹ and, in any event, “measures derogating from the Covenant, as set forth in article 4, paragraph 1, [...] [must be] limited to the extent strictly required by the exigencies of the situation”.¹⁵⁰

The treaty provisions described in this paragraph establish a sort of parallelism between treaty law and customary international law, in the sense that, *grossly speaking*, the rights considered absolutely non-derogable by the provisions in point may be considered as corresponding to rules of *jus cogens* under customary international law. This parallelism, however, must be considered with a due degree of flexibility. First, as previously noted, the lists of non-derogable rights provided by the norms under examination do not correspond with each other, and this raises the question of which of them may be considered as illustrating the actual core of human rights corresponding to rules of *jus cogens*. Secondly, it may well be possible that, while “[t]he proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7)”, “the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”.¹⁵¹

Up to the moment of this writing, the United States of America has never used the opportunity offered by Article 4 ICCPR (the only one applicable to the American government among the provisions in discussion) to officially proclaim a state of emergency suspending the enjoyment of the rights established by the Covenant.¹⁵² It has been noted, however, that “the Military Order on Detention, Treatment, Trial of Certain Non-Citizens in the War Against Terrorism issued by President Bush on 13 November 2001 contains provisions which, as a matter of fact, do establish a derogation from Articles 9 [right to liberty and security of the person] and 14 [right of all persons to equality before courts and tribunals] ICCPR”.¹⁵³

146 *Id.*, para. 13(c).

147 *Id.*, para. 13(d).

148 *Id.*, para. 13(e).

149 *Id.*, para. 3.

150 *Id.*, para. 4.

151 *Id.*, para. 11.

152 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed on 14 Sep. 2019).

153 See Angelika Siehr, “Derogation Measures under Article 4 ICCPR, with Special Consideration of the ‘War Against International Terrorism’”, 47 *German Yearbook of International Law* 545, 571-572 (2004).

Applicability of Human Rights in the Event of Armed Conflict

According to the traditional understanding of international law, application of human rights would be in principle reserved to situations of peacetime, while the body of law applicable in the event of armed conflict would be international humanitarian law (hereinafter: IHL).¹⁵⁴ In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹⁵⁵ the ICJ elaborated the theory of IHL as *lex specialis*, “namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.¹⁵⁶ However, the Court also stated that “the right not arbitrarily to be deprived of one’s life [provided for by Article 6 ICCPR] applies also in hostilities”,¹⁵⁷ while “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life [...] can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.¹⁵⁸

The ICJ clarified its position—quite ambiguous indeed¹⁵⁹—in the subsequent advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stating that “the protection offered by human rights conventions does not cease in case of armed conflict”, “[s]ave through the effect of provisions for derogation [in time of emergency] of the kind to be found in Article 4 [ICCPR]”.¹⁶⁰ Among the human rights instruments assumed to have been violated by Israel, after specifying that “the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”,¹⁶¹ the Court included the ICESCR and the CRC. With respect to the former, the ICJ affirmed that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the [ICESCR]”.¹⁶² As far as the CRC is concerned, the Court took note of its Article 2¹⁶³ and concluded that it is “applicable within the Occupied Palestinian Territory”.¹⁶⁴

Subsequently, in its judgment concerning the armed activities of Uganda in the territory of the Democratic Republic of Congo, the ICJ confirmed that international instruments on human rights are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories.¹⁶⁵ In the case at hand, the Court established that Ugandan military forces perpetrated “massive human rights violations” and grave breaches of international human rights law,¹⁶⁶ leading the government of Uganda to be in “clear violation” of, *inter alia*, Articles 6(1) and 7 ICCPR, Articles 4 and 5 ACHPR, Articles 38(2) and 38(3) CRC and Articles 1, 2, 3(3) and 3(6) of the *Optional Protocol to the Conven-*

154 See, among others, Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975).

155 Advisory Opinion, ICJ Reports, 226 (8 July 1996).

156 *Id.*, para. 25.

157 *Id.*

158 *Id.*

159 See Christian Tomuschat, “Human Rights and International Humanitarian Law”, 21 *European Journal of International Law* 15, 17-18 (2010).

160 See *Legal Consequences of the Construction of a Wall*, para. 106.

161 *Id.*, para. 111.

162 *Id.*, para. 112.

163 Article 2, para. 1, CRC states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

164 See *Legal Consequences of the Construction of a Wall*, para. 113.

165 See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment, I.C.J. Reports, 168, para. 216 (19 Dec. 2005).

166 *Id.*, para. 207.

tion on the Rights of the Child on the Involvement of Children in Armed Conflict.^{167 168} The same position was reiterated by the ICJ in its order on provisional measures released in the context of the dispute between Georgia and the Russian Federation concerning the application of the CERD, when the Court affirmed that such a Convention always applies in the event of armed conflict, “even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law”.¹⁶⁹ Last but not least, in its judgment on admissibility concerning the case of *Congo v. Rwanda*, the judges emphasized that,

“[w]hile the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter’s Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case [...] The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court’s jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law”.¹⁷⁰

The position of the ICJ is confirmed by the practice of human rights monitoring bodies. The HRC has made it clear that “the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the [ICCPR] [...] Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, [ICCPR] for the actions of their authorities outside their own territories”.¹⁷¹ In other words, “the [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.¹⁷²

In its recent General Comment No. 36, concerning Article ICCPR, on the right to life, the HRC reiterated that, “[l]ike the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities”.¹⁷³ To a similar extent, the Committee against torture has made it clear that a “State party should recognize and ensure that the [CAT] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction”,¹⁷⁴ the latter expression including “all areas under the de facto effective control of the State party, by

167 2173 UNTS 222.

168 See *Armed Activities on the Territory of the Congo*, para. 219.

169 See *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Reports, 353, para. 112 (15 Oct. 2008).

170 See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 6, para. 127 (2006).

171 See Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. See also Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, para. 4 (18 Aug. 1998).

172 See General Comment No. 31 [80], para. 11.

173 See General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, para. 64 (30 Oct. 2018).

174 See Conclusions and Recommendations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, para. 14 (25 July 2006).

whichever military or civil authorities such control is exercised”.¹⁷⁵ In an equivalent vein, the Committee on Economic, Social and Cultural Rights, in a report on the occupation of Palestinian territories by Israel, strongly rejected “the State party’s assertion regarding the distinction between human rights and humanitarian law under international law to support its argument that the Committee’s mandate ‘cannot relate to events in the Gaza Strip and West Bank’”. The Committee accordingly reminded Israel that “even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law”.¹⁷⁶

Regional human rights courts stand along the same lines. The IACtHR, despite some initial hesitation, has constantly affirmed the applicability of the ACHR in the event of armed conflict, specifying that the scope of the provisions of the Convention—apart from the possibility of suspending part of them in time of public emergency, as examined in the previous paragraph—cannot be limited per effect of the inherent difficulties usually faced by States in ensuring their application in arduous situations like those usually characterizing armed conflicts.¹⁷⁷ The African Commission on Human and Peoples’ Rights has also taken the position that those human rights which are usually considered as non-derogable in time of emergency apply fully and unconditionally in the event of armed conflict, and States are bound to use at least the same level of diligence expected from them in peacetime, irrespective of the existence and possible applicability of IHL as *lex specialis*.¹⁷⁸

As far as the ECtHR is concerned, while it has developed a more abundant and laborious practice, its jurisprudence is clearly oriented towards recognizing the full applicability of the ECHR in the event of armed conflict and military occupation, provided that the existence of the jurisdiction of the State concerned has been established and that the specific rights at stake are not lawfully derogated from pursuant to the provisions of the Convention.¹⁷⁹ It is notable that, with specific respect to the right to life, the ECtHR has recognized that the test of *necessity* to be satisfied for deprivation of life to be considered justified pursuant to Article 2, para. 2, ECHR¹⁸⁰ is the same in time of war and in peacetime. In fact,

“Article 2 [ECHR] covers not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than ‘absolutely necessary’ for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates

175 *Id.*, para. 15.

176 See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. Doc. E/C.12/1/Add.69, para. 12 (31 Aug. 2001). See also, consistently, Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67, U.N. Doc. E/CN.4/1992/26, paras. 55–59 (15 Jan. 1992).

177 For a more comprehensive assessment of the pertinent practice of the IACtHR see Federico Lenzerini, “From *Jus in Bello* to *Jus Commune Humanitatis*, The Interface of Human Rights Law and International Humanitarian Law in the Regulation of Armed Conflicts”, in Federico Lenzerini and Ana Filipa Vrdoljak (eds.), *International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature* 69–77 (2014).

178 *Id.*, pp. 77–79.

179 *Id.*, pp. 79–87.

180 Article 2, para. 2, ECHR states that “[d]eprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than *absolutely necessary*: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection” (emphasis added).

that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is ‘necessary in a democratic society’ under [other provisions of the Convention]. Consequently, the force used must be *strictly proportionate* to the achievement of the permitted aims”.¹⁸¹

The long-lasting practice of U.N. bodies confirms the validity of the approach of human rights monitoring bodies. Already in 1967, in Resolution 237 of 14 June the Security Council affirmed that “essential and inalienable human rights should be respected even during the vicissitudes of war”.¹⁸² Three years later the General Assembly affirmed that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”.¹⁸³ In more recent times, the Security Council has called upon States, in many occasions, to fully respect human rights in situations of armed conflicts.¹⁸⁴ An equivalent position has been followed by the Secretary-General, based on the assumption that “the human rights provisions of the [U.N.] Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other”.¹⁸⁵

In a 1970 report, the Secretary-General even stressed that “[t]here are instances in which the autonomous protection ensured by the human rights instruments of the United Nations is more effective and far-reaching than that derived from the norms of the Geneva Conventions and other humanitarian instruments oriented towards armed conflicts”.¹⁸⁶ Also, in 1991 the Commission on Human Rights, taking position on the occupation of Kuwait by Iraq, strongly condemned “the Iraqi authorities and occupying forces for their grave violations of human rights against the Kuwaiti people and nationals of other States and in particular the acts of torture, arbitrary arrests, summary executions and disappearances in violation of the Charter of the United Nations, the International Covenants on Human Rights, and other relevant legal instruments”.¹⁸⁷ Finally, the Human Rights Council has emphasized that “effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law”.¹⁸⁸

181 See *Case of Isayeva, Yusupova and Bazayeva v. Russia*, Applications nos. 57947/00, 57948/00 and 57949/00, judgment, para. 169 (24 Feb. 2005) (emphasis added). The Court has confirmed this position in many other cases. In particular, the ECtHR “has delivered more than 250 judgments finding violations of the Convention in connection with the armed conflict in the Chechen Republic of the Russian Federation. About 60% of the applications concern enforced disappearances; other issues include killing and injuries to civilians, destruction of homes and property, indiscriminate use of force, use of landmines, illegal detention, torture and inhuman conditions of detention. The applicants most commonly refer to Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) [ECHR] and to Article 1 (protection of property) of Protocol No. 1 to the Convention” (see European Court of Human Rights, *Factsheet – Armed conflicts*, September 2018, available at <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>, accessed on 22 Aug. 2019), p. 10.

182 See preamble, second recital.

183 See *Basic principles for the protection of civilian populations in armed conflicts*, 9 December 1970, A/RES/2675, available at <<https://www.refworld.org/docid/3b00f1c961.html>> (accessed on 22 Aug. 2019), para. 1.

184 For the relevant practice see Office of the UN High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, 96-100 (2011).

185 *Id.*, p. 100.

186 *Id.*, p. 101.

187 See Situation of human rights in Kuwait under Iraqi occupation, Res. 1991/67 (6 March 1991), available at <<https://www.refworld.org/docid/3b00f0bf50.html>> (accessed on 22 Aug. 2019).

188 See Resolution 9/9, Protection of the human rights of civilians in armed conflict, available at <https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf> (accessed on 22 Aug. 2019), preamble,

In light of the practice just summarized, the full applicability of human rights in time of war is beyond question, with the exception of such rights which can be, *and are*, legitimately suspended in a time of public emergency, provided that the latter concept undoubtedly includes situations of armed conflict.¹⁸⁹ Accordingly, in light of the “relevant principles of international law, a State’s responsibility may be engaged where, *as a consequence of military action—whether lawful or unlawful*—that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, [human] rights and freedoms [...] derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration”.¹⁹⁰

Protection of Human Rights in Occupied Territory

The considerations just developed re the applicability of human rights in the event of armed conflict plainly extend to the situations of military occupation. It is evident that there is even a stronger reason for applying human rights standards in situations of military occupation than in armed conflict.¹⁹¹ In fact, “while it might be more difficult to assert extraterritorial application in other situations of armed conflict, the case for the extraterritorial application of human rights obligations in situations of occupation is more straightforward, because occupation actually entails the exercise of authority over foreign territory (or part thereof)”.¹⁹² In other words, “the situation of military occupation is different from the situation of armed conflict. The distinction is that the occupier controls the occupied territory, there are no major military operations in the occupied zone, a certain minimum extent of order and security is reconstituted, and civil life is also restored to some extent. Occupational law, by its very nature, ‘resembles’ the law of peace, even though it forms part of the law of armed conflicts”.¹⁹³ In addition,

“human rights are not conditional. They are given to every individual because they are human. The political, social and economic circumstances surrounding the individual do not affect an individual’s human rights; therefore, the rights and protections found in human rights documents cannot be withheld simply because the individual lives under a foreign military force. There is little doubt that the rights and protections found in human rights documents are applicable to populations living under occupation”.¹⁹⁴

There is therefore little or no doubt that “[a] state in belligerent occupation is obliged to adhere to the norms of human rights law”.¹⁹⁵

seventh recital.

- 189 See, consistently (among many others), Michelle A. Hansen, “Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict”, 194 *Military Law Review* 1, 7 (2007); Noam Lubell, “Human rights obligations in military occupation”, 94 (885) *International Review of the Red Cross* 317, 318 (Spring 2012) (“international human rights law applies at all times, regardless of peace or war”); Eyal Benvenisti, *The International Law of Occupation* 13 (2nd edition, 2012); Klaudia Hraníková Pytelová, “Military Occupation and Human Rights Protection”, 3 *ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law* 27, 29 (2018).
- 190 See ECtHR, *Case of Issa and Others v. Turkey*, Appl. No. 31821/96, judgment, para. 69 (16 Nov. 2004). See also *Loizidou v. Turkey (preliminary objections)*, para. 62.
- 191 See Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, 100 *American Journal of International Law* 580, 594 (2006).
- 192 See Hanne Cuyckens, “Review Essay - The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Occupation: A Review of the Relevant Parts of the Books on the Law of Occupation”, 10 *Human Rights and International Legal Discourse* 275, 288 (2016).
- 193 See Pytelová, 30.
- 194 See Brian Walsh & Ilan Peleg, “Human rights under military occupation: The need for expansion”, 2 *The International Journal of Human Rights* 62, 66 (1998).
- 195 See John Quigley, “The Relation Between Human Rights Law and the Law of Belligerent Occupation:

This conclusion is confirmed by the relevant international practice. In its 2005 judgment concerning the *Armed Activities on the Territory of the Congo*, the ICJ, after concluding that at the relevant time Uganda was “an occupying Power” of part of the territory of Congo, found that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”.¹⁹⁶ The Court added that “Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation”.¹⁹⁷ It therefore concluded that “Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the [Uganda Peoples’ Defence Forces] and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power [...] in respect of violations of international human rights law and international humanitarian law in the occupied territory”.¹⁹⁸

The position of the ICJ is echoed by human rights monitoring bodies. Among them, the jurisprudence of the ECtHR emerges. The European Court has released many judgments concerning different situations of military occupation, in which it has recognized the violation by the occupying State of a number of rights protected by the ECHR—including, among others, Article 1 (obligation to respect human rights), Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), and Article 13 (right to an effective remedy)¹⁹⁹—on the basis of the exercise by the State concerned of an *effective control* over the occupied territory. Furthermore, “[m]any states and international organisations evaluate occupants with reference to standards derived from both the law of occupation and human rights law. For example, the US State Department uses the law of occupation and human rights standards to evaluate Israeli behaviour in the Occupied Territories”.²⁰⁰

It is just the case to specify that the catalogue of human rights to be guaranteed by the occupying powers in the occupied territories is not limited to civil and political rights, but also extends to economic, social and cultural rights. As noted above, the applicability of the ICESCR in situations of military occupation has been affirmed by the ICJ in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²⁰¹ Also, in its previously cited report of the occupation of Palestinian territories by Israel, the Committee on Economic, Social and Cultural Rights expressed

“its deep concern about the State party’s continuing gross violations of economic, social and cultural rights in the occupied territories, especially the severe measures adopted by the State party to restrict the movement of civilians between points within and outside the occupied territories, severing their access to food, water, health care, education and work. The Committee is particularly concerned that on frequent occasions, the State party’s closure policy has prevented civilians from reaching medical services and that emergency situations have ended at times in

Does an Occupied Population have a Right to Freedom of Assembly and Expression?”, 12 *Boston College International and Comparative Law Review* 1, 28 (1989).

196 See *Armed Activities on the Territory of the Congo*, para. 179.

197 *Id.*, para. 180.

198 *Id.*, para. 220.

199 See, among many others, *Case of Al-Saadoon and Mufdhi v. The United Kingdom*, Appl. No. 61498/08, judgment (2 Mar. 2010); *Case of Al-Skeini and Others v. The United Kingdom*; *Case of Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, judgment (7 July 2011); *Case of Jaloud v. The Netherlands*, Appl. No. 47708/08, judgment (20 Nov. 2014).

200 See Walsh & Peleg, 66.

201 See above in this chapter.

death at checkpoints”.²⁰²

Guaranteeing economic, social and cultural rights may be of vital importance during military occupation, since “for the populations of an occupied territory, it is often precisely these rights that are of the greatest concern [...] the inhabitants of the territory require their health, education, and employment situation to continue in as uninterrupted a manner as possible”.²⁰³ In this respect, “the duties of the Occupying Power go beyond non-interference and negative/respect obligations to include positive obligations [...] In a prolonged occupation, it may be incumbent upon the Occupying Power not only to engage in the core minimum of obligations but also to ensure the long-term strategic aspects of fulfilling the population’s rights”.²⁰⁴

Continuing Violations of Human Rights in Situations of Military Occupation

Once established that human rights standards are fully applicable in situations of military occupation, there is not much to elaborate on the fact of whether or not continuing violations of human rights may also take place in the same situations. The solution of this issue is indisputably positive, as continuing violations are an integral part of the human rights discourse. In *Cyprus v. Turkey* the ECtHR accordingly found that the respondent State, which was exercising effective control determined by military occupation over the territory of the Northern part of Cyprus, committed “a continuing violation of Article 8 of the Convention [right to private and family life] by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus”,²⁰⁵ as well as of Article 1 of Protocol 1 (protection of property), “by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights”.²⁰⁶ With respect to the latter provision, the Court has specified that it “would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power”.²⁰⁷

Also, in *Varnava and Others v. Turkey*, in relation to the disappearance of nine Cypriot nationals who had been detained by the Turkish military forces, the Court, sitting as Grand Chamber, found that there was a “continuing violation of Article 2 [ECHR] on account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974”,²⁰⁸ as well as a continuing violation of Article 5 ECHR, by virtue of the fact that the Turkish authorities had failed to carry out “an effective investigation into the arguable claim that the two [of the] missing men had been taken into custody and not seen subsequently”.²⁰⁹ Similarly, in *Chiragov and Others v. Armenia*—a case concerning six Azerbaijani refugees who were unable to return to their homes and property in Azerbaijan, from where they had been forced to flee in 1992, during the conflict over Nagorno-Karabakh—the Grand Chamber held that the respondent State was responsible of continuing violations of Article 1 of Protocol 1 and Articles 8 and 13 ECHR.²¹⁰

202 See Concluding Observations of the Committee on Economic, Social and Cultural Rights, para. 13

203 See Noam Lubell, “Human rights obligations in military occupation”, 94 (885) *International Review of the Red Cross* 317, 329 (Spring 2012).

204 *Id.*, 332.

205 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 175 (10 May 2001).

206 *Id.*, para. 189.

207 See Grand Chamber Decision as to the Admissibility of Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 by *Takis Demopoulos and Others against Turkey*, para. 112 (1 Mar. 2010).

208 See *Case of Varnava and Others v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgment, para. 194 (18 Sep. 2009).

209 *Id.*, para. 208.

210 See *Case of Chiragov and Others v. Armenia*, cit. For an analogous case see *Case of Sargsyan v. Azerbaijan*, Appl.

Availability of Remedies for Human Rights Violations in Situations of Military Occupation

The existence of a situation of military occupation does not produce particular implications as regards the rule of the prior exhaustion of domestic remedies.²¹¹ The main consideration to be taken into account in this respect is that, in a situation of military occupation, the expression “domestic remedies” usually refers to the remedies made available by the occupying power. In most cases such remedies are those ordinarily available in the territory of the occupying State. In other cases, however, ad hoc courts may be established by the occupying government, usually of military or special character. While the fact of whether or not a domestic remedy may be considered as available, effective and sufficient²¹² must be evaluated on a case-by-case basis, taking into account the specific characteristics of the instant case, generally “military or special courts [...] could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice [...] [and] do not afford the strict guarantees of the proper administration of justice [...] which are essential for the effective protection of human rights”.²¹³

According to Principle No. 9 of the *Draft Principles Governing the Administration of Justice through Military Tribunals*,²¹⁴ “[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”. In general, the approach of human rights monitoring bodies is based on the consideration that “military courts [...] in most cases do not comply with the obligation of independence and impartiality”.²¹⁵ It follows that, when remedies against human rights violations occurring in situations of military occupation are only available before military courts, a strong presumption exists (which is up to the occupying government to rebut) that such remedies are not available, effective and sufficient.

Conditions for Establishing United States’ International Responsibility

International responsibility for human rights violations is an issue of States *vis-à-vis* individual (or groups of) victims. However, States other than the one responsible for the violation hold an indirect (although internationally relevant) interest that the violation is brought to an end, in light of the fact that protection of human rights corresponds to an interest of the international community as a whole. This implies that all States have a legal interest in it, irrespective of whether or not they have any “more qualified” connection with a violation (as happens, in particular, when the victim of a human rights breach is a citizen of the State concerned).

The present chapter is premised on the postulation that the Hawaiian Kingdom was occupied by the United States in 1893 and that it has remained in the same condition since that time.²¹⁶ Previous paragraphs have shown that, in situations of military occupation, internationally recognized human rights find full application consistently with the ordinary rules generally gov-

No. 40167/06, judgment (16 June 2015).

211 See above in this chapter.

212 *Id.*

213 See HRC, General comment No. 13: Article 14 (Administration of justice) (1984), available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4721&Lang=en> (accessed on 14 Sep. 2019), para. 4. See also General Comment No. 32, para. 22.

214 U.N. Doc. E/CN.4/2006/58 (13 Jan. 2006).

215 See Sharon Weill, “The judicial arm of the occupation: the Israeli military courts in the occupied territories”, 89 (866) *International Review of the Red Cross* 395, 400 (June 2007).

216 This postulation is elaborated in Chapters 2 and 3 of Part II of this book.

erning human rights law. An occupied territory falls within the jurisdiction of the occupying Power, for the latter exercises *effective control* over such a territory. The only possible exception to the full applicability of human rights in situations of military occupation is represented by the case when it is established that the military occupation determines a situation of public emergency, which is officially declared by the occupying State, explaining which specific rights are suspended and the reasons of their suspension. Up to the moment of this writing, however, the United States of America has never used the opportunity offered by Article 4 ICCPR (the only one applicable to the American government among the international treaties including provisions allowing for suspension of human rights guarantees in times of public emergency) to officially proclaim a state of emergency suspending the enjoyment of the rights established by the Covenant.²¹⁷ Furthermore, most fundamental human rights remain non-derogable in whatever circumstances, including situations of public emergency, and demand to be fully and effectively applied in all cases of military occupation, depriving the occupying Power of the possibility to suspend, derogate or even limit their implementation.

International responsibility for human rights violations arises from both treaty law and customary international law. As a consequence, all States in the world are bound to respect and guarantee the effective enjoyment of human rights by all persons subject to their jurisdiction irrespective of whether or not they have ratified the relevant treaties. Even leaving aside any consideration concerning the political and legal status attributed to the Hawaiian Kingdom pending the occupation by the United States, the existence of the jurisdiction of the latter over the territory of Hawai'i is well established, as the American government retains a *de facto* and *de jure* control over such a territory.

The actual existence of human rights violations is based on the principle of *tempus regit actum*. Therefore, a violation of such rights may be considered as existing only whether and to the extent that the act, fact or omission from which the supposed breach originated was prohibited by the law in force at the time when it was held or took place. However, according to the principle of continuing violations, a human rights breach continues to exist for the entire time that the situation determined by the above act, fact or omission continues to produce wrongful effects. As a consequence, a State may be held responsible for a human rights violation even when the act, fact or omission from which it originally arose was committed a long time ago, on the condition that its wrongful effects continued to be produced after a rule entered into force for the above State qualifying the above act, fact or omission as a human rights breach. In other words, State responsibility for human rights violations extends over the entire period during which the act continues and remains not in conformity with its international obligations. Continuing violations of human rights frequently occur in the event of armed conflict and in time of military occupation. Based on the condition that sufficient evidence of the actual existence of breaches is collected, it may be maintained that certain supposed human rights violations committed by the United States in the territory of Hawai'i since 17 January 1893, before the time that human rights standards have crystallized as rules of international law, may assume the characterization of continuing violations, whether and to the extent that they have continued to produce illegal effects after that time.

Provided that sufficient evidence of their breach is collected, among the rights which may be supposed of having been violated by the United States as a result of the occupation of the territory of the Hawaiian Kingdom particular attention should be devoted to those inherently connected to the violations of international humanitarian law determined by the occupation. These violations, whether and to the extent they have actually taken place,²¹⁸ would first of all need to be treated as war crimes, which are primarily to be considered under the lens of

217 See above in this chapter.

218 See, Schabas, Chapter 4.

international criminal law. However, they would also produce notable implications in terms of human rights protection. It is the case, for instance, of the crime of *usurpation of sovereignty* consequent to the occupation.²¹⁹ The human rights implications arising from such a crime are determined by the fact that it usually hinders the effective exercise by the citizens of the occupied State of the right to participate in government, provided for by Article 25 ICCPR and Article 23 ACHR. Even supposing that the citizens of the country to which sovereignty has been usurped are given the formal opportunity to participate in the government installed on their territory by the occupied State, this would hardly comply with the requirement, inherent in the right in point, that all citizens shall enjoy the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. In fact, it is reasonable to maintain that in most cases the representatives “freely chosen” by the citizens of the occupied State would be part of the political organization of the latter, and not of the government imposed by the occupying power.

Similar reflections may be developed with respect to the war crime of *denationalization*.²²⁰ Indeed, such a crime presupposes several implications in terms of human rights. As a matter of facts, denationalization impedes the enjoyment of the right of peoples to self-determination, of the right to nationality (since one is actually deprived of his/her own original nationality), of the right to freedom of thought and expression, and, in a particularly remarkable way, of right to education consistent with one’s (or, for children, parents’) own convictions and wishes.

Obvious human rights repercussions are also determined by the crimes of *pillage*²²¹ and of *confiscation and destruction of property*,²²² which normally translate into breaches of the right to property. Last but not least, a few specific considerations should be devoted to the crime of *unlawful transfer of populations to the occupied territory*.²²³ In this regard, the Hawaiian government census of 1889 revealed that at that time only 1,928 citizens of the United States lived in Hawai‘i, corresponding to less than 2% of the entire population; by 1950 this number had increased to 293,379.²²⁴ Irrespective of whether or not such a mass migration is to be considered as illegal, today the expulsion of those people from the Hawaiian territory would contravene international human rights law in many respects, even if expulsion would be grounded only on the basis of nationality and not on other grounds (such as race, religion, political opinion, etc.).²²⁵ At the same time, however, one may raise the issue of whether the allegedly unlawful transfer of Americans to the Hawaiian territory may have resulted into human rights breaches to the prejudice of Hawaiian citizens. This issue would be relevant, in particular, with respect to the right to participate in government, in a similar fashion to what has been noted above with respect to the crime of usurpation of sovereignty. Also, if adequate evidence would show that the transfer of the American population to Hawai‘i was promoted in view of consolidating the American occupation, the question might be raised of whether it has given rise to violations of the cultural rights of the Hawaiian people. In addition, it might be inferred that the unlawful transfer of American citizens to Hawai‘i facilitated the commission of the crime of denationalization, and would therefore be correlated with the human rights implications arising from it.

219 *Id.*, 155-157, 168.

220 *Id.*, 159-161, 168. On the process of denationalization of the Hawai‘i see David Keanu Sai, “The Impact of the U.S. Occupation on the Hawaiian People”, 13 October 2018, available at <<http://neatoday.org/2018/10/13/us-occupation-of-hawaii/>> (accessed on 14 Sep. 2019).

221 See Schabas, Chapter 4, 161-163, 170

222 *Id.*, 163-164, 168.

223 *Id.*, 166-167, 169.

224 See David Keanu Sai, “American Occupation of the Hawaiian State: A Century Unchecked”, 1 *Hawaiian Journal of Law and Policy* 46, 63-64 (2004).

225 See Yaël Ronen, “Status of Settlers Implanted by Illegal Territorial Regimes”, 79 *British Yearbook of International Law* 194, 236-259 (2008).

Whether and to the extent that the existence of human rights violations committed by the United States during the occupation of the Hawaiian Kingdom since 17 January 1893 would be actually established, victims would first of all need to rely on the domestic remedies afforded by the United States, provided that such remedies are available, effective and sufficient. Once such remedies have been unsuccessfully exhausted, or it is apparent that they are not available, effective or sufficient, victims might have recourse to the available international human rights monitoring bodies in order to obtain a decision recognizing the existence of the breach, requesting the responsible State to put it to an end, and asking it and to provide adequate redress. Considering the international human rights treaties ratified by the United States, the only international human rights body that would hold the competence to receive petitions claiming human rights violations committed by the American government is the Inter-American Commission on Human Rights, on the basis of the 1948 American Declaration of the Rights and Duties of Man. The Commission does not possess the competence to release any decision of binding character, but its findings have a strong moral force.

In consideration of the *erga omnes* character of State obligations in the human rights field, responsibility for their breach is owed to the international community as a whole—*rectius*: to all other States members of the international community—and, therefore, all States may invoke the responsibility of the government author of the violation, as well as claim its immediate cessation and the granting of appropriate reparation in favour of the victim(s) of the breach. It follows that any State in the world would be entitled—or would even have a moral duty—to appropriately react against possible human rights violations committed in the territory of Hawai‘i, once their actual commission has been verified.

Development and Contents of the Right of Peoples to Self-Determination

The right to self-determination attributes peoples a free choice to determine their own destiny,²²⁶ particularly in political terms. It originally emanated from the proclamation of enlightened ideas of popular sovereignty and representative government, affirmed in particular by Locke and Rousseau²²⁷ and subsequently incorporated in the American *Declaration of Independence* of 1776 and in the French *Declaration of the Rights of Man and of the Citizen* of 1789. Self-determination was afterwards used by Lenin as the foundation of the Bolshevik Revolution, while in 1918 US President Woodrow Wilson consecrated it “as a paramount principle of international legitimation”,²²⁸ through declaring that “[n]ational aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesman will henceforth ignore at their peril”.²²⁹

Although the right to self-determination did not find its way in the *Covenant of the League of Nations*, it was implicitly part of the mandate of the League in the context of two of its areas of competence, i.e. the protection of minorities and the system of administration of mandated territories.²³⁰ However, in 1920 the International Committee of Jurists and the Commission of Rapporteurs appointed by the Council of the League of Nations to settle the *Åland Islands*

226 See Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcom N. Shaw and Christian Tomuschat, “The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty”, in Anne Bayefski (ed.), *Self-determination in International Law: Quebec and Lessons Learned*, 248, para. 1.17 (2000).

227 See Christine Griffioen, *Self-Determination as a Human Right. The Emergency Exit of Remedial Secession* 6 (2010).

228 See Uriel Abulof, “We the peoples? The strange demise of self-determination”, in 22 *European Journal of International Relations* 536 (2016).

229 See President’s address to Congress, *The Washington Post* (12 Feb. 1918).

230 See Griffioen, 7.

dispute between Sweden and Finland held that, “[a]lthough the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations”.²³¹

It was with the *Charter of the United Nations* that the right to self-determination was recognized as one of the fundamental rules of the international society. In particular, Article 1(2) includes among the purposes of the United Nations the commitment “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. This principle is reiterated in Article 55, according to which respect for self-determination of peoples stands at the basis of the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. While scholars disagree on the contents of the right to self-determination at the time it was enunciated in the rules just described—particularly on the fact of whether or not it already presupposed a right to secession for people under colonization²³²—subsequent developments of international practice, especially within the United Nations, progressively led to its positive development as encompassing a right to independence for peoples subjected to foreign domination. Beginning in the 1950s, the UN General Assembly affirmed the right to self-determination in numerous resolutions.²³³ Res. 1514 (XV) of 14 December 1960, in particular, “represents a defining moment in the consolidation of State practice on decolonization”,²³⁴ because

“it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination”.²³⁵

As stated by the ICJ, Res. 1514 (XV) uses a “normative” language,²³⁶ in so far as it declares that “[a]ll peoples have the right to self-determination”,²³⁷ affirms that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations”,²³⁸ and demands that “[i]mmediate steps shall be taken, in [...] all [...] territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire”.²³⁹

In 1966, Article 1 common to the ICCPR and the ICESCR proclaimed that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political

231 See Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question (October 1920), available at <<https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf>> (accessed on 23 Aug. 2019), p. 3.

232 For a negative opinion see Cassese, 41.

233 See, among others, Res. 637 (VII) (16 Dec. 1952), Res. 738 (VIII) (28 Nov. 1953) and Res. 1188 (XII) (11 Dec. 1957).

234 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, para. 150 (25 February 2019), available at <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> (accessed on 23 Aug. 2019).

235 *Id.*, para. 152.

236 *Id.*, para. 153.

237 See Resolution 1514(XV), *Declaration on the granting of independence to colonial countries and peoples*, para. 2 (14 December 1960).

238 *Id.*, para. 1.

239 *Id.*, para. 5.

status and freely pursue their economic, social and cultural development”. Subsequently, the U.N. General Assembly reaffirmed, in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted on 24 October 1970, that the right to self-determination of peoples, which includes respect for “the national unity and territorial integrity of a State or country”,²⁴⁰ is one of the “basic principles of international law”,²⁴¹ to the point that today the fact that it has arose to the status of a principle of *jus cogens* cannot be reasonably disputed. This is confirmed by the circumstance that the principle in discussion is constantly reiterated in the context of State practice when violations occur.²⁴² In this respect—as a matter of example—one may refer to the position taken by the United States in 1979, in occasion of the invasion of Afghanistan by the USSR. In a memorandum dated 29 December 1979, the Legal Adviser of the US Department of State, Roberts B. Owen, declared that,

“[b]y the terms of Article 2, paragraph 4 of the UN Charter, the USSR is bound ‘to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’ Among those Purposes are ‘respect for the principle of equal rights and self-determination of peoples’ (Article 1, paragraph 2). The use of Soviet troops forcibly to depose one ruler and substitute another clearly is a use of force against the political independence of Afghanistan; and it just as clearly contravenes the principle of Afghanistan’s equal international rights and the self-determination of the Afghan people”.²⁴³

Contents and Applicability of the Right to Self-Determination

In the well-known judgment *Reference: Secession of Quebec*, the Supreme Court of Canada noted that the

“right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed [...] The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context [...] A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession”.²⁴⁴

While the third situation described by the Canadian Supreme Court remains controversial, no reasonable doubts arise on the fact that a right to *external* self-determination—corresponding to a right to obtain political independence—exists in the first two cases illustrated by the Court. This right was consolidated as a principle of general international law already in the 1960s. It follows that, since then, in the two cases just described, a people is entitled to enjoy its right to self-determination—understood as independence and territorial integrity—and all

240 Available at <<https://www.un.org/ruleoflaw/files/3dda1f104.pdf>> (accessed on 23 Aug. 2019), preamble, fifteenth recital.

241 *Id.*, 3.

242 See, among others, Cassese, 66.

243 See Marian L. Nash, “Contemporary Practice of the United States Relating to International Law”, 74 *American Journal of International Law*, 1980, p. 418.

244 See *Reference re Secession of Quebec*, 20 August 1998, [1998] 2 S.C.R. 217, para. 134.

States have an obligation to respect it and to cooperate in order to make its enjoyment by the people concerned concretely possible.

In the recent Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice (ICJ) held that the right to self-determination of peoples, where it has not been properly exercised and the current political situation does not reflect “the free and genuine expression of the will of the people concerned”,²⁴⁵ cannot be considered as having been extinguished with the passing of time, as the fact of impeding a people to exercise its right to self-determination over time “is an unlawful act of a continuing character”²⁴⁶ resulting from the fact of maintaining the situation of alien domination. At the same time, “[s]ince respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right [...] [and] all [UN] Member States must co-operate”²⁴⁷ to make it possible that the right in point is properly exercised. The first of the conclusions reached by the ICJ is consistent with the long-established rules on *intertemporal law*.²⁴⁸ Indeed, “the right to self-determination [...] is a *continuing right*”.²⁴⁹ As a right of continuing character, the right to self-determination must be interpreted as implying that “a State’s domestic political institutions must be free from outside interference [...] [and prohibiting] States from invading and occupying the territory of other [...] States in such a manner as to deprive the people living there of their right of self-determination”.²⁵⁰ This is consistent with Judge Huber’s position expressed in the previously quoted *Island of Palmas* arbitration, making it clear that “[t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law”.²⁵¹ It follows that, “even if the mere discovery of Palmas could be considered to have conferred on Spain a full and perfect title under the law of the seventeenth century, it would not constitute a good title today unless Spain’s sovereignty had been maintained in accordance with the requirements of the modern law of effective occupation”.²⁵² As a consequence, occupation of a territory by a foreign State cannot be considered lawful if it is not in line with the current rules of international law governing occupation itself, irrespective of whether or not it might be considered legitimate at the time when the territory concerned was occupied. Consistently, “belligerent occupation does not affect the continuity of the State. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist”.²⁵³

The “Kind” of Self-Determination Which Does Not Apply to Hawai‘i

In contemporary times a fervent debate is ongoing concerning the exact meaning and contents of the right to self-determination, the “peoples” that are entitled to it, as well as the concrete prerogatives arising from it. The main reason of such a debate is that the concept of self-determination of peoples, considered as a whole, has recently broadened to cover situations which

245 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, cit., para. 172.

246 *Id.*, para. 177.

247 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, cit., para. 180. See also *East Timor (Portugal v. Australia)*, judgment of 30 June 1995, *I.C.J. Reports*, 1995, p. 90, para. 29: “[i]n the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”.

248 See above in this chapter.

249 See Cassese, *Self-determination of Peoples: A Legal Reappraisal*, cit., p. 54 (Italics in the original text).

250 *Id.*, p. 55.

251 See *Island of Palmas case*, 845.

252 See International Law Commission, “Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur Topic: Law of Treaties”, in *Yearbook of the International Law Commission*, Vol. II, 9 (1964).

253 See James Crawford, *The Creation of States in International Law*, 73 (2nd ed., 2007).

were not contemplated in its traditional characterization, to which we have referred so far in this chapter. The debate in point is developing not only among scholars and legal experts, but also among activists, NGOs and other actors, who, while driven by the most commendable intentions, do not always possess the necessary competences to manage the issue with sufficient clarity. This is the reason why confusion and misunderstandings are quite common with respect to the identification of the different peoples in the world that have a title to self-determination and, especially, of the concrete prerogatives to which they are entitled. In fact, while the contents of—and the implications arising from—the claims advanced by such peoples are often notably different, the real outcomes to which each claim of self-determination may lead are frequently misunderstood, to the point of attributing to a given people prerogatives that are totally different from those to which such a people is entitled.

In recent times, the Hawaiian people has been the object of this kind of misunderstanding, in the sense that its right to self-determination has been referred to as the specification of the right in point as recognized in favour of indigenous peoples. This has especially happened as regards the case of the planned construction of the thirty meter Telescope on Mauna Kea, with respect to which the need to “ensure [that] the human rights of Indigenous Peoples opposed to the telescope project are respected, protected and fulfilled” has been claimed, referring especially to the right of free, prior and informed consent.²⁵⁴ Among the human rights to which the sentence just reproduced refers, the right to self-determination is included, which, to some extent, may be considered the main foundation of the other collective human rights recognized in favour of indigenous peoples. In this respect, Article 3 UNDRIP states that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This provision is to be read in coordination with Article 46, para. 1, of the same Declaration, according to which “[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”. As explained by the Committee on the Rights of Indigenous Peoples of the International Law Association,

“scholars, governments and indigenous peoples assert that Articles 3 and 46 para. 1 UNDRIP, taken together, recognize a right of self-determination for indigenous peoples that differs from the right to self-determination held by non-self-governing peoples living under colonial domination [or foreign occupation]. According to this view, UNDRIP confirms that indigenous peoples have an international legal right to a unique ‘contemporary’ form of self-determination, giving them the right to engage in ‘belated nation-building’, to negotiate with the others within their State, to exercise control over their lands and resources, and to operate autonomously”.²⁵⁵

For the sake of simplicity—and going along with the approach followed by the majority of scholars and in the context of the pertinent international practice—we may refer to this kind of self-determination as *internal self-determination*. By the very fact of being *internal*, this characterization of self-determination *does in no way imply any form of right to independence or*

254 See “Amnesty International calls for a TMT moratorium”, *The Hawaii Independent* (27 July 2019), available at <<https://thehawaiiindependent.com/story/amnesty-international-calls-for-tmt-moratorium>> (accessed on 21 Sep. 2019); “United Nations Indigenous Issues Expert Pens Letter To Governor About Mauna Kea”, *Big Island Video News* (17 Sep. 2019), available at <<https://www.bigislandvideonews.com/2019/09/17/united-nations-indigenous-issues-expert-pens-public-letter-to-governor-about-mauna-kea/>> (id.).

255 See International Law Association, *The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report*, available at <<http://www.ila-hq.org/index.php/committees>> (accessed on 21 September 2019), p. 11.

secession from the territorial State to which a given people *de facto* belongs. It follows that the fact of referring to the Hawaiian people as holder of *this kind* of the right to self-determination is simply *misleading and incorrect*. In other words, the kind of self-determination commonly referred to as *internal* self-determination—which is the one that is recognized in favour of indigenous peoples—is *not* the category of the right to self-determination which is claimed by the Hawaiian people, intended as the *national people of the Hawaiian Kingdom*. In fact, as stated by the Committee on the Rights of Indigenous Peoples, the latter peoples have an international legal right to negotiate “within their State”, implying that indigenous peoples are not States of their own, but reside and are entitled to exercise their rights within an existing State. This characterization does *not* apply to Native Hawaiians as citizens of the Hawaiian Kingdom, who rather claim to be a national people under foreign occupation.

The “Kind” of Self-Determination Which Is Actually Claimed by the Hawaiian People

As emphasized above quoting the Canadian Supreme Court’s judgment *Reference: Secession of Quebec*, a “clear case where a right to *external self-determination* accrues is where a people is subject to *alien subjugation, domination or exploitation* outside a colonial context”.²⁵⁶ The *Hawaiian people*—as allegedly entitled to self-determination—is to be intended as the complex of subjects of the Hawaiian Kingdom, including not only those Hawaiians of aboriginal blood, whether pure or part,²⁵⁷ but also non-aboriginal Hawaiian individuals. At the same time, the kind of self-determination to which the Canadian Supreme Court refers—defined *external self-determination*—is the one which *actually entitles a people to exercise a right to independence, or secession*, from the State by which it is *de facto* occupied or subjugated. In other words, we are referring to the kind of self-determination attributed to a people

“whose government represents the whole of the people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, [which] complies with the principle of self-determination in respect of all of its people [...] To put it another way, the people of such a State exercise the right of self-determination through their participation in the government of the State on a basis of equality”.²⁵⁸

A people of this kind is consequently “entitled to the protection of its territorial integrity”.²⁵⁹ Consistently, “the Hawaiian people retain[s] 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”.²⁶⁰

Applicability of the Right to Self-Determination During the American Occupation

Before the American occupation of 1893, the Hawaiians were used to self-governing themselves “through [the] participation in the government of the State on a basis of equality”,²⁶¹

256 See text corresponding to n. 244 above (emphasis added).

257 Hawaiian Kingdom law refers to the natives that comprise part of the national population of Hawaiian subjects as aboriginal, both pure and part; see *Naone v. Thurston*, 1 Haw. 392 (1856), *Rex v. Booth*, 2 Haw. 616 (1863), *In re Estate of His Late Majesty Lunalilo*, 4 Haw. 162 (1879), *Makea v. Nalua*, 4 Haw. 221 (1879), and *Bishop v. Gulick*, 7 Haw. 627 (1889).

258 See Crawford, 118-19.

259 *Id.*, p. 119.

260 See Craven, Chapter 3, 126.

261 See text corresponding to n. 258 above.

according to the model which, some decades later, would have been accepted as a generally recognized rule of international law. In other words, the Hawaiian people was exercising its right to self-determination before this right was recognized in international law. This clearly emerges from the conduct of international relations by the Hawaiian Kingdom at the relevant time. For instance, between 1855 and 1857, the then Hawaiian Majesty's Commissioner, and Political and Commercial Agent, to the Independent States and Tribes of Polynesia planned to annex to Hawai'i, with the help of a British adventurer, the Polynesian atoll of Sikaiana, in order to extend the Hawaiian Kingdom's territory south of the equator. The planned annexation deal, which King Kamehamea IV eventually refused to ratify, "included a plebiscite of the islanders to obtain their approval, a progressive idea unheard of at the time".²⁶² Also, less than one year after the beginning of the American occupation, a petition by the Hawaiian Patriotic League was addressed to US President Cleveland,²⁶³ in which the fact was highlighted that, as a result of the US intervention, Hawaiians were actually deprived of all their political rights, especially the right of being governed by a government representative of them, giving rise to "a political crime [which] was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government".²⁶⁴ These examples clearly show that the idea of self-determination was well-entrenched in the understanding of internal and international relations by the Hawaiian Kingdom well before it was accepted as a rule of international law. Therefore, in claiming its entitlement to exercise the right to self-determination, the Hawaiian people—intended, as specified in the previous paragraph, as the complex of subjects of the Hawaiian Kingdom—does not only demand to enjoy a right considered as being attributed to it by international law, but also to recover its capacity to manage the government of the Kingdom consistently with what was used to do at the time predating the American occupation.

As noted above, the right to self-determination is a right of continuing character implying that "a State's domestic political institutions must be free from outside interference [...] [and prohibiting] States from invading and occupying the territory of other [...] States in such a manner as to deprive the people living there of their right of self-determination".²⁶⁵ It follows that, to the extent that the Hawaiian Kingdom may be considered as being subjected to foreign occupation (a postulation on which – as noted above – the present chapter is premised), the Hawaiian people retains its rights to self-determination, as established by customary international law, according to the terms explained above in this chapter.

Conclusion

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

262 See Lorenz Gonschor, "*Ka Hoku o Osiania*: Promoting the Hawaiian Kingdom as a Model for Political Transformation in Nineteenth-Century Oceania", in Sebastian Jobs and Gesa Mackenthun (eds.), *Agents of Transculturation. Border-Crossers, Mediators, Go-Betweens* 166 (2013).

263 See US House of Representatives, 53d Congress, 3d Session, Appendix II, *Foreign Relations of the United States*, 1894, Affairs in Hawaii 1294 (1895) 1294.

264 *Id.*, p. 1295.

265 See text corresponding to n. 250 above.

according to the terms explained above. Furthermore, the existence of a likely possibility that breaches of international human rights (provided that certain conditions are met) have actually taken place, and/or that the right to self-determination has been denied as a result of the occupation is *prima facie* realistic. It follows that, should the existence of these violations be effectively confirmed by adequate factual evidence to be determined by the Royal Commission of Inquiry, the Hawaiian Kingdom—as well as the individuals affected by human rights breaches—would be entitled to claim that such violations would be brought to an end, as well as the right to receive appropriate redress for the wrongs suffered. Also, in consideration of the fact that both human rights in general, and the right of a national people to exercise its self-determination in particular, are the object of *erga omnes* obligations, all States in the world would be affected by their breach, and would therefore be entitled—or would even have a moral duty—to appropriately react against the above violations.

PART III

HAWAIIAN LAW,
TREATIES WITH FOREIGN STATES
AND INTERNATIONAL HUMANITARIAN LAW

CONSTITUTION

Granted by His Majesty Kamehameha V, by the Grace of God, King of the Hawaiian Islands, on the Twentieth Day of August, A. D. 1864.

ARTICLE 1. God hath endowed all men with certain inalienable rights; among which are life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

ARTICLE 2. All men are free to worship God according to the dictates of their own conscience; but this sacred privilege hereby secured, shall not be so construed as to justify acts of licentiousness, or practices inconsistent with the peace or safety of the Kingdom.

ARTICLE 3. All men may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and no law shall be enacted to restrain the liberty of speech, or of the press, except such laws as may be necessary for the protection of His Majesty the King and the Royal Family.

ARTICLE 4. All men shall have the right, in an orderly and peaceable manner, to assemble, without arms, to consult upon the common good, and to petition the King or Legislative Assembly for redress of grievances.

ARTICLE 5. The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 7. No person shall be held to answer for any crime or offense (except in cases of impeachment, or for offenses within the jurisdiction of a Police or District Justice, or in summary proceedings for contempt), unless upon indictment, fully and plainly describing such crime or offense, and he shall have the right to meet the witnesses who are produced against him face to face; to produce witnesses and proofs in his own favor; and by himself or his counsel, at his election, to examine the witnesses produced by himself, and cross-examine those produced against him, and to be fully heard in his defense. In all cases in which the right of trial by Jury has been heretofore used, it shall be held inviolable forever, except in actions of debt or assumpsit in which the amount claimed is less than Fifty Dollars.

ARTICLE 8. No person shall be required to answer again for an offense, of which he has been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment.

ARTICLE 9. No person shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law.

ARTICLE 10. No person shall sit as a judge or juror, in any case in which his relative is interested, either as plaintiff or defendant, or in the issue of which the said judge or juror, may have, either directly or through a relative, any pecuniary interest.

ARTICLE 11. Involuntary servitude, except for crime, is forever prohibited in this Kingdom; whenever a slave shall enter Hawaiian Territory, he shall be free.

ARTICLE 12. Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects; and no warrants shall issue but on probable cause supported by oath or affirmation and describing the place to be searched, and the persons or things to be seized.

ARTICLE 13. The King conducts His Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among His subjects.

ARTICLE 14. Each member of society has a right to be protected by it, in the enjoyment of his life, liberty, and property, according to law; and, therefore, he shall be obliged to contribute his proportional share to the expenses of this protection, and to give his personal services, or an equivalent when necessary but no part of the property of any individual shall be taken from him, or applied to public uses, without his own consent, or the enactment of the Legislative Assembly, except the same shall be necessary for the military operation of the Kingdom in time of war or insurrection; and whenever the public exigencies may require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

ARTICLE 15. No subsidy, duty or tax of any description shall be established or levied, without the consent of the Legislative Assembly; nor shall any money be drawn from the Public Treasury without such consent, except when between the session of the Legislative Assembly the emergencies of war, invasion, rebellion, pestilence, or other public disaster shall arise, and then not without the concurrence of all the Cabinet, and of a majority of the whole Privy Council; and the Minister of Finance shall render a detailed account of such expenditure to the Legislative Assembly.

ARTICLE 16. No Retrospective Laws shall ever be enacted.

ARTICLE 17. The Military shall always be subject to the laws of the land; and no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by the Legislature.

ARTICLE 18. Every Elector shall be privileged from arrest on election days during his attendance at election, and in going to and returning therefrom, except in cases of treason, felony, or breach of the peace.

ARTICLE 19. No Elector shall be so obliged to perform military duty, on the day of election, as to prevent his voting; except in time of war, or public danger.

ARTICLE 20. The Supreme Power of the Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial these shall always be preserved distinct, and no Judge of a Court of Record shall ever be a member of the Legislative Assembly.

ARTICLE 21. The Government of this Kingdom is that of a Constitutional Monarchy, under His Majesty Kamehameha V, His Heirs and Successors.

ARTICLE 22. The Crown is hereby permanently confirmed to His Majesty Kamehameha V, and to the Heirs of His body lawfully begotten, and to their lawful Descendants in a direct line; failing whom, the Crown shall descend to Her Royal Highness the Princess Victoria Kamamalu Kaahumanu, and the heirs of her body, lawfully begotten, and their lawful descendants in a direct line. The Succession shall be to the senior male child, and to the heirs of his body; failing a male child, the succession shall be to the senior female child, and to the heirs of her body. In case there is no heir as above provided, then the successor shall be the person

whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life; but should there be no such appointment and proclamation, and the Throne should become vacant, then the Cabinet Council, immediately after the occurring of such vacancy, shall cause a meeting of the Legislative Assembly, who shall elect by ballot some native Alii of the Kingdom as Successor to the Throne; and the Successor so elected shall become a new Stirps for a Royal Family; and the succession from the Sovereign thus elected, shall be regulated by the same law as the present Royal Family of Hawaii.

ARTICLE 23. It shall not be lawful for any member of the Royal Family of Hawaii who may by Law succeed to the Throne, to contract Marriage without the consent of the Reigning Sovereign. Every Marriage so contracted shall be void, and the person so contracting a Marriage, may, by the Proclamation of the Reigning Sovereign, be declared to have forfeited His or Her right to the Throne, and after such Proclamation, the Right of Succession shall vest in the next Heir as though such offender were Dead.

ARTICLE 24. His Majesty Kamehameha V. will, and His Successors upon coming to the Throne, shall take the following oath: I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.

ARTICLE 25. No person shall ever sit upon the Throne, who has been convicted of any infamous crime, or who is insane, or an idiot.

ARTICLE 26. The King is the Commander-in-Chief of the Army and Navy, and of all other Military Forces of the Kingdom, by sea and land; and has full power by Himself, or by any officer or officers He may appoint, to train and govern such forces, and He may judge best for the defence and safety of the Kingdom. But he shall never proclaim war without the consent of the Legislative Assembly.

ARTICLE 27. The King, by and with the advice of His Privy Council, has the power to grant reprieves and pardons, after conviction, for all offences, except in cases of impeachment.

ARTICLE 28. The King, by and with the advice of His Privy Council, convenes the Legislative Assembly at the seat of Government, or at a different place, if that should become dangerous from an enemy or any dangerous disorder; and in case of disagreement between His Majesty and the Legislative Assembly, he adjourns, prorogues, or dissolves it, but not beyond the next ordinary Session; under any great emergency, he may convene the Legislative Assembly to extraordinary Sessions.

ARTICLE 29. The King has the power to make Treaties. Treaties involving changes in the Tariff or in any law of the Kingdom shall be referred for approval to the Legislative Assembly. The King appoints Public Ministers, who shall be commissioned, accredited, and instructed agreeably to the usage and law of Nations.

ARTICLE 30. It is the King's Prerogative to receive and acknowledge Public Ministers; to inform the Legislative Assembly by Royal Message, from time to time, of the state of the Kingdom, and to recommend to its consideration such measures as he shall judge necessary and expedient.

ARTICLE 31. The person of the King is inviolable and sacred. His Ministers are responsible. To the King belongs the Executive power. All laws that have passed the Legislative Assembly, shall require His Majesty's signature in order to their validity.

ARTICLE 32. Whenever, 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 or Council of Regency, as hereinafter provided.

ARTICLE 33. It 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 or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King, until he shall have attained the age of eighteen years, which age is declared to be the Legal Majority of such Sovereign.

ARTICLE 34. The King is Sovereign of all the Chiefs and of all the People; the Kingdom is His.

ARTICLE 35. All Titles of Honor, Orders, and other distinctions, emanate from the King.

ARTICLE 36. The King coins money, and regulates the currency by law.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom or any part of it under martial law.

ARTICLE 38. The National Ensign shall not be changed, except by Act of the Legislature.

ARTICLE 39. The King's private lands and other property are inviolable.

ARTICLE 40. The King cannot be sued or held to account in any Court or Tribunal of the Realm.

ARTICLE 41. There shall continue to be a Council of State, for advising the King in all matters for the good of the State, wherein He may require its advice, and for assisting him in administering the Executive affairs of the Government, in such manner as he may direct; which Council shall be called the King's Privy Council of State, and the members thereof shall be appointed by the King, to hold office during His Majesty's pleasure.

ARTICLE 42. The King's Cabinet shall consist of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom, and these shall be His Majesty's Special Advisers in the Executive affairs of the Kingdom; and they shall be ex officio Members of His Majesty's Privy Council of State. They shall be appointed and commissioned by the King, and hold office during His Majesty's pleasure, subject to impeachment. No act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible.

ARTICLE 43. Each member of the King's Cabinet shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks. The Ministry hold seats ex officio, as Nobles, in the Legislative Assembly.

ARTICLE 44. The Minister of Finance shall present to the Legislative Assembly in the name

of the Government, on the first day of the meeting of the Legislature, the Financial Budget, in the Hawaiian and English languages.

ARTICLE 45. The Legislative power of the Three Estates of this Kingdom is vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together.

ARTICLE 46. The Legislative Body shall assemble biennially, in the month of April, and at such other time as the King may judge necessary, for the purpose of seeking the welfare of the Nation. This Body shall be styled the Legislature of the Hawaiian Kingdom.

ARTICLE 47. Every member of the Legislative Assembly shall take the following oath: I most solemnly swear, in the presence of Almighty God, that I will faithfully support the Constitution of the Hawaiian Kingdom, and conscientiously and impartially discharge my duties as a member of this Assembly.

ARTICLE 48. The Legislature has full power and authority to amend the Constitution as hereinafter provided; and from time to time to make all manner of wholesome laws, not repugnant to the provisions of the Constitution.

ARTICLE 49. The King shall signify His approval of any Bill or Resolution, which shall have passed the Legislative Assembly, by signing the same previous to the final rising of the Legislature. But if he shall object to the passing of such Bill or Resolution, He will return it to the Legislative Assembly, who shall enter the fact of such return on its journal, and such Bill or Resolution shall not be brought forward thereafter during the same session.

ARTICLE 50. The Legislative Assembly shall be the judge of the qualifications of its own members, and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as the Assembly may provide.

ARTICLE 51. The Legislative Assembly shall choose its own officers and determine the Rules of its own proceedings.

ARTICLE 52. The Legislative Assembly shall have authority to punish by imprisonment, not exceeding thirty days, every person, not a member, who shall be guilty of disrespect to the Assembly, by any disorderly or contemptuous behavior in its presence; or who, during the time of its sitting, shall publish any false report of its proceedings, or insulting comments upon the same; or who shall threaten harm to the body or estate of any of its members, for anything said or done in the Assembly; or who shall assault any of them therefor, or who shall assault or arrest any witness, or other person ordered to attend the Assembly, in his way going or returning; or who shall rescue any person arrested by order of the Assembly.

ARTICLE 53. The Legislative Assembly may punish its own members for disorderly behavior.

ARTICLE 54. The Legislative Assembly shall keep a journal of its proceedings; and the yeas and nays of the members, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

ARTICLE 55. The Members of the Legislative Assembly shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the Sessions of the Legislature, and in going to and returning from the same; and they shall not be held to answer for any speech or debate made in the Assembly, in any other Court or place whatsoever.

ARTICLE 56. The Representatives shall receive for their services a compensation to be ascertained by law, and paid out of the Public Treasury, but no increase of compensation shall take effect during the year in which it shall have been made, and no law shall be passed increasing the compensation of said Representatives beyond the sum of five hundred dollars for each session. (1882 A Proposed Amendment To Article 56 of the Constitution granted His Majesty Kamehameha V on the 20th day of August, A.D. 1864, according to Article 80 of the Constitution)

ARTICLE 57. The King appoints the Nobles, who shall hold their appointments during life, subject to the provisions of Article 53; but their number shall not exceed twenty.

ARTICLE 58. No person shall be appointed a Noble who shall not have attained the age of twenty-one years and resided in the Kingdom five years.

ARTICLE 59. The Nobles shall be a Court, with full and sole authority to hear and determine all impeachments made by the Representatives, as the Grand Inquest of the Kingdom, against any officers of the Kingdom, for misconduct or maladministration in their offices; but previous to the trial of every impeachment the Nobles shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence and the law. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this Government; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment and punishment according to the laws of the land. No Minister shall sit as a Noble on the trial of any impeachment.

ARTICLE 60. The Representation of the People shall be based upon the principle of equality, and shall be regulated and apportioned by the Legislature according to the population, to be ascertained, from time to time, by the official census. The Representatives shall not be less in number than twenty-four, nor more than forty, who shall be elected biennially.

ARTICLE 61. No person shall be eligible for a Representative of the People, who is insane or an idiot; nor unless he be a male subject of the Kingdom, who shall have arrived at the full age of Twenty-One years—who shall know how to read and write—who shall understand accounts—and shall have been domiciled in the Kingdom for at least three years, the last of which shall be the year immediately preceding his election; and who shall own Real Estate, within the Kingdom, of a clear value, over and above all incumbrances, of at least Five Hundred Dollars; or who shall have an annual income of at least Two Hundred and Fifty Dollars, derived from any property, or some lawful employment.

ARTICLE 62. Every male subject of the kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the kingdom for one year immediately preceding the election, and who shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters for his district as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that district. Provided, however, that no insane or idiotic person, or any person who shall have been convicted of any infamous crime within this kingdom, unless lie shall have been pardoned by the King, and by the terms of such pardon have been restored to all the rights of a subject, shall be allowed to vote. (1874 Proposed Amendment To Article Sixty-Two of the Constitution Granted on the Twentieth Day of August, A.D. 1864, in Accordance with Article Eighty of said Constitution)

ARTICLE 63. The property qualification of the Representatives of the people may be changed by law. (1874 Proposed Amendment To Article Sixty-Three of the Constitution Granted on the Twentieth Day of August, A.D. 1864, in Accordance with Article Eighty of said Constitution)

ARTICLE 64. The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such Inferior Courts as the Legislature may, from time to time, establish.

ARTICLE 65. The Supreme Court shall consist of a Chief Justice, and not less than two Associate Justices, any of whom may hold the Court. The Justices of the Supreme Court shall hold their offices during good behavior, subject to removal upon impeachment, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Provided, however, that any Judge of the Supreme Court or any other Court of Record may be removed from office, on a resolution passed by two-thirds of the Legislative Assembly, for good cause shown to the satisfaction of the King. The Judge against whom the Legislative Assembly may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least ten days before the day on which the Legislative Assembly shall act thereon. He shall be heard before the Legislative Assembly.

ARTICLE 66. The Judicial Power shall be divided among the Supreme Court and the several Inferior Courts of the Kingdom, in such manner as the Legislature may, from time to time, prescribe, and the tenure of office in the Inferior Courts of the Kingdom shall be such as may be defined by the law creating them.

ARTICLE 67. The Judicial Power shall extend to all cases in law and equity, arising under the Constitution and laws, of this Kingdom, and Treaties made, or which shall be made under their authority, to all cases affecting Public Ministers and Consuls, and to all cases of Admiralty and Maritime jurisdiction.

ARTICLE 68. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be ex officio President of the Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him; his decisions being subject, however, to the revision of the Supreme Court on appeal. Should the Chief Justice ever be impeached, some person specially commissioned by the King shall be President of the Court of Impeachment during such trial.

ARTICLE 69. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties.

ARTICLE 70. The King, His Cabinet, and the Legislative Assembly, shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions.

ARTICLE 71. The King appoints the Justices of the Supreme Court, and all other Judges of Courts of Record; their salaries are fixed by law.

ARTICLE 72. No judge or Magistrate can sit alone on an appeal or new trial, in any case on which he may have given a previous judgment.

ARTICLE 73. No person shall ever hold any office of Honor, Trust, or Profit under the Government of the Hawaiian Islands, who shall, in due course of law, have been convicted of Theft, Bribery, Perjury, Forgery, Embezzlement, or other high crime or misdemeanor, unless he shall have been pardoned by the King, and restored to his Civil Rights, and by the express terms of his pardon, declared to be appointable to offices of Trust, Honor, and Profit.

ARTICLE 74. No officer of this Government shall hold any office, or receive any salary from any other Government or Power whatever.

ARTICLE 75. The Legislature votes the Appropriations biennially, after due consideration of the revenue and expenditure for the two preceding years, and the estimates of the revenue and expenditure of the two succeeding years, which shall be submitted to them by the Minister of Finance.

ARTICLE 76. The enacting style in making and passing all Acts and Laws shall be, "Be it enacted by the King, and the Legislative Assembly of the Hawaiian Islands, in the Legislature of the Kingdom assembled."

ARTICLE 77. To avoid improper influences which may result from intermixing in one and the same Act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in its title.

ARTICLE 78. All laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws heretofore enacted, or that may hereafter be enacted, which are contrary to this Constitution, shall be null and void.

ARTICLE 79. This Constitution shall be in force from the Twentieth day of August in the year One Thousand Eight Hundred and Sixty-four, but that there may be no failure of justice, or inconvenience to the Kingdom, from any change, all officers of this Kingdom, at the time this Constitution shall take effect, shall have, hold, and exercise all the power to them granted, until other persons shall be appointed in their stead.

ARTICLE 80. Any amendment or amendments to this Constitution may be proposed in the Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof, such proposed amendment or amendments shall be entered on its journal, with the yeas and nays taken thereon, and referred to the next Legislature; which proposed amendment or amendments shall be published for three months previous to the next election of Representatives; and if in the next Legislature such proposed amendment or amendments shall be agreed to by two-thirds of all the members of the Legislative Assembly, and be approved by the King, such amendment or amendments shall become part of the Constitution of this country.

KAMEHAMEHA R.

PROCLAMATION

[Restoration of the Monarchical Government]

Comes Now, David Keanu Sai, a native Hawaiian subject, in his public capacity as Regent of the Hawaiian Kingdom, lawfully appointed in accordance with Article 33 of the Constitution of 1864 since the 1st day of March, A.D. 1996, of record as document no. 96-035316 in the Bureau of Conveyances, and being the successor of the Hawaiian Kingdom Trust Company, of record as document no. 96-067865 in the said Bureau, it is in this capacity that I hereby establish the following statements of fact.

1st. On February 3rd, 1996, at a meeting of the Hawaiian Kingdom Trust Company, a general partnership formed under and by virtue of an “Act to Provide for the Registration of Co-partnership Firms,” p. 648, Compiled Laws of 1884, having in view the proper the authority required and allowed by deeds of trust namely document no. 96-000664, no. 96-004246, no. 96-006277, no. 96-014115 and no. 96-014116, all being duly registered in the said Bureau, it had become necessary to the prosperity of the Hawaiian Kingdom and the proper physical, mental and moral improvement of the beneficiaries of the aforesaid trust, who retain a vested undivided rights in and to all the lands of the Hawaiian Islands as native Hawaiian subjects, that the necessary steps be taken for the quieting of all land titles in these islands.

2nd. Perfect Title Company, a general partnership established under and by virtue of the same legislative act aforesaid, and whose deed of general partnership is of record as document no. 95-153346 in the said Bureau, had been appointed by the Trustees of the Hawaiian Kingdom Trust Company to investigate and confirm or reject all claims of fee-simple titles arising after the 10th day of December, A.D. 1845, in accordance with Hawaiian law.

3rd. On February 6th, 1996, a covenant of agreement was entered between the Hawaiian Kingdom Trust Company, aforesaid, and Perfect Title Company, aforesaid, binding themselves and their heirs, executors and administrators and assigns to the true and faithful performance of the quiet title action, or record as document no. 96-016046 in the said Bureau.

4th. In the February 19th, 1996 issue of the Pacific Business News and the March 1996 issue of the Ka Wai Ola o Oha newspaper the public was notified that Perfect Title Company, aforesaid, had been appointed by the Trustees of the Hawaiian Kingdom Trust Company to investigate and confirm or reject all claims of fee-simple titles arising after the 10th day of December, A.D. 1845, in accordance with Hawaiian law. All persons claiming to possess a fee-simple title are required to file with Perfect Title Company by depositing specifications of their claims, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from the 14th day of February, A.D. 1996; or in default of so doing, they will after that time be forever barred of all right to recover the same in the courts of justice.

5th. In the absence of the Government class and the Konohiki (Landlord) class, aforesaid, the Trustees of the Hawaiian Kingdom Trust Company, deriving its authority by certain deeds of trust of the native Tenant class, namely documents no. 96-019923, no. 96-006277, no. 96-025845, no. 96-000664, no. 96-026388, no. 96-014116, no. 96-014115, no. 96-004246, and no. 96-028714, on the 1st day of March, 1996, had appointed myself, David Keanu Sai, to the Office of Regent, intrusted with the vicarious administration of the Hawaiian government during the absence of a Monarch, and that I shall hold office until such time as the Legislative body shall hereafter convene to confirm or amend this appointment. Notice of this appointment, aforesaid, was duly registered in the said Bureau.

6th. On the same day of the aforesaid recorded notice of appointment, a subsequent notice of

proclamation from the Office of the Regent, of record as document no. 96-035328 in the said Bureau, confirmed the Quiet Title Action, aforesaid, and proclaims that where the Hawaiian Kingdom Trust Company would issue patents in fee-simple or enter into lease agreements for individuals who qualify for the same, that it shall now be done by the Office of Regent, or such person as will be lawfully delegated by the same, and that upon completion of all investigative reports, the Hawaiian Kingdom Trust Company shall enter in the Bureau of Conveyances a notice of determination for public record. By this confirmatory proclamation of the Quiet Title Action by the public Office of Regent, the Bureau of Conveyances has been reopened for the lawful registration of the Notices of Investigations upon a Claim to Fee-simple and the subsequent grants of freehold estates and leases issued upon the same, which said Bureau had been incapable of lawfully registering documents since the 17th day of January, 1893, whereupon the Chief Executive of the Hawaiian Kingdom, being Queen Lili'uokalani along with her cabinet, were forcibly removed from office, thereby affecting the authority and competency of registering conveyances in accordance with chapter XXVI of the Compiled Laws of 1884.

7th. On the 30th of June, A.D. 1996, the Hawaiian Kingdom Trust Company, aforesaid, was dissolved in accordance with the provisions of its deed of general partnership, of record as document no. 96-067865 in the said Bureau. The said partnership would remain in existence until the absentee government is re-established, whereupon, all record and monies of the same will be transferred and conveyed over to the office of the Minister of Interior. In light of the appointment of the Regent on the 1st day of March, 1996, aforesaid, as chief executive of the government under article 21 of the Constitution of 1864, and the Regent's authority to appoint the Minister of Interior under section 30, chapter VI, title II, p. 8, Compiled Laws of 1884, the Hawaiian Kingdom Trust Company, by its Trustees, did remise, release and forever quitclaim unto myself as appointed Regent of the Hawaiian Kingdom, all of its rights, title and interest acquired certain deeds of trust under the exclusive authority and jurisdiction of the Hawaiian Kingdom.

Now, therefore, I, David Keanu Sai, by the authority in me vested as Regent of the Hawaiian Kingdom and in conformity with the Constitution and laws, do hereby proclaim as follows:

1. The Hawaiian Monarchical system of Government is hereby re-established;
2. The Civil Code of the Hawaiian Islands as noted in the Compiled Laws of 1884, together with the session laws of 1884 and 1886 and the Hawaiian Penal Code are in full force. All Hawaiian laws and Constitutional principles not consistent herewith are void and without effect.
3. The laws are obligatory upon all persons, whether subjects of this Kingdom, or citizens or subjects of any foreign State, while within the limits of this Kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.
4. Private agreements shall have no effect to contravene any law which concerns public order or good morals. But individuals may, in all cases in which it is not expressly or impliedly prohibited, renounce what the law has established in their favor, when such renunciation does not affect the rights of others, and is not contrary to the public good.
5. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.

[seal] Done at the city of Honolulu, Island of O'ahu, this 28th day of February A.D. 1997.

[signed]
David Keanu Sai [seal]

PROCLAMATION

[Provisional Laws of the Realm]

Whereas, the armed forces of the United States of America have invaded and occupied the shores of the Hawaiian Islands on two separate occasions, the first being from January 16, 1893 to April 1, 1893, and the second since August 12, 1898 to the present, whereby the latter being an illegal and prolonged occupation; and

Whereas, the armed forces of the United States of America on January 17, 1893 aided and abetted a small group of insurgents in seizing the Executive office of the Hawaiian Kingdom government and thereafter participated in the coercion of all government employees and officials in the executive and judicial branches of the government of the Hawaiian Kingdom to sign oaths of allegiance to the insurgency calling themselves the so-called provisional government; and

Whereas, United States President Grover Cleveland concluded, through a presidential investigation, that the overthrow of the Hawaiian Kingdom government was unlawful, and that the United States bears the sole responsibility for the overthrow of the government of a friendly State, and provide restitution; and

Whereas, executive mediation took place between United States Minister Plenipotentiary Albert Willis and Her Majesty Queen Lili'uokalani beginning on November 13, 1893, at the United States Legation in the city of Honolulu, and on December 18, 1893 an agreement was reached through *exchange of notes* committing the United States to reinstate the government, and thereafter the Hawaiian Kingdom to grant amnesty to the insurgents; and

Whereas, United States President Cleveland and his successors in office failed to faithfully execute the agreement and allowed the insurgency to gain power through the hiring of American mercenaries in order to seek annexation to the United States of America; and

Whereas, during the Spanish-American War, the armed forces of the United States of America unlawfully invaded and occupied the Hawaiian Islands on August 12, 1898, being a neutral State, to wage war against the Spanish colonies of the Philippines and Guam in the Pacific Ocean; and

Whereas, since the second occupation, the armed forces of the United States of America have not complied with international law, the international laws of occupation, both customary and by conventions, and international humanitarian law; and

Whereas, the armed forces of the United States of America under the guise of civilian authority seized control of the government of the Hawaiian Kingdom calling itself the so-called Republic of Hawai'i, being the successor to the provisional government, and renamed the same as the government of the Territory of Hawai'i on April 30, 1900, and then subsequently renamed as the government of the State of Hawai'i on March 18, 1959; and

Whereas, the so-called provisional government, the Republic of Hawai'i, the Territory of Hawai'i, and the State of Hawai'i have no legal basis under Hawaiian Kingdom law or the international laws of occupation; and

Whereas, the occupant State has unlawfully levied pecuniary contributions of various kinds that included taxes and the imposition of fines in violation of international law; and

Whereas, the occupant State has unlawfully seized public and private property for the construction of its government agencies and military installations from the occupied State and its inhabitants, and that restoration and compensation shall be made under *jus post liminii*; and

Whereas, the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom as it stood prior to the insurrection of July 6, 1887 has placed the Hawaiian Kingdom into a state of emergency that could lead to economic ruination and calamity; and

Whereas, war crimes have and continue to be committed as a result of the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom in accordance with the 1907 Hague Regulations and the 1949 Geneva Convention IV; and

Whereas, customary international law recognizes that the rules on belligerent occupation will also apply where a belligerent State, in the course of war, occupies neutral territory, being the territory of the Hawaiian Kingdom; and

Whereas, customary international law recognizes that when neutral territory is militarily occupied by a belligerent, the occupant State does not possess a wide range of rights with regard to the occupied State and its inhabitants as it would in occupied enemy territory; and

Whereas, customary international law recognizes that legislative power remains with the government of the occupied State during military occupation of the occupied State's territory; and

Whereas, Her late Majesty Queen Lili'uokalani died on November 11, 1917, without an heir apparent proclaimed in accordance with Article 22 of the 1864 Constitution, as amended; and

Whereas, it is provided by Article 33 of the Constitution that should a Monarch die without confirming an heir apparent in accordance with Hawaiian law, the Cabinet Council shall serve as an *acting* Council of Regency who shall administer the Government in the name of the Monarch, and exercise all the Powers which are constitutionally vested in the Monarch, until the Legislative Assembly may be assembled to elect by ballot a *de jure* Regent or Council of Regency; and

Whereas, according to Article 42 of the Constitution, the Cabinet Council consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance and the Attorney General of the Kingdom; and

Whereas, an *acting* Regency, by virtue of the offices made vacant in the Cabinet Council, was established under the doctrine of necessity by proclamation on February 28, 1997, pursuant to Article 33 of the Constitution and possesses the constitutional authority to temporarily exercise the Royal Power of the Hawaiian Kingdom under Article 32; and

Whereas, the Legislative Assembly is unable to be assembled in accordance with Title 3—Of the Legislative Department, Civil Code of the Hawaiian Islands (Compiled Laws, 1884), in order to elect by ballot a *de jure* Regent or Council of Regency as a direct result of the prolonged occupation of the Hawaiian Kingdom by the armed forces of the United States of America and the Rules of Land Warfare of the United States; and

Whereas, the public safety requires:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do here-

by acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

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

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876);

And, We do hereby call upon the said Commander of the United States Pacific Command, and those subordinate military personnel to whom he may delegate such authority to seize control of our government, calling itself the State of Hawai'i, by proclaiming the establishment of a military government, during the present prolonged military occupation and until the military occupation has ended, to exercise those powers allowable under the international laws of occupation and international humanitarian law;

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

And, We do further require that all courts of the Hawaiian Kingdom, whether judicial or administrative, shall administer the provisional laws hereinbefore proclaimed forthwith;

And, We do further require that Consular agents of foreign States within the territory of the Hawaiian Kingdom shall comply with Article X, Chapter VIII, Title 2—Of the Administration of Government, Civil Code of the Hawaiian Islands (Compiled Laws, 1884) and the Law of Nations;

And, We do further require every person now holding any office of profit or emolument under the State of Hawai'i and its Counties, being the Hawaiian government, take and subscribe the oath of allegiance in accordance with *An Act to Provide for the Taking of the Oath of Allegiance by Persons in the employ of the Hawaiian Government* (1874).

[seal]

In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 10th day of October A.D. 2014.

David Keanu Sai, Ph.D.
Chairman of the Council of Regency
Acting Minister of the Interior

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

[signed]
Kau'i P. Sai-Dudoit,
Acting Minister of Finance

[signed]
Dexter Ke'eaumoku Ka'iana, Esq.,
Acting Attorney General

PROCLAMATION

[Recognition of the State of Hawai‘i and County Governments]

Whereas, the insurgency, with the support and protection of United States troops, unlawfully seized control of the Hawaiian Kingdom governmental infrastructure on January 17, 1893, and called themselves the so-called provisional government; and

Whereas, the insurgency maintained the Hawaiian Kingdom’s governmental institutions with the exception of the Executive Monarch and Cabinet, to include the head of the police force; and

Whereas, all Hawaiian government officials were coerced to sign oaths of allegiance to the unlawful regime; and

Whereas, the State of Hawai‘i, and its Counties, is a successor of the Territory of Hawai‘i, the Republic of Hawai‘i, and the so-called provisional government, all of which have no legal basis under Hawaiian Kingdom law or the international laws of occupation; and

Whereas, the United States, including through its proxy, the State of Hawai‘i and its Counties, as an administrative body, is in effective control of the territory of the Hawaiian Kingdom without lawful authority; and

Whereas, according to Article 42 of the 1907 Hague Convention, IV, a State’s territory is considered occupied when it is placed under the authority of the Occupying State; and

Whereas, Article 42 has three requisite elements: (1) the presence of a foreign State’s forces; (2) the exercise of authority over the occupied territories by the foreign State or its proxy; and (3) the non-consent by the occupied State; and

Whereas, United States President Grover Cleveland’s manifesto to the Congress on December 18, 1893, and the continued United States presence today without a treaty of peace firmly meets all three elements of Article 42; and

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.

[seal] In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 3rd day of June A.D. 2019.

[signed]
David Keanu Sai, Ph.D.
Chairman of the Council of Regency
Acting Minister of the Interior

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

[signed]
Kau'i P. Sai-Dudoit,
Acting Minister of Finance

[signed]
Dexter Ke'eaumoku Ka'ama, Esq.,
Acting Attorney General

PROCLAMATION

[Appointment of Minister of Foreign Affairs *ad interim*]

Whereas, on October 17, 2018, His Excellency Peter Umialiloa Sai, Minister of Foreign Affairs, died; and

Whereas, the office of Minister of Foreign Affairs had become vacant; and

Whereas, administrative precedence provides that one of the ministers of the Cabinet Council, being the *acting* Council of Regency, can provisionally serve in the place of the deceased minister's office *ad interim* until the seat is filled by commission; and

Whereas, the Minister of the Interior, His Excellency David Keanu Sai, Ph.D., has the necessary qualifications to serve as the Minister of Foreign Affairs *ad interim* until the seat is filled by commission:

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 designate His Excellency David Keanu Sai, Ph.D., to be Minister of Foreign Affairs *ad interim* while remaining as Minister of the Interior and Chairman of the Council of Regency.

[seal] In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 11th day of November A.D. 2019.

[signed]
David Keanu Sai, Ph.D.
Chairman of the Council of Regency
Acting Minister of the Interior

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

[signed]
Kau'i P. Sai-Dudoit,
Acting Minister of Finance

[signed]
Dexter Ke'eaumoku Ka'iama, Esq.,
Acting Attorney General

TREATY WITH AUSTRIA-HUNGARY

His Majesty the Emperor of Austria, King of Bohemia etc. and Apostolic King of Hungary on the one part and His Majesty the King of the Kingdom of the Hawaiian Islands on the other part,

Being equally animated by the desire of regulating and extending the commercial relations, and of promoting the facilities of navigation between Their respective States and Possessions, have resolved to conclude a Treaty for that purpose and have named for their Plenipotentiaries that is to say:

His Imperial and Royal Apostolic Majesty, the Count Frederick Ferdinand de Beast, His Imperial and Royal Majesty's Chamberlain, Privy Councilor, Ambassador Extraordinary at the Court of St. James, Grand Cross of the Order of St. Stephen, and of that of Leopold etc. and

His Majesty the King of the Kingdom of the Hawaiian Islands, Manley Hopkins, Esq., His Hawaiian Majesty's Charge d'affaires and Consul General in London, Knight Commander of the Order of Kamehameha I and of Isabella la Catolica, who after having communicated to each other their respective full powers found to in due and proper form, have agreed upon and concluded the following articles.

ARTICLE I. There shall be perpetual peace and friendship between the Austro-Hungarian Emperor and the Kingdom of the Hawaiian Islands, and between the citizens of the two Countries, without exception of person and place.

ARTICLE II. There shall be between the Austro-Hungarian Empire and the Kingdom of the Hawaiian Islands reciprocal freedom of commerce and navigation, and the citizens of the Austro-Hungarian Empire in the Hawaiian Islands, and Hawaiians within the Empire of Austria-Hungary may enter with their Vessels and Cargoes into all places, ports and rivers, which are or shall hereafter be open to foreign commerce, with the same liberty and security as are or may be enjoyed by the native of the each country respectively, always provided, that the Police Regulations established for the preservation of peace and good order shall be duly respected.

ARTICLE III. The Citizens of the two high Contracting Parties may, like the natives in the respective territories, travel, reside, trade wholesale or retail, and transact any lawful business, and rent or occupy the houses, stores, or shops which they may require for the purposes of residence or business, and in the transaction of every business shall be on a perfect equality with the natives of the country. In the performance of all business, the citizens of each contracting power, when resident in the territory of the other, shall conform to all the laws and regulations of the country, and they shall not be subject in any case to any other charges, restrictions, taxes or impositions, than those to which the natives are subject.

ARTICLE IV. The Citizens of each high Contracting Party when resident in the territory of the other shall enjoy the most constant and complete protection for their persons and property, and for this purpose they shall have free and easy access to the Courts of Justice, provided by law, in pursuit and defense of their rights. They shall be at liberty to employ lawyers, advocates or Agents to prosecute or defend their rights before such Courts of Justice. In fact they shall enjoy in this respect all the rights and privileges which are granted to natives, and shall be subject to the same conditions.

ARTICLE V. The Citizens of each high Contracting Party, when resident in the territory of

the other shall be exempt from all service, whether in the Army or Navy, or in the National Guard or Militia, and shall be exempt from all forced loans, and from every extraordinary contribution, not general and by law established.

ARTICLE VI. The most entire liberty of conscience is guaranteed to citizens of each of the high contracting Parties within the territories of the other, no one shall be molested on account of his religion or the observance thereof.

ARTICLE VII. The Citizens of each of the high contracting Parties shall in the territory of the other, have the right of acquiring, and possessing property of every description and kind, whether the same be real or personal property, and may dispose of the same, as may seem to them best, whether by sale, donation, exchange, will or in any other way, also the citizens of either of the two States may become heirs to property, situated in the other, and may succeed without hindrance to the properties that may devolve upon them, dispose of the same according to their pleasure, and such heirs or legatees shall not be subject to any charge, or be bound to pay any expenses of the successor or otherwise higher than those which shall be borne in like case by the natives themselves.

ARTICLE VIII. All vessels sailing under the respective flags of either of the high contracting Parties, and which shall be bearers of the ship's papers and documents required by the laws of their respective countries, shall be taken and considered to be the vessels of the country whose flag they carry.

ARTICLE IX. Vessels of either of the high contracting parties arriving in the ports of the other, or departing from them, shall not be subjected to other, or higher duties of tonnage, light, houses, anchorage Port charges, Government wharfage, pilotage, quarantine, or other charges, under any denomination whatsoever, than those to which national Vessels may be subjected, it being however expressly understood, that no stipulation in this Treaty made, shall be taken as applying to the coasting trade, which each contracting party reserves to itself, respectively, and will regulate according to its own laws.

ARTICLE X. Articles of all sorts imported into or exported from the Ports of either of the contracting Parties, under the flag of the other, shall pay no other or higher duties, or be subject to any other charges, than if imported or exported under the national flag.

ARTICLE XI. Vessels of one of the contracting Parties, compelled to seek shelter in the ports of the other, shall pay neither on the Vessel nor the Cargo more duties than those levied on national vessels in the same situation, provided that such ships carry on no commerce, and delay no longer in the aforesaid ports, than may be required for the purposes which impelled them to seek shelter.

ARTICLE XII. Austro-Hungarian Ships of War, or whale ships shall have free access to all the Hawaiian Ports, to anchor, be repaired, and victual their crews, and they may proceed from one harbor to another for fresh provisions. In all the Ports, which are or may hereafter be opened to foreign vessels, Austro-Hungarian ships of war and whalers shall be subject to the same rules, which are or may be imposed on, and shall enjoy the same rights and privileges, which are or may be granted to the ships of the most favored nation.

ARTICLE XIII. The two high contracting Parties hereby agree that any favor, privilege, or immunity whatsoever, in matters of commerce or navigation, which either contracting Party has granted, or may hereafter grant to subjects or citizens or any other State shall be extended to the subjects or citizens of the other contracting party gratuitously, if the concession in favor of the other State shall have been gratuitous, or in return for a compensation as nearly as possible

of proportionate value and effect, to be adjusted by mutual agreement if the concession shall have been conditional.

ARTICLE XIV. Each of the two contracting Parties may appoint Consuls, Vice-Consuls, and Consular Agents to reside in the territory of the other for the purpose of the protection of commerce; but before any Consul shall enter upon his functions, he shall first obtain the authorization of the Government to which he is sent; either of the contracting Parties may except from the residence of Consuls such particular places as either may think fit to be excepted, it being understood that neither Party will impose any restriction which is not common in the country to all nations.

ARTICLE XV. The Diplomatic Agents, Consul General, Consul, Vice-Consuls and Consular Agents of Austria-Hungary in the Hawaiian Islands, shall enjoy all the rights, privileges, immunities, and exceptions enjoyed by the Diplomatic Agents, Consuls, Vice-Consuls, and Consular Agents of the same rank, belonging to the most favored nation, and the same shall be the position in Austria-Hungary of the Hawaiian Diplomatic Agents, Consuls General, Consuls, Vice-Consuls and Consular Agents.

ARTICLE XVI. The Consuls, Vice-Consuls, and Consular Agents of either the contracting parties residing within the territory of the other, may require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the Ships of War, or merchant Vessels of their Country. For this purpose they shall apply to the competent local authorities in writing, proving by the exhibition of the crew list, or other official documents, that the persons named formed a part of the ship's crew and this reclamation being there substantiated the surrender shall be refused. All aid and assistance shall be given for the discovery and arrest of such deserters, who shall be detained in the prisons of the country at the request and cost of those who shall claim them, until they may be restored to the Vessel to which they belonged, or sent back to their own Country. If however they shall not be restored to the Vessel from which they deserted, or sent back to their own Country within six months from the day of arrest, or if the party causing such arrest and imprisonment shall not defray the expenses thereof, the deserter may be set at liberty, and shall not be arrested thereafter for the same cause. However, if the deserter shall have committed any crime or offense against the laws of the Country where he is, his release shall not take place, until a competent tribunal shall have given judgment, and that judgment been carried into execution. It is however, understood that Seaman, natives of either Country, who shall desert the Vessels of either party within the territories of their own Country, shall be excepted from this arrangement and treated according to the laws of their own Country. And it is formally agreed between the two contracting Parties, that every other favor or facility granted, or to be granted by either to any other Party for the arrest of deserters, shall also be granted to the present contracting Parties, as fully as if they had found part of the present treaty.

ARTICLE XVII. All operations pertaining to the salvage of Vessels, carrying the Flag of either of the contracting parties, stranded or unchecked upon the Coasts of either of the contracting Parties, shall be superintended by the respective Consular Agents, but if the persons interested be on the spot, or the Captain possess adequate powers, the administration of the wreck shall be committed to them. The intervention of the local authorities shall only be applied to the maintenance of order, to guarantee the rights of Salvors, if the do not belong to the shipwrecked crew, and to insure the execution of the measures to be taken for the entry and departure of the saved goods. In the absence and until the arrival, of the Consular Agents, the local authorities will take the needful steps for the protection of persons and property wrecked. The goods saved shall never be subjected to customs or other duty, unless they are disposed of for home consumption.

ARTICLE XVIII. The Ship's merchandize and effects belonging to the respective citizens, which may have been taken by pirates or conveyed to, or found in the Ports of either of the contracting Parties, shall be delivered to their owners on payment of the expenses, should there be such; the amount to be determined by the competent tribunals, when the rights of the proprietors shall be proved before these tribunals, and the claim being made within the space of eighteen months, by interested parties by the Attornies, or by the Agents of their respective Governments.

ARTICLE XIX. The present Treaty shall be in force for Ten Years, counting from the day of the exchange of the Ratifications, and if in one year after the expiration of the term, neither the one or the other of the two contracting Parties shall have announced by official declarations, its intention that it shall cease to have effect, the said Treaty will remain still obligatory during one year, and so onward until the expiration of the twelve months, which shall follow the official declaration in question, at whatever time it may be made.

ARTICLE XX. The present Treaty shall be ratified, and the Ratifications shall be exchanged at London in ten months, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and affixed thereto their respective Seals.

Done at London, this 18th day of June in the year of our Lord, one thousand eight hundred and seventy five.

[L.S.]

FREDERICK FERDINAND DE BEAST

[L.S.]

MANLEY HOPKINS, ESQ.

TREATY WITH BELGIUM

His Majesty the King of the Hawaiian Islands on the one part, and His Majesty the King of the Belgians on the other part, desiring to facilitate the establishment of commercial relations between the Hawaiian islands and Belgium, and to favor their development by a treaty of Amity, Commerce and Navigation, suited for securing to the two countries equal and reciprocal advantages, have nominated to this purpose for their Plenipotentiaries, that is to say:

His Majesty the King of the Hawaiian Islands, Sir John Bowring as Envoy Extraordinary and Minister Plenipotentiary and His Majesty the King of the Belgians the Sicur Charles Rogier, His Minister of Foreign Affairs, Grand Officer of the Order of Leopold, etc., etc., etc.

Who having mutually communicated their powers and found them in good and true form, have agreed on the following articles:

ARTICLE 1. There shall be perpetual peace and constant friendship between the Kingdom of the Hawaiian Islands and that of Belgium, and between the citizens of the two countries, without exception of persons or place.

ARTICLE II. There shall be between the Hawaiian Islands and Belgium reciprocal freedom in commerce and navigation. Hawaiian subjects in Belgium, and Belgians in the Hawaiian Islands, may enter in the same liberty and security with their vessels and cargoes as are enjoyed by the natives of the respective countries, in all places, ports and rivers which are or shall in future be open to foreign commerce: provided always, that the police regulations employed for the protection of the citizens of the most favored nations be respected.

ARTICLE III. The citizens of each of the contracting parties may, like the natives in the respective territories, travel or reside, trade wholesale or retail, rent occupy the houses, stores and shops which they may require; they may carry on the transport of merchandise and money, and receive consignments; they may also, when they have resided more than a year in the country, and their goods, chattels or movables which they there possess shall offer a sufficient security be admitted as sureties in custom-house transactions.

The citizens of both countries shall, on a footing of perfect equality, be free both to purchase and to sell, to establish and to fix the price of goods, merchandise and articles of every kind, whether imported or of home manufacture, whether for home consumption or for exportation.

They shall also enjoy liberty to carry on their business themselves, to present to the custom-house their own declarations or to have their place supplied by their own attornies, factors, consignees, agents, or interpreters whether in the purchase or sale of their goods, their property or merchandise, whether for the loading or unloading or of the expedition of their vessels.

They shall also have the right to fulfill all the functions that are confided to them by their own countrymen, by strangers or by natives, in the position of attornies, factors, agents, consignees, or interpreters.

For the performance of all these acts they shall conform to all the laws and regulations of the country, and they shall not be subject in any case to any other charges, restrictions, taxes or impositions than those to which the natives are subject; provided, always, that the police regulations employed for the protection of the citizens of the most favored nation be respected.

It is also specially provided that all the advantages, of any kind whatever, actually granted by the laws and decrees now in force or which shall in future be accorded to foreign settlers, shall be granted to Belgians established or who shall establish themselves in whatever positions they may deem fit in the Hawaiian Territory.

And the same shall hold good for Hawaiian subjects in Belgium.

ARTICLE IV. The respective citizens of the two countries shall enjoy the most constant and complete protection for their persons and property. Consequently they shall have free and easy access to the courts of justice in the pursuit and defence of their rights in every instance and degree of jurisdiction established by the laws. They shall be at liberty under any circumstances to employ lawyers, advocates or agents, from any class whom they may see fit to authorize to act in their name. In fine, they shall, in all respects enjoy, the same rights and privileges which are granted to natives and they shall be subject to the same conditions.

ARTICLE V. The Hawaiians in Belgium, and the Belgians in the Hawaiian Islands, shall be exempt from all service whatever, in the army or navy, or in the national guard or militia, and they cannot be subject to any other charges, restrictions, taxes or impositions on their property, furniture, or movables than those to which the natives themselves are subject.

ARTICLE VI. The citizens of both countries respectively shall not be subject to any embargo, nor to be detained with their vessels, luggage, cargoes or commercial effects for any military expedition whatever, nor for any public or private service whatever, unless the government or local authority shall have previously agreed with the parties interested, that a just indemnity shall be granted for such service, and for such compensation as might fairly be required for the wrong or injury (which not being purely fortuitous) may have grown out of the service which they have voluntarily undertaken.

ARTICLE VII. The most entire liberty of conscience is guaranteed to Hawaiian subjects in Belgium and to the Belgians in the Hawaiian Islands. Both parties must conform in the outward observance of their religion to the laws of the country.

ARTICLE VIII. Citizens of either of the contracting parties shall, on the respective territories, have the right of possessing property of any sort, and disposing of the same in like manner as the natives.

Belgians shall enjoy in all the Hawaiian territories the right of collecting and transmitting successions *ab intestato* or testamentaries as Hawaiians, according to the laws of the country without being subjected as strangers to any burthens or imposts which are not paid by the natives.

And reciprocally, Hawaiian subjects shall enjoy as Belgians, the right of collecting and transmitting successions *ab intestato* or testamentary on the same conditions as Belgians, according to the laws of the country, and without being subject as strangers to any charge or impost not payable by the natives.

The same reciprocity between the citizens of the two countries shall exist for donations *inter vivos*. On the exportation of property collected or acquired under any head by Belgians in the Hawaiian Islands, or by Hawaiians in Belgium, there shall be no duty on removal or immigration, nor any duty whatever to which natives are not subjected.

ARTICLE IX. All Belgian or Hawaiian vessels sailing under their respective colors, and which shall be bearers of the ship's papers and documents required by the laws of the respective countries shall be considered as national vessels.

ARTICLE X. Belgian vessels which shall arrive either in ballast or laden in Hawaiian ports, or which shall leave the same, and reciprocally, Hawaiian vessels which, either in ballast or laden, enter or leave the ports of Belgium, whether by sea, or by river, or canals, whatever be the place of their departure or that of their destination, shall not be subject either at entry or departure, to duties on tonnage, port or transit, pilotages, anchorage, shifting, light-houses, sluices, canals, quarantines, salvage, bonding-warehouses, patents, brokerage, navigation, passage, or to any duties or charges whatever, levied on the hulks of vessels received or established for the benefit of the government, of the public functionaries, communes or establishments of any sort other than those which are now or may hereafter be levied on national vessels.

ARTICLE XI. In all that regards the stationing, the loading and unloading of vessels in the ports, roadsteads, harbors and docks, and generally for all the formalities and arrangements whatever to which vessels employed in commerce with their freights and loading may be subject, it is agreed that no privilege shall be granted to national vessels, which shall be equally granted to vessels of the other country, the intention of the high contracting parties being that in this respect also the respective vessels shall be treated on the footing of perfect equality.

ARTICLE XII. Vessels of the subjects of the contracting parties, compelled to seek shelter in the ports of the other, shall pay neither on the vessel nor the cargo more duties than those levied on national vessels in the same situation; provided, that the necessity of such shelter seeking be legally shown, that the vessel shall carry on no commercial speculations, and that it will tarry no longer than is required by the motives which impelled it to enter the port.

ARTICLE XIII. Belgian ships of war, and whaling ships shall have free access to all the Hawaiian ports; they may there anchor, be repaired and victual their crews; they may proceed from one harbor to another of the Hawaiian Islands for fresh provisions.

At all the ports which are or may be hereafter opened to foreign vessels, Belgian ships of war and whalers shall be subject to the same rules which are or may be imposed, and shall enjoy in all respects the same rights, privileges and immunities which are or may be granted to Hawaiian ships and whalers, or to those of the most favored nation.

ARTICLE XIV. Articles of all sorts imported into the ports of either of the contracting States, under the flag of the other, whatever be their origin, and from whatever country imported, shall pay neither, other nor heavier duties of entry, and shall not be subjected to any other charges than if imported under the national flag.

ARTICLE XV. Articles of all sorts exported from either of the two countries, under the flag of the other, from whatever country they may be, shall not be subjected to other duties or other formalities, than if exported under the national flag.

ARTICLE XVI. Hawaiian ships in Belgium, and Belgian ships in the Hawaiian Islands, may discharge a portion of their cargo in the port of their first arrival, and proceed with the rest of their cargo to other ports of the same country, which may be open to foreign trade, whether to complete their unloading or to provide their return cargo, and shall pay in neither port other or heavier duties than those levied on national vessels in similar circumstances.

As regards the coasting trade, the vessels of each country shall be mutually treated on the same footing as the most favored nation.

ARTICLE XVII. During the period allowed by laws of the two countries for the warehousing of goods, no other duties than those for custody and storage shall be levied upon articles imported from one of the two countries into the other, until they shall be removed for transit,

reexportation or internal consumption.

In no case shall such articles pay higher duties or be liable to other formalities than if they had been imported under the national flag, or from the most favored country.

ARTICLE XVIII. Merchandise shipped on board Belgian or Hawaiian ships, or belonging to their respective citizens, may be transhipped in the ports of two countries to a vessel bound for a national or foreign port, according to the custom house regulations of the two countries, and the goods so transhipped for other ports shall be exempt from all duties of customs or warehouses.

ARTICLE XIX. Articles of all sorts proceeding from Belgium, or shipped for Belgium, shall enjoy in their passage through the territory of the Hawaiian Islands, whether in direct transit or for reexportation, all the advantages possessed under the same circumstances by the most favored nation.

And reciprocally the articles of every sort, the produce of the Hawaiian Islands or sent from that country, shall enjoy in their passage through Belgium, the same advantages as are possessed by the most favored nation.

ARTICLE XX. Neither one nor the other of the contracting parties will impose upon the goods proceeding from the soil, the manufactures or the warehouses of the other different or greater duties on importation or reexportation, than those which shall be imposed on the same merchandise coming from any other foreign country.

Nor shall there be imposed on the goods exported from one country to the other, different or higher duties than if they were exported to any other foreign country.

No restriction or prohibition of importation or reexportation shall take place in the reciprocal commerce of the contracting parties which shall not be equally extended to all other nations.

ARTICLE XXI. Consuls-General, Consuls, Vice-Consuls and Consular Agents may be established by each country in the other for the protection of commerce, such agents shall not enter upon their functions or enjoyment of the rights, privileges and immunities which belong to them until they have obtained the authorization of the territorial government, which shall, besides, preserve the right of determining the place of residing where Consuls may be established; it being understood that neither Government will impose any restriction which is not common in the country to all nations.

ARTICLE XXII. The Consuls-General, Consuls, Vice-Consuls and Consular Agents of Belgium in the Hawaiian Islands shall enjoy all the privileges, immunities and exemptions, enjoyed by the agents of the most favored nation in the same circumstances.

And the same shall be the position in Belgium of the Hawaiian Consuls-General, Consuls, Vice-Consuls and Consular Agents.

ARTICLE XXIII. The desertion of seamen embarked in the vessels of either of the contracting parties shall be severely dealt with in their respective territories. In consequence the Belgian consuls shall have the power to cause to be arrested and sent on board, or to Belgium, seamen who may have deserted Belgian vessels in the Hawaiian ports. But for this purpose they must apply to the competent local authorities, and justify, by the exhibition of the original or the duly certified copy of the ship's register, the roll or other official documents to prove that the persons named formed part of the ship's crew. On this application, so supported, the delivery

of the seamen shall not be refused.

All aid and assistance shall be given for the discovery and arrest of such deserters, who shall be detained in the prisons of the country, on the requirement and at the expense of the consuls, until they shall find an opportunity of sending them away, If, however no opportunity shall offer in the course of two months, counting from the day of arrest, the deserters may be set at liberty.

It is understood that seamen who are native Hawaiians shall be excepted from this arrangement and to be treated according to the laws of their own country, on the requirement and at the expense of the consuls, until they shall find an opportunity of sending them away. If, however, no opportunity shall offer in the course of the two months, counting from the day of arrest, the deserters may be set at liberty.

It is understood that seamen who are native Hawaiians shall be excepted from this arrangement and to be treated according to the laws of their own country.

If the deserter have committed any crime in the Hawaiian territory, his release shall not take place till the competent tribunal shall have given judgment, and this judgment been carried into execution.

Hawaiian consuls shall possess exactly the same rights in Belgium, and it is formally agreed between the two contracting parties, that every other favor or facility granted or to be granted by either to any other power for the arrest of deserters shall be also granted to the present contracting parties as fully as if they had formed part of the present treaty.

ARTICLE XXIV. All operations connected with the salvage of stranded or wrecked vessels on the Hawaiian coasts shall be superintended by the Consular Agent of Belgium and reciprocally the Consular Hawaiian Agents shall superintend the operations connected with the salvage of Hawaiian vessels stranded or wrecked on the Belgian coasts.

But if the parties interested find themselves on the spot, or the captain possess adequate powers, the administration of the wreck shall be committed to them.

The intervention of the local authorities shall only be applied to the maintenance of order, to guarantee the rights of the salvors if they do not belong to the ship-wrecked crew, and to assure the execution of the measures to be taken for the entry and departure of the saved goods. In the absence and until the arrival of the Consular Agents, the local authorities will take the needful steps for the protection of persons and property wrecked.

The goods saved shall never be subjected to customs or duty, unless they are disposed of for home consumption.

ARTICLE XXV. The ships, merchandise and effects belonging to the respective citizens which may have been taken by pirates or conveyed to or found in the ports of either of the contracting parties, shall be delivered to their owners on payment of the expenses should there be such, the amount to be determined by the competent tribunals when the right of the proprietor shall be proved before these tribunals, and the claim being made within the space of eighteen months by the interested parties, by their attorneys, or by the agents of their respective Governments.

ARTICLE XXVI. If, from a concurrence of unfortunate circumstances, differences between the contracting parties should cause an interruption of the relations of friendship between them, and that after having exhausted the means of an amicable and conciliatory discussion,

TREATY WITH BREMEN

KAMEHAMEHA III., King of the Hawaiian Islands, to all to whom these presents shall come,
GREETING:

WHEREAS, a Treaty of Friendship, Commerce and Navigation between Us and the Free Hanseatic City of Bremen, was, concluded and signed at Honolulu, on the seventh day of August, one thousand eight hundred and fifty-one, by the Plenipotentiary of Us, and the specially authorized Consul of the said Free Hanseatic City of Bremen, which Treaty is word for word, as follows:

It being desirable that a general convention and instrument of mutual agreement should exist between the Hawaiian Kingdom and the Free Hanseatic City of Bremen, the following Articles have, for that purpose and to that intent, been mutually agreed upon and signed between the Government of the Hawaiian Islands and that of Bremen.

ARTICLE I. There shall be perpetual peace and amity between His Majesty the King of the Hawaiian Islands, His Heirs and Successors, and the Free Hanseatic City of Bremen, and those who may succeed in the Government thereof.

ARTICLE II. The citizens of Bremen residing within the dominions of the King of the Hawaiian Islands, shall enjoy the same protection in regard to their civil rights, as well as to their persons and properties, as native subjects; and the King of the Hawaiian Islands engages to grant to the citizens of Bremen, the same rights and privileges which now are, or may hereafter be granted to, or enjoyed by any other foreigners, subjects of the most favored nation.

In the event of any subject of either of the two contracting parties dying without will or testament, in the territories of the other contracting party, the consul-general, consul, or acting consul of the State to which the deceased may belong, shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, until an executor or administrator be named according to the laws of the country in which the death shall have taken place.

ARTICLE III. The protection of the King of the Hawaiian Islands shall be extended to all Bremen vessels, their officers and crews, within the harbors and roads of his dominions.

In time of war they shall receive all possible protection against the enemies of Bremen. In case of ship-wreck, the local authorities and officers of the King shall use their utmost exertions to succour them and secure them from plunder. The salvage dues shall be settled according to the general law of salvage, and in case of dispute, shall be regulated by arbitrators chosen by both parties.

ARTICLE IV. The desertion of seamen belonging to Bremen vessels shall be severely repressed by the local authorities, who shall employ all means at their disposal to arrest and confine deserters, and the lawful expenses shall be defrayed by the captain or owners. In such cases no unnecessary severity is to be used, and due notice is to be immediately given to the Bremen Consul, agreeably to the 6th Article of this Treaty.

ARTICLE V. Bremen citizens shall be allowed to reside or settle on any part of the dominions of the King of the Hawaiian Islands, upon obtaining a document certifying that they are worthy persons, from the Bremen Consul, whose duty it is not to give any such documents to others than *bona fide* citizens of Bremen. In the case of Bremen sailors wishing to remain on

the islands, permission shall be previously obtained of the *Government by the Bremen* Consul.

ARTICLE VI. It is agreed that the Bremen Consul shall be instructed to zealously attempt to settle amicably, and extra judicially, all difficulties arising with Bremen citizens; and that when any case is brought before the court of foreign causes, the presiding judge shall, with the least possible delay, communicate knowledge thereof to the Bremen Consul, also that when Bremen sailors or citizens are committed, in consequence of police or other offences, information shall be conveyed to him, forthwith, by the Prefect or other officer of the police.

ARTICLE VII. No productions of Bremen, or any other goods on board of, or imported in Bremen ships, that can be imported by other foreign ships, shall be prohibited, nor pay more than those duties levied on goods of the most favored nation. Any augmentation in the rate of duties levied on goods, shall not take effect nor be enforced, until eight calendar months after the first public notification of such change.

ARTICLE VIII. Bremen merchandise and property, or goods imported in Bremen vessels, liable to an entrance duty higher than 5 per cent. ad valorem, shall be allowed to be bonded, paying only the usual transit duty.

ARTICLE IX. All Bremen vessels shall have the right am1 privilege of disposing of their cargoes, or any part thereof, at all or any of the ports of the Hawaiian dominions, now open, or that may hereafter be opened to foreign commerce, and to take in any produce of the Hawaiian Islands which they may receive in payment of such cargoes, But they shall not be allowed to take any goods or merchandise or freight from one island or port to another, such coasting trade being restricted to bottoms sailing under the Hawaiian flag.

ARTICLE X. The subjects of His Majesty the King of the Hawaiian Islands, shall, in their commercial relations, or relations of any other nature, with the Free Hanseatic City of Bremen, and her dependencies, be treated on the footing of the most favored nation.

Done at Honolulu this seventh day of August, 1851.

[L. S.] R.C. WYLLIE.
Minister of Foreign Relations.

[L. S.] STEPHEN REYNOLDS,
Under special authority from the Senate of Bremen.

ADDITIONAL ARTICLE. This Treaty shall not be permanently binding till it receive the ratification of His Majesty the King of the Hawaiian Islands, and of the Senate of the Free Hanseatic City of Bremen, but in the meanwhile, for the sake of Bremen vessels, or citizens arriving, it is mutually agreed that it shall take effect, provisionally, from this date.

Done at Honolulu this seventh day of August, 1851.

[L.S.] STEPHEN REYNOLDS
Under special authority from the Senate of Bremen

[L.S.] R.C. WYLLIE
Minister of Foreign Relations

TREATY WITH BRITAIN

KAMEHAMEHA III., King of the Hawaiian Islands, to all to whom these presents shall come.
Greeting:

Whereas, a Treaty of Friendship, Commerce and Navigation between Us and Her most Gracious Majesty the Queen of Great Britain and Ireland, Defender of the Faith, &c., &c., &c., was concluded and signed at Honolulu, on the tenth day of July, in the year of our Lord one thousand eight hundred and fifty-one, by the Plenipotentiaries of Us and of the said Queen of Great Britain, duly and respectively authorized for that purpose, which treaty is word for word, as follows:

HER MAJESTY THE QUEEN of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the Hawaiian Islands, being desirous to maintain and improve the relations of good understanding which happily subsist between them, and to promote the commercial intercourse between their respective subjects, have deemed it expedient to conclude a Treaty of Friendship, Commerce and Navigation, and have for that purpose named as their respective Plenipotentiaries, that is to say:

Her Majesty the Queen of Great Britain and Ireland, William Miller, Esquire, Her Consul General for the Islands in the Pacific Ocean:

And His Majesty the King of the Hawaiian Islands, Robert Crichton Wyllie, Esquire, His Minister of Foreign Relations, Member of his Privy Council of State and of His House of Nobles:

Who, after having communicated to each other their full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. There shall be perpetual friendship between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Her Heirs and Successors, and the King of the Hawaiian Islands, His Heirs and Successors, and between their respective subjects.

ARTICLE II. There shall be between all the dominions of Her Britannic Majesty, and the Hawaiian Islands, a reciprocal freedom of commerce. The subjects of each of the two contracting parties respectively, shall have liberty freely and securely to come with their ships and cargoes, to all places, ports and rivers in the territories of the other, where trade with other nations is permitted. They may remain and reside in any part of the said territories respectively, and hire and occupy houses and warehouses; and may trade, by wholesale or retail, in all kinds of produce, manufactures, and merchandise of lawful commerce; enjoying the same exemptions and privileges as native subjects, and subject always to the same laws and established customs as native subjects.

In like manner, the ships of war of each contracting party respectively, shall have liberty to enter into all harbors, rivers, and places, within the territories of the other, to which the ships of war of other nations are or may be permitted to come, to anchor there, and to remain, and refit; subject always to the laws and regulations of the two countries respectively.

The stipulations of this article do not apply to the coasting trade, which each contracting party reserves to itself, respectively, and shall regulate according to its own laws.

ARTICLE III. The two contracting parties hereby agree that any favor, privilege, or immunity whatever, in matters of commerce or navigation, which either contracting party has actually

granted, or may hereafter grant, to the subjects or citizens of any other State shall be extended to the subjects or citizens of the other contracting party, gratuitously if the concession in favor of that other State shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

ARTICLE IV. No other or higher duties shall be imposed on the importation into the dominions of Her Britannic Majesty, of any article the growth, produce or manufacture of the Hawaiian Islands, and no other or higher duties shall be imposed on the importation into the Hawaiian Islands, of any article the growth, produce or manufacture of Her Britannic Majesty's dominions, than are or shall be payable on the like article, being the growth, produce or manufacture of any other foreign country.

Nor shall any other or higher duties or charges be imposed, in the territories of either of the contracting parties on the exportation of any article to the territories of the other, than such as are or may be payable, on the exportation of the like article, to any other foreign country. No prohibition shall be imposed upon the importation of any article, the growth, produce or manufacture of the territories of either of the two contracting parties, into the territories of the other, which shall not equally extend to the importation of the like articles, being the growth, produce or manufacture of any other country. Nor shall any prohibition be imposed upon the exportation of any article from the territories of either of the two contracting parties to the territories of the other, which shall not equally extend to the exportation of the like article to the territories of all other nations.

ARTICLE V. No other or higher duties or charges on account of tonnage, light, or harbor dues, pilotage, quarantine, salvage in case of damage or shipwreck, or any other local charges, shall be imposed, in any of the ports of the Hawaiian Islands on British vessels, than those payable in the same ports by Hawaiian vessels, nor in the ports of Her Britannic Majesty's territories, on Hawaiian vessels, than shall be payable in the same ports on British vessels.

ARTICLE VI. The same duties shall be paid on the importation of any article which is or may be legally importable into the Hawaiian Islands, whether such importation shall be in Hawaiian or in British vessels; and the same duties shall be paid on the importation of any article which is or may be legally importable into the dominions of Her Britannic Majesty, whether such importation shall be in British or Hawaiian vessels. The same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any article which is or may be legally exportable from the Hawaiian Islands, whether such exportation shall be in Hawaiian or in British vessels; and the same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any article which is or may be legally exportable from Her Britannic Majesty's dominions, whether such shall be in British or in Hawaiian vessels.

ARTICLE VII. British whalships shall have access to the ports of Hilo, Kealakekua and Hanalei, in the Sandwich Islands, for the purpose of refitment and refreshment, as well as to the ports of Honolulu and Lahaina, which two last mentioned ports only are ports of entry for all merchant vessels, and in all the above-named ports, they shall be permitted to trade or to barter their supplies or goods, excepting spirituous liquors, to the amount of two hundred dollars, *ad valorem*, for each vessel, without paying any charge for tonnage or for harbor dues of any description, or any duties or imposts whatever upon the goods or articles so traded or bartered. They shall also be permitted, with the like exemption from all charges for tonnage and harbor dues, further to trade or barter, with the same exception as to spirituous liquors, to the additional amount of one thousand dollars, *ad valorem*, for each vessel, paying on the additional goods and articles so traded and bartered, no other or higher duties, than are payable on like goods and articles, when imported in national vessels, and by native subjects. They shall also

be permitted to pass from port to port of the Sandwich Islands for the purpose of procuring refreshments, but they shall not discharge their seamen or land their passengers in the said islands, except at Honolulu and Lahaina, and in all the ports named in this article, British whalships shall enjoy, in all respects whatsoever, all the rights, privileges and immunities which are or may be enjoyed by national whalships of the most favored nation. The like privilege of frequenting the three ports of the Sandwich Islands, named in this article, which are not ports of entry for merchant vessels, is also guaranteed to all the public armed vessels of Great Britain. But nothing in this article shall be construed as authorizing any British vessel, having on board any disease, usually regarded as requiring quarantine, to enter, during the continuance of any such disease on board, any port of the Sandwich Islands, other than Honolulu or Lahaina.

ARTICLE VIII. All merchants, commanders of ships, and others, the subjects of Her Britannic Majesty, shall have full liberty, in the Hawaiian Islands, to manage their own affairs themselves, or to commit them to the management of whomsoever they please, as broker, factor, agent or interpreter; nor shall they be obliged to employ any other persons than those employed by Hawaiian subjects, nor to pay to such persons as they shall think fit to employ, any higher salary or remuneration than such as is paid, in like cases, by Hawaiian subjects. British subjects in the Hawaiian Islands shall be at liberty to buy from and to sell to whom they like, without being restrained or prejudiced by any monopoly, contract, or exclusive privilege of sale or purchase whatever; and absolute freedom shall be allowed in all cases to the buyer and seller, to bargain and fix the price of any goods, wares or merchandise, imported into, or exported from the Hawaiian Islands, as they shall see good; observing the laws and established customs of those Islands. The same privileges shall be enjoyed in the dominions of Her Britannic Majesty, by Hawaiian subjects, under the same conditions.

The subjects of either of the contracting parties, in the territories of the other, shall receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries, respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all causes, the advocates, attorneys or agents of whatever description, whom they may think proper; and they shall enjoy in this respect the same rights and privileges as native subjects.

ARTICLE IX. In whatever relates to the police of the ports, the lading and unlading of ships, the warehousing and safety of merchandise, goods and effects, the succession to personal estates by will or otherwise, and the disposal of personal property of every sort and denomination by sale, donation, exchange or testament, or in any other manner whatsoever, as also with regard to the administration of justice, the subjects of each contracting party shall enjoy, in the territories of the other, the same privileges, liberties and rights, as native subjects; and they shall not be charged, in any of these respects, with any other or higher imposts or duties, than those which are or may be paid by native subjects: subject always to the local laws and regulations of such territories.

In the event of any subject of either of the two contracting parties dying without will or testament, in the territories of the other contracting party, the consul-general, consul, or acting consul of the nation to which the deceased may belong, shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, until an executor or administrator be named according to the laws of the country in which the death shall have taken place.

ARTICLE X. The subjects of Her Britannic Majesty residing in the Hawaiian Islands, and Hawaiian subjects residing in the dominions of Her Britannic Majesty, shall be exempted from all compulsory military service whatsoever, whether by sea or land, and from all forced loans or military exactions or requisitions; and they shall not be compelled, under any pretext

whatsoever, to pay any ordinary charges, requisitions or taxes, other or higher than those that are, or may be, paid by native subjects.

ARTICLE XI. It is agreed and covenanted that neither of the two contracting parties shall knowingly receive into, or retain in, its service, any subject of the other party who have deserted from the naval or military service of that other party; but that, on the contrary, each of the contracting parties shall respectively discharge from its service any such deserters, upon being required by the other party so to do.

And it is further agreed, that if any of the crew shall desert from a vessel of war or merchant vessel of either contracting party, while such vessel is within any port in the territory of the other party, the authorities of such port and territory shall be bound to give every assistance in their power for the apprehension of such deserters, on application to that effect being made by the Consul of the party concerned, or by the deputy or representative of the Consul; and no public body shall protect or harbor such deserters.

It is further agreed and declared, that any other favor or facility with respect to the recovery of deserters, which either of the contracting parties has granted or may hereafter grant, to any other State, shall be considered as granted also to the other contracting party, in the same manner as if such favor or facility had been expressly stipulated by the present treaty.

ARTICLE XII. It shall be free for each of the two contracting parties to appoint consuls for the protection of trade, to reside in the territories of the other party; but before any consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and either of the contracting parties may except from the residence of consuls such particular places as either of them may judge fit to be excepted. The diplomatic agents and consuls of the Hawaiian Islands, in the dominions of Her Britannic Majesty, shall enjoy whatever privileges, exemptions and immunities are, or shall be granted there to agents of the same rank belonging to the most favored nation; and, in like manner, the diplomatic agents and consuls of Her Britannic Majesty in the Hawaiian Islands shall enjoy whatever privileges, exemptions, and immunities are or may be granted there to the diplomatic agents and consuls of the same rank belonging to the most favored nation.

ARTICLE XIII. For the better security of commerce between the subjects of Her Britannic Majesty and of the King of the Hawaiian Islands, it is agreed that if, at any time, any rupture, or any interruption of friendly intercourse should unfortunately take place between the two contracting parties, the subjects of either of the two contracting parties shall be allowed a year to wind up their accounts, and dispose of their property; and a safe conduct shall be given them to embark at the port which they shall themselves select. All subjects of either of the two contracting parties who may be established in the territories of the other, in the exercise of any trade or special employment, shall in such case have the privilege of remaining and continuing such trade and employment therein, without any manner of interruption in full enjoyment of their liberty and property as long as they behave peaceably, and commit no offense against the laws; and their goods and effects, of whatever description they may be, whether in their own custody, or entrusted to individuals or to the State, shall not be liable to seizure or sequestration, or to any other charges or demands than those which may be made upon the like effects or property belonging to native subjects. In the same case, debts between individuals, public funds, and the shares of companies shall never be confiscated, sequestered or detained.

ARTICLE XIV. The subjects of Her Britannic Majesty, residing in the Hawaiian Islands, shall not be disturbed, persecuted or annoyed on account of their religion, but they shall have perfect liberty of conscience therein, and shall be allowed to celebrate divine service, either within their own private houses, or in their own particular churches or chapels, which they

shall be at liberty to build and maintain in convenient places, approved of by the Government of the said Islands. Liberty shall also be granted to them to bury in burial places which, in the same manner, they may freely establish and maintain, such subjects of Her Britannic Majesty, who may die in the said Islands. In the like manner, Hawaiian subjects shall enjoy, within the dominions of Her Britannic Majesty, perfect and unrestrained liberty of conscience, and shall be allowed to exercise their religion publicly or privately, within their own dwelling houses, or in the chapels and places of worship appointed for that purpose agreeably to the system of toleration established in the dominions of Her said Majesty.

ARTICLE XV. In case there should at any time be established British mail packets, touching at a port of the Sandwich Islands, a British packet agent shall be permitted to reside at such port, and to collect, on account of the British Post-office, the British sea-rate of postage which may be hereafter fixed for the conveyance of letters by British packets from the Sandwich Islands to any other place to which those packets may proceed.

Such British mail packets shall have free access to the ports of the Sandwich Islands, and shall be allowed to remain to refit, to refresh, to land passengers and their baggage, and to transact any business connected with the public mail service of Great Britain. They shall not be subject in such ports to any duties of tonnage, harbor, light-houses, quarantine, or other similar duties, of whatever nature or under whatever denomination.

ARTICLE XVI. If any ship of war or merchant vessel, of either of the contracting parties, should be wrecked on the coasts of the other, such ship or vessel, or any parts thereof, and all furniture and appurtenances belonging thereunto, and all goods and merchandise which shall be saved therefrom, or the produce thereof if sold, shall be faithfully restored to the proprietors, upon being claimed by them, or by their duly authorized agents; and if there are no such proprietors or agents on the spot, then said goods and merchandise, or the proceeds thereof, as well as all the papers found on board such wrecked ship or vessel, shall be delivered to the British or Hawaiian consul, in whose district the wreck may have taken place; and such consul, proprietors or agents shall pay only the expenses incurred in the preservation of the property, together with the rate of salvage which would have been payable in the like case of a wreck of a national vessel. The goods and merchandise saved from the wreck shall not be subject to duties unless cleared for consumption.

ARTICLE XVII. In order that the two contracting parties may have the opportunity of hereafter treating and agreeing upon such other arrangements as may tend still further to the improvement of their mutual intercourse, and to the advancement of the interest of their respective subjects, it is agreed that at any time after the expiration of seven years from the date of the exchange of the ratifications of the present treaty, either of the contracting parties shall have the right of giving to the other party notice of its intention to terminate articles 4, 5 and 6 of the present treaty; and that at the expiration of twelve months after such notice shall have been received by either party from the other, the said articles, and all the stipulations contained therein, shall cease to be binding on the two contracting parties.

ARTICLE XVIII. The present treaty shall be ratified, and the ratifications shall be exchanged at Honolulu in ten months or sooner, if possible.

In witness whereof, the respective Plenipotentiaries have signed the same, and affixed thereto their respective Seals.

Done at Honolulu, this tenth day of July, in the year of our Lord one thousand eight hundred and fifty-one.

[L.S.] ROBERT CRICHTON WYLLIE

[L.S.] WILLIAM MILLER

TREATY WITH DENMARK

It being desirable that a general convention, and instrument of mutual agreement, should exist between Denmark and the Hawaiian Islands, the following articles have for that purpose, and to that intent, been mutually agreed upon and signed between the Governments of Denmark and the Hawaiian Islands:

ARTICLE I. There shall be perpetual peace and amity between His Majesty the King of Denmark, and His Majesty the King of the Hawaiian Islands, their heirs and successors.

ARTICLE II. The subjects of His Majesty the King of Denmark, residing within the dominions of the King of the Hawaiian Islands, shall enjoy the same protection in regard to their civil rights as well as their persons and properties, as native subjects; and the King of the Hawaiian Islands engages to grant to Danish subjects the same rights and privileges which now are, or may hereafter be, granted to or enjoyed by any other foreigners, subjects of the most favored nation.

ARTICLE III. The protection of the King of the Hawaiian Islands shall be extended to all Danish vessels, their officers and crews within the harbors and roads of his dominions. In time of war, they shall receive all possible protection against the enemies of the King of Denmark. In case of shipwreck, the local authorities and officers of the King shall use their utmost exertions to succour them and secure them from plunder.

The salvage dues shall be settled according to the general law of salvage, and, in case of dispute, shall be regulated by arbitrators chosen by both parties.

ARTICLE IV. The desertion of seamen belonging to Danish vessels shall be severely repressed by the local authorities, who shall employ all means at their disposal to arrest and confine deserters, and the lawful expenses shall be defrayed by the captain or owners. In such cases, no unnecessary severity is to be used, and due notice is to be immediately given to the Danish Consul, agreeably to the 6th article of this treaty.

ARTICLE V. Danish subjects shall be allowed to reside or settle on any part of the dominions of the King of the Hawaiian Islands, upon obtaining a document certifying that they are worthy persons, from the Danish Consul, whose duty it is not to give any such document to others than *bona fide* subjects of His Majesty the King of Denmark.

In the case of Danish sailors wishing to remain on the islands, permission shall be previously obtained of the Government, by the Danish Consul.

ARTICLE VI. It is agreed that the Danish Consul shall be instructed to zealously attempt to settle amicably and extra-judicially, all difficulties arising with Danish subjects; and that when any case is brought before the court of foreign causes, the presiding judge shall, with the least possible delay, communicate knowledge thereof to the Danish Consul; also that when Danish sailors or subjects are committed, in consequence of police or other offences, information shall be conveyed to him, forthwith, by the Prefect or other officer of the police.

ARTICLE VII. No Danish productions, or any other goods on board of, or imported in Danish ships, that can be imported by other foreign ships. shall be prohibited, nor pay more than those duties levied on goods of the most favored nation, Any alteration in the duties levied on goods, shall not take effect nor be enforced until twelve calendar months after the first public notification of such change.

ARTICLE VIII. Danish merchandise and property, or goods imported in Danish vessels, liable to an entrance duty higher than 5 per cent. *ad valorem*, shall be allowed to be bonded, paying only the usual transit duty.

Until the erection of a building by the Hawaiian Government for such warehousing and bonding, such Danish merchandise or property, or goods imported in Danish vessels, shall be allowed to be warehoused and bonded in private warehouses, under the seals and superintendence of the Hawaiian custom-house officers, and the responsibility of the owner of the goods, or the consignee.

ARTICLE IX. All Danish vessels shall have the right and privilege of disposing of their cargoes, or any part thereof, at all or any of the ports of the Hawaiian dominions, now open, or that may hereafter be opened to foreign commerce, and to take in any produce of the Hawaiian Islands, which they may receive in payment of such cargoes. But they shall not be allowed to take any goods or merchandise or freight from one island or port to another, such coasting trade being restricted to bottoms sailing under the Hawaiian flag.

ARTICLE X. The subjects of His Majesty the King of the Hawaiian Islands, shall, in their commercial relations, or relations of any other nature with Denmark and her possessions, be treated on the footing of the most favored nation.

Done at Honolulu this 19th day of October, 1846.

[L.S.] R.C. WYLLIE
His Hawaiian Majesty's Minister of Foreign Relations and
Member of His Council of State

[L.S.] STEEN BILLE
His D. M.'s Chamberlain, and Post Captain of the R.N.;
Knight of Danebroke, and of the French Order "Pour le
Merite Militaire," commanding H.D.M's Frigate Galathea

TREATY WITH FRANCE

Treaty of Friendship, Commerce and Navigation, between His Majesty Napoleon III., Emperor of the French, and His Majesty Kamehameha IV., King of the Sandwich Islands. In the name of the Most Holy Trinity,

Relations of commerce having been established several years ago between France and the Sandwich Islands, it has been considered useful to regulate these relations, to favor their development and to perpetuate their duration, by a treaty of Friendship, Commerce and Navigation, founded on the common interests of the two States, and such as to secure the enjoyment, by their respective subjects, of equal and reciprocal advantages.

In conformity with this principle, and with this object, they have nominated for their Plenipotentiaries, to wit:

His Majesty the Emperor of the French, Monsieur Louis Emile Perrin, Knight of the Imperial Order of the Legion of Honor, His Consul and Commissioner near the Hawaiian Government:

And His Majesty the King of the Sandwich Islands, His Royal Highness the Prince Lot Kamehameha, General Commanding-in-Chief, His Minister of the Interior, Acting Minister of Finance, Member of His Privy Council and of the House of Nobles; and Robert Crichton Wyllie, Esq., His Minister of Foreign Relations, His Secretary of State for War and the Navy, Member of His Privy Council and of the House of Nobles:

Who, having communicated their respective powers, found in due form and order, have agreed to the following articles:

ARTICLE I. There shall be constant peace and perpetual friendship between His Majesty the Emperor of the French, His heirs and successors, on the one part, and His Majesty the King of the Sandwich Islands, His heirs and successors, on the other part, and between the subjects of the two States, without excepting persons or places.

ARTICLE II. There shall be reciprocal liberty of commerce between all the territories of the French Empire, in Europe, and those of the Hawaiian Islands. Their respective subjects shall have entire liberty to enter with their ships and cargoes, in all the places, ports and rivers of the two States, which are or may be opened to foreign commerce.

They shall have liberty to trade from place to place, under the provisions of the laws, to discharge there, in all or in part, the cargoes by them imported from abroad, and, thereafter, to lay in their return cargoes; but they shall not have liberty there to discharge the merchandise which they shall have received from another port of the same State, or, in other words, to carry on the coasting trade, which remains exclusively reserved to the natives.

They shall have liberty, in their respective territories, to travel or reside, trade by wholesale or retail, as native subjects, to establish themselves wherever they may think it suitable for their interests, to hire and occupy the houses, stores and shops which may be necessary to them, to effect the transmissions of goods and money and to receive consignments, to be admissible as bondsmen, at the custom-houses, after they shall have been established more than one year in their places of residence, within either of the two States, and after that the real estate which they may there possess shall afford a sufficient guaranty.

They shall be at entire liberty to conduct their business themselves, and especially to present in the custom-houses their own declarations, or to be represented when they find it convenient by a factor, agent, consignee or interpreter, without having, as foreigners, to pay any extra charge or pecuniary allowance. They shall have the right to buy and to sell of and to whom they please, without any monopoly, contract or exclusive privilege of sale or purchase, prejudicing or restricting in any manner whatever, their liberty in this respect. They shall be equally free in all their purchases as well as in all their sales, to fix the price of their goods, merchandise and objects of every kind, both imported and destined for exportation, so long as they comply with the laws and regulations of the country.

Finally, they shall not be subjected in any of the aforesaid cases, to other charges, taxes or imposts at the custom-houses than those to which native subjects are subjected.

ARTICLE III. It is agreed that documents presented by French subjects in their own language shall be admitted in every case in which documents in the English language may be admitted, and the business to which the documents drawn up in said language may relate shall be dispatched with the same good faith and care; but whenever a translation is presented about the accuracy of which a difference may arise, the same shall be referred to the French Consul for his revision and certificate of approval.

ARTICLE IV. Their respective subjects shall enjoy, in both States, a constant and complete protection for their persons and properties. They shall, consequently, have free and easy access to the tribunals of justice, in prosecution and defense of their rights, in every instance, and in all the degrees of jurisdiction established by the laws. They shall be at liberty to employ, in all circumstances, the advocates, solicitors or agents of every class that they may think proper; in fine, they shall enjoy, in all these respects, the same rights and privileges which are or may be granted to native subjects.

They shall, besides, be exempt from all personal service, whether in the army or the navy, in national guards or militia, as also from every war tax, forced loan, requisition or military service, whatever it may be, and in every other case they shall not be subjected, whether as regards their personal property or real estate, to other charges or imposts than those to which the natives themselves, or the subjects or citizens of the most favored nation, without exception, shall be subjected.

Hawaiian subjects shall enjoy in all the possessions and colonies of France the same rights, privileges and the same liberty of commerce and navigation which are actually enjoyed or may be enjoyed by the most favored nation; and, reciprocally, the French inhabitants of the possessions and colonies of France shall enjoy, in all their extension, the same rights and privileges, and the same liberty of commerce and navigation which, by this treaty, are accorded in the Hawaiian Islands to the French in regard to their commerce and navigation.

ARTICLE V. French subjects shall not be disturbed or troubled in any way in the Hawaiian Islands on account of religion; they shall enjoy, on the contrary, in the public or private exercise of their worship, entire liberty of conscience and all the guarantees, rights and protection now ensured or that may be hereafter ensured to native subjects and the subjects or citizens of the most favored nation.

Hawaiian subjects shall enjoy, in France, in regard to religion, the same rights, guarantees, liberty and protection.

ARTICLE VI. The subjects of the two countries shall be free to acquire and possess real estate, and to dispose, as may suit them, by sale, donation, exchange, will, or in any other way

whatever, of all the property which they may possess in the respective territories; also, the subjects of either of the two States who may become heirs of property situated in the other, may succeed without hindrance to those said properties which may devolve upon them even ab intestato, and dispose of them according to their pleasure; and the said heirs or legatees shall not be subjected to any charges of transfer or deduction, and shall not be bound to pay any expenses of succession or others higher than those which shall be borne, in like cases, by the natives themselves.

ARTICLE VII. If (which God forbid!) the peace between the two contracting parties come to be broken, there shall be granted, on both sides, to the subjects of each of the two contracting parties, a term of one year to settle their affairs and to dispose of their property, and, moreover, a safe conduct shall be delivered to them to embark in such ports as they may voluntarily indicate.

All other Frenchmen or Hawaiians having a fixed or permanent establishment in the respective States, for the exercise of any profession or occupation, whatever it may be, shall be allowed to preserve their establishments and to continue their profession without being disturbed in any manner whatever, and they shall continue in the full and entire possession of their liberty and their property so long as they shall commit no offense against the laws of the country. Finally, their property or goods, of whatever nature they may be, shall not be subjected to any seizure or sequestration, nor to other charges and imposts than those exacted from natives.

Likewise the moneys which may be due to them by private individuals, or which they may possess, in the public funds, in banks, in manufacturing and commercial companies, shall never be seized, sequestered or confiscated.

ARTICLE VIII. French commerce in the Hawaiian Islands, and Hawaiian commerce in France, shall be treated, in regard to custom-house duties, both for importation and exportation, as that of the most favored foreign nation.

In any case the import duty imposed in France upon the products of the soil or of the industry of the Hawaiian Islands, and in those Islands upon the products of the soil or of the industry of France, shall not be other or higher than those to which the same products of the most favored nation are or may be subjected. The same shall be observed in regard to duties on exportation.

No prohibition or restriction of importation or exportation shall take place, in the reciprocal trade of the two countries, which shall not be equally extended to all other nations, and the formalities which may be required to authenticate the origin or the process of the goods respectively imported into either of the two States, shall be equally common to all other nations.

ARTICLE IX. All the products of the soil and of the industry of either of the two countries, the importation of which is not expressly prohibited, shall pay in the ports of the other the same duties of importation, whether they be laden on board of French or Hawaiian vessels. Also the products exported shall pay the same duties and enjoy the same franchises, allowances and drawbacks of duties which are or may be reserved to the exportation made in national vessels, excepting, however, from the foregoing all special privileges and encouragements granted or to be granted in either of the two countries to their national fisheries.

ARTICLE X. It is agreed:

1. That the importation and the sale of wines and brandies of French origin shall not be prohibited in the Hawaiian Islands.

2. That the rate of duties imposed in Hawaiian ports on the importation of wines of French origin, namely, those known as wines of “cargaison” in casks and in cases, shall not exceed, during the existence of the present treaty, the rate of 5 per cent, on the value, the invoice cost to serve as the basis of appraisement, agreeably to the Hawaiian law of April 27th, 1846.

3. That the rate of duties on French wines of higher quality, but under 18 per cent, of alcoholic strength, shall not, during the same period, exceed that of 15 per cent, ad valorem.

4. That the rate of duties imposed upon brandies of French origin shall not exceed, during the same period, three dollars, as a maximum, on the gallon, such as defined by the Hawaiian law of April 27th, 1846, 3d part, 4th chapter, article 2d, page 187.

5. There shall not be added, in any case, to the duties on wines and brandies herein specified any extra charge of customs or navigation, or any other charge, whatever its title may be.

It is understood that nothing in this article shall prohibit the imposition of tonnage dues by the Hawaiian Government on the total amount of foreign and national navigation.

ARTICLE XI. French vessels arriving in the ports of the Hawaiian Islands or departing from them, and Hawaiian vessels on their entrance to or departure from the ports of France shall not be subjected to other or higher duties of tonnage, light-houses, anchorage, port, government wharfage, pilotage, quarantine or others, under any denomination whatever it may be, affecting the hull of the vessel, than those to which the vessels of the most favored nation are or may be subjected.

ARTICLE XII. French vessels in the Hawaiian Islands, and Hawaiian vessels in France, may discharge a part of their cargo in the port which they may first enter, and repair, afterwards, with the rest of the same cargo to other ports of the same State, whether it be to complete the discharge of their cargo imported, or to complete the lading of their return cargo, they not paying in each port other or higher duties than those which national vessels pay in similar circumstances.

ARTICLE XIII. Whenever in consequence of a forced putting into port or proved average, the vessels of either of the two contracting powers shall enter the ports of the other or touch upon its coast, they shall not be subjected to any duties of navigation, under any denomination under which these duties may be respectively established, except the duties of pilotage and others representing the payment of the services rendered by private exertions, provided that the vessels shall not engage in any operation of trade, whether in loading or in discharging goods. They shall be allowed to deposit on shore the goods composing their cargoes to prevent their destruction, and no other charges shall be exacted of them than those which relate to the hiring of stores and public workshops which may be necessary for the deposit of the goods and the repairs of the damages of the vessels.

ARTICLE XIV. Vessels constructed in France, or nationalized according to the laws of that country, shall be considered to be French vessels, provided always that the captain and three-fourths of the crew be French. The owner or the owners of the said vessels shall have to prove the same nationality only in the same proportions as required by the French laws.

In like manner all the vessels constructed within the territory of the Hawaiian Islands, or nationalized agreeably to Hawaiian laws, shall be considered Hawaiian vessels, provided always that the captain and three-fourths of the crew be Hawaiian. The owner or the owners of the said vessels shall have to prove the same nationality only in the same proportions as those required by the Hawaiian laws.

It is besides agreed that every French or Hawaiian vessel, in order to enjoy, under the above conditions, the privilege of its nationality, shall be furnished with a passport, license to sail, or register, the form of which shall be reciprocally communicated, and which being certified by the authorities competent to deliver the same shall show:

1. The name, the profession and the residence in France, or in the Hawaiian Islands, of the owner, expressing therein that he is the only owner, or if there are several owners, stating their number and what share each of them possesses.
2. The name, the dimensions, the burden, and in short all the peculiarities of the vessel which may distinguish her as well as establish her nationality. In case of any doubt in regard to that nationality, that of the owner, of the captain and of the crew, the consuls or consular agents of either of the two countries to which the vessel may be destined shall have the right to require authentic proofs before vising the papers on board, but this to be without any expense to the vessel.

If experience should hereafter demonstrate that the interests of the navigation of either of the two contracting parties suffer by the tenor of the present article, they reserve to themselves to make therein in common accord the modifications which may appear to them convenient.

ARTICLE XV. The vessels of war, the steam vessels belonging to the State, the packet boats engaged in the postal service, and the French whaling vessels, shall have free access to the Hawaiian ports of Hanalei, Honolulu, Lahaina, Hilo, Kawaihae, Kealahou and Koloa; they shall have liberty to stay there to make repairs and to refresh their crews; they may also proceed from one port to another of said ports of the Hawaiian Islands with the view of there procuring fresh provisions.

In all the ports specified in the present article, as well as in all those which may be hereafter opened to foreign vessels, the vessels of war, steam vessels belonging to the State, the packet boats engaged in the postal service and the French whaleships shall be subjected to the same rules as are or maybe imposed on, and shall enjoy in all respects the same rights, privileges and immunities which are or may be granted to the same Hawaiian vessels and whaleships, or to those of the most favored nation.

ARTICLE XVI. Consuls and vice-consuls of each of the two countries may be established in the other for the protection of commerce, but those agents shall not enter upon their functions without having obtained the exequatur of the territorial government. The latter shall besides preserve their right to determine the localities in which it may suit it to admit consuls, it being well understood that in this respect the two governments shall not offer respectively any restriction which, in their country, may not be common to all nations.

ARTICLE XVII. The respective consuls and vice-consuls, as well as "eaves consuls," chancellors or secretaries attached to their mission, shall enjoy, in the two countries, the privileges generally allowed to their office, such as the exemption from the billet of soldiers and that from all direct contributions as well personal as on movables, or sumptuary, unless always they be subjects of the country, or that they become either proprietors or possessors of real estate, or, finally, that they engage in trade or commerce, whereby they will be subjected to the same taxes, charges or imposts, as other private individuals. These agents shall enjoy, besides, all the other privileges, exemptions and immunities which may be granted in the places of their residence to the agents of the same rank of the most favored nation.

Neither consuls, vice-consuls, nor their "eaves," chancellors or secretaries, provided they are not engaged in business of any sort, but exclusively confine themselves to the fulfillment to

their public duties, shall be subjected to appear as witnesses before the tribunals. When the justice of the country shall have need to take any judicial declaration, on their part, it ought to require it of them in writing, or to proceed to their domicile to receive it *viva voce*.

In case of the death, indisposition or absence of the consuls or vice-consuls, the chancellors or secretaries shall enjoy the perfect right of being admitted to manage, *ad interim*, the affairs of the consular establishment, without hindrance or obstacle on the part of the local authorities, which, on the contrary, shall give them, in that case, every aid and assistance; and they shall enjoy, during the period of their provisional management, all the rights, privileges and immunities stipulated, in the present convention, in favor of consuls and vice-consuls.

To secure the execution of the paragraph which, precedes, it is agreed that the chiefs of the consular offices, on their arrival in the country of their residence, shall send to the Government a list of the names of the persons attached to their mission, and if any change should therein afterwards be made, they shall in like manner give notice of the same.

ARTICLE XVIII. The archives, and in general, all the papers of the offices of the chancellors of the respective consulates, shall be inviolable, and, under no pretext nor in any case whatever shall they be seized or examined by the local, authorities.

ARTICLE XIX. The respective consuls shall be free to establish consular agents or vice-consuls in the different towns, ports and places within their consular jurisdiction, where the good of the service confided to them shall require it; it being well understood that they shall first obtain the approval and the *exequatur* of the territorial government.

These agents may be indiscriminately chosen from among the subjects of the two countries, as well as from among foreigners, and shall be furnished with a commission delivered by the consul who shall have named them, and under whose orders they may be placed. They shall enjoy, besides, the same privileges and immunities stipulated for by the 17th article of the present convention, subject to the exceptions mentioned in the first paragraph of the said article.

ARTICLE XX. The respective consuls, on the death of their fellow-countrymen, deceased without having made wills, or designated any testamentary executors, shall have power:

1. To affix seals, whether officially or at the request of the parties interested, upon the movable effects and the papers of the deceased, giving, beforehand, notice of that operation to the competent local authorities, who may thereat attend, and who, also, if they think proper, may cross, with their seals, those which shall have been affixed by the consuls, and then those double seals shall not be removed except in concert.
2. Also to draw up, in the presence of the competent authorities of the country, if they think it to be their duty to present themselves on the spot, the inventory of the estate.
3. To cause proceedings to take place, according to the usage of the country, for the sale of the movable goods, belonging to the estate; in fine, to administer or liquidate personally, or to name, under their responsibility, an agent to administer and liquidate the said estate, without any interference by the local authorities in these new operations.

But the said consuls shall be bound to cause to be announced the death of the deceased in one of the gazettes which may be published within the compass of their jurisdiction; and they shall not have power to make a delivery of the estate, or of its proceeds, to the lawful heirs, or to their mandatories, except after having paid all the debts which the deceased may have contracted in the country, or until one year shall have transpired from the date of the death,

without any reclamation having been presented against the estate.

ARTICLE XXI. In everything that concerns the police of the port, the lading and discharging of vessels, the safety of merchandise, property and goods, the subjects of the two countries shall be respectively subject to the laws and statutes of the territory. Nevertheless, the respective consuls shall be exclusively charged with the internal order on board of the merchant vessels of their nation, and shall alone take cognizance of all the crimes, misdemeanors and other matters of difference, in relation to said internal order, which may supervene between the master, the officers, and the crew, provided the contending parties be exclusively French or Hawaiian subjects, and the local authorities shall not be allowed therein to interfere, unless by the approval or consent of the consuls, or in cases where the public peace and tranquility are disturbed and endangered.

ARTICLE XXII. The respective consuls shall have power to cause to be arrested and returned, whether on board or to their own country, sailors and all other persons regularly forming part of the crews of the vessels of their respective nations, bearing any other title than that of passengers, who shall have deserted from the said vessels. For this purpose they shall apply, in writing, to the competent local authorities, and they shall prove by the exhibition of the register of the vessel, or of the roll of the crew, or, if the vessel shall have departed, by copy of the said document, duly certified by them, that the men, whom they reclaim made part of the said crew. When this application is so justified, the return is not to be refused. Besides, every aid and assistance shall be given to them for the search, seizure and arrest of the said deserters, who shall even be detained and guarded in the prisons of the country, on the request and at the expense of the consuls, and till those agents shall find an opportunity to send them away. If, however, such an opportunity should not present itself within the period of three months, counting from the day of arrest, the deserters shall be placed at liberty, and shall not be again arrested for the same cause.

It is, moreover, formally agreed that every other concession or facility tending to repress desertion which one of the two contracting parties may have granted, or may hereafter grant, to another State, shall be considered as equally acquired, in full right, by the other contracting party, in the same manner as if that concession or facility had been expressly stipulated in the present treaty.

ARTICLE XXIII. In all cases where there shall be no objection by any of the owners, freighters, insurers, or their respective agents, either in the port of departure or of arrival, the injuries which the vessels of the two countries may have experienced at sea while on their voyage to the respective ports, the repairs of such injuries shall be regulated by the consuls of their respective nations.

ARTICLE XXIV. All the operations relative to the salvage of French vessels shipwrecked or stranded upon the coast of the Hawaiian Islands shall be directed by the consuls of France, and, reciprocally, the Hawaiian consuls shall direct the operations relative to the salvage of the vessels of their nation shipwrecked or stranded on the coasts of France.

The local authorities shall only interfere in the two countries to preserve order, to secure the interests of the salvors, if they do not belong to the shipwrecked crew, and to carry into effect the regulations to be observed for the entry and the exportation of the merchandise saved. In the absence of, and until the arrival of the consul or vice-consul, the local authorities shall, moreover, take all necessary measures for the protection of individuals, and the preservation of goods shipwrecked.

The goods saved shall not be subjected to any customhouse duties, unless they be entered for

internal consumption.

The charges for salvage and other necessary expenses in the two countries shall not be other or higher than those which may be paid in like cases by national vessels.

ARTICLE XXV. It is formally agreed between the two contracting parties, that besides the preceding stipulations the diplomatic and consular agents, the subjects of every class, the ships, the cargoes and the merchandise of either of the two States, shall enjoy in full right in the other, the franchises, privileges and immunities of every kind, granted to or which may be hereafter granted in favor of the most favored nation, and this gratuitously if the concession be gratuitous, or with the same compensation if the concession be conditional.

It is specially stipulated that the postal arrangements, concluded in Honolulu on the 24th of November, 1853, and which regulate the exchange of correspondence between the Society Islands and the Hawaiian archipelago, and reciprocally, shall be maintained, and that the two contracting parties reserve to themselves only the right of modifying the details thereof, in the proportion and measure that hereafter necessity may point out.

ARTICLE XXVI. The present treaty shall be in force for ten years, counting from the day of exchange of the ratifications, and if, in one year before the expiration of this term, neither the one nor the other of the two contracting parties announce by an official declaration its intention that it shall cease to have effect, the said treaty will remain still obligatory during one year, and so onwards until the expiration of the twelve months which shall follow the official declaration in question, at whatever time it may be made.

It is well understood that in case this declaration come to be made by one or other of the contracting parties, the provisions of the treaty, relative to trade and navigation, and contained in the articles 8, 9, 10, 11, 12, 13, 14 and 24, shall be alone considered as having ceased and expired, but that, in regard to the other articles, the said treaty shall remain, nevertheless, perpetually obligatory, and cannot be modified except by a mutual agreement between the two contracting parties.

ARTICLE XXVII. The present treaty shall be ratified, and the ratifications exchanged, at Honolulu, within the term of ten months or sooner, if possible, and it shall not go into effect until after twelve months from the date of said exchange. In faith of which the before-named Plenipotentiaries have signed the same, and have affixed their respective seals.

Done at Honolulu, this twenty-ninth day of October, in the year of Our Lord, one thousand eight hundred and fifty-seven

[signed] EM. PERRIN
 [seal]

[signed] L. KAMEHAMEHA
 [seal]

[signed] R.C. WYLLIE
 [seal]

TREATY WITH GERMANY

His Majesty the German Emperor, King of Prussia, in the name of the German Empire on the one part, and His Majesty the King of the Hawaiian Islands on the other part, being desirous to maintain and improve the relations of good understanding which happily subsist between Germany and the Hawaiian Islands, to promote the development of commerce and navigation between the two countries and to define the rights, privileges, immunities and duties of the respective Consular officers, have deemed it expedient to conclude a Treaty of Friendship, Commerce and Navigation and a Consular Convention, and have for that purpose appointed their respective Plenipotentiaries, namely:

His Majesty the German Emperor, King of Prussia: His Superior Privy Councillor of Government Dr. Johannes Rosing and His Privy Councillor of Legation, Hermann Adolph Heinrich Albrecht von Kusserow and His Majesty the King of the Hawaiian Islands: His Envoy Extraordinary and Minister Plenipotentiary near His Majesty the German Emperor Henry A. P. Carter; who after having communicated to each other their respective full powers, found to be in good and due form, have agreed to and signed the following articles:

ARTICLE I. There shall be perpetual friendship and peace between the German Empire and the Kingdom of the Hawaiian Islands and between the subjects and citizens of the two countries.

ARTICLE II. The subjects and citizens of the two High Contracting Parties may remain and reside in any part of said territories respectively and shall receive and enjoy full and perfect protection for their persons and property. They shall have free and easy access to the courts of justice, provided by law, in pursuit and defence of their rights, and they shall be at liberty to choose and employ lawyers, advocates or agents to pursue or defend their rights before such courts of justice; and they shall enjoy in this respect all the rights and privileges as native subjects or citizens.

In whatever relates to rights of residence, to the possession of real estate, goods and effects of any kind, to the succession to real or personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever, the subjects and citizens of each Contracting Party shall enjoy the territories of the other the same privileges, liberties and rights and shall be subject only to the same imposts or charges in these respects as native subjects and citizens.

In regard to marriages concluded by subjects and citizens of the German Empire in the Kingdom of the Hawaiian Islands and by Hawaiian subjects and citizens in the German Empire, the form of marriage shall be regulated by the laws of the country where the marriage is concluded.

The subjects or citizens of each of the High Contracting Parties shall enjoy in the dominions of the other entire liberty of conscience and of private or public exercise of their worship and all the guarantees, rights and protection now ensured, or that may be hereafter ensured to native subjects and citizens, or to the subjects and citizens of any other nation. This liberty and protection shall extend also to the right of burying their respective countrymen according to their religious customs in suitable and convenient places, which they may establish and maintain for that purpose, subject always to the local laws and regulations.

The subjects and citizens of either of the Contracting Parties residing in the territories of the other shall be exempted from all compulsory military service whatsoever, whether by sea or land, and from all forced loans or military exactions or requisitions, and they shall not be com-

pelled under any pretext whatsoever to pay any ordinary charges, requisitions or taxes, other or higher than those that are or may be paid by native subjects or citizens.

They shall not be subject to any embargo, nor be detained with their vessels, crews, cargoes or commercial effects, to be used for any military expedition whatever, or for any public or private service whatever, unless the Government or local authority shall have previously agreed with the parties interested on the indemnity to be granted for such service and for such compensation, as may fairly be required for the injury, which (not being purely fortuitous) may grow out of the service, which they have voluntarily undertaken.

ARTICLE III. There shall be between the dominions of the High Contracting Parties a reciprocal freedom of Commerce and Navigation.

The subjects and citizens of the two Contracting Parties shall have liberty to travel in any part of said territories respectively and hire and occupy houses and warehouses; and they may trade, by wholesale or retail, in all kinds of produce, manufactures and merchandise of lawful commerce without being restrained or prejudiced by any monopoly, contract or exclusive privilege of sale or purchase whatever, subject only to the laws, police and customs regulations of the country, like native subjects or citizens.

They shall have liberty, freely and securely, to come and go with their ships and cargoes to all places, ports and rivers in the territories of the other, which are or may be opened to foreign commerce, and they shall have liberty, there to discharge under the same conditions as natives or the subjects of any other nation, wholly or in part, the cargoes imported by them from abroad, and to lay in and complete, wholly or in part, their return cargoes. This liberty, however, shall not apply to the coasting trade, which the High Contracting Parties reserve to be regulated by the laws of their respective countries; but it is understood, that the subjects and citizens of the High Contracting Parties shall enjoy also in this respect the rights, which are or may be granted, under such laws, to the subjects and citizens of any other country.

No other or higher duties or charges on account of tonnage, light or harbor dues, pilotage, quarantine, salvage in case of damage or ship wreck, or any other local charges, shall be imposed in any of the ports of the two countries respectively than shall be payable by vessels of the country, to whose dominions such ports belong; and for competing such dues upon tonnage the ships' registers shall be taken as indicating the tonnage expressed therein under the system of admeasurement actually adopted by both countries, save any additions or deductions authorized by the admeasurement laws of the respective countries.

It is agreed that German or Hawaiian ships sailing under the flag of their respective country and provided with the papers and documents required by the laws of their respective country shall, for the purposes of this Treaty, be deemed such vessels as their flag and papers show.

In fact, the two High Contracting Parties agree that any favor, privilege or immunity whatever in matters of trade, commerce or navigation, which either Contracting Party has actually granted, or may hereafter grant to subjects and citizens of their own (without prejudice to the coasting trade before mentioned or to such other trade, as they may by law exclusively reserve to their respective subjects or citizens), or of any other country, shall be extended to the subjects and citizens of the other party under the conditions and regulations, gratuitously, if such concession shall have been made gratuitously, or (without prejudice to the matter of customs duties treated of in the following articles) in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement if such concession shall have been conditional.

ARTICLE IV. No other or higher duties shall be imposed on the importation into the Hawaiian Islands of any article the growth, produce or manufacture of the German Empire, and no other or higher duties shall be imposed on the importation into the German Empire of any article, the growth, produce or manufacture of the Hawaiian Islands, than are or shall be payable on the like article being the growth, produce or manufacture of any foreign country.

ARTICLE V. No prohibition shall be imposed upon the importation of any article, the growth, produce or manufacture of the territories of either of the two Contracting Parties into the territories of the other, which shall not equally extend to the importation of the like article being the growth, produce or manufacture of any other country; without prejudice however to the reciprocal right of temporarily prohibiting from sanitary reasons the importation of certain articles from the territories of the other Contracting Party.

Nor shall any prohibition be imposed upon the exportation of any article from the territories of either of the two Contracting Parties to the territories of the other, which shall not equally extend to the exportation of the like article to the territories of all other nations.

ARTICLE VI. The same duties shall be paid on the importation into the dominions of either of the Contracting Parties of any article, which is, or may be legally imported therein by native or foreign subjects and citizens, whether such importation shall be in German or in Hawaiian vessels. The same duties shall be paid and the same bounties or drawbacks allowed on the exportation of any article from the dominion of either of the Contracting Parties, which is or may be legally exportable therefrom by native or foreign subjects and citizens, whether such exportation shall be in German or in Hawaiian vessels.

Merchandise shipped on board German or Hawaiian ships or belonging to their respective subjects or citizens maybe transhipped in the ports of the two countries to a vessel bound to a national port of entry or for any foreign port, subject always to the custom-house regulations of the two countries, and the goods so transhipped for foreign ports shall be exempt from all duties of customs or warehouses.

Articles of all sorts proceeding from or shipped for the two countries respectively shall enjoy in their passage through the territories of the High Contracting Parties, whether in direct transit or for re-exportation, all the advantages possessed under the same circumstances by any other nation.

ARTICLE VII. The vessels of war, vessels belonging to the State, mail packets and whaling vessels of either of the Contracting Parties shall have free access to all ports, rivers or places of the other, which are open to foreign commerce and be at liberty to stay therein, to make repairs and refresh their crews and provisions. They shall be subjected to the same charges, rules, laws and regulations, as are or may be imposed on, and shall enjoy in all respects the same rights, privileges or immunities, which are or may be granted to vessels of the same class of any other nation.

ARTICLE VIII. All vessels bearing the flag of Germany or Hawaii shall in times of war receive every possible protection, short of actual hostility, within the ports and waters of the two countries, and each of the High Contracting Parties engages to respect under all circumstances the neutral rights of the flag and the dominions of the other.

ARTICLE IX. For the better security of commerce between the respective subjects it is agreed that if at any time any interruption of friendly intercourse should unfortunately take place between the two Contracting Parties, the subjects of either of the two Contracting Parties shall be allowed a year to close up their accounts and dispose of their property; and a safe conduct

shall be given them to embark at the port, which they may themselves select. All subjects of either of the two Contracting Parties, who may be established in the territories of the other in the exercise of any trade or special employment, shall in such case have the privilege of remaining and continuing such trade and employment therein, without any manner of interruption, in full enjoyment of their liberty and property as long as they behave peaceably and commit no offence against the laws, and their goods and effects of whatever description they may be, whether in their own custody or intrusted to individuals or to the State, shall not be liable to seizure or sequestration or to any other charge or demand than those, which may be made upon the like effects or property belonging to native subjects. In the same case debts between individuals, public funds and the shares of corporations shall never be confiscated, sequestered or detained.

ARTICLE X. Each of the Contracting Parties agrees to receive from the other Consuls-General, Consuls, Vice-Consuls and Consular Agents in all its ports, cities and places, except in those, where it may not be convenient to recognize such officers. This reservation, however, shall not apply to one of the contracting parties, without also applying to every other Power.

ARTICLE XI. The Consuls-General, Consuls, Vice-Consuls or Consular Agents shall be reciprocally received and recognized on the presentation of their commissions in the forms established in their respective countries. The necessary exequatur for the exercise of their functions shall be furnished to them free of charge, and on the exhibition of this instrument they shall be admitted at once and without difficulty by the territorial authorities, judicial or executive, of the ports, cities and places of their residence and district to the enjoyment of the prerogatives reciprocally granted. The Government that furnishes the exequatur reserves the right to withhold or withdraw the same on a statement of the reasons, for which it has thought proper to do so.

ARTICLE XII. The respective Consuls-General, Consuls, Vice-Consuls or Consular Agent, as well as their Chancellors and Secretaries shall enjoy in the two countries all privileges, exemptions and immunities, which have been granted or in future may be granted to the agents of the same rank of the most favored nation. Consular officers not being citizens of the country where they are accredited shall enjoy in the country of their residence personal immunity from arrest or imprisonment, except in the case of crimes, exemption from military billetings and contributions, from military service of every sort and other public duties, and from all direct or personal or sumptuary taxes, duties or contributions. If, however, the said Consular officers are or become owners of real estate in the country, in which they reside, or engage in commerce, they shall be subject to the same taxes and imposts and to the same jurisdiction as citizens of the country, owners of real estate and merchants. But under no circumstances shall their official income be subject to any tax. Consular officers, who engage in business or commerce, shall not plead their consular privileges to avoid commercial or other liabilities. Consular officers of either character shall not in any event be interfered with in the exercise of their official functions further than is indispensable for the administration of the laws of the country.

ARTICLE XIII. Consuls-General, Consuls, Vice-Consuls and Consular Agents may place over the outer door of their offices or of their dwellings the arms of their nation with the proper inscription indicative of the office. And they may also hoist the flag of their country on the Consular edifice, except in places, where a Legation of their country is established. They may also hoist their flag on board any vessel employed by them in port exclusively for Consular purposes.

ARTICLE XIV. The Consular archives shall be at all times inviolable, and under no pretence whatever shall the local authorities be allowed to examine or seize the papers forming part of them. When, however, a Consular officer is engaged in other business, the papers relating to the Consulate shall be kept in a separate enclosure, apart from his private papers.

ARTICLE XV. In the event of the death, prevention or absence of Consuls-General, Consuls, Vice-Consuls and Consular Agents, their Chancellors or Secretaries, whose official character may have previously been made known to the respective authorities in Germany or in the Hawaiian Islands, may temporarily exercise their functions, and while thus acting they shall enjoy all the rights, prerogatives and immunities granted by this convention to their incumbents.

ARTICLE XVI. Consuls-General and Consuls may with the approbation of their respective Governments appoint Acting Consuls as their substitutes in case of hinderance or temporary absence, and Consular Agents in the cities, ports and places within their jurisdiction. Such Acting Consuls or Consular Agents shall be furnished with a commission by the Consul, who appoints them, or by his Government. Any substitute thus appointed shall enjoy consular privileges according to Articles XI and XII, while Consular Agents are to be treated as subordinates of the Consul under whose responsibility they act.

ARTICLE XVII. Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have the right to apply to the authorities of the respective countries, judicial or executive, within the extent of their consular district, for the redress of any infraction of the treaties and conventions existing between the two countries, or of international law; to ask information of said authorities and to address the same to the end of protecting the rights and interests of their countrymen, especially in cases of the absence of the latter or of any legal representative of the same, in which cases such Consuls, etc., shall be presumed to be their legal representatives. If due notice should not be taken of such application the Consular officers aforesaid, in the absence of a Diplomatic Agent of their country, may apply directly to the Government of the country where they reside.

ARTICLE XVIII. Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two countries or their Chancellors, shall have the right conformably to the laws and regulations of the country:

1. To take at their office or dwelling, at the residence of the parties, or on board of vessels of their own nation, the depositions of the captains and crews, of passengers on board, of merchants or any other citizens of their country;

2. To receive and verify unilateral acts, wills and bequests of their countrymen, and any and all acts of agreement entered upon between citizens of their own country, and between such citizens and the citizens or other inhabitants of the country where they reside; and also all contracts between the latter, provided such contracts relate to property situated in, or to business to be transacted in the territory of the nation, which said Consular officers represent. But nothing in this article shall interfere with the regulations of the Hawaiian Islands regarding labor contracts.

All such acts of agreement and other instruments and also copies and translations thereof, when duly authenticated by such Consul-General, Consul, Vice-Consul or Consular Agent under his official seal, shall be received by the public officials and in courts of justice as legal documents or as authenticated copies, as the case may be, and shall have the same force and effect as if drawn up or authenticated by competent officers of one or the other of the two countries.

ARTICLE XIX. In case of the death of any citizen of Germany in the Hawaiian Islands or of any citizen of the Hawaiian Islands in the German Empire, without having in the country of his or her decease any known heirs or testamentary executors by him or her appointed, the competent local authorities shall at once inform the nearest Consular officer of the nation, to which the deceased belonged, of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

The said Consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors until they are duly represented. He may also, when he deems it expedient, personally administer upon the estate of the deceased for the benefit of his or her lawful heirs and creditors in accordance with the laws of the country, where the death has taken place. To that end he shall apply to the competent court for authority, and in the absence of reasonable objection such authority shall be granted. In all successions to inheritances citizens of each of the Contracting Parties shall pay in the country of the other such duties only as they would be liable to pay if they were citizens of the country, in which the property is situated, or the judicial administration of the same may be exercised.

ARTICLE XX. Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two countries are exclusively charged with the inventorying and the safe-keeping of goods and effects of every kind left by the sailors on ships of their nation, who died on board ship or on land, during the voyage, or in the port of destination, or by passengers while attached to the ship.

ARTICLE XXI. Consuls-General, Consuls, Vice-Consuls and Consular Agents shall be at liberty to go either in person or by proxy on board vessels of their nation, admitted to entry, and to examine the officers and crews, to examine the ships' papers, to receive declarations concerning their voyage, their destination and the incidents of the voyage, also to draw up manifests and lists of freight, to facilitate the entry and clearance of their vessels, and finally to accompany the said officers or crews before the judicial or administrative authorities of the country, to assist them as their interpreters or agents. In case of the seizure or detention of any vessel in the ports of either party for violating revenue or other laws, the authorities shall give due notice to the said Consular officers, in order that they may be present at any proceedings with reference to the same, and assist the officers and crew of the ship in courts of law or before any local magistrate. Upon the non-appearance of the said officers or their representative, the case may be proceeded with in their absence.

ARTICLE XXII. Consuls-General, Consuls, Vice-Consuls or Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind, which may arise either at sea or in port between the captain, officers and crew, especially also in reference to wages and the execution of mutual contracts. Neither any court or authority shall on any pretext interfere in these differences, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or when persons other than the officers and crew of the vessel are parties to the disturbance or difference. Except as aforesaid the local authorities shall confine themselves to the rendering of efficient aid to the Consuls when they may ask it, in order to arrest and hold all persons, whose names are borne in the ships' articles and whom they may deem it necessary to detain. Those persons shall be arrested, at the sole request of the Consuls, addressed in writing to the local authorities and supported by an official extract from the register of the ship or the list of the crew, and shall be held during the whole time of the stay of the vessel in the port at the disposal of the Consuls. Their release shall be granted only at the request of the Consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the Consuls.

ARTICLE XXIII. Consuls-General, Consuls, Vice-Consuls or Consular Agents may arrest the officers, sailors and all other persons making part of the crews of ships of war or merchant-vessels of their nation, who may be guilty or accused of having deserted said ships and vessels, for the purpose of sending them on board or back to their country. To that end the Consuls of (Germany in the Hawaiian Islands shall apply to the authorities, and the Consuls of the Hawaiian Islands in Germany shall apply to any of the competent authorities, and make a request in writing to the deserter, supporting it by an official extract of the register of the vessel and

the list of the crew, or by other official documents, to show that the men, whom they claim, belong to said crew. Upon such request alone thus supported and without the exaction of any oath from the Consuls the deserters (not being citizens of the country, where the demand is made either at the time of their shipping or of their arrival in port, or accused of, or under conviction for any crime or offence) shall be given up to the Consuls. All aid and protection shall be furnished them for the pursuit, seizure and arrest of the deserters, who shall be taken to the prisons of the country and there detained at the request and the expense of the Consuls until the said Consuls may find an opportunity of sending them away. If, however, such opportunity should not present itself within the space of six months, counting from the day of the arrest, the deserters shall be set at liberty and shall not again be arrested for the same cause.

ARTICLE XXIV. In the absence of an agreement to the contrary between the owners, freighters and insurers all damages suffered at sea by the vessels of the two countries, whether they enter port voluntarily or by stress of weather, shall be settled by the Consuls-General, Consuls, Vice-Consuls and Consular Agents of the respective countries. If, however, the said Consul-General, Consul, Vice-Consul or Consular Agent is interested in or agent for said vessel or cargo, or if any inhabitant of the country or citizen or subject of a third power shall be interested in the matter, and the parties cannot agree, the local authorities shall decide.

ARTICLE XXV. In the event of a vessel belonging to the Government or owned by a citizen of one of the two Contracting Parties being wrecked or cast on shore on the coast of the other, the local authorities shall inform the Consul-General, Consul, Vice-Consul or Consular Agent of the district of the occurrence, or if there be no such Consular Agency they shall inform the Consul-General, Consul, Vice-Consul or Consular Agent of the nearest district. All proceedings relative to the salvage of Hawaiian vessels wrecked or cast on shore in the territorial waters of the German Empire, shall take place in accordance with the laws of Germany; and, reciprocally, all measures of salvages, relative to German vessels wrecked or cast on shore in the territorial waters of the Hawaiian Islands, shall take place in accordance with the laws of the Hawaiian Islands. The Consular authorities have, in both countries, to intervene only to superintend the proceedings having reference to the repair and revictualling, or, if necessary, to the sale of the vessel wrecked or cast on shore, and then only in the absence of parties interested, their factors or agents. For the intervention of the local authorities no charges shall be made, except such as in similar cases are paid by the vessels of the nation.

In case of doubt concerning the nationality of a shipwrecked vessel, the local authorities shall have exclusively the direction of the proceedings provided for in this article. All merchandise and goods not destined for consumption in the country where the wreck takes place, shall be free of all duties, but subject to regulations of bonded goods.

Article XXVI. The present Treaty shall come in force immediately after the exchange of the ratifications. In order that the two Contracting Parties may have an opportunity of hereafter treating and agreeing upon such modifications or other arrangements as may tend to the improvement of their mutual intercourse or to the advancement of the interests of their respective subjects, it is agreed that at any time after the 31st day of July, 1882, either of the Contracting Parties may give to the other notice of its intention to terminate Articles IV, V and VI of the present Treaty or to terminate the Treaty as a whole, and that at the expiration of twelve months after the date of such notice, the said articles (if such notice shall have reference only to said articles) or the present Treaty (if such notice shall have been to that effect) and all the stipulations contained therein shall cease to be binding on the two Contracting Parties.

ARTICLE XXVII. The present Treaty shall extend also to the Grand Duchy of Luxemburg as long as the same belongs to the German Customs Union.

ARTICLE XXVIII. The present Treaty shall be ratified and the ratifications exchanged at Berlin before the 31st day of July, 1880, or sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the same and affixed thereto their respective seals.

Done at Berlin the twenty-fifth day of March, and at Honolulu the nineteenth day of September, in the year of Our Lord one thousand eight hundred and seventy-nine.

[L.S.] JOHANNES BOSING, Dr.

[L.S.] H. v. KUSSEBOW,

[L.S.] HENBY A. P. CABTEB.

SEPARATE ARTICLE. Certain relations of proximity and other considerations having rendered it important to the Hawaiian Government to enter into mutual arrangements with the Government of the United States of America by a convention concluded at Washington, the 30th day of January, 1875.

The two High Contracting Parties have agreed, that the special advantages granted by said convention to the United States of America, in consideration of equivalent advantages, shall not in any case be invoked in favor of the relations sanctioned between the two High Contracting Parties by the present Treaty.

The present separate article shall have the same force and value, as if it were inserted, word for word, in the Treaty signed this day, and shall be ratified at the same time.

In witness whereof, the respective Plenipotentiaries have signed the same and affixed thereto their respective seals.

Done at Berlin the twenty-fifth day of March, and at Honolulu the nineteenth day of September, in the year of Our Lord one thousand eight hundred and seventy-nine.

[L.S.] JOHANNES EOSING, Dr.

[L.S.] H. v. KUSSEEOW

[L.S.] H. A. P. CARTER

TREATY WITH HAMBURG

It being desirable that a general convention and instrument of mutual agreement should exist between Hamburg and the Hawaiian Islands, the following Articles have, for that purpose and to that intent, been mutually agreed upon and signed between the Governments of Hamburg and that of the Hawaiian Islands:

ARTICLE I. There shall be perpetual peace and amity between the Republic and free Hanseatic City of Hamburg, and His Majesty the King of the Hawaiian Islands, their heirs and successors.

ARTICLE II. The citizens of the Republic of Hamburg, residing within the dominions of the King of the Hawaiian Islands, shall enjoy the same protection in regard to their civil rights, as well as to their persons and properties, as native subjects; and the King of the Hawaiian Islands engages to grant to citizens of the Republic of Hamburg the same rights and privileges which now are, or may hereafter be, granted to or enjoyed by any other foreigners, subjects of the most favored nation.

ARTICLE III. The protection of the King of the Hawaiian Islands shall be extended to all Hamburg vessels, their officers and crews, within the harbors and roads of his dominions. In time of war they shall receive all possible protection against the enemies of the Republic of Hamburg. In case of shipwreck, the local authorities and officers of the King shall use their utmost exertions to succour them and secure them from plunder. The salvage dues shall be settled according to the general law of salvage, and in case of dispute, shall be regulated by arbitrators chosen by both parties.

ARTICLE IV. The desertion of seamen belonging to Hamburg vessels shall be severely repressed by the local authorities, who shall employ all means at their disposal to arrest and confine deserters, and the lawful expenses shall be defrayed by the captain or owners. In such case no unnecessary severity is to be used, and due notice is to be immediately given to the Hamburg Consul, agreeably to the 6th Article of this Treaty.

ARTICLE V. Hamburg citizens shall be allowed to reside or settle on any part of the dominions of the King of the Sandwich Islands, upon obtaining a document certifying that they are worthy persons, from the Hamburg Consul, whose duty it is not to give any such document to others than bona fide citizens of the Republic of Hamburg. In the case of Hamburg sailors wishing to remain on the islands, permission shall be previously obtained of the government by the Hamburg Consul.

ARTICLE VI. It is agreed that the Hamburg Consul shall be instructed to zealously attempt to settle amicably, and extra judicially, all difficulties arising with Hamburg citizens; and that when any case is brought before the court of foreign causes, the presiding judge shall, with the least possible delay, communicate knowledge thereof to the Hamburg Consul, also that when Hamburg sailors or citizens are committed, in consequence of police or other offences, information shall be conveyed to him, forthwith, by the Prefect or other officer of the police.

ARTICLE VII. No productions of the Republic of Hamburg or any other goods on board of or imported in Hamburg ships, that can be imported by other foreign ships, shall be prohibited, nor pay more than those duties levied on goods of the most favored nation. Any alteration in the duties levied on goods, shall not take effect nor be enforced, until twelve calendar months after the first public notification of such change.

ARTICLE VIII. Hamburg merchandise and property, or goods imported in Hamburg vessels, liable to an entrance duty higher than 5 per cent, *ad valorem*, shall be allowed to be bonded, paying only the usual transit duty.

ARTICLE IX. All Hamburg vessels shall have the right and privilege of disposing of their cargoes, or any part thereof, at all or any of the ports of the Hawaiian dominions, now open, or that may hereafter be opened to foreign commerce, and to take in any produce of the Hawaiian Islands which they may receive in payment of such cargoes. But they shall not be allowed to take any goods or merchandise or freight from one island or port to another, such coasting trade being restricted to bottoms sailing under the Hawaiian flag.

ARTICLE X. The subjects of His Majesty the King of the Hawaiian Islands shall, in their commercial relations, or relations of any other nature, with the Republic and free Hanseatic City of Hamburg, and her dependencies, be treated on the footing of the most favored nation.

Done at Honolulu this 8th day of January, 1848.

[L.S.] E. A. SUWEEKEOP
Consul and Plenipotentiary for the Republic and free Hanseatic
City of Hamburg

[L.S.] R. C. WYLLIE
His Hawaiian Majesty' s Minister of Foreign Relations and Member
of his Council of State

TREATY WITH ITALY

His Majesty the King of Italy, on the one part, and His Majesty the King of the Hawaiian Islands, on the other part, desiring to facilitate the establishment of commercial relations between Italy and the Hawaiian Islands, and to favor their development by a treaty of Amity, Commerce and Navigation, suited for securing to the two countries equal and reciprocal advantages, have nominated for this purpose Plenipotentiaries, that is to say:

His Majesty the King of Italy, the Chevalier Constantino Nigra, His Envoy Extraordinary and Minister Plenipotentiary to His Majesty the Emperor of the French; and His Majesty the King of the Hawaiian Islands, Sir John Bowring, His Envoy Extraordinary and Minister Plenipotentiary; who having mutually communicated their powers, and found them in good and true form, have agreed upon the following articles:

ARTICLE I. There shall be perpetual peace and constant friendship between the Kingdom of Italy and that of the Hawaiian Islands, and between the citizens of the two countries, without exception of person or place.

ARTICLE II. There shall be, between Italy and the Hawaiian Islands, reciprocal freedom in commerce and navigation. Italians in the Hawaiian Islands, and Hawaiian subjects in Italy, may enter in the same liberty and security with their vessels and cargoes as are enjoyed by the natives themselves in all places, ports and rivers which are, or shall in future be open to foreign commerce, provided, always, that the police regulations employed for the protection of the citizens of the most favored nations be respected.

ARTICLE III. The citizens of the two contracting parties may, like the natives in the respective territories, travel or reside, trade wholesale or retail, rent or occupy the houses, stores and shops which they may require; they may carry on the transport of merchandise and money, and receive consignments; they may also, when they have resided more than a year in the country, and the real or personal property which they may possess shall offer a sufficient security, be admitted as sureties in Custom-house transactions. The citizens of both countries shall, on a footing of perfect equality, be free both to purchase and to sell, to establish and to fix the price of goods, merchandise and articles of every kind, whether imported or of home manufacture whether for home consumption or for exportation. They shall also enjoy liberty to carry on their business themselves, to present to the Custom-house their own declarations; or to have their places supplied by their own attorneys, factors, consignees, agents or interpreters, whether in the purchase or sale of their goods, property or merchandise; whether for the loading or unloading and expedition of their vessels.

They shall also have the right to fulfill all the functions that are confided to them by their own countrymen, by strangers, or by natives, in the position of attorneys, factors, agents, consignees, or interpreters.

For the performance of all these acts, they shall conform to all the laws and regulations of the country, and they shall not be subject, in any case, to any other charges, restrictions, taxes or impositions than those to which the natives are subject, provided, always, that the police regulations employed for the protection of the most favored nation be respected. It is also specially provided that all the advantages of any kind whatever, actually granted by the laws or decrees now in force, or which in future shall be accorded to foreign settlers, shall be guaranteed to Italians established, or who establish themselves in whatever locality they may deem fit in the Hawaiian territory, and the same shall hold good for Hawaiian subjects in Italy.

ARTICLE IV. The respective citizens of the two countries shall enjoy the most constant and complete protection for their persons and property. Consequently, they shall have free and easy access to the courts of justice in the pursuit and defence of their rights, in every instance and degree of jurisdiction established by the laws. They shall be at liberty, under any circumstances, to employ lawyers, advocates or agents from any class, whom they may see fit to authorize to act in their name. In fine, they shall in all respects enjoy the same rights and privileges which are granted to natives, and they shall be subject to the same conditions.

ARTICLE V. The Italians in the Hawaiian Islands, and the Hawaiians in Italy, shall be exempt from all service, whether in the army or navy, or in the national guard or militia, and they cannot be subject to any other charges, restrictions, taxes or impositions on their property, real or personal, than those to which the natives themselves are subject.

ARTICLE VI. The citizens of both countries respectively shall not be subject to any embargo, nor to be detained with their vessels, crews, cargoes or commercial effects for any military expedition whatever, nor for any public or private service whatever, unless the government or local authority shall have previously agreed with the parties interested, that a just indemnity shall be granted for such service, and for such compensation as might fairly be required for the injury which (not being purely fortuitous) may have grown out of the service which they have voluntarily undertaken.

ARTICLE VII. The most entire liberty of conscience is guaranteed to the Italians in the Hawaiian Islands, and to Hawaiian subjects in Italy. Both parties must conform in the outward observance of their religion to the laws of the country.

ARTICLE VIII. Citizens of either of the contracting parties shall, on the respective territories, have the right of possessing property of any sort, and disposing of the same to the natives.

Italians shall enjoy in all the Hawaiian territories the right of collecting and transmitting successions *ab intestato* or testamentary as Hawaiians, according to the laws of the country without being subjected as strangers to any burthens or imposts which are not paid by the natives.

Reciprocally Hawaiian subjects shall enjoy in Italy the right of transmitting succession *ab intestato* or testamentary on the same conditions as Italians, according to the laws of the country, and without being subject as strangers to any charge or impost not paid by the natives.

The same reciprocity between the citizens of the two countries shall exist for donations *inter vivos*. On the exportation of property collected or acquired under any head by Italians in the Hawaiian Islands, or by Hawaiians in Italy, there shall be no duty on removal or immigration, nor any duty whatever to which natives are not subjected.

ARTICLE IX. All Italian or Hawaiian vessels sailing under their respective flags, and which shall be bearers of the ship's papers and documents required by the laws of the respective countries shall be considered as Italian or Hawaiian vessels respectively.

ARTICLE X. Italian vessels which shall arrive either in ballast or laden in Hawaiian ports, or which shall leave the same, and reciprocally, Hawaiian vessels which, either in ballast or laden, enter or leave the ports of Italy, whether by sea, river or canals, whatever be the port of their departure or their destination, shall not be subject either on entry or departure, to duties on tonnage, port or transit, pilotages, anchorage, shifting, light-houses, sluices, canals, quarantines, salvage, bonding-warehouses, patents, brokerage, navigation, passage, or to any duties or charges whatever, levied on the hulks of vessels received or established for the benefit of the government, public functionaries, communes or establishments of any sort other than those which are now or may hereafter be levied on national vessels.

ARTICLE XI. In all that regards the stationing, the loading and unloading of vessels in the ports, roadsteads, harbors and docks, and generally for all the formalities and arrangements to which vessels employed in commerce with their freights and loading may be subject, it is agreed that no privilege shall be granted to national vessels, which shall not be equally granted to vessels of the other country, the intention of the high contracting parties being that in this respect also the respective vessels shall be treated on the footing of perfect equality.

ARTICLE XII. Vessels of the contracting parties, compelled to seek shelter in the ports of the other, shall pay neither on the vessels nor the cargo more duties than those levied on national vessels in the same situation; provided, that the above-named ships shall carry on no commercial speculations, and that they tarry no longer in the aforesaid ports than is required by the motives which impelled them to seek such shelter.

ARTICLE XIII. Italian ships of war, and whaling ships, shall have free access to all the Hawaiian ports; they may there anchor, be repaired and victual their crews; they may proceed from one harbor to another of the Hawaiian Islands for fresh provisions.

In all the ports which are or may be hereafter opened to foreign vessels, Italian ships of war and whalers shall be subject to the same rules which are or may be imposed, and shall enjoy in all respects the same rights, privileges and immunities which are or maybe granted to Hawaiian ships and whalers, or to those of the most favored nation.

ARTICLE XIV. Articles of all sorts imported into the ports of either of the contracting States, under the flag of the other, whatever be their origin, and from whatever country imported, shall pay neither, other nor heavier duties of entry, and shall not be subjected to any other charges than if imported under the national flag.

ARTICLE XV. Articles of all sorts exported from either of the two countries, under the flag of the other, from whatever country they may be, shall not be subjected to other duties or other formalities, than if exported under the national flag.

ARTICLE XVI. Italian ships in Hawaiian Islands, and Hawaiian ships in Italy, may discharge a portion of their cargo in the port of their first arrival, and proceed with the rest of their cargo to other ports of the same country, which may be open to foreign trade, whether to complete their unloading or to provide their return cargo, and shall pay in neither port other or heavier duties than those levied on national vessels in similar circumstances.

As regards the coasting trade, the vessels of each country shall be mutually treated on the same footing as the most favored nation.

ARTICLE XVII. During the period allowed by laws of the two countries for the warehousing of goods, no other duties than those for custody and storage shall be levied upon articles imported from one of the two countries into the other, until they shall be removed for transit, re-exportation or internal consumption.

In no case shall such articles pay higher duties or be liable to other formalities than if they had been imported under the national flag, or from the most favored country.

ARTICLE XVIII. Merchandise shipped on board Italian or Hawaiian ships, or belonging to their respective citizens, may be transhipped in the ports of the two countries to a vessel bound for a national or foreign port, according to the custom house regulations of the two countries, and the goods so transhipped for other ports shall be exempt from all duties of customs or warehouses.

ARTICLE XIX. Articles of all sorts proceeding from Italy, or shipped for Italy, shall enjoy in their passage through the territory of the Hawaiian Islands, whether in direct transit or for re-exportation, all the advantages possessed under the same circumstances by the most favored nation. Reciprocally objects of every sort, the produce of the Hawaiian Islands or sent from that country, shall enjoy in their passage through Italy, the same advantages as are possessed by the most favored nation.

ARTICLE XX. Neither one nor the other of the contracting parties will impose upon the goods proceeding from the soil, the manufactures or the warehouses of the other different or greater duties on importation or re-exportation, than those which shall be imposed on the same merchandise coming from any other foreign country.

Nor shall there be imposed on the goods exported from one country to the other, different or higher duties than if they were exported to any other foreign country.

No restriction or prohibition of importation or exportation shall take place in the reciprocal commerce of the contracting parties which shall not be equally extended to all other nations.

ARTICLE XXI. Consuls-General, Consuls, Vice-Consuls and Consular Agents may be established by each country in the other for the protection of commerce, such agents shall not enter upon their functions or enjoyment of the rights, privileges and immunities which belong to them until they have obtained the authorization of the territorial government, which shall, besides, preserve the right of determining the place of residence where Consuls may be established; it being understood that neither Government will impose any restriction which is not common in the country to all nations.

ARTICLE XXII. The Consuls General, Consuls, Vice-Consuls and Consular Agents of Italy, in the Hawaiian Islands, shall enjoy all the rights, privileges, immunities and exemptions enjoyed by the agents of the most favored nation in the same circumstances.

And the same shall be the position in Italy, of the Hawaiian Consuls-General, Consuls, Vice Consuls and Consular Agents.

ARTICLE XXIII. The desertion of seamen embarked in the vessels of either of the contracting parties shall be severely dealt with in their respective territories. In consequence the Italian consuls shall have the power to cause to be arrested and sent on board, or to Italy, seamen who have deserted Italian vessels in the Hawaiian ports. But for this purpose they must apply to the competent local authorities, and justify, by the exhibition of the original or the duly certified copy of the ship's register, the roll or other official documents to prove that the persons named formed part of the ship's crew. On their application, so supported, the delivery of the seamen shall not be refused.

All aid and assistance shall be given for the discovery and arrest of such deserters, who shall be detained in the prisons of the country, on the requirement and at the expense of the consuls, until they shall find an opportunity of sending them away, If, however, no opportunity shall offer in the course of two months, counting from the day of arrest, the deserters may be set at liberty.

It is understood that seamen who are native Hawaiians shall be excepted from this arrangement and to be treated according to the laws of their own country.

If the deserter have committed any crime in the Hawaiian territory, his release shall not take place till the competent tribunal shall have given judgment, and this judgment been carried into execution.

Hawaiian consuls shall possess exactly the same rights in Italy, and it is formally agreed between the two contracting parties, that every other favor or facility granted or to be granted by either to any other power for the arrest of deserters shall be also granted to the present contracting parties as fully as if they had formed part of the present treaty.

ARTICLE XXIV. All operations connected with the salvage of stranded or wrecked Italian vessels on the Hawaiian coasts shall be superintended by the Consular Agent of Italy, and reciprocally the Consular Hawaiian Agents shall superintend the operations connected with the salvage of Hawaiian vessels stranded or wrecked on the Italian coasts.

But if the parties interested happen to be on the spot, or the captain possess adequate powers, the administration of the wreck shall be committed to them.

The intervention of the local authorities shall only be applied to the maintenance of order, to guarantee the rights of the salvors if they do not belong to the ship-wrecked crew, and to insure the execution of the measures to be taken for the entry and departure of the saved goods. In the absence and until the arrival of the Consular Agents, the local authorities will take the needful steps for the protection of persons and property wrecked.

The goods saved shall never be subjected to customs or duty, unless they are disposed of for home consumption.

ARTICLE XXV. The ships, merchandise and effects belonging to the respective citizens which may have been taken by pirates or conveyed to or found in the ports of either of the contracting parties, shall be delivered to their owners on payment of the expenses should there be such, the amount to be determined by the competent tribunals when the right of the proprietor shall be proved before these tribunals, and the claim being made within the space of eighteen months by the interested parties, by their attorneys, or by the agents of their respective Governments.

ARTICLE XXVI. If, from a concurrence of unfortunate circumstances, differences between the contracting parties should cause an interruption of the relations of friendship between them, and that after having exhausted the means of an amicable and conciliatory discussion, the object of their mutual desire should not have been completely attained, the arbitration of a third power, equally the friend of both, shall by a common accord be appealed to, in order to avoid by this means a definitive rupture.

ARTICLE XXVII. The present treaty shall be in vigor for ten years, to commence six months after the exchange of ratification. If a year before the expiration of this term neither of the contracting parties shall have announced, by an official declaration, its intention of terminating it, the treaty shall still remain in force for a year, and so continue from year to year.

ARTICLE XXVIII. The present treaty shall be ratified and the ratification exchanged at Paris, within the space of a year and a half, or earlier if may be.

In faith, whereof, the respective Plenipotentiaries have signed the same, and thereto affixed their seals.

Done in duplicate at Paris, the 22d of July, 1863.

[L.S.] CONSTANTINO NIGEA

[L.S.] JOHN BOWRING

ADDITION ARTICLE—The two high contracting parties agree: That whatever privilege, immunity, favor or diminution of duties on commerce or navigation, which may be granted by either of the two States to any other power, shall immediately, and of full right, be conceded to the other contracting party, without any compensation.

The two high contracting parties further agree to conform to the principles adopted by the Congress of Paris, as announced in the Declaration of the 16th of April, 1856, with reference to privateering and to neutral rights of blockade, as follows:

1. Privateering is and remains abolished.
2. The neutral flag shall cover the goods of the enemy, with the exception of contraband of war.
3. Neutral merchandise, with the exception of contraband of war, shall not be sequestered under an enemy's flag.
4. Blockades, in order to be recognized, must be effective, i.e., they shall be maintained by a force really sufficient to prevent access to the littoral of the enemy.

The present additional article is considered as an integral part of the Treaty of Commerce and Navigation, concluded between the Kingdom of Italy and the Hawaiian Kingdom, at Paris, the 22d July, 1865.

It shall have the same force and duration, and it shall be included in the ratifications of the same Treaty.

Paris, the 27th of February, 1869.

[L.S.] NIGRA

[L.S.] JOHN BOWRING

TREATY WITH JAPAN

Whereas, a Treaty of Amity and Commerce between His Majesty the King, and His Imperial Majesty the Tenno of Japan, was concluded at Yeddo, on the 19th day of August, 1871, which has been ratified by His Majesty the King, and His Imperial Majesty, the Tenno of Japan, and the ratifications duly exchanged— which Treaty is, word for word, as follows:

His Majesty the King of the Hawaiian Islands, and His Imperial Japanese Majesty, the Tenno, being equally animated by the desire to establish relations of friendship between the two countries, have resolved to conclude a Treaty, reciprocally advantageous, and for that purpose have named their Plenipotentiaries, that is to say, His Majesty the King of the Hawaiian Islands, His Excellency C. E. De Long, appointed and commissioned by His Majesty, Envoy Extraordinary and Minister Plenipotentiary of the Kingdom of Hawaii, near the Government of His Majesty, the Tenno of Japan, and His Imperial Japanese Majesty, the Tenno, His Excellency Sawa Iusanme Kiyowara Noluyoshe. Minister for Foreign Affairs, and His Excellency Terachima Jusee Fugiwara Munemori, First Assistant Minister for Foreign Affairs, who having communicated to each other their respective full powers, which are found in good order, and in proper form, have agreed upon the following Articles:

ARTICLE I. There shall be perpetual peace and friendship between His Majesty the King of the Hawaiian Islands, and His Imperial Japanese Majesty, the Tenno, their heirs and successors, and between their respective subjects.

ARTICLE II. The subjects of each of the two high contracting parties, respectively, shall have the liberty freely and securely to come with their ships and cargoes to all places, ports and rivers in the territories of the other, where trade with other nations is permitted; they may remain and reside in any such ports, and places respectively, and hire and occupy houses and warehouses, and may trade in all kinds of produce, manufactures and merchandise of lawful commerce, enjoying at all times the same privileges as may have been, or may hereafter be granted to the citizens or subjects of any other nation, paying at all times such duties and taxes as may be exacted from the citizens or subjects of other nations doing business or residing within the territories of each of the high contracting parties.

ARTICLE III. Each of the high contracting parties shall have the right to appoint, if it shall seem good to them, a Diplomatic Agent, who shall reside at the seat of the Government of the respective countries, and Consuls and Consular Agents, who shall reside in the ports or places within the territories of the other where trade with other nations is permitted. The Diplomatic Agents and Consuls of each of the high contracting parties shall exercise all the authority and jurisdiction, and shall enjoy within the territories of the other all the rights and privileges, exemptions and immunities which now appertain, or may hereafter appertain to Agents of the same rank of the most favored nations.

ARTICLE IV. It is hereby stipulated, that the Hawaiian Government and its subjects, upon like terms and conditions, will be allowed free and equal participation in all privileges, immunities and advantages that may have been or may hereafter be granted by His Majesty the Tenno of Japan, to the Government, citizens or subjects of any other nation.

ARTICLE V. The Japanese Government will place no restrictions whatever upon the employment by Hawaiian subjects of Japanese in any lawful capacity. Japanese in the employ of foreigners may obtain Government passports to go abroad, on application to the Governor of any open port.

ARTICLE VI. It is hereby agreed that such revision of this Treaty, on giving six months previous notice to either of the high contracting parties, may be made by mutual agreement, as experience shall prove necessary.

ARTICLE VII. The present Treaty shall be ratified by His Majesty the King of the Hawaiian Islands, and by His Imperial Majesty the Tenno, and the ratifications exchanged at Yedo, the same day as the date of this Treaty, and shall go into effect immediately after the date of such exchange of ratifications.

In token whereof, the respective Plenipotentiaries have signed this Treaty.

Done at the City of Yedo, this 19th day of August, A. D. One Thousand Eight Hundred and Seventy-one, corresponding in Japanese date to the fourth day of the 7th month of the 4th year of Meiji.

[signed] C. E. DE LONG [seal]

[signed] SAWA IUSANME KIYOWARA NOLUYOSHE [seal]

[signed] TERACHIMA JUSEE FUGIWARRA MUNEMORI [seal]

TREATY WITH THE NETHERLANDS & LUXEMBOURG

His Majesty the King of the Hawaiian Islands, on the one part, and His Majesty of the King of the Netherlands on the other part, desiring by a treaty of Friendship, Commerce and Navigation to secure amicable relations between the two kingdoms and commercial intercourse between their respective subjects, have to this end named for their Plenipotentiaries, that is to say:

His Majesty the King of the Hawaiian Islands, Sir John Bowring, Knight Bachelor of England, His Minister Plenipotentiary and Envoy Extraordinary; and His Majesty the King of the Netherlands, Jonkheer Paul vander Maesen de Sombreff, His Minister of Foreign Affairs, and Gerardus Henri Betz, His Minister of Finance; who, after having examined their full powers and found them in good and true form have agreed on the following articles:

ARTICLE I. There shall be a sincere and durable friendship between His Majesty the King of the Hawaiian Islands, His heirs and successors and His subjects, on the one part, and His Majesty the King of the Netherlands, His heirs and successors and His subjects on the other part.

ARTICLE II. The respective subjects of the two high contracting parties shall be perfectly and in all respects assimilated on their establishment and settlement, whether for a longer or shorter time in the States and Colonies of the other party on the terms granted to the subjects of the most favored nation in all which concerns the permission of sojourning, the exercise of legal professions, taxes, in a word, all the conditions relative to sojourn and establishment.

ARTICLE III. The products and manufactured articles of every sort, coming from the Hawaiian Islands, imported directly or indirectly, and all merchandise without distinction of origin imported from the Hawaiian Islands or their colonies, shall be admitted on the payment of customs import duties equal and not greater and on the same conditions as those to which are subjected the produce and manufactured articles of the most favored foreign nation, in the Netherlands and their colonies in matters of commerce and customs.

And reciprocally the produce and manufactured articles of every sort proceeding from the Kingdom of the Netherlands or from its colonies, imported directly or indirectly, and all goods without distinction of origin, imported from the Netherlands into the Hawaiian Islands, shall be admitted on the payment of customs and import duty equal but not greater and under the same conditions as are imposed on the products and manufactured articles of the most favored foreign nation in the Hawaiian Islands, and their colonies, as regards commerce and customs.

Exception is allowed from this rule were special favors have been or may hereafter be granted in the Netherlands Colonies of the East Indies, to the Asiatic nations of the Eastern Archipelago, for the importation of the products of their soil and their industry and for their exportations.

ARTICLE IV. No duties of tonnage, harbor, light-houses, pilotage, quarantine or other similar duties of whatever nature or under whatever denomination shall be imposed in either country upon the vessels of the other, which shall not be equally imposed in the like cases on national vessels. And in general has concerns the importation of all goods and articles of whatever description, the Netherlands flag in the Hawaiian islands, and the Hawaiian flag in the Netherlands and their colonies, will be assimilated to the flag of the most favored nation.

ARTICLE V. Any advantage which in future either of the high contracting parties shall grant

to another state as regards the establishments or exercise of industry, commerce, custom duties or navigation, shall be granted in the same way at the same time to the other contracting party.

ARTICLE VI. The present treaty shall be in vigor for ten years, to date from the day of the exchange of the ratifications.

In case that neither the one nor the other shall have notified twelve months before the expiration of said period of ten years the intention of terminating its conditions, the treaty shall continue in force for another year, to reckon from the date on which the other contracting party shall have given notice and so on from year to year.

The ratification shall take place by His Majesty the King of the Hawaiian Islands and His Majesty the King of the Netherlands,—and the ratification shall be exchanged at the Hague or elsewhere, within the space of eighteen months, or earlier if may be.

In witness of which the above named Plenipotentiaries have signed in a fixed here to their respective seals.

Done at the Hague, this sixteenth day of October, in the year one thousand eight hundred and sixty-two.

[L.S.] JOHN BOWRING

[L.S.] J.P. VANDER MAESEN de SOMBREFF

[L.S.] G.H. BETZ

TREATY WITH PORTUGAL

His Majesty the King of the Hawaiian Islands and His Majesty the King of Portugal and of Algarves, equally desirous of binding and strengthening the relations of friendship and commerce which happily exist between their respective States, have resolved to conclude a Convention to regulate temporarily these relations, until a definite treaty can be made, and for this purpose have appointed their Plenipotentiaries, namely:

His Majesty the King of the Hawaiian Islands, Mr. Henry A. P. Carter, member of His Privy Council of State, Grand Officer of the Royal Order of Kalakaua, His Envoy Extraordinary and Minister Plenipotentiary at this Court; and His Majesty the King of Portugal and the Algarves, Mr. Antonio de Serpa Pimental, Counselor of State, Peer of the Realm, Minister and Secretary of State of Foreign Affairs; who, after communicating each to the other their full powers, which they found in good and due form, agreed to the following:

ARTICLE I. The Consular Agents, the subjects, the ships and products of the soil, or of the industry of one of the two countries, will enjoy on the territory of the other the same exemptions, privileges, and immunities which other Consular Agents, subjects, ships and products of the soil, or of the industry of the most favored nation, enjoy.

ARTICLE II. It is, therefore, understood that the special advantages which Portugal may judge convenient to grant to Brazil cannot be claimed by the Hawaiian Islands, in virtue of their right of a most favored nation, and that in the same way, the advantages which these Islands grant to the United States cannot be claimed by Portugal.

ARTICLE III. The High Contracting Parties equally desirous of conciliating individual liberty with regard to the contract for service with the regulations necessary to be adopted to regulate conveniently the emigration, agree that until a definite convention is made for this purpose, the following conditions be observed:

1. That the two Governments will render mutual help to oblige the captains of vessels which transport emigrants from one country to the other to observe the regulations in force in the country where the emigrants embark, with regard to the space which everyone ought to occupy, the quantity and quality of food, medicine, and all sanitary and hygienic conditions.
2. That in view of this, the Diplomatic or Consular Agents of each of the two countries will be given all the facilities to inspect the vessels that arrive with emigrants to the ports of the other country, and see if the respective captains have complied with the regulations to which the preceding clause refers.
3. That to the same Diplomatic or Consular Agents shall be equally given all the facilities that they may satisfy themselves whether the contracts for service for their countrymen have been fulfilled, and to secure for them, in case of violation, all the protection of the laws and of the local authorities.

ARTICLE IV. The present Convention shall be ratified and the ratifications shall be exchanged in Honolulu or in Lisbon, as soon as possible.

ARTICLE V. The present Convention shall take effect sixty days after the ratifications are exchanged, and will remain in force until one of the High Contracting Parties shall notify the other of its intention to abrogate the Treaty remaining in force (after) one year after this notice, counting from the date of the notification.

It is understood that in all respects when not depending on Legislative authority, the present Convention shall come into effect in the Hawaiian Kingdom as soon as approved by the Hawaiian Government, and in Portugal as soon as such approval shall be notified to the Portuguese Government.

In testimony of which, the respective Plenipotentiaries hereby sign and place their respective seals.

Made in Lisbon, in duplicate, on the fifth day of May, in the year of Our Lord eighteen hundred and eighty-two.

[L.S.] ANTONIO DE SERPA PIMENTAL

[L.S.] HENRY A. P. CARTER

TREATY WITH RUSSIA

On the 19th of June, 1869, a Convention of Commerce and Navigation was duly entered into by His Excellency C. de Varigny, Minister Plenipotentiary, on behalf of His Hawaiian Majesty, and M. le Comte de Stackelberg, Russian Ambassador in Paris, duly authorized to negotiate in the premises; which said Convention has been duly ratified, and the ratifications exchanged, on the 1st of December, 1869, and is, word for word, as follows:

ARTICLE I. There shall be a reciprocal liberty of commerce and navigation between Russia and the Hawaiian Kingdom.

ARTICLE II. The subjects of His Majesty the Emperor of all the Russias, and the subjects of His Majesty the King of the Hawaiian Islands, shall be treated reciprocally on the footing of the most favored nation.

ARTICLE III. It is understood, however, that the preceding stipulations do not interfere in any way with the laws, ordinances, and special regulations in matters of commerce, industry and police, that are in force in each of the countries, and that are applicable to all foreigners.

ARTICLE IV. Each of the two contracting parties shall have the power to constitute Consuls General and Consular Agents, in the cities and ports of the States and possessions of the other, which are opened to foreign commerce. The Consuls General and Consular Agents shall not, however, enter upon their functions, except after having been approved of, and duly admitted by the Government near which they are accredited. They shall exercise their functions, and shall enjoy all the privileges, exemptions and immunities belonging to, or that may be granted to, the Consuls of the most favored nation. In case they should be engaged in trade, they shall not be entitled to the immunities granted to "Consuls Functionaries."

ARTICLE V. In case a Russian vessel should be wrecked on the coasts of the Hawaiian Kingdom, or a Hawaiian vessel on the coasts of Russia, the local authorities shall give aid and assistance for the salvage of the cargo, and for its restitution to its owners.

ARTICLE VI. The present Convention of Commerce and Navigation shall remain in force during ten years from the date of the signature and Act. It may be renewed at the expiration of the term of ten years.

ARTICLE VII. The stipulations contained in the Present Act, drawn in duplicate in the English and in the French languages, shall obtain the confirmation of the respective Governments, and the declarations to that effect, executed in the usual form, shall be exchanged in Paris, within six months, or sooner, if possible.

Paris, 19th June, 1869.

[L.S.] C. de VARIGNY

[L.S.] CTE. E. de STACKELBERG

All persons are hereby notified that the said Convention is to be regarded, in all its provisions, as part of the public law of the Kingdom, and respected accordingly.

[L.S.] CHAS. C. HARRIS,
Minister for Foreign Affairs

TREATY WITH SAMOA

By virtue of My inherent and recognized rights as King of the Samoan Islands by My own people and by Treaty with the three Great Powers of America, England and Germany, and by and with the advice of My Government and the consent of Taimua and Faipule, representing the Legislative powers of My Kingdom, I do hereby freely and voluntarily offer and agree and bind Myself to enter into a Political Confederation with His Majesty Kalakaua, King of the Hawaiian Islands, and I hereby give this solemn pledge that I will conform to whatever measures may hereafter be adopted by His Majesty Kalakaua and be mutually agreed upon to promote and carry into effect this Political Confederation, and to maintain it now and forever.

In witness whereof, I have hereunto set My hand and seal this 17th day of February, A. D. 1887.

[M. E.] MALIETOA,
King of Samoa.

By the King:

[Signed] WM. COE

We, Taimua and Faipule of the Government of Samoa, appointed by the House of Taimua and Faipule, hereby approve of and support the above agreement.

[Signed]

Taimua—Utumapu, of the District of Itu o tane; Pau, of the District of Faasaleleaga; Tuisam, of the District of Lufi Lufi; Tuao, of the District of Lulumoega; Leiataua, of the District of Manono; Teo, of the District of Tuamasaga; Su, of the District of Faleao Palauli; Molioo, of the District of Atua.

Faipule—Tafi, of the District of Loa Atua; Vaafai, of the District of Launuaia; Uuga, of the District of Itu tane; Alipia, of the District of Leulumoega; Taotua, of the District of Faasaleleaga; Faanaua, of the District of Itu teme; Sao, of the District of Itu teme; Vailun, of the District of Aana.

[Signed] WILLIAM COE,
Assistant Secretary of State

[Signed] LE MAMEA,
Minister of Interior

I hereby certify that the foregoing is a full and true translation of the original document in the Samoan language.

WILLIAM COE,
H. S. M.'s Interpreter.

Kalakaua, by the Grace of God of the Hawaiian Islands, King: To all to whom these Presents shall come, Greeting: Whereas on the seventeenth day of February last past His Majesty Malietoa, King of the Samoan Islands, entered into an Agreement and Treaty binding himself to

enter into a Political Confederation with Us, and whereas the said Agreement and Treaty was at the same time approved by the Taimua and Faipule of Samoa and accepted in Our name by Our Minister Plenipotentiary, Honorable John E. Bush, now, therefore, having read and considered the said Agreement and Treaty, We do by these Presents approve, accept, confirm and ratify it for Ourselves, Our Heirs and Successors, subject to the obligations which His Majesty Malietoa may be under to those Foreign Powers with which He and the People of Samoa and the Government thereof have at this time any treaty relations, engaging and promising upon Our Royal Word to enter into Political Confederation with His Majesty King Malietoa, and to conform to such measures as may be hereafter agreed upon between Us for the carrying into effect of such Confederation. For the greater testimony and validity of all which We have caused the Great Seal of Our Kingdom to be affixed to these Presents, which We have signed with Our Royal hand.

Given at Our Palace of Iolani this Twentieth Day of March, in the Year of Our Lord One Thousand Eight Hundred and Eighty-seven, and in the Fourteenth Year of Our Reign.

[L.S.] [M. E.] KALAKAUA

By the King:

[signed] WALTER M. GIBSON
Minister of Foreign Affairs and Premier

TREATY WITH SPAIN

Know all Men, that whereas His Majesty the King and Her Majesty the Queen of Spain did on the 9th day of October, in the year of Our Lord Eighteen Hundred and Sixty-three, at London, by their respective Plenipotentiaries, negotiate a Treaty of Peace and Friendship, which said Treaty is word for word, as follows:

Her Majesty the Queen of Spain, on the one part, and His Majesty the King of the Hawaiian Islands on the other part, desiring to facilitate the establishment of commercial relations between Spain and the Hawaiian Islands and to favor their development by a Treaty of Amity, Commerce and Navigation suited for securing to the two countries equal and reciprocal advantages, have nominated to this purpose for their Plenipotentiaries, that is to say: Her Majesty the Queen of Spain, Don Juan Tomas Comyn, Knight Grand Cross of the Royal Order of Isabella the Catholic, Knight Commander of the Royal distinguished Order of Charles the Third, Grand Cross of the Order of Phillip the Magnanimous of Hesse, of that of Christ of Portugal, &c., Grand Officer of the Legion of Honor of France, Commander of the Order of Our Lady of Villaviciosa of Portugal and of the Red Eagle of Prussia, &c., Chamberlain of Her Catholic Majesty, late Royal Councillor in extraordinary and Her actual Envoy Extraordinary and Minister Plenipotentiary at the Court of Her Britannic Majesty; and His Majesty the King of the Hawaiian Islands, Sir John Bowring, Knight Bachelor of Great Britain. Who, having mutually communicated their powers, and found them in good and true form, have agreed on the following Articles:

ARTICLE I. There shall be perpetual peace and constant friendship between the Kingdom of Spain and that of the Hawaiian Islands, and between the citizens of the two countries, without exception of person or place.

ARTICLE II. There shall be, between Spain and the Hawaiian Islands, reciprocal freedom in commerce and navigation. Spaniards in the Hawaiian Islands, and Hawaiian subjects in Spain, may enter in the same liberty and security with their vessels and cargoes as are enjoyed by the natives of the respective countries, in all places, ports and rivers which are, or shall in future be open to foreign commerce; provided, always, that the police regulations employed for the protection of the citizens of the most favored nations be respected.

ARTICLE III. The citizens of each of the contracting parties may, like the natives in the respective territories, travel or reside, trade wholesale or retail, let or occupy the houses, stores and shops which they may require; they may carry on the transport of merchandise and money, and receive consignments; they may also, when they have resided more than a year in the country, and their goods, chattels or movables which they there possess shall offer a sufficient security, be admitted as sureties in Custom-house transactions. The citizens of both countries shall, on a footing of perfect equality, be free both to purchase and to sell, to establish and to fix the price of goods, merchandise and articles of every kind, whether imported or of home manufacture, whether for home consumption or for exportation. They shall also enjoy liberty to carry on their business themselves, to present to the Custom-house their own declarations; or to have their places supplied by their own attorneys, factors, consignees, agents or interpreters, whether in the purchase or sale of their goods, property or merchandise; whether for the loading or unloading and expedition of their vessels.

They shall also have the right to fulfill all the functions that are confided to them by their own countrymen, by strangers, or by natives, in the position of attorneys, factors, agents, consignees, or interpreters.

For the performance of all these acts, they shall conform to all the laws and regulations of the country, and they shall not be subject, in any case, to any other charges, restrictions, taxes or impositions than those to which the natives are subject; provided, always, that the police regulations employed for the protection of the citizens of the most favored nation be respected. It is also specially provided, that all the advantages of any kind whatever, actually granted by the laws and decrees now in force, or which in future shall be accorded to foreign settlers, shall be guaranteed to Spaniards established, or who establish themselves in whatever position they may deem fit in the Hawaiian territory, and the same shall hold good for Hawaiian subjects in Spain.

ARTICLE IV. The respective citizens, of the two countries shall enjoy the most constant and complete protection for their persons and property. Consequently, they shall have free and easy access to the courts of justice in the pursuit and defence of their rights, in every instance and degree of jurisdiction established by the laws. They shall be at liberty, under any circumstances, to employ lawyers, advocates or agents from any class, whom they may see fit to authorize to act in their name. In fine, they shall in all respects enjoy the same rights and privileges which are granted to natives, and they shall be subject to the same conditions.

ARTICLE V. The Spaniards in the Hawaiian Islands, and the Hawaiians in Spain, shall be exempt from all service, whether in the army or navy, or in the national guard or militia, and they cannot be subject to any other charges, restrictions, taxes or impositions on their property, furniture or movables, than those to which the natives themselves are subject.

ARTICLE VI. The citizens of both countries respectively shall not be subject to any embargo, nor to be detained with their vessels, luggage, cargoes or commercial effects for any military expedition whatever, nor for any public or private service whatever, unless the government or local authority shall have previously agreed with the parties interested, that a just indemnity shall be granted for such service, and for such compensation as might fairly be required for the wrong which (not being purely fortuitous) may have grown out of the service which they have voluntarily undertaken.

ARTICLE VII. Citizens of either of the contracting parties shall, on the respective territories, have the right of possessing property of any sort, and disposing of it on the same conditions as native subjects.

Spaniards shall enjoy in all the Hawaiian territories the right of collecting and transmitting successions *ab intestato* or testamentary as Hawaiians, according to the laws of the country without being subjected as strangers to any burthens or imposts which are not paid by the natives.

Reciprocally Hawaiian subjects shall enjoy in Spain the right of collecting and transmitting succession *ab intestato* or testamentary, on the same conditions as Spaniards, according to the laws of the country, and without being subject as strangers to any charge or impost not paid by the natives.

The same reciprocity between the citizens of the two countries shall exist for donations *inter vivos*. On the exportation of property collected or acquired under any head by Spaniards in the Hawaiian Islands, or by Hawaiians in Spain, there shall be no duty on removal or immigration, nor any duty whatever to which natives are not subjected.

ARTICLE VIII. All Spanish or Hawaiian vessels, sailing under their respective colors, and which shall be bearers of the ship's papers and documents required by the laws of the respective countries shall be considered as national vessels.

ARTICLE IX. Spanish vessels which shall arrive either in ballast or laden in Hawaiian ports, or which shall leave the same, and reciprocally, Hawaiian vessels which, either in ballast or laden, enter or leave the ports of Spain, whether by sea, river or canals, whatever be the place of their departure or that of their destination, shall not be subject either at entry or departure, to duties on tonnage, port or transit, pilotages, anchorage, shifting, light-houses, sluices, canals, quarantines, salvage, bonding-warehouses, patents, brokerage, navigation, passage, or to any duties or charges whatever, levied on the hulks of vessels received or established for the benefit of the government, public functionaries, communes or establishments of any sort other than those which are now or may hereafter be levied on national vessels.

ARTICLE X. In all that regards the stationing, the loading and unloading of vessels in the ports, roadsteads, harbors and docks, and generally for all the formalities and arrangements whatever to which vessels employed in commerce, with their freights and loading may be subject, it is agreed that no privilege shall be granted to national vessels, which shall not be equally granted to vessels of the other country, the intention of the high contracting parties being that in this respect also the respective vessels shall be treated on the footing of perfect equality.

ARTICLE XI. Vessels of the subjects of the contracting parties, compelled to seek shelter in the ports of the other, shall pay neither on the vessels nor the cargo more duties than those levied on national vessels in the same situation; provided, that the necessity of such shelter seeking be legally shown; that the vessels shall carry on no commercial speculations, and that they tarry no longer in the aforesaid ports than is required by the motives which impelled them to seek such shelter.

ARTICLE XII. Spanish ships of war, and whaling ships, shall have free access to all the Hawaiian ports; they may there anchor, be repaired and victual their crews; they may proceed from one harbor to another of the Hawaiian Islands for fresh provisions.

At all the ports which are or may be hereafter opened to foreign vessels, Spanish ships of war and whalers shall be subject to the same rules which are or may be imposed, and shall enjoy in all respects the same rights, privileges and immunities which are or maybe granted to Hawaiian ships and whalers, or to those of the most favored nation.

ARTICLE XIII. Articles of all sorts imported into the ports of either of the contracting States, under the flag of the other, whatever be their origin, and from whatever country imported, shall pay neither, other nor heavier duties of entry, and shall not be subjected to any other charges than those imposed on vessels under the flag of the most favored nation.

ARTICLE XIV. Spanish ships in the Hawaiian Islands, and Hawaiian ships in Spain, may discharge a portion of their cargo in the port of their first arrival, and proceed with the rest of their cargo to other ports of the same country, which may be open to foreign trade, whether to complete their unloading or to provide their return cargo, and shall pay in neither port other or heavier duties than those levied on national vessels in similar circumstances.

As regards the coasting trade, the vessels of each country shall be mutually treated on the same footing as the most favored nation.

ARTICLE XV. During the period allowed by laws of the two countries for the warehousing of goods, no other duties than those for custody and storage shall be levied upon articles imported from one of the two countries into the other, until they shall be removed for transit, re-exportation or internal consumption.

In no case shall such articles pay higher duties or be liable to other formalities than if they had been imported under the national flag, or from the most favored country.

ARTICLE XVI. Merchandise shipped on board Spanish or Hawaiian ships, or belonging to their respective citizens, may be transhipped in the ports of the two countries to a vessel bound for a national or foreign port, according to the custom house regulations of the two countries, and the goods so transhipped for other ports shall be exempt from all duties of customs or warehouses.

ARTICLE XVII. Articles of all sorts proceeding from Spain, or shipped for Spain, shall enjoy in their passage through the territory of the Hawaiian Islands, whether in direct transit or for re-exportation, all the advantages possessed under the same circumstances by the most favored nation.

Reciprocally, the articles of every sort proceeding from the Hawaiian Islands or sent for that country, shall enjoy in their passage through Spain, the same advantages as are possessed by the most favored nation.

ARTICLE XVIII. Neither one nor the other of the contracting parties will impose upon the goods proceeding from the soil, the manufactures or the warehouses of the other different or greater duties on importation or re-exportation, than those which shall be imposed on the same merchandise coming from any other foreign country.

Nor shall there be imposed on the goods exported from one country to the other, different or higher duties than if they were exported to any other foreign country.

No restriction or prohibition of importation or exportation shall take place in the reciprocal commerce of the contracting parties which shall not be equally extended to all other nations.

ARTICLE XIX. Consuls-General, Consuls, Vice-Consuls and Consular Agents may be established by each country in the other for the protection of commerce, such agents shall not enter upon their functions or enjoyment of the rights, privileges and immunities which belong to them until they have obtained the authorization of the territorial government, which shall, besides, preserve the right of determining the place of residence where Consuls may be established; it being understood that neither Government will impose any restriction which is not common in the country to all nations.

ARTICLE XX. The Consuls General, Consuls, Vice-Consuls and Consular Agents of Spain, in the Hawaiian Islands, shall enjoy all the rights, privileges, immunities and exemptions enjoyed by the agents of the most favored nation in the same circumstances.

And the same shall be the position in Spain, of the Hawaiian Consuls-General, Consuls, Vice-Consuls and Consular Agents.

ARTICLE XXI. The desertion of seamen embarked in the vessels of either of the contracting parties shall be severely dealt with in their respective territories. In consequence the Spanish consuls shall have the power to cause to be arrested and sent on board, or to Spain, seamen who may have deserted Spanish vessels in the Hawaiian ports. But for this purpose they must apply to the competent local authorities, and justify, by the exhibition of the original or the duly certified copy of the ship's register, the roll or other official documents to prove that the persons named formed part of the ship's crew. On this application, so supported, the delivery of the seamen shall not be refused.

All aid and assistance shall be given for the discovery and arrest of such deserters, who shall be detained in the prisons of the country, on the requirement and at the expense of the consuls, until they shall find an opportunity of sending them way, If, however, no opportunity shall

offer in the course of two months, counting from the day of arrest, the deserters may be set at liberty.

It is understood that seamen who are native Hawaiians shall be excepted from this arrangement, and be treated according to the laws of their own country.

If the deserter has committed any crime in the Hawaiian territory, his release shall not take place till the competent tribunal shall have given judgment, and this judgment been carried into execution.

Hawaiian consuls shall possess exactly the same rights in Spain, and it is formally agreed between the two contracting parties, that every other favor or facility granted or to be granted by either to any other power for the arrest of deserters shall be also granted to the present contracting parties as fully as if they had formed part of the present treaty.

ARTICLE XXII. All operations connected with the salvage of stranded or wrecked Spanish vessels on the Hawaiian coasts shall be superintended by the Consular Agent of Spain, and reciprocally the Consular Hawaiian Agents shall superintend the operations connected with the salvage of Hawaiian vessels stranded or wrecked on the Spanish coasts.

But if the parties interested find themselves on the spot, or the captain possess adequate powers, the administration of the wreck shall be committed to them.

The intervention of the local authorities shall only be applied to the maintenance of order, to guarantee the rights of the salvors if they do not belong to the ship-wrecked crew, and to insure the execution of the measures to be taken for the entry and departure of the saved goods. In the absence and until the arrival of the Consular Agents, the local authorities will take the needful steps for the protection of persons and property wrecked.

The goods saved shall never be subjected to customs or other duty, unless they are disposed of for home consumption.

ARTICLE XXIII. The ships, merchandise and effects belonging to the respective citizens which may have been taken by pirates or conveyed to or found in the ports of either of the contracting parties, shall be delivered to their owners on payment of the expenses should there be such, the amount to be determined by the competent tribunals when the right of the proprietor shall be proved before these tribunals, and the claim being made within the space of eighteen months by the interested parties, by their attorneys, or by the agents of their respective Governments.

ARTICLE XXIV. If, from a concurrence of unfortunate circumstances, differences between the contracting parties should cause an interruption of the relations of friendship between them, and that after having exhausted the means of an amicable and conciliatory discussion, the object of their mutual desire should not have been completely attained, the arbitration of a third power, equally the friend of both, shall by a common accord be appealed to, in order to avoid by this means a definitive rupture.

ARTICLE XXV. Hawaiian subjects shall enjoy, in the Ultra-marine possessions of Spain, the advantages which are conceded to the subjects of the most favored nation, and in the same possessions, the stipulations of this treaty shall have effect when not openly opposed to the special legislation there existing.

ARTICLE XXVI. All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands,

and Her Majesty the Queen of Spain engages to respect, in time of war the neutrality of the Hawaiian Islands, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands,

ARTICLE XXVII. The present treaty shall be in vigor for ten years, to commence six months after the exchange of ratification. If a year before the expiration of this term neither of the contracting parties shall have announced, by an official declaration, its intention of terminating it, the treaty shall still remain in force for a year, and so continue from year to year.

ARTICLE XXVIII. The present treaty shall be ratified and the ratification exchanged at London, within the space of eighteen months, or earlier if may be.

In faith, whereof, the respective Plenipotentiaries have signed the same, and thereto affixed their seals.

Done in duplicate at London, this twenty-ninth day of October, in the year of Our Lord One Thousand Eight Hundred and Sixty-three.

[L.S.] JUAN T. COMYN

[L.S.] JOHN BOWRING

TREATY WITH SWEDEN AND NORWAY

Treaty between the Kingdom of the Hawaiian Islands and the United Kingdoms of Sweden and Norway, concluded by R. C. Wyllie, Esquire, His Hawaiian Majesty's Minister of Foreign Relations, Member of His Privy Council of State and of His House of Nobles, and C.A. Virgin, Chamberlain to His Majesty the King of Sweden, Post Captain of the Royal Swedish Navy, Knight of the Royal Order of the Sword of Sweden and of the Imperial Russian Order of St. Stanislaus; signed at Honolulu the 1 July 1852.

It being of great advantage to establish relations of friendship and commerce between the Kingdoms of His Majesty the King of Sweden and Norway and the Kingdom of His Majesty the King of the Hawaiian Islands, the undersigned, having exchanged their powers, mutually admitted as sufficient, have agreed, on the part of their respective Sovereigns, to conclude a Treaty of Friendship, commerce and Navigation, as follows:

ARTICLE I. There shall be perpetual friendship between His Majesty the King of the United Kingdoms of Sweden and Norway, His Heirs and Successors, and the King of the Hawaiian Islands, His Heirs and Successors, and between their respective subjects.

ARTICLE II. There shall be between all the dominions of His Swedish and Norwegian Majesty, and the Hawaiian Islands, a reciprocal freedom of commerce. The subjects of each of the two contracting parties, respectively, shall have liberty freely and securely to come with their ships and cargoes, to all places, ports and rivers, in the territories of the other, where trade with other nations is permitted. They may remain and reside in any part of the said territories, respectively, and hire and occupy houses and warehouses, and may trade, by wholesale or retail, in all kinds of produce, manufactures and merchandise of lawful commerce; enjoying the same exemptions and privileges as native subjects, and subject always to the same laws, and established customs, as native subjects.

In like manner the ships of war of each contracting party, respectively, shall have liberty to enter into all harbours, rivers, and places, within the territories of the other to which the ships of war of other nations are or may be permitted to come, to anchor there, and to remain and refit; subject always to the laws and regulations of the two countries respectively.

The stipulations of this article do not apply to the coasting trade, which each contracting party reserves to itself, respectively, and shall regulate according to its own laws.

ARTICLE III. The two contracting parties hereby agree, that any favour, privilege, or immunity whatever, in matters of commerce or navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other state, shall be extended to the subjects or citizens of the other contracting party, gratuitously, if the concession in favour of that other state shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

ARTICLE IV. No other or higher duties shall be imposed on the importation into the dominions of His Swedish and Norwegian Majesty of any article, the growth, produce or manufacture of His Swedish and Norwegian Majesty's dominions, that are or shall be payable on the like article, being the growth, produce or manufacture of any other foreign country.

Nor shall any other or higher duties or charges be imposed in the territories of either of the contracting parties on the exportation of any article to the territories of the other, than such

as are or may be payable on the exportation of the like article to any other foreign country. No prohibition shall be imposed upon the importation of any article, the growth, produce or manufacture of the territories of either of the two contracting parties, into the territories of the other, which shall not equally extend to the importation of the like articles, being the growth, produce or manufacture of any other country. Nor shall any prohibition be imposed upon the exportation of any article from the territories of either of the two contracting parties to the territories of the other, which shall not equally extend to the exportation of the like articles to the territories of all other nations.

ARTICLE V. No other or higher duties or charges on account of tonnage, light, or harbour dues, pilotage, quarantine, salvage in cases of damage or shipwreck, or any other local charges shall be imposed in any of the ports of the Hawaiian Islands on Swedish and Norwegian vessels, than those payable in the same ports by Hawaiian vessels, nor in the ports of His Swedish and Norwegian Majesty's territories, on Hawaiian vessels, than shall be payable in the same ports on Swedish and Norwegian vessels.

ARTICLE VI. The same duties shall be paid on the importation of any article which is or may be legally importable into the Hawaiian Islands, whether such importation shall be in Hawaiian or in Swedish and Norwegian vessels; and the same duties shall be paid on the importation of any article which is or may be legally importable into the dominions of His Swedish and Norwegian or in Hawaiian vessels. The same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any article which is or may be legally exportable from the Hawaiian Islands, whether such exportation shall be in Hawaiian or in Swedish and Norwegian vessels; and the same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any article which is or may be legally exportable from His Swedish and Norwegian Majesty's dominions, whether such exportation shall be in Swedish and Norwegian or in Hawaiian vessels.

ARTICLE VII. Swedish and Norwegian whale ships shall have access to the ports of Hilo, Kealakekua and Hanalei in the Sandwich Islands for the purpose of refitment and refreshment, as well as to the ports of Honolulu and Lahaina, which two last mentioned ports only are ports of entry for all merchant vessels; and in all the above named ports they shall be permitted to trade or to barter their supplies or goods, excepting spirituous liquors, to the additional amount of one thousand dollars ad valorem, for each vessel, paying upon the additional goods and articles so traded and bartered no other or higher duties than are payable on like goods and articles when imported in national vessels and by native subjects. They shall also be permitted to pass from port to port of the Sandwich Islands for the purpose of procuring refreshments, but they shall not discharge their seamen, or land their passengers in the said Islands, except at Honolulu and Lahaina; and in all the ports named in this article, Swedish and Norwegian whale ships shall enjoy in all respects whatsoever all the rights, privileges and immunities which are or may be enjoyed by national whale ships, or by whale ships of the most favored nation.

The like privilege of frequenting the three ports of the Sandwich Islands named in this article, which are not ports of entry for merchant vessels, is also guaranteed to all the public armed vessels of Sweden and Norway. But nothing in this article shall be construed as authorizing any Swedish or Norwegian vessel having on board any disease usually regarded as requiring quarantine, to enter during the continuance of any such disease on board, any ports of the Sandwich Islands other than Honolulu or Lahaina.

ARTICLE VIII. All merchants, commanders of ships and others, the subjects of His Swedish and Norwegian Majesty, shall have full liberty in the Hawaiian Islands, to manage their own affairs themselves or to commit them to the management of whomsoever they please, as broker, factor, agent or interpreter; nor shall they be obliged to employ any other persons

than those employed by Hawaiian subjects, nor to pay to such persons as they shall think fit to employ, any higher salary or remuneration than such as is paid in like cases by Hawaiian subjects. Swedish and Norwegian subjects in the Hawaiian Islands shall be at liberty to buy from and to sell to whom they like, without being restrained or prejudiced by any monopoly, contract or exclusive privilege of sale or purchase whatever; and absolute freedom shall be allowed in all cases to the buyer and seller, to bargain and fix the price of any goods, wares or merchandise, imported into or exported from the Hawaiian Islands, as they shall see good: observing the laws and established customs of those Islands. The same privileges shall be enjoyed in the dominions of His Swedish and Norwegian Majesty by Hawaiian subjects under the same conditions.

The subjects of either of the contracting parties in the territories of the other shall receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the Courts of Justice in the said countries, respectively, for the prosecution and defence of their just rights, and they shall be at liberty to employ, in all causes, the advocates, attorneys, or agents of whatever description, whom they may think proper; and they shall enjoy in this respect the same rights and privileges as native subjects.

ARTICLE IX. In whatever relates to the police of the ports, the lading and unlading of ships, the warehousing and safety of merchandise, goods and effects, the succession to personal estates by will or otherwise, and the disposal of personal property of every sort and denomination by sale, donation, exchange or testament, or in any other manner whatsoever, as also with regard to the administration of justice, the subjects of each contracting party shall enjoy in the territories of the other, the same privileges, liberties and rights as native subjects, and they shall not be charged in any of these respects with any other or higher impost or duties, than those which are or may be paid by native subjects; subject always to the local laws and regulations of such territories.

In the event of any subject of either of the two contracting parties dying without will or testament in the territories of the other contracting party, the Consul General, Consul or acting Consul of the nation to which the deceased may belong, shall so far as the laws of each country will permit, take charge of the property which the deceased may have left for the benefit of his lawful heirs and creditors, until an executor or administrator be named according to the laws of the country in which the death shall have taken place.

ARTICLE X. The subjects of His Swedish and Norwegian Majesty residing in the Hawaiian Islands, and Hawaiian subjects residing in the dominions of His Swedish and Norwegian Majesty shall be exempted from all compulsory military service whatsoever, whether by sea or by land, and from all forced loans, or military exactions or requisitions, and they shall not be compelled under any pretext whatsoever to pay any ordinary charges, requisitions or taxes, other or higher than those that are or may be paid by native subjects.

ARTICLE XI. It is agreed and covenanted that neither of the two contracting parties shall knowingly receive into, or retain in its service, any subjects of the other party who have deserted from the naval or military services of that other party, but that on the contrary, each of the contracting parties shall, respectively, discharge from its service any such deserters upon being required by the other party so to do.

And it is further agreed that if any of the crew shall desert from a vessel of war, or merchant vessel of either contracting party, while such vessel is within any port in the territory of the other party, the authorities of such port and territory shall be bound to give every assistance in their power for the apprehension of such deserters, on application to that effect being made by the consul of the party concerned, or by the deputy or representative of the consul; and no public body shall protect or harbour such deserters.

It is further agreed and declared that any other favour or facility with respect to the recovery of deserters, which either of the contracting parties has granted or may hereafter grant to any other state, shall be considered as granted also to the other contracting party, in the same manner as if such favour or facility had been expressly stipulated by the present treaty.

ARTICLE XII. It shall be free for each of the two contracting parties to appoint Consuls for the protection of trade to reside in the territories of the other party, but, before any consul shall act as such, he shall in the usual form be approved and admitted by the government to which he is sent; and either of the contracting parties may except from the residence of consuls such particular places as either of them may judge fit to be excepted. The diplomatic agents and consuls of the Hawaiian Islands in the dominions of His Swedish and Norwegian Majesty shall enjoy whatever privileges, exemptions and immunities are or shall be granted there to agents of the same rank belonging to the most favoured nation; and in like manner the diplomatic agents and consuls of His Swedish and Norwegian Majesty in the Hawaiian Islands shall enjoy whatever privileges, exemptions or immunities are or may be granted there to the diplomatic agents and consuls of the same rank belonging to the most favoured nation.

ARTICLE XIII. For the better security of commerce between the subjects of His Swedish and Norwegian Majesty and of the King of the Hawaiian Islands, it is agreed that if, at any time, any rupture or any interruption of friendly intercourse should unfortunately take place between the two contracting parties the subjects of either of the two contracting parties, shall be allowed a year to wind up their accounts and dispose of their property, and a safe conduct shall be given them to embark at the port which they shall themselves select. All subjects of either of the two contracting parties who may be established in the territories of the other in the exercise of any trade or special employment shall in such case have the privilege of remaining and continuing such trade and employment therein, without any manner of interruption, in full enjoyment of their liberty and property, as long as they behave peaceably and commit no offence against the laws; and their goods and effects, of whatever description they may be, whether in their own custody or entrusted to individuals or to the state, shall not be liable to seizure or sequestration, or to any other charges or demands than those which may be made upon the like effects or property belonging to native subjects. In the same case debts between individuals, public funds, and the shares of companies shall never be confiscated, sequestered or detained.

ARTICLE XIV. The subjects of His Swedish and Norwegian Majesty, residing in the Hawaiian Islands, shall not be disturbed, persecuted or annoyed on account of their religion, but they shall have perfect liberty of conscience therein, and shall be allowed to celebrate Divine Service either within their own private houses or in their own particular churches or chapels, which they shall be at liberty to build and maintain in convenient places, approved of by the Government of the said Islands. Liberty shall also be granted to them to bury in burial places, which in the same manner they may freely establish and maintain, such subjects of His Swedish and Norwegian Majesty, who may die in the said Islands. In like manner Hawaiian subjects shall enjoy within the dominions of His Swedish and Norwegian Majesty perfect and unrestrained liberty of conscience, and shall be allowed to exercise their religion publicly or privately, within their own dwelling houses, or in the chapels or place of worship appointed to that purpose, agreeably to the system of toleration established in the dominions of His said Majesty.

ARTICLE XV. All vessels bearing the flag of Sweden or of Norway in time of war shall receive every possible protection, short of actual hostility, within the ports and waters of His Majesty the King of the Hawaiian Islands; and His Majesty the King of Sweden and Norway engages to respect in time of war the neutral rights of the Hawaiian Kingdom and to use his good offices with all other powers, having treaties with His Majesty the King of the Hawaiian Islands, to induce them to adopt the same policy towards the Hawaiian Kingdom.

ARTICLE XVI. If any ship of war or merchant vessel, of either of the contracting parties should be wrecked on the coasts of the other, such ship or vessel or any parts thereof, and all furniture and appurtenance belonging thereunto, and all goods and merchandise which shall be saved therefrom, or the produce thereof, if sold, shall be faithfully restored to the proprietors upon being claimed by them or by their duly authorized agents, and if there are no such proprietors or agents on the spot, then the said goods or merchandise, or the proceeds thereof, as well as all the papers found on board such wrecked ship or vessel shall be delivered to the Swedish and Norwegian or Hawaiian consul in whose district the wreck may have taken place, and such consul, proprietors or agents shall pay only the expences incurred in the preservation of the property, together with the rate of salvage which would have been payable in the like case of a wreck of a national vessel. The goods and merchandise saved from the wreck shall not be subject to duties, unless cleared for consumption.

ARTICLE XVII. In order that the two contracting parties may have the opportunity of hereafter trading and agreeing upon such other arrangements as may tend still further to the improvement of their mutual intercourse, and to the advancement of the interests of their respective subjects, it is agreed that at any time after the expiration of seven years from the date of the exchange of the ratifications of the present treaty, either of the contracting parties shall have the right of giving to the other party notice of its intentions to terminate Articles 4, 5 and 6 of the present Treaty; and that at the expiration of 18 months after such notice shall have been received by either party from the other, the said articles, and all the stipulations contained therein shall cease to be binding on the two contracting parties.

ARTICLE XVIII. The present Treaty shall be ratified and the Ratifications shall be exchanged at Honolulu in eighteen months, or sooner, if possible.

In witness whereof the respective Plenipotentiaries have signed the same, and affixed thereto their respective seals.

Done at Honolulu this first day of July, in the year of our Lord one thousand eight hundred and fifty two.

[L.S.] R. C. WYLLIE
H.H.M.'s Minister of Foreign Affairs, Member of His Privy
Council of State, and of His House of Nobles

[L.S.] C. A. VIRGIN
Chamberlain to His Majesty the King of Sweden and
Norway, Post Captain in the R. Swedish Navy, Knight of
the Royal Order of the Sword and of the Imperial Russian
Order of St. Stanislaus.

TREATY WITH SWITZERLAND

Treaty of Friendship, Establishment and Commerce between Majesty the King of the Hawaiian Islands and the Swiss Confederation.

Majesty the King of the Hawaiian Islands and the Swiss Confederation, animated by the desire to establish and to strengthen the ties of Friendship between the two countries and to promote by every means in their power the commercial relations between their respective citizens, resolved to conclude a Treaty of Friendship and Commerce and reciprocal establishment and have for that purpose named as their Plenipotentiaries, that is to say:

Majesty the Hawaiian King, Sir John Bowring, Knight of Great Britain, Commander of the Order of Leopold of Belgium. etc., etc., His Envoy Extraordinary Minister Plenipotentiary, and the Swiss Federal Council, Mr. Frederic Frey Flerosee, Federal Colonel, Member the Swiss Federal Council, head of the Department of Commerce and Customs, who, after having Communicated each other their respective full powers, found in good due form, have agreed upon and signed the following Articles:

ARTICLE I. There shall be, between the Hawaiian Islands Switzerland, perpetual peace and reciprocal liberty of establishment and commerce; Hawaiians shall be received treated in every canton of the Swiss Confederation, as regards their persons and their properties, on the same foot and in the same manner as now are or may hereafter be treated, the citizens of other cantons. The Swiss shall enjoy Hawaiian Islands all the same rights as Hawaiians in Switzerland. Conformably with this principle and within limits, the citizens of each of the contracting parties freely, in their respective territories, and conforming themselves to the laws of the country, travel and sojourn, wholesale and retail, exercise every profession or industry, hire and occupy houses, warehouses, shops or other establishments necessary to them, effect transport of merchandise and money, receive consignments both from the interior and from foreign countries, and for all or any of these operation the said citizens shall be subject to no other obligation than those which rest upon national subjects, excepting those police arrangements which are employed towards the most favored nations. They shall both be placed on a footing of perfect equality, free in all their purchases as in all their sales, and to establish and to fix the price of Articles, merchandise and all objects imported, as well as national, whether sold for home consumption or intended for exportation, on the condition of expressly conforming to the laws and regulations of the country.

They shall enjoy the same freedom for carrying on their own affairs, of presenting in the custom-house their own declarations, or of replacing them by whom they please as attornies, factors, agents, consignees or interpreters in the purchase or sale of their goods, properties or merchandise. They shall enjoy the right of exercising all the functions confided to them by their own countrymen, by foreigners or natives as attornies, factors, agents consignees or interpreters.

In fine they shall not pay on account of their commerce or industry in any of the towns, or places of the said States, whether they be there established or temporarily residing, any duties, taxes or imposts of whatever denomination they may be, other or higher than those paid by natives or citizens of the most favored nations and the privileges, immunities or other favors whatever, which are enjoyed in the matters of commerce or industry by the citizens of either of the contracting States shall be common to those of the other.

ARTICLE II. The citizens of one of the contracting parties residing or established in the territories of the other, who may desire to return to their country or who shall be sent away by a

judicial sentence, by a police measure regularly adopted and executed or according to the laws of mendicancy and public morals, shall be received at all times and under all circumstances, they and their families in the country of their origin and in which they may have preserved their legal rights.

ARTICLE III. The citizens of each of the contracting parties shall enjoy on the territory of the other the most per-fee and complete protection for their persons and their properties. They shall in consequence have free and easy access to the tribunals of justice for their claims and the defence of their rights, in all cases and in every degree of jurisdiction established by the law. They shall be free to employ in all circumstances advocates, lawyers or agents of any class whom they may choose to act in their name, chosen among those admitted to exercise these professions by the laws of the country. In fine they shall enjoy in this respect the same rights and privileges accorded to natives and be subject to the same conditions.

Anonymous, commercial, industrial or financial societies, legally authorized in either of the two countries, shall be admitted to plead in justice in time other, and shall enjoy in this respect the same rights as individuals.

ARTICLE IV. The citizens of each of the contracting parties shall, on the territories of the other, enjoy full and entire liberty to acquire, to possess by purchase, sale, donation, exchange, marriage, testament, succession ab intestato, or in any other way, every sort of real or personal property which the laws of the country allow a native of the country to dispose of or to possess.

Their heirs and representatives may succeed them and take possession by themselves, or by their attorneys, acting in their names, according to time ordinary forms of law applicable to native citizens.

In the absence of such heirs or representatives, the property shall be treated in the same manner as that of a native citizen under similar circumstances.

And in no case shall they pay on the value of such property any impost, contribution or charge, other or greater than that to which natives are subject.

In all cases it shall be allowed to the citizens of the two contracting parties to export their property, that is to say: Hawaiian citizens on Swiss territory, and Swiss citizens on Hawaiian territory, shall freely and without being subjected on exportation to pay any duty whatever as strangers, or being called on to pay other or heavier duties than those to which native citizens are themselves subject.

ARTICLE V. Time citizens of each of the contracting parties who may be in the territories of the other, shall be freed from all obligatory military service, either in the army or time navy, the national or civic guard or militia. They shall be free from the payment of all exemption money or contributions imposed for personal service, as from all military requisitions, except for lodgings or supplies for soldiers on their route, according to the usage of the country, to be required equally from natives and from foreigners.

ARTICLE VI. Neither in time of peace nor in time of war shall there, under any circumstances, be imposed or exacted on the property of a citizen of either of the contracting parties in the territories of the other taxes, duties, contributions or charges higher than are imposed or exacted on the same Properties belonging to a native of the country, or a subject of the most favored nation.

It is further understood that there shall be neither received nor demanded from a citizen of

either of the contracting parties in the territory of the other, any impost, be it what it may, other or greater than what is or may be demanded of a native or a citizen, or subject of the most favored nation.

ARTICLE VII. It shall be free for each of the two contracting parties to nominate Consuls, Vice-Consuls or Consular Agents, in the territories of time other. But before any of these officers can act as such, he must be acknowledged and admitted by the government to which he is sent, according to time ordinary usage, and either of the contracting parties may except from the residence of consular officers such particular places as it may deem fit.

The Consular authorities of each of the contracting parties shall enjoy on the territories of the other all the privileges, exemptions and immunities accorded to officers of the same rank of time most favored nation.

ARTICLE VIII. The two contracting parties promise to place time respective citizens in everything which concerns the importation, warehousing, transit and exportation of every Article of legal commerce on the same footing as native citizens, or the citizens or subjects of the most favored nation, wherever these enjoy an exceptional advantage not granted to natives.

ARTICLE IX. Neither of time contracting parties shall exact on the importation, warehousing, transit or exportation of the products of the soil, or manufactures of the other, higher duties than those which are or may be imposed on the same Articles, being the produce of the soil, or the manufactures of any other country. The import duties to be paid in the Hawaiian Islands on the products of Swiss origin or manufacture shall, therefore, be, as soon as this present treaty becomes in force, reduced to the rate accorded to time most favored nation, and levied by the same rule and under the same conditions.

ARTICLE X. The two contracting parties promise that in case either of them shall grant to a third power any favor in commercial or custom house matters, that favor shall be extended at time same time and in full right to the other of the contracting parties.

ARTICLE XI. Articles subject to duty on entry, but serving as patterns, and which are imported into the Hawaiian Islands by commercial travelers of Swiss houses, or imported into Switzerland by the commercial travelers of Hawaiian houses shall, on both sides, be admitted without charge. subject to the custom house regulations necessary to insure their re-exportation or transfer to time bonded warehouse.

ARTICLE XII. Should any question arise between the contracting countries which cannot be amicably settled by the diplomatic correspondence of time two governments, these shall by common accord designate a third friendly and neutral power as arbiter, whose decision shall be recognized by both parties.

ARTICLE XIII. The stipulations of the present treaty shall take effect in the two countries from time hundredth day after the exchange of time ratifications. Time treaty shall remain in vigor for ten years, dating from time day of the said exchange. In ease neither of time contracting parties shall have notified twelve months before time end of time said period its intention to terminate time same, this treaty will continue obligatory till the expiry of a year, reckoning from the day on which either of the contracting parties shall give notice of its termination.

The contracting parties reserve to themselves the right of introducing by common consent into this treaty any modifications which are not opposed to its spirit or its principles, and of which experience shall have demonstrated the utility.

ARTICLE XIV. The present treaty shall be subjected to the approval of the Privy Council of His Hawaiian Majesty, and of the Legislative Chambers of Switzerland, and time ratifications shall be exchanged in Paris within eighteen months of the date of the signature, or earlier if may be.

In faith of which the respective Plenipotentiaries have signed time treaty and hereunto affixed their seals.

Done by duplicate in Berne the twentieth day of July, one thousand eight hundred and sixty-four.

By the Hawaiian Plenipotentiary,

[L. S.] JOHN BOWRING

By the Swiss Plenipotentiary,

[L. S.] FREDERIC FREY FLEROSSEE

TREATY WITH THE UNITED STATES OF AMERICA

KAMEHAMEHA III., King of the Hawaiian Islands, to all to whom these presents shall come,
Greeting:

Know Ye, that whereas a treaty of friendship, commerce and navigation between Our Kingdom and the United States of North America, was concluded and signed by Our and their Plenipotentiaries, in the city of Washington, on the 20th day of December, 1849, which treaty is word for word, as follows:

The United States of America and His Majesty the King of the Hawaiian Islands, equally animated with the desire of maintaining the relations of good understanding which have hitherto so happily subsisted between their respective states, and consolidating the commercial intercourse between them, have agreed to enter into negotiations for the conclusion of a treaty of friendship, commerce and navigation, for which purpose they have appointed Plenipotentiaries, that is to say:

The President of the United States of America John M. Clayton, Secretary of State of the United States; and His Majesty the King of the Hawaiian Islands, James Jackson Jarves, accredited as His special commissioner to the Government of the United States; who, after having exchanged their full powers, found in good and due form, have concluded and signed the following articles:

ARTICLE I. There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, His heirs and His successors.

ARTICLE II. There shall be reciprocal liberty of commerce and navigation between the United States of America and the Hawaiian Islands. No duty of customs, or other impost, shall be charged upon any goods, the produce or manufacture of one country, upon importation from such country into the other, other or higher than the duty or impost charged upon goods of the same kind, the produce or manufacture of, or imported from, any other country: and the United States of America and His Majesty the King of the Hawaiian Islands do hereby engage, that the subjects or citizens of any other state shall not enjoy any favor, privilege or immunity whatever, in matters of commerce and navigation, which shall not also, at the same time, be extended to the subjects or citizens of the other contracting parties gratuitously, if the concession in favor of that other state shall have been gratuitous, and in return for a compensation, as nearly as possible, of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

ARTICLE III. All articles the produce and manufacture of either country which can legally be imported into either country from the other, in ships of that other country, and thence coming, shall, when so imported, be subject to the same duties, and. enjoy the same privileges, whether imported in ships of the one country, or in ships of the other; and in like manner, all goods which can legally be exported or re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, and be entitled to the same privileges, drawbacks, bounties and allowances, whether exported in ships of the one country or in ships of the other; and all goods and articles, of whatever description, not being of the produce or manufacture of the United States, which can be legally imported into the Sandwich Islands, shall, when so imported in vessels of the United States, pay no other or higher duties, imposts or charges, than shall be payable upon the like goods

and articles, when imported in the vessels of the most favored foreign nation other than the nation of which the said goods and articles are the produce or manufacture.

ARTICLE IV. No duties of tonnage, harbor, light-houses, pilotage, quarantine, or other similar duties, of whatever nature, or under whatever denomination, shall be imposed in either country upon the vessels of the other, in respect of voyages between the United States of America and the Hawaiian Islands, if laden, or in respect of any voyage, if in ballast, which shall not be equally imposed in the like cases on national vessels.

ARTICLE V. It is hereby declared, that the stipulations of the present treaty are not to be understood as applying to the navigation and carrying trade between one port and another situated in the States of either contracting party, such navigation and trade being reserved exclusively to national vessels.

ARTICLE VI. Steam vessels of the United States which may be employed by the Government of the said States, in the carrying of their public mails across the Pacific Ocean, or from one port in that ocean to another, shall have free access to the ports of the Sandwich Islands, with the privilege of stopping therein to refit, to refresh, to land passengers and their baggage, and for the transaction of any business pertaining to the public mail service of the United States, and shall be subject in such ports to no duties of tonnage, harbor, light-houses, quarantine, or other similar duties of whatever nature or under whatever denomination.

ARTICLE VII. The whaleships of the United States shall have access to the ports of Hilo, Kealakekua and Hanalei, in the Sandwich Islands, for the purposes of refitment and refreshment, as well as to the ports of Honolulu and Lahaina, which only are ports of entry for all merchant vessels, and in all the above-named ports, they shall be permitted to trade or barter their supplies or goods, excepting spirituous liquors, to the amount of two hundred dollars *ad valorem* for each vessel, without paying any charge for tonnage or harbor dues of any description, or any duties or imposts whatever upon the goods or articles so traded or bartered. They shall also be permitted, with the like exemption from all charges for tonnage and harbor dues, further to trade or barter, with the same exemption as to spirituous liquors, to the additional amount of one thousand dollars, *ad valorem*, for each vessel, paying upon the additional goods, and articles so traded and bartered, no other or higher duties, than are payable on like goods, and articles, when imported in the vessels and by the citizens or subjects of the most favored foreign nation. They shall also be permitted to pass from port to port of the Sandwich Islands for the purpose of procuring refreshments, but they shall not discharge their seamen or land their passengers in the said Islands, except at Lahaina and Honolulu, and in all ports named in this article, the whaleships of the United States shall enjoy in all respects whatsoever, all the rights, privileges and immunities, which are enjoyed by, or shall be granted to, the whaleships of the most favored foreign nation. The like privilege of frequenting the three ports of the Sandwich Islands, above named in this article, not being ports of entry for merchant vessels, is also guaranteed to all the public armed vessels of the United States. But nothing in this article shall be construed as authorizing any vessel of the United States, having on board any disease usually regarded as requiring quarantine, to enter, during the continuance of such disease on board, any port of the Sandwich Islands, other than Lahaina or Honolulu.

ARTICLE VIII. The contracting parties engage, in regard to the personal privileges that the citizens of the United States of America shall enjoy in the dominions of His Majesty the King of Hawaiian Islands, and the subjects of His said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practised towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, by

sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament ab intestator; and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. And in case of the absence of the heirs and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective states. The citizens or subjects of the contracting parties shall not be obliged to pay, under any pretense whatever, any taxes or impositions, other or greater than those which are paid, or may hereafter be paid, by the subjects or citizens of the most favored nation in the respective states of the high contracting parties. They shall be exempt from all military service, whether by land or by sea; from forced loans, and from every extraordinary contribution not general and by laws established. Their dwellings, warehouses, and all premises appertaining thereto, destined for the purposes of commerce or residence, shall be respected. No arbitrary search of, or visit to their houses, and no arbitrary examination or inspection whatever of the books, papers or accounts of their trade, shall be made; but such measures shall be executed only in conformity with the legal sentence of a competent tribunal; and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states, shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively.

ARTICLE IX. The citizens and subjects of each of the two contracting parties shall be free in the States of the other to manage their own affairs themselves, or to commit those affairs to the management of any persons whom they may appoint as their broker, factor or agent, nor shall the citizens and subjects of the two contracting parties be restrained in their choice of persons to act in such capacities, nor shall they be called upon to pay any salary or remuneration to any person whom they shall not choose to employ. Absolute freedom shall be given in all cases to the buyer and seller to bargain together and to fix the price of any goods or merchandise imported into, or to be exported from the States and dominions of the two contracting parties; save and except generally such cases wherein the laws and usages of the country may require the intervention of any special agents in the States and dominions of the contracting parties. But nothing contained in this or any other article of the present treaty shall be construed to authorize the sale of spirituous liquors to the natives of the Sandwich Islands farther than such sale may be allowed by the Hawaiian laws.

ARTICLE X. Each of the two contracting parties may have, in the ports of the other, consuls, vice-consuls, and commercial agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nation; but if any such consuls shall exercise commerce, they shall be subject to the same laws and usages to which the private individuals of their nation are subject in the same place. The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose, they shall apply to the competent tribunals, judges and officers, and shall in writing demand the said deserters, proving by the exhibition of registers of the

vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice-consuls or commercial agents, and may be confined in the public prisons at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessel to which they belonged, or sent back to their own country, by a vessel of the same nation, or any other vessel whatsoever. The agents, owners or masters of vessels on account of whom the deserters have been apprehended, upon the requisition of the local authorities shall be required to take or send away such deserters from the states and dominions of the contracting parties, or give such security for their good conduct as the law may require. But if not sent back nor reclaimed within six months from the day of their arrest, or if all the expenses of such imprisonment are not defrayed by the party causing such arrest and imprisonment, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserters should be found to have committed any crime or offense, their surrender may be delayed until the tribunal before which their case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect.

ARTICLE XI. It is agreed that perfect and entire liberty of conscience shall be enjoyed by the citizens and subjects of both the contracting parties, in the countries of the one and the other, without their being liable to be disturbed or molested on account of their religious belief. But nothing contained in this article shall be construed to interfere with the exclusive right of the Hawaiian Government to regulate for itself the schools which it may establish or support within its jurisdiction.

ARTICLE XII. If any ships of war or other vessels be wrecked on the coasts of the states or territories of either of the contracting parties, such ships or vessels, or any parts thereof, and all furniture and appurtenances belonging thereunto, and all goods and merchandise which shall be saved therefrom, or the produce thereof if sold, shall be faithfully restored with the least possible delay to the proprietors, upon being claimed by them, or by their duly authorized factors; and if there are no such proprietors or factors on the spot, then the said goods and merchandise, or the proceeds thereof, as well as all the papers found on board such wrecked ships or vessels, shall be delivered to the American or Hawaiian consul, or vice-consul, in whose district the wreck may have taken place; and such consul, vice-consul, proprietors or factors, shall pay only the expenses incurred in the preservation of the property, together with the rate of salvage and expenses of quarantine which would have been payable in the like case of a wreck of a national vessel; and the goods and merchandise saved from the wreck shall not be subject to duties unless entered for consumption; it being understood that in case of any legal claim upon such wreck, goods or merchandise, the same shall be referred for decision to the competent tribunals of the country.

ARTICLE XIII. The vessels of either of the two contracting parties which may be forced by stress of weather or other cause into one of the ports of the other, shall be exempt from all duties of port or navigation paid for the benefit of the State, if the motives which led to their seeking refuge be real and evident, and if no cargo be discharged or taken on board, save such as may relate to the subsistence of the crew, or be necessary for the repair of the vessels, and if they do not stay in port beyond the time necessary, keeping in view the cause which led to their seeking refuge.

ARTICLE XIV. The contracting parties mutually agree to surrender, upon official requisition, to the authorities of each, all persons who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other; provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so

charged shall be found, would justify his apprehension and commitment for trial if the crime had there been committed; and the respective judges and other magistrates of the two governments, shall have authority, upon complaint made under oath, to issue a warrant for the apprehension of the person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ARTICLE XV. So soon as steam or other mail packets under the flag of either of the contracting parties, shall have commenced running between their respective ports of entry, the contracting parties agree to receive at the Post Offices of those ports all mailable matter, and to forward it as directed, the destination being to some regular Post Office of either country; charging thereupon the regular postal rates as established by law in the territories of either party receiving said mailable matter, in addition to the original postage of the office whence the mail was sent. Mails for the United States shall be made up at regular intervals at the Hawaiian Post Office, and dispatched to ports of the United States, the Postmasters at which ports shall open the same, and forward the enclosed matter as directed, crediting the Hawaiian Government with their postages as established by law and stamped upon each manuscript or printed sheet.

All mailable matter destined for the Hawaiian Islands shall be received at the several Post-offices in the United States and forwarded to San Francisco or other ports on the Pacific Coast of the United States, whence the Post-masters shall dispatch it by the regular mail packets to Honolulu, the Hawaiian Government agreeing on their part to receive and collect for and credit' the Post-office Department of the United States with the United States rates charged thereupon. It shall be optional to pre-pay postage on letters in either country, but postage on printed sheets and newspapers shall in all cases be pre-paid. The respective Post-office Departments of the contracting parties shall, in their accounts, which are to be adjusted annually, be credited with all dead letters returned.

ARTICLE XVI. The present treaty shall be in force from the date of the exchange of the ratifications for the term of ten years, and further, until the end of twelve months after either of the contracting parties shall have given notice to the other of its intention to terminate the same, each of the said contracting parties reserving to itself the right of giving such notice at the end of the said term of ten years, or at any subsequent term. Any citizen or subject of either party infringing the articles of this treaty shall be held responsible for the same, and the harmony and good correspondence between the two governments shall not be interrupted thereby, each party engaging in no way to protect the offender or sanction such violation.

ARTICLE XVII. The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of the said States, and by His Majesty the King of the Hawaiian Islands, by and with the advice of His Privy Council of State, and the ratifications shall be exchanged at Honolulu within eighteen months from the date of its signature, or sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the same in triplicate, and have thereto affixed their Seals. Done at Washington, in the English language, the twentieth day of December, in the year One Thousand Eight Hundred and Forty-nine.

[Seal] JOHN M. CLAYTON

[Seal] JAMES JACKSON JARVES

CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND AND ITS ANNEX: REGULATIONS CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND

The Hague, 18 October 1907

[List of Contracting Parties]

Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles I and 2 of the Regulations adopted must be understood.

The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

[Here follow the names of Plenipotentiaries]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

ARTICLE 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

ARTICLE 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

ARTICLE 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

ARTICLE 4. The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of 29 July 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

ARTICLE 5. The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the Representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be immediately sent by the Netherlands Government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

ARTICLE 6. Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 7. The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty

days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

ARTICLE 8. In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

ARTICLE 9. A register kept by the Netherlands Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2), or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague 18 October 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel to the Powers which have been invited to the Second Peace Conference.

(Here follow signatures)

ANNEX TO THE CONVENTION

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I ON BELLIGERENTS

CHAPTER I The qualifications of belligerents

ARTICLE 1. The laws, rights, and duties of war apply not only to armies, but also to militia and Volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

ARTICLE 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having

had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

ARTICLE 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II Prisoners of war

ARTICLE 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

ARTICLE 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any

punishment on account of the previous flight.

ARTICLE 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

ARTICLE 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE 11. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

ARTICLE 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ARTICLE 14. An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the

latter may issue.

ARTICLE 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

ARTICLE 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

ARTICLE 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

CHAPTER III The sick and wounded

ARTICLE 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

SECTION II HOSTILITIES

CHAPTER I Means of injuring the enemy, sieges, and bombardments

ARTICLE 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

ARTICLE 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

ARTICLE 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

ARTICLE 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II

Spies

ARTICLE 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

ARTICLE 30. A spy taken in the act shall not be punished without previous trial.

ARTICLE 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

CHAPTER III

Flags of truce

ARTICLE 32. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer

and interpreter who may accompany him.

ARTICLE 33. The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

ARTICLE 34. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

CHAPTER IV Capitulations

ARTICLE 35. Capitulations agreed upon between the Contracting Parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

CHAPTER V Armistices

ARTICLE 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

ARTICLE 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

ARTICLE 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

ARTICLE 39. It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

ARTICLE 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

ARTICLE 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

SECTION III
MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

ARTICLE 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

ARTICLE 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ARTICLE 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

ARTICLE 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

ARTICLE 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

ARTICLE 47. Pillage is formally forbidden.

ARTICLE 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

ARTICLE 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

ARTICLE 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

ARTICLE 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

ARTICLE 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

ARTICLE 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

Geneva, 12 August 1949

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

Part I. General Provisions

Art. 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

Art. 5 Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Art. 6. The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year

after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Art. 7. In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, not restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

Art. 8. Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Art. 9. The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention.

They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

Art. 10. The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

Art. 11. The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When persons protected by the present Convention do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State in which the State of which they are nationals has not normal diplomatic representation.

Art. 12. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Part II. General Protection of Populations Against Certain Consequences of War

Art. 13. The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Art. 14. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Art. 15. Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Art. 16. The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Art. 17. The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Art. 18. Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Art. 19. The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Art. 20. Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their duties. This armband shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armband, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

Art. 21. Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Art.22. Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

Art. 23. Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments

indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Art. 24. The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

Art. 25. All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

Art. 26. Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

Part III. Status and Treatment of Protected Persons

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Art. 28. The presence of a protected person may not be used to render certain points or areas immune from military operations.

Art. 29. The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

Art. 30. Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate, as much as possible, visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

Art. 31. No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Art. 32. The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Art. 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Art. 34. The taking of hostages is prohibited.

Section II. Aliens in the territory of a party to the conflict

Art. 35. All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

If any such person is refused permission to leave the territory, he shall be entitled to have refusal reconsidered, as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

Art. 36. Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Art. 37. Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Art. 38. With the exception of special measures authorized by the present Convention, in particularly by Article 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

- (1) they shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) if they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- (5) children under fifteen years, pregnant women and mothers of children under seven years

shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

Art. 39. Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

Art. 40. Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

Art. 41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

Art. 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Art. 43. Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable

amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Art. 44. In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Art. 45. Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Art. 46. In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

Section III. Occupied territories

Art. 47. 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.

Art. 48. Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and

decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

Art. 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Art. 50. The 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.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

Art. 51. The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Art. 52. No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Art. 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Art. 54. The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Art. 55. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical

supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Art. 56. To 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, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

Art. 57. The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

Art. 58. The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

Art. 59. If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Art. 60. Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert

relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Art. 61. The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Art. 62. Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

Art. 63. Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

(a) recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;

(b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Art. 65. The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Art. 66. In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Art. 67. The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.

Art. 68. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty against a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

Art. 69. In all cases the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment of awarded.

Art. 70. Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Art. 71. No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred

against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

- (a) description of the accused;
- (b) place of residence or detention;
- (c) specification of the charge or charges (with mention of the penal provisions under which it is brought);
- (d) designation of the court which will hear the case;
- (e) place and date of the first hearing.

Art. 72. Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

Art. 73. A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

Art. 74. Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgement involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71 and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A

record of judgements other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgement has been received by the Protecting Power.

Art. 75. In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.\

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

Art. 76. Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

Art. 77. Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

Art. 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Section IV. Regulations for the treatment of internees

Chapter I. General provisions

Art. 79. The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

Art. 80. Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

Art. 81. Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.

Art. 82. The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

Chapter II. Places of Internment

Art. 83. The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

Art. 84. Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

Art. 85. The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

Art. 86. The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

Art. 87. Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

Art. 88. In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the measures internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

Chapter III. Food and Clothing

Art. 89. Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

Art. 90. When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

Chapter IV. Hygiene and Medical Attention

Art. 91. Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

Art. 92. Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

Chapter V. Religious, Intellectual and Physical Activities

Art. 93. Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and belonging to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid down by the Detaining Power in the interests of discipline and security.

Art. 94. The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.

Art. 95. The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article, shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees, thus detailed, shall not be inferior to those applicable to work of the same nature in the same district.

Art. 96. All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

Chapter VI. Personal Property and Financial Resources

Art. 97. Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they

have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

Art. 98. All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.) but may not be allocated by that Power or distributed by the Detaining Power on the basis of discriminations between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependants. They may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power, on request, and shall accompany the internee in case of transfer.

Chapter VII. Administration and Discipline

Art. 99. Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must, likewise, be given in a language which they understand.

Art. 100. The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body, is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Art. 101. Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

Art. 102. In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

Art. 103. The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

Art. 104. Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

Chapter VIII. Relations with the Exterior

Art. 105. Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Powers shall likewise inform the Parties concerned of any subsequent modifications of such measures.

Art. 106. As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

Art. 107. Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

Art. 108. Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

Art. 109. In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients. Nor shall such agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Art. 110. An relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this end, in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

Art. 111. Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

- (a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136;
- (b) correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The costs occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited

thereby.

Art. 112. The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Art. 113. The Detaining Powers shall provide all reasonable execution facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

Art. 114. The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

Art. 115. In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

Art. 116. Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

Chapter IX. Penal and Disciplinary Sanctions

Art. 117. Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishments only.

No internee may be punished more than once for the same act, or on the same count.

Art. 118. The courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be

obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

Art. 119. The disciplinary punishments applicable to internees shall be the following:

- (1) a fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days.
- (2) discontinuance of privileges granted over and above the treatment provided for by the present Convention
- (3) fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.
- (4) confinement.

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

Art. 120. Internees who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape, may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape or attempt to escape, shall be liable on this count to disciplinary punishment only.

Art. 121. Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

Art. 122. Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured

internees shall be handed over to the competent authorities as soon as possible. In cases of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

Art. 123. Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

Art. 124. Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements: they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

Art. 125. Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

Art. 126. The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

Chapter X. Transfers of Internees

Art. 127. The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

Art. 128. In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

Chapter XI. Deaths

Art. 129. The wills of internees shall be received for safe-keeping by the responsible authorities; and if the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated. Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the pro-

cedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

Art. 130. The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

Art. 131. Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

Chapter XIII. Release, Repatriation and Accommodation in Neutral Countries

Art. 132. Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Art. 133. Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be

set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

Art. 134. The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

Art. 135. The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Section V. Information Bureaux and Central Agency

Art. 136. Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.

Art. 137. Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.

Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.

All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

Art. 138. The information received by the national Bureau and transmitted by it shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

Art. 139. Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

Art. 140. A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

Art. 141. The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

Part IV. Execution of the Convention

Section I. General Provisions

Art. 142. Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure

time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

Art. 143. Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

Art. 144. The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

Art. 145. The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Art. 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and

in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Art. 148. No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Art. 149. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

Section II. Final Provisions

Art. 150. The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Art. 151. The present Convention, which bears the date of this day, is open to signature until 12 February 1950, in the name of the Powers represented at the Conference which opened at Geneva on 21 April 1949.

Art. 152. The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Art. 153. The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

Art. 154. In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Art. 155. From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Art. 156. Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Art. 157. The situations provided for in Articles 2 and 3 shall have immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Art. 158. Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Art. 159. The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

In witness whereof the undersigned, having deposited their respective full powers, have signed the present Convention.

Done at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal

Council shall transmit certified copies thereof to each of the signatory and acceding States.

Annex I. Draft Agreement Relating to Hospital and Safety Zones and Localities

Art. 1. Hospital and safety zones shall be strictly reserved for the persons mentioned in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, and in Article 14 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and for the personnel entrusted with the organization and administration of these zones and localities, and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

Art. 2. No persons residing, in whatever capacity, in a hospital and safety zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

Art. 3. The Power establishing a hospital and safety zone shall take all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

Art. 4. Hospital and safety zones shall fulfil the following conditions:

- (a) they shall comprise only a small part of the territory governed by the Power which has established them
- (b) they shall be thinly populated in relation to the possibilities of accommodation
- (c) they shall be far removed and free from all military objectives, or large industrial or administrative establishments
- (d) they shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

Art. 5. Hospital and safety zones shall be subject to the following obligations:

- (a) the lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit
- (b) they shall in no case be defended by military means.

Art. 6. Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.

Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground.

They may be similarly marked at night by means of appropriate illumination.

Art. 7. The Powers shall communicate to all the High Contracting Parties in peacetime or on the outbreak of hostilities, a list of the hospital and safety zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

As soon as the adverse party has received the above-mentioned notification, the zone shall be regularly established.

If, however, the adverse party considers that the conditions of the present agreement have not

been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

Art. 8. Any Power having recognized one or several hospital and safety zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions, for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose, members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

Art. 9. Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power which has recognized the zone.

If, when the time limit has expired, the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

Art. 10. Any Power setting up one or more hospital and safety zones, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by the Protecting Powers or by other neutral Powers, persons eligible to be members of the Special Commissions mentioned in Articles 8 and 9.

Art. 11. In no circumstances may hospital and safety zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

Art. 12. In the case of occupation of a territory, the hospital and safety zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

Art. 13. The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital and safety zones.

Annex II. Draft Regulations concerning Collective Relief

Art. 1. The Internee Committees shall be allowed to distribute collective relief shipments for which they are responsible to all internees who are dependent for administration on the said Committee's place of internment, including those internees who are in hospitals, or in prison or other penitentiary establishments.

Art. 2. The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the Internee Committees. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

Art. 3. Members of Internee Committees shall be allowed to go to the railway stations or other

points of arrival of relief supplies near their places of internment so as to enable them to verify the quantity as well as the quality of the goods received and to make out detailed reports thereon for the donors.

Art. 4. Internee Committees shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their places of internment has been carried out in accordance with their instructions.

Art. 5. Internee Committees shall be allowed to complete, and to cause to be completed by members of the Internee Committees in labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

Art. 6. In order to secure the regular distribution of collective relief supplies to the internees in their place of internment, and to meet any needs that may arise through the arrival of fresh parties of internees, the Internee Committees shall be allowed to create and maintain sufficient reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the Internee Committee holding the keys of one lock, and the commandant of the place of internment the keys of the other.

Art. 7. The High Contracting Parties, and the Detaining Powers in particular, shall, so far as is in any way possible and subject to the regulations governing the food supply of the population, authorize purchases of goods to be made in their territories for the distribution of collective relief to the internees. They shall likewise facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

Art. 8. The foregoing provisions shall not constitute an obstacle to the right of internees to receive collective relief before their arrival in a place of internment or in the course of their transfer, nor to the possibility of representatives of the Protecting Power, or of the International Committee of the Red Cross or any other humanitarian organization giving assistance to internees and responsible for forwarding such supplies, ensuring the distribution thereof to the recipients by any other means they may deem suitable.

ANNEX III

I. Internment Card

I. INTERNMENT CARD

ANNEX III

1. Front

<u>CIVILIAN INTERNMENT MAIL</u>	Postage free
POST CARD	
<p style="text-align: center;">IMPORTANT</p> <p>This card must be completed by each internee immediately on being interned and each time his address is altered by reason of transfer to another place of internment or to a hospital.</p> <p>This card is not the same as the special card which each internee is allowed to send to his relatives.</p>	<p>CENTRAL INFORMATION AGENCY FOR PROTECTED PERSONS</p> <p>INTERNATIONAL COMMITTEE OF THE RED CROSS</p>

Reverse side

Write legibly and in block letters—1. Nationality		
2. Surname	3. First names (<i>in full</i>)	4. First name of father
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;">5. Date of birth</div> <div style="width: 45%;">6. Place of birth</div> </div>		
7. Occupation		
8. Address before detention		
9. Address of next of kin		
*10. Interned on : (or) Coming from (hospital, etc.) on :		
*11. State of health		
12. Present address		
13. Date	14. Signature	
*Strike out what is not applicable—Do not add any remarks—See explanations on other side of card		

(Size of internment card—10×15 cm.)

II. ANNEX III

LETTER

CIVILIAN INTERNEE SERVICE

Postage free

To

Street and number

Place of destination (*in block capitals*)

Province or Department

Country (*in block capitals*)

Internment address

Date and place of birth

Surname and first names

Sender :

(Size of letter — 29 × 15 cm.)

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Gentian Zyberi, "Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration," 5(3) *ESIL Reflections* 1 (2016).

In response to the prolonged occupation of the Hawaiian Kingdom by the United States since 17 January 1893, and the commission of war crimes and human rights violations that continue to take place with impunity, the Royal Commission of Inquiry was established by the Council of Regency on 17 April 2019. The Council of Regency represented the Hawaiian Kingdom at the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*, PCA case no. 1999-01, from 1999-2001.

The mandate of the Royal Commission Inquiry is to “ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom.” Dr. David Keanu Sai was appointed as Head of the Commission and he has commissioned recognized experts in various fields of international law who are the authors of chapters 3, 4 and 5 of this book. These experts include Professor Matthew Craven, University of London, SOAS—public international law; Professor William Schabas, Middlesex University London—international criminal law; and Professor Federico Lenzerini, University of Siena, Italy—human rights and self-determination.

There is no statute of limitation for war crimes. As a matter of customary international law, States are under an obligation to prosecute individuals for the commission of war crimes committed outside of its territory or to extradite them for prosecution by other States or international courts should they enter their territory.

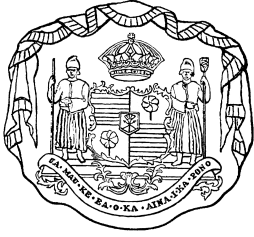
This book provides background information on the Royal Commission of Inquiry, Hawaiian constitutional governance, the United States belligerent occupation of the Hawaiian Kingdom, the continuity of the Hawaiian Kingdom as a State, the commission of war crimes committed in the Hawaiian Kingdom, and human rights violations in the Hawaiian Kingdom and the right of self-determination of the Hawaiian people.

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Enclosure “2”



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22 March 2023

MEMORANDUM ON THE FORMULA TO DETERMINE PROVISIONAL LAWS

Under customary international law relevant to Queen Lili‘uokalani’s conditional surrender to the United States on 17 January 1893, the United States, as the occupying State, was obligated to administer Hawaiian Kingdom law, which consist of the Civil Code,¹ together with the session laws of 1884² and 1886,³ and the Penal Code.⁴ This norm of customary international law was later codified under Article 43 of the 1907 Hague Regulations⁵ and Article 64 of the 1949 Fourth Geneva Convention.⁶ However, instead of administering the laws of the Hawaiian Kingdom,⁷ the United States unlawfully annexed the Hawaiian Islands in 1898 during the Spanish-American War and began to impose its municipal laws over Hawaiian territory since then to the present.

¹ Civil Code of the Hawaiian Kingdom (1884) (online at <https://hawaiiankingdom.org/civilcode/index.shtml>).

² Session Laws of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

³ Session Laws of the Hawaiian Kingdom (1886) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

⁴ Penal Code of the Hawaiian Kingdom (1869) (online at https://hawaiiankingdom.org/pdf/Penal_Code.pdf).

⁵ Article 43 of the 1907 Hague Regulations states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

⁶ Article 64 of the 1949 Fourth Geneva Convention states, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”

⁷ See David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 57-94 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

To administer Hawaiian Kingdom law as it existed in 1893 would not be prudent given the longevity of the military occupation that is now at 130 years. Therefore, to bring the laws of the Hawaiian Kingdom up to date, the Council of Regency proclaimed provisional laws for the Realm because of the prolonged military occupation. The proclamation of provisional laws of 10 October 2014 states:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

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

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).⁸

Before determining what United States statutes, State of Hawai‘i statutes, and County ordinances (collectively referred to herein as “American municipal laws”) are not “contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law,” there must be a type of interpretive methodology for extracting a conclusion based on the doctrine of necessity and the principle of constitutional necessity allowable under Hawaiian law.

⁸ Council of Regency, *Proclamation of Provisional Law* (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).

This memorandum provides a formula to be used for determining what American municipal laws may be considered the provisional laws of the Hawaiian Kingdom during the American military occupation that augments and not replaces the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code. American municipal laws to be considered as provisional laws exclude the provisions of the constitutions of the United States and the State of Hawai‘i. The Hawaiian Constitution of 1864, as amended,⁹ remains the constitutional order and organic law of the country. This memorandum is intended for the use of American authorities operating within the territorial jurisdiction of the Hawaiian Kingdom to determine which American municipal laws may be considered provisional laws during its effective control of Hawaiian territory.

With a view to bringing compliance with international humanitarian law by the State of Hawai‘i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations,¹⁰ the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The proclamation read:

Whereas in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai‘i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Powers 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.¹¹

⁹ 1864 Constitution, as amended (online at https://hawaiiankingdom.org/pdf/1864_Constitution.pdf).

¹⁰ Article 42 of the 1907 Hague Regulations states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

¹¹ Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (3 June 2019) (online https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

The State of Hawai‘i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the “laws in force in the country.”¹² Prior to the proclamation, the State of Hawai‘i and its Counties were established by virtue of U.S. Congressional legislation unlawfully imposed within Hawaiian territory, being the war crime of *usurpation of sovereignty during military occupation*. According to Professor Schabas, “the actus reus of the offense of ‘usurpation of sovereignty’ would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation.”¹³

The establishment and maintenance of the civilian governments of the United States and the State of Hawai‘i and its Counties within the territory of the Hawaiian Kingdom are not “necessary for military purposes of the occupation,” but rather have been established to benefit the United States and its citizenry. The existence of these civilian governments also constitutes a violation of the Hawaiian citizenry’s right to self-determination under international law. Professor Saul explains that the principle of self-determination is where “the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure.”¹⁴

Moreover, according to Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States, “each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects [...] but subject always to the laws and statutes of the two countries respectively.”¹⁵ The imposition of American municipal laws is not only a violation of international humanitarian law and international criminal law, but also a violation of the 1849 treaty.

Professor Benvenisti explains that “[d]uring the occupation, the ousted government would often attempt to influence life in the occupied area out of concern for its nationals [...]. One way to accomplish such goals is to legislate for the occupied population.”¹⁶ While

¹² Article 43 of the 1907 Hague Regulations.

¹³ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 157 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

¹⁴ Matthew Saul, “The Right to Self-Determination and the Prolonged Occupation of Palestinian Territory,” in Gentian Zyberi (ed.), *Protecting Community Interests through International Law* 3 (2021).

¹⁵ Treaty with the United States of America, in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 305, 307 (2020).

¹⁶ Eyal Benvenisti, *The International Law of Occupation* 104 (2nd ed., 2012).

some “national courts, and a number of scholars have rejected any duty to respect legislation made by the ousted government while it is outside the occupied area [,] 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 laws.”¹⁷ The difference here, however, is that the Council of Regency is not operating in exile or “outside the occupied area,” but rather was established and is operating *in situ*—within the territorial jurisdiction of the Hawaiian Kingdom. Furthermore, “even if the occupant does not have to respect such new legislation, the legislation would be regarded as valid nevertheless by the returning sovereigns or by its courts which would apply them retroactively at the end of the occupation.”¹⁸

To legislate is also an exercise of the police power of the Occupied State. While police power escapes an exact definition, it is understood to be the ability of the government of a State to enact legislation to safeguard its citizenry. During times of military occupation, international humanitarian law would allow this. In *Berman v. Parker*, the United States Supreme Court stated that “[p]ublic safety, public health, morality, peace and quiet, law and order [...] are some of the more conspicuous examples of the traditional application of the police power.”¹⁹

Based on the *doctrine of necessity*, Professor Lenzerini states that “the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom.”²⁰ He also holds that the Regency “has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.”²¹

Doctrine of Necessity

Under English common law, Professor de Smith states that deviations from a State’s constitutional order “can be justified on grounds of necessity.”²² He also asserts that “State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution.”²³

¹⁷ *Id.*

¹⁸ *Id.*, 105.

¹⁹ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁰ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317-333, 324 (2020).

²¹ *Id.*, 325.

²² Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).

²³ *Id.*

Certain principles of English common law have been recognized in the Hawaiian Kingdom. In *The King v. Agnee et al.*, the Hawaiian Supreme Court stated that “[w]e do not recognize as conclusive the common law nor the authorities of the courts of England or of the United States, any farther than the principles which they support may have become incorporated in our system of laws, and recognized by the adjudication of the Supreme Court.”²⁴ In *Agnee*, the Court cited English common law commentators on criminal law such as Chitty and Bishop as well as English criminal cases.

Professor Oppenheimer explains that “a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country.”²⁵ In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated that there are certain limitations to the principle of necessity, “namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful [...] Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign.”²⁶

Other national courts, to include the U.S. Supreme Court,²⁷ have consistently held that emergency action cannot justify a subversion of a State’s constitutional order. The doctrine of necessity provides the necessary parameters and limits of emergency action so as not to subvert. Of the five governing principles of necessity which apply to the assumption of vacant government office(s), four of these principles apply to the current situation of interpreting what laws are to be considered the provisional laws of the Hawaiian Kingdom. These include:

1. an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
2. there must be no other course of action reasonably available;
3. any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
4. it must not impair the just rights of citizens under the Constitution[.]²⁸

²⁴ *The King v. Agnee et al.*, 3 Haw. 106, 112 (1869).

²⁵ F.W. Oppenheimer, “Governments and Authorities in Exile,” 36 *Am. J. Int’l. L.* 568, 581 (1942).

²⁶ See *Madzimbamuto v. Lardner-Burke*, 1. A.C. 645, 732 (1969). See also *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokosto v. HM King Moshoeshoe II*, LRC (Const) 24, 132 (1989).

²⁷ *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

²⁸ *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88-89 (1986).

Constitutional Necessity

According to Professor Paulsen, the constitution of necessity “properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results.”²⁹ U.S. President Abraham Lincoln was the first to invoke the principle of constitutional necessity, or in his words “indispensable necessity.” President Lincoln determined his duty to preserve, “by every indispensable means, that government—that nation—of which the constitution was the organic law.”³⁰ In his letter to U.S. Senator Hodges, President Lincoln explained the theory of constitutional necessity.

By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.³¹

Like the United States, the Hawaiian Kingdom is a constitutional form of governance whereby the 1864 Constitution, as amended, limits governmental powers. The American republic’s constitution is similar yet incompatible to the Hawaiian monarchical constitution. The primary distinction is that the former establishes the functions of a republican form of government, while the latter establishes the function of a constitutional monarchy. Both adhere to the separation of powers doctrine of the executive, legislative and judicial branches. Where they differ as regards this doctrine, however, is in the aspect that the American constitution provides separate but equal branches of government, while the Hawaiian constitution provides for separate but coordinate branches of government, whereby the Executive Monarch retains a constitutional prerogative to be exercised in extraordinary situations within the confines of the constitution.

Under the American construction of separate but equal, the Congress, as the legislative branch, can paralyze government if it does not pass a budget for government operations, and the President, as head of the executive branch, can do nothing to prevent the shutdown.

²⁹ Michael Stokes Paulsen, “The Constitution of Necessity,” 79(4) *Notre Dame L. Rev.* 1268 (2004).

³⁰ Letter from Abraham Lincoln, U.S. President, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *Abraham Lincoln: Speeches and Writings 1859-65*, Don E. Fehrenbacher (ed.), 585-86 (1989).

³¹ *Id.*

On the contrary, the Hawaiian Kingdom’s executive is capable of intervention by constitutional prerogative should the occasion arise, as occurred in 1855.

In that year’s legislative session, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget. King Kamehameha IV explained that “the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about \$200,000, which Bill we could not sanction.”³² After the House of Nobles “repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed it Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people in the Kingdom.”³³ A new election for Representatives occurred and the Legislative Assembly was reconvened in special session and a budget passed.

Under Article 24 of the 1864 Constitution, the Executive Monarch took the following oath: “I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.” The Ministers, however, took another form of oath: “I solemnly swear in the presence of Almighty God, that I will faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties of [Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General].”

Lincoln viewed the source of constitutional necessity as arising from the oath taken by the executive chief, whereby the duty for making “constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—[is] in the President of the United States, whose special sworn duty the Constitution makes it to ‘preserve, protect and defend the Constitution of the United States.’”³⁴ The operative word for the Executive Monarch’s oath of office is “to maintain the Constitution of the Kingdom whole and inviolate.” Inviolable meaning free or safe from injury or violation. The Hawaiian constitution is the organic law for the country.

Exercising the Constitutional Prerogative without a Monarch

In 1855, the Monarch exercised his constitutional prerogative to keep the government operating under a workable budget, but the king also kept the country safe from injury by

³² Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* 62 (1918).

³³ *Id.*

³⁴ Paulsen, 1258.

an unwarranted increase in taxes. The duty for making constitutional decisions in extraordinary situations, in this case as to what constitutes the provisional laws of the country during a prolonged and illegal belligerent occupation, stems from the oath of the Executive Monarch. The Council of Regency serves in the absence of the Monarch; it is not the Monarch and, therefore, cannot take the oath.

The Cabinet Ministers that comprise the Council of Regency have taken their individual oaths to “faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties” of their offices, but there is no prerogative in their oaths to “maintain the Constitution of the Kingdom whole and inviolate.” Therefore, this prerogative must be construed to be inherent in Article 33 when the Cabinet Council serves as the Council of Regency, “who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.” The Monarch’s constitutional prerogative is in its “Powers” that the Council of Regency temporarily exercises in the absence of the Monarch. Therefore, the Council of Regency has the power “to maintain the Constitution of the Kingdom whole and inviolate,” and, therefore, provisionally legislate, through proclamations, for the protection of Hawaiian subjects during the American military occupation.

Legal Status of American Municipal Laws in the Hawaiian Kingdom

Under public international law, the laws and administrative measures of the United States that have been imposed throughout the territory of the Hawaiian Kingdom have no extra-territorial effect. In *The Lotus* case, the Permanent Court of International Justice explained, “[n]ow the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”³⁵ According to Judge Crawford, derogation of this principle will not be presumed.³⁶ Therefore, under public international law, American municipal laws being imposed in the Hawaiian Kingdom are not laws but rather situations of facts. Within the Hawaiian constitutional order, this distinction between situations of facts and Hawaiian law is fundamental so as not to rupture the Hawaiian legal system in this extraordinary and extralegal situation of a prolonged military occupation.

As Professor Dicey once stated, “English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they

³⁵ *The Lotus*, PCIJ Series A, No. 10, 18 (1927).

³⁶ James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).

enforce is not a foreign law, but a right acquired under the law of a foreign country.”³⁷ Any right acquired under American municipal laws that have been unlawfully imposed within the territory of the Hawaiian Kingdom, being a situation of fact and not law, must be recognized by Hawaiian law. Without it being acquired under Hawaiian law, there is no right to be recognized. Before any right can be claimed, American municipal laws must first be transformed from situations of facts into provisional laws of the Hawaiian Kingdom.

In determining which American municipal laws, being situation of facts, shall constitute a provisional law of the kingdom, the following questions need to be answered. If any question is answered in the affirmative, with the exception of the last question, then it shall not be considered a provisional law.

1. The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?
2. Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.
3. If the American municipal law has no comparison to Hawaiian Kingdom law, would it run contrary to the Hawaiian Kingdom’s police power?
4. If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?
5. Does the American municipal law infringe vested rights secured under Hawaiian law?
6. And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

*Application to State of Hawai‘i statutes on
Murder, Manslaughter, and Negligent Homicide*

§707-701 Murder in the first degree. (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

³⁷ A.V. Dicey, *The Conflict of Laws* 12 (6th ed., 1949).

- (a) More than one person in the same or separate incident;
 - (b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;
 - (c) A person known by the defendant to be a witness in a criminal prosecution and the killing is related to the person's status as a witness;
 - (d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section;
 - (e) A person while the defendant was imprisoned;
 - (f) A person from whom the defendant has been restrained, by order of any court, including an ex parte order, from contacting, threatening, or physically abusing pursuant to chapter 586;
 - (g) A person who is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order;
 - (h) A person known by the defendant to be a witness in a family court proceeding and the killing is related to the person's status as a witness; or
 - (i) A person whom the defendant restrained with intent to:
 - (i) Hold the person for ransom or reward; or
 - (ii) Use the person as a shield or hostage.
- (2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1972, c 9, pt of §1; am L 1986, c 314, §49; am L 2001, c 91, §4; am L 2006, c 230, §27; am L 2011, c 63, §2; am L 2016, c 214, §1]

§707-701.5 Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person; provided that this section shall not apply to actions taken under chapter 327L.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1986, c 314, §50; am L 2018, c 2, §6]

§707-702 Manslaughter. (1) A person commits the offense of manslaughter if:

- (a) The person recklessly causes the death of another person; or
 - (b) The person intentionally causes another person to commit suicide;
- provided that this section shall not apply to actions taken under chapter 327L.

(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be

determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be; provided that an explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant's discovery, defendant's knowledge, or the disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant's explanation includes the discovery, knowledge, or disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict.

(3) Manslaughter is a class A felony. [L 1972, c 9, pt of §1; am L 1987, c 181, §8; am L 1996, c 197, §2; am L 2003, c 64, §1; am L 2006, c 230, §28; am L 2018, c 2, §7; am L 2019, c 149, §1]

§707-702.5 Negligent homicide in the first degree. (1) A person commits the offense of negligent homicide in the first degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol; or

(b) A vulnerable user by the operation of a vehicle in a negligent manner.

(2) A person who violates subsection (1)(a) shall be guilty of a class B felony; provided that the person shall be guilty of a class A felony when the person:

(a) Has been convicted one or more times for the offense of operating a vehicle under the influence within fifteen years of the instant offense;

(b) Is, at the time of the instant offense, engaging in conduct that would constitute a violation of section 291E-62; or

(c) Is a highly intoxicated driver as defined by section 291E-1.

(3) A person who violates subsection (1)(b) shall be guilty of a class B felony.

(4) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, and any other law to the contrary, the sentencing court may impose a lesser sentence for a person convicted of a class A felony under this section if the court finds that strong mitigating circumstances warrant the action. Strong mitigating circumstances shall include but not be limited to the provisions of section 706-621. The court shall provide a written opinion stating its reasons for imposing the lesser sentence.

(5) For the purposes of this section, a person "has been convicted one or more times for the offense of operating a vehicle under the influence" if the person has one or more:

(a) Convictions under section 291E-4(a), 291E-61, 291E-61.5, or 291E-64;

(b) Convictions in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an

unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or

(c) Adjudications of a minor for a law violation that, if committed by an adult, would constitute a violation of section 291E-4(a), 291E-61, or 291E-61.5, that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside before the instant offense shall not be deemed prior convictions for the purposes of this section. [L 1988, c 292, pt of §1; am L 2012, c 316, §2; am L 2022, c 48, §2]

§707-703 Negligent homicide in the second degree. (1) A person commits the offense of negligent homicide in the second degree if that person causes the death of:

- (a) Another person by the operation of a vehicle in a negligent manner; or
- (b) A vulnerable user by the operation of a vehicle in a manner that constitutes simple negligence as defined in section 707-704(2).

(2) Negligent homicide in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1988, c 292, §2; am L 2012, c 316, §3]

§707-704 Negligent homicide in the third degree. (1) A person is guilty of the offense of negligent homicide in the third degree if that person causes the death of another person by the operation of a vehicle in a manner which is simple negligence.

- (2) “Simple negligence” as used in this section:
- (a) A person acts with simple negligence with respect to the person’s conduct when the person should be aware of a risk that the person engages in that conduct.
 - (b) A person acts with simple negligence with respect to attendant circumstances when the person should be aware of a risk that those circumstances exist.
 - (c) A person acts with simple negligence with respect to a result of the person’s conduct when the person should be aware of a risk that the person’s conduct will cause that result.
 - (d) A risk is within the meaning of this subsection if the person’s failure to perceive it, considering the nature and purpose of the person’s conduct and the circumstances known to the person, involves a deviation from the standard of care that a law-abiding person would observe in the same situation.

(3) Negligent homicide in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1988, c 292, §3]

Hawaiian Kingdom law on Murder and Manslaughter

Penal Code, Chapter VII (As amended by the Act of June 30, 1860)

1. Murder is the killing of any human being with malice aforethought, without authority, justification or extenuation by law.
2. When the act of killing another is proved, malice aforethought shall be presumed, and the burthen shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor.
3. Whoever is guilty of murder shall be punished by death.
4. In every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection.
5. Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter.
6. Manslaughter is of three degrees, and the jury under an indictment for murder or manslaughter may return a verdict of manslaughter in either degree, or of assault and battery, as the facts proved will warrant.
7. Whoever is guilty of manslaughter in the first degree shall be punished by imprisonment at hard labor, for a term of years not less than ten, nor more than twenty, in the discretion of the court.
8. Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor, not more than ten years or less than five years.
9. Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor not more than five years, or by a fine not more than one thousand dollars, in the discretion of the court.
10. Whoever, under an indictment for murder, or manslaughter, shall be found guilty of assault and battery, as provided in section 6 of this chapter, shall be punished by imprisonment at hard labor not more than two years, or by a fine not exceeding five hundred dollars, in the discretion of the court.
11. No person shall be adjudged to have killed another unless death ensues within a year and a day from the injury inflicted.

12. Chapter VII of the Penal Code is hereby repealed from and after the passage of this chapter: Provided, however, that such repeal shall not take affect any offense committed or penalty or forfeiture incurred under said chapter, but that the same shall remain in full force in respect to the liability of any person to be proceeded against, or against whom proceedings are pending, for any offense committed under said chapter.

COMMENTARY

General analysis. The Hawaiian Kingdom law on murder draws from the English law—the 1752 *Murder Act*.³⁸ Like the *Murder Act*, the Hawaiian statute provides that “[w]hoever is guilty of murder shall be punished by death,” and “[i]n every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection.” Section 2 of the *Murder Act* provides that after the execution, the body of the murderer be delivered “to the hall of the Surgeons Company...to be dissected and anatomized by the said Surgeons.”

Teaching human anatomy “became essential for a European medical education, with Paris, Edinburgh and London (in that order of priority) attracting fee-paying students anxious to obtain extra qualifications as physicians and surgeons from dissecting criminal corpses.”³⁹ Under the *Murder Act*, post-mortem dissection was also viewed as post-mortem punishment to serve as a deterrent for the crime. In the Hawaiian Kingdom, there was no Surgeons Company but only surgeons in private practice or employed by Queen’s Hospital being a quasi-public medical institution. Unlike the *Murder Act*, the sentence to post-mortem dissection was discretionary by the court and only considered if the body was requested by a surgeon, which would appear for the purpose of medical education and not post-mortem punishment.

Under the 1850 Penal Code, the murder statute had two degrees, but this was repealed by the Legislature in 1860 to have none.⁴⁰ Manslaughter, however, had three degrees to be considered by the jury.

Do the State of Hawai‘i statutes on murder, manslaughter and negligent homicide violate any provisions of the 1864 Constitution, as amended? No.

Do they run contrary to a monarchical form of government? No.

³⁸ 25 George II, c. 37.

³⁹ Elizabeth T. Hurren, *Dissecting the Criminal Corpse: Staging Post-Execution Punishment in Early Modern England* 5 (2016).

⁴⁰ An Act to Amend the Law Relating to Murder and Manslaughter (1860).

If the State of Hawai‘i statutes on murder, manslaughter and negligent homicide have no comparison to Hawaiian Kingdom law, would it be authorized under the Hawaiian Kingdom’s police power? Not applicable because the Hawaiian Kingdom has a law on murder and manslaughter.

If the State of Hawai‘i statutes on murder, manslaughter and negligent homicide are comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute on murder and manslaughter? Under the 1850 Penal Code, the Hawaiian statute on murder provided first and second degrees. First-degree murder carried the death penalty and second-degree murder carried “imprisonment at hard labor for a term of years not less than five nor more than twenty, in the discretion of the court.” The 1850 statute on manslaughter, however, did not have degrees, which stated:

The laws should make some allowance for human infirmity; therefore whoever kills another without malice aforethought, under the sudden impulse of passion, excited by provocation or other adequate cause, whether insult, threats, violence or otherwise, by the party killed, of a nature tending to disturb the judgment and faculties, and weaken the possession of a self-control of the killing party, is not guilty of murder but manslaughter; and shall be punished by imprisonment at hard labor not more than ten years, or by fine not less than one thousand dollars, nor more than ten thousand dollars.

The 1860 Legislature amended that statute to remove the degrees of murder and provide three degrees of manslaughter. The punishment for murder was death and the punishment for the degrees of manslaughter varied by years of imprisonment. The State of Hawai‘i statute has two degrees of murder, no degrees for manslaughter, and three degrees of negligent homicide.

While the punishment under Hawaiian statute is death for murder and imprisonment at hard labor, it does reflect criminal laws of other foreign States in the nineteenth century to include the United States. Hard labor is a “punishment, additional to mere imprisonment, sometimes imposed upon convicts sentenced to a penitentiary for serious crimes, or for misconduct while in prison.”⁴¹ However under Hawaiian Kingdom criminal statutes, all sentencing to imprisonment is at hard labor. It was not an addition to imprisonment.

With the progressive affirmation of human rights in international law, the death penalty has started to be seen as inconsistent with the very idea of human dignity. Since then, the

⁴¹ *Black’s Law* 717 (6th ed., 1990).

international community of States adopted several instruments that ban the use of the death penalty. These instruments include:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;⁴²
- Protocol No. 6 to the European Convention on Human Rights, concerning the abolition of the death penalty, and Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances;⁴³ and
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.⁴⁴

As a member of the community of States, the Hawaiian Kingdom's statute on the death penalty and imprisonment at hard labor is inconsistent with the most recent developments of international law and should no longer be enforced.

Nearly every state in the American Union and the federal government has a felony murder rule. The "rule allows a defendant to be charged with first-degree murder for a killing that occurs during a dangerous felony, even if the defendant is not the killer."⁴⁵ The felony-murder rule has been used to support murder convictions of defendants where one victim of a robbery accidentally shoots another victim,⁴⁶ where one of the defendant's co-robbers kills another co-robber during a robbery for the latter's refusal to obey orders and not as part of the robbery transaction,⁴⁷ and where the defendant (a dope addict) commits robbery of the defendant's homicide victim as an afterthought following the killing.⁴⁸ The application of the felony-murder rule dispenses with the need to prove that culpability with respect to the homicidal result that is otherwise required to support a conviction for murder and therefore leads to anomalous results. Therefore, the felony murder rule is inconsistent the Hawaiian statute on murder.

Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on vested rights secured under Hawaiian law? No.

Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on the obligations of the Hawaiian Kingdom under customary international law or being a Contracting State to its treaties? Yes. Although not a party to any treaty

⁴² General Assembly resolution 44/128.

⁴³ Council of Europe, European Treaty Series – No. 114.

⁴⁴ Organization of American States, Treaty Series – No. 73.

⁴⁵ Justia, *Felony Murder* (online at: <https://www.justia.com/criminal/offenses/homicide/felony-murder/>).

⁴⁶ *People v. Harrison*, 203 Cal. 587, 265 P. 230 (1928).

⁴⁷ *People v. Cabalero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

⁴⁸ *People v. Arnold*, 108 Cal. App. 2d 719, 239 P.2d 449 (1952).

banning the use of the death penalty and cruel punishment, the Hawaiian Kingdom recognizes that banning the death penalty and cruel punishment is a duty of States, in line with the recent developments in the field of international human rights law. Therefore, the Hawaiian Kingdom statute on the death penalty and imprisonment at hard labor should be considered as no longer consistent with international law.

Conclusion. Considering this analysis, the State of Hawai‘i laws on murder, manslaughter and negligent homicide are not “contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law.” To the extent that the felony murder rule is omitted, the State of Hawai‘i law on murder would be consistent with the Hawaiian Kingdom law on murder.



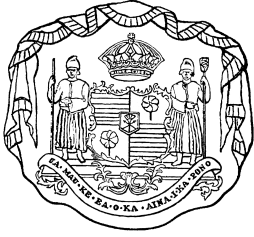
David Keanu Sai, Ph.D.

Chairman, Council of Regency

Minister of the Interior

Minister of Foreign Affairs *ad interim*

Enclosure “3”



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7 April 2023

MEMORANDUM ON THE ROLE AND FUNCTION OF THE
MILITARY GOVERNMENT OF HAWAI'I

For the past 130 years, the United States, as the occupying State, has not complied with the law of occupation since securing effective control of Hawaiian territory by virtue of Queen Lili'uokalani's conditional surrender of 17 January 1893. When the provisional government was formed, through intervention, it only replaced the Executive Monarch and her Cabinet with insurgents calling themselves an Executive and Advisory Councils. All other government officials remained in place. With the oversight of United States troops, all Hawaiian government officials who remained in place were coerced into signing oaths of allegiance to the new regime.¹ This continued when the American puppet changed its name to the so-called Republic of Hawai'i on 4 July 1894 with alien mercenaries having replaced American troops.

After investigating the overthrow of the Hawaiian government, President Cleveland reported to the Congress on 18 December 1893 that the provisional government was "neither a government *de facto* nor *de jure*,"² and that it "owes its existence to an armed invasion by the United States."³ A government created through intervention is a puppet regime of the intervening State, and, as such, has no lawful authority. "Puppet governments," according to Professor Marek, "are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements [because] such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant."⁴

¹ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 211 (1895) (hereafter "Executive Documents").

² *Id.*, 453.

³ *Id.*, 454.

⁴ Krystyna Marek, *Identity and Continuity of States in Public International Law* 114 (2nd ed., 1968).

Annexation and United States Practice

United States practice proscribes annexation during military occupation until a treaty of peace has been agreed upon by both States. In *American Insurance Company v. Canter*, U.S. Chief Justice John Marshall wrote that “the holding of conquered territory [is] mere military occupation, until its fate shall be determined at the treaty of peace.”⁵ Furthermore, as Professor Craven explains:

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 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 recognized 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 ‘Stimson 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.⁶

Nevertheless, under the guise of a Congressional joint resolution of annexation,⁷ the United States armed forces physically reoccupied the Hawaiian Kingdom on 12 August 1898 at the height of the Spanish-American War. In a secret session of the U.S. Senate on 31 May 1898, Senator Morgan, an advocate for annexation, stated, “I am here delighted, Mr. President, with the opportunity now, if I am permitted to do so, of entering into the discussion not of the propriety of the annexation of Hawaii as a measure of national policy, but of entering into the discussion as the necessity of annexing Hawaii or taking it under military control while the war is going on.”⁸ From a domestic law standpoint, Senator William Allen clearly stated the limitations of United States laws when the joint resolution of annexation was being debated on the floor of the Senate on 4 July 1898. Allen stated:

⁵ *American Insurance Company v. Canter*, 26 U.S. 511 (Pet.) (1828).

⁶ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 134 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁷ *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, 30 U.S. 750 (1898).

⁸ “Senate Secret Debate on Seizure of the Hawaiian Islands,” 1 *Haw. J.L. & Pol.* 230, 243 (2004).

The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein.⁹

Despite the unlawfulness, the Congress passed the joint resolution of annexation, and it was signed into law by President William McKinley on 7 July 1898. Patriotic societies and many of the Hawaiian citizenry boycotted the annexation ceremony in Honolulu held at 'Iolani Palace on 12 August 1898, and “they protested annexation occurring without the consent of the governed.”¹⁰ Professor Marek explains that, “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”¹¹ Even the U.S. Department of Justice in a 1988 legal opinion concluded it is “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution,”¹² because congressional acts have no extraterritorial effect.

Furthermore, when the Congress took over the Republic of Hawai‘i by *An Act To provide a government for the Territory of Hawaii* on 30 April 1900,¹³ it was an attempt to clothe the insurgents with United States law. Section 1 of the Act states that “the phrase ‘laws of Hawaii,’ as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii.”¹⁴ The leadership of the Republic of Hawai‘i remained the leadership of the Territory of Hawai‘i. Despite the flagrant usurpation of Hawaiian sovereignty and the violations of international humanitarian law, the Congress, in 1959, renamed the Territory of Hawai‘i to the State of Hawai‘i under *An Act To provide for the admission of the State of Hawaii into the Union*.¹⁵ These Congressional laws, which have no effect within the territory of the Hawaiian Kingdom, did not transform the puppet regime into a *de jure* government. The maintenance of the puppet also stands in direct violation of customary international law as it was in 1893, and later the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. The governmental infrastructure of

⁹ 31 Cong. Rec. 6635 (1898).

¹⁰ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* 322 (2016). Coffman initially published this book in 1998 titled *Nation Within: The Story of the American Annexation of the Nation of Hawai‘i*. Coffman explained, “In the book’s subtitle, the word Annexation has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation,” at xvi.

¹¹ Marek, 110.

¹² Douglas Kmiec, “Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” 12 *Op. O.L.C.* 238, 252 (1988).

¹³ *Act to provide a government for the Territory of Hawaii*, 31 Stat. 141 (1900).

¹⁴ *Id.*

¹⁵ *An Act to provide for the admission of the State of Hawaii into the Union*, 73 Stat. 4 (1959).

the Hawaiian Kingdom continued as the governmental infrastructure of the current State of Hawai‘i.

The Law of Occupation

Article 43 of the 1907 Hague Regulations provides that “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The “text of Article 43,” according to Professor Benvenisti, “was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law.”¹⁶ Professor Graber also states, that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”¹⁷ Furthermore, the United States government also recognizes that this principle is customary international law that predates the Hague Conventions. In a 1943 legal opinion, the United States stated:

The Hague Convention clearly enunciated the principle that the laws applicable in an occupied territory remain in effect during the occupation, subject to change by the military authorities within the limits of the Convention. Article 43: [...] This declaration of the Hague Convention amounts only to a reaffirmation of the recognized international law prior to that time.¹⁸

The administration of occupied territory is set forth in the 1907 Hague Regulations, being Section III of the 1907 Fourth Hague Convention. According to Professor Schwarzenberger, “Section III of the Hague Regulations on Land Warfare of 1907 was declaratory of international customary international law.”¹⁹ Also, consistent with what was generally considered the international law of occupation, in force at the time of the Spanish-American War, the “military governments established in the territories occupied by armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials.”²⁰ Many other authorities also viewed the 1907 Hague Regulations as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and

¹⁶ Eyal Benvenisti, *The International Law of Occupation* 8 (1993).

¹⁷ Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914* 143 (1949).

¹⁸ Opinion on the Legality of the Issuance of AMG (Allied Military Government) Currency in Sicily, 23 Sept. 1943, reprinted in *Occupation Currency Transactions: Hearings Before the Committees on Appropriations Armed Services and Banking and Currency*, U.S. Senate, 80th Congress, First Session, 73, 75 (17-18 Jun. 1947).

¹⁹ Georg Schwarzenberger, “The Law of Belligerent Occupation: Basic Issues,” 30 *Nordisk Tidsskrift Int’l Ret* 11 (1960).

²⁰ Munroe Smith, “Record of Political Events,” 13(4) *Pol. Sci. Q.* 745, 748 (1898).

subsequent military occupation. Commenting on the occupation of the Hawaiian Kingdom, Professor Dumberry states,

[T]he 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.²¹

It is also important to note, for the purposes of international law, that the United States never made an international claim to the Hawaiian Islands through *debellatio*, which is a questionable mode of acquiring sovereignty through “the disintegration and eventual disappearance of its government and the total absence of organized resistance by citizens and soldiers of the defeated state.”²² Instead, the United States, in 1959, failed to mention its military occupation and unlawful overthrow of the Hawaiian government in 1893 when it reported to the United Nations Secretary General that “Hawaii has been administered by the United States since 1898. As early as 1900, Congress passed an Organic Act, establishing Hawaii as an incorporated territory in which the Constitution and laws of the United States, which were not locally inapplicable, would have full force and effect.”²³ This extraterritorial application of American municipal laws is not only in violation of *The Lotus* case principle,²⁴ but is also prohibited by the rules of international humanitarian law. This subject is fully treated by Professor Benvenisti, who states:

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

²¹ Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continuity as an Independent State under International Law” 1(2) *Chinese J. Int’l L.* 655, 682 (2002).

²² Gehard von Glahn, *Law Among Nations* 723 (6th ed., 1992)

²³ United Nations, *Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America*, Document no. A/4226, Annex 1, 2 (24 Sep. 1959).

²⁴ *Lotus* case (France v. Turkey), PCIJ Series A, No. 10, 19-20 (1927). According to the Permanent Court of International Justice, “[n]ow the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”

administration would then choose to operate through extraterritorial prescription of its national institutions.²⁵

The hostile army, in this case, included not only United States armed forces, but also its puppet regime that disguised itself as the so-called provisional government. As an entity created through intervention, this puppet regime existed as a civilian armed force that worked in tandem with the United States armed forces under the direction of the U.S. diplomat John Stevens. Furthermore, the occupant does not possess the sovereignty of the occupied State and therefore cannot compel allegiance. United States practice views “[b]elligerent occupation [...], being based upon the possession of [occupied] territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional.”²⁶ The prolonged nature of the American occupation is unprecedented.

United States has Presented no Rebuttable Evidence to the Hawaiian Kingdom’s Continued Existence as an Independent State

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there “is a presumption that the State continues to exist, with its rights and obligations [...] despite a period in which there is no, or no effective, government,”²⁷ and belligerent occupation “does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”²⁸ Addressing the presumption of the German State’s continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.²⁹

“If one were to speak about a presumption of continuity,” explains Professor Craven, “one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in

²⁵ Benvenisti, 19.

²⁶ FM 27-10, section 353.

²⁷ James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

²⁸ *Id.*

²⁹ Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.”³⁰ Evidence of “a valid demonstration of legal title, or sovereignty, on the part of the United States” would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*³¹ and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.³²

Instead of a treaty, the United States unilaterally annexed the Hawaiian Islands in 1898 by a municipal law. As a municipal law of the United States, it is without extraterritorial effect. It is not a treaty. To annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.³³ International law does not permit annexation of territory of another state.³⁴

Furthermore, in 1988, the United States Department of Justice’s Office of Legal Counsel (“OLC”) published a legal opinion that addressed, *inter alia*, the annexation of Hawai‘i. The OLC’s memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.³⁵ The OLC concluded that only the President and not the Congress possesses “the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”³⁶ As Justice Marshall stated, “[t]he President is the sole

³⁰ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

³¹ 9 Stat. 922 (1848).

³² 30 Stat. 1754 (1898).

³³ There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

³⁴ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

³⁵ Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” 12 *Opinions of the Office of Legal Counsel* 238 (1988).

³⁶ *Id.*, 242.

organ of the nation in its external relations, and its sole representative with foreign nations,”³⁷ and not the Congress. The OLC further opined, “we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”³⁸ Therefore, the OLC concluded “it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”³⁹

That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by the President’s proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by enacting a law because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the “laws of no nation can justly extend beyond its own territories.”⁴⁰ Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the:

[...] constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. [...] Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it.”⁴¹

Professor Willoughby also stated, the “incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is [...] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts.”⁴²

War Crime of Usurpation of Sovereignty During Military Occupation

For the Hawaiian Kingdom, a potent check to an abuse of power is international criminal law. Statutory limitation of war crimes is prohibited by customary international law,⁴³ and

³⁷ *Id.*, 242.

³⁸ *Id.*

³⁹ *Id.*, 262.

⁴⁰ *The Apollon*, 22 U.S. 362, 370 (1824).

⁴¹ Kmiec, 252.

⁴² Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

⁴³ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d’information déposé en application de l’article 145 du Règlement par la Mission d’information de la Commission de la défense nationale et des forces*

the prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.⁴⁴ On this subject, the Government of the United States, in a diplomatic note to the Government of Iraq in 1991 regarding its belligerent occupation of Kuwait, declared that “under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.”⁴⁵ Last year, Germany prosecuted a 97-year-old former Nazi secretary for war crimes committed during the Second World War.⁴⁶

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies, which included the United States. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative measures and policies of the occupying State over the territory of the occupied State. Usurpation is the “unlawful encroachment or assumption of the use of property, power or authority which belongs to another.”⁴⁷

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations. The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the Bolshevik hordes that invaded the territories.” It said that in Romania, the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” The Commission listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and

armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d’autres pays et l’ONU au Rwanda entre 1990 et 1994, 286 (1999).

⁴⁴ United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

⁴⁵ Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁴⁶ Reuters, *Former concentration camp secretary, 97, convicted of Nazi war crimes* (20 Dec. 2022) (online at <https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/>).

⁴⁷ Black’s Law 1545 (6th ed., 1990).

administration ousted;” “[t]axes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “[p]ublic property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);” “[p]rohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “[t]he Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.,” “[m]useums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”⁴⁸

The war crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this “rule is incident to military occupation and was clearly intended to protect the inhabitants of any “occupied territory against the unnecessary exercise of sovereignty by a military occupant.”⁴⁹ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, “there do not appear to have been any prosecutions for that crime by international criminal tribunals.”⁵⁰ However, the war crime of *usurpation of sovereignty during military occupation* is a war crime under “particular” customary international law. According to the United Nations’ International Law Commission, “[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”⁵¹ In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission’s position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.

⁴⁸ *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).

⁴⁹ *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

⁵⁰ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 156 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁵¹ Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

The Royal Commission of Inquiry (“RCI”), established by the Council of Regency by proclamation on 17 April 2019,⁵² views *usurpation of sovereignty during military occupation* as a war crime under “particular” customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the situation of Hawai‘i, the war crime of *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State’s proxies such as the State of Hawai‘i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai‘i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists’ accommodations collected by the State of Hawai‘i and the Counties.

The Counties of the State of Hawai‘i have recently added 3% surcharges to the State of Hawai‘i’s 10.25% transient accommodations tax. Added with the State of Hawai‘i’s general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American duties on goods that are imported to the United States destined to Hawai‘i. These

⁵² “Proclamation establishing the Royal Commission of Inquiry,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 8-9 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

duty rates are collected by the United States according to the United States Tariff Act of 1930, as amended, and the Trade Agreements Act of 1979.

The Council of Regency

International humanitarian law reverses the principle of effective control of territory. According to Professor Marek, “in the first place: of these two legal orders, that of the occupied State is regular and ‘normal,’ while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is [...] strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness.”⁵³ Therefore, belligerent occupation “is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.”⁵⁴

In 1996, remedial steps were taken, under the *doctrine of necessity*, to reinstate the Hawaiian Kingdom government as it was under its legal order prior to the U.S. invasion in 1893.⁵⁵ An *acting* Council of Regency was established in accordance with the Hawaiian Constitution and the doctrine of necessity to serve in the absence of the Executive Monarch. By virtue of this process, an *acting* Government, comprised of officers *de facto*, was established as the successor to Queen Lili‘uokalani who died on November 11, 1917.

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

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

⁵³ Marek, *Identity and Continuity of States*, 102.

⁵⁴ *Id.*

⁵⁵ David Keanu Sai, “The Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.⁵⁶

Article 33 provides that the Cabinet Council “shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King.” Like the Belgian Council of Regency, the Hawaiian Council of Regency was bound to call into session the Legislative Assembly to provide for a regency but because of the prolonged belligerent occupation and the effects of denationalization it was impossible for the Legislative Assembly to be called into session. Until such time when the military occupation comes to end, Article 33 provides that the Cabinet Council, comprised of the Ministers of the Interior, Foreign Affairs, Finance and the Attorney General, “shall be a Council of Regency, until the Legislative Assembly” can be called into session. The operative word is “shall.”

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili‘uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States’ recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,⁵⁷ was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili‘uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.⁵⁸ Successors to King Kamehameha III were not established through “extra-legal changes,” but rather under the constitution and laws of the Hawaiian Kingdom. United States foreign relations law states that “[w]here a new administration succeeds to power in accordance with a state’s constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed.”⁵⁹

Strategic Plan of the Council of Regency

The strategic plan of the Council of Regency entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase

⁵⁶ F.E. Oppenheimer, “Governments and Authorities in Exile,” *Am. J. Int. Law* 36 (1942): 568-595, 569.

⁵⁷ U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

⁵⁸ M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).

⁵⁹ *Restatement (Third)*, §203, comment c.

II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

The PCA accepted the case as a dispute between a “State” and a “private party” and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention that established the PCA.⁶⁰ The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done “[p]ursuant to article 47 of the 1907 Convention.”⁶¹ The PCA Administrative Council publishes the annual reports.

Along with the United States, the other Contracting States with the Hawaiian Kingdom in its treaties that are also members of the PCA Administrative Council, include Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden, and Switzerland. Their acknowledgment of the continuity of the Hawaiian State also acknowledges the full force and effect of their treaties with the Hawaiian Kingdom except where the law of occupation supersedes them.⁶² Moreover, the United States entered into an agreement with the Council of Regency to have access to the records and pleadings of the arbitration after the PCA acknowledged Hawaiian Statehood.⁶³ This agreement constitutes explicit recognition of the Council of Regency as the government of the occupied State by the United States.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the author of this memorandum entered the political science graduate program where he received a master’s degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted

⁶⁰ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at <https://pca-cpa.org/en/cases/35/>); see also David Keanu Sai, “Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001),” 4 *Haw. J.L. Pol.* 133-161 (2022).

⁶¹ Permanent Court of Arbitration, Annual Reports, <https://pca-cpa.org/en/about/annual-reports/>.

⁶² For treaties of the Hawaiian Kingdom with Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland see “Treaties with Foreign States,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁶³ Sai, *The Royal Commission of Inquiry*, 25-26.

other master's theses, doctoral dissertations, peer review articles and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,⁶⁴ to *Nation Within—The History of the American Occupation of Hawai'i*.⁶⁵ Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai'i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for ... the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai'i, the might of the United States does not make it right.⁶⁶

As a result of the exposure, United Nations Independent Expert, Dr. deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i dated 25 February 2018.⁶⁷ Dr. deZayas stated:

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

⁶⁴ Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).

⁶⁵ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

⁶⁶ *Id.*, xvi.

⁶⁷ Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁶⁸ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁶⁹

In a letter to David Ige, Governor of the State of Hawai‘i, dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency’s proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency’s proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

⁶⁸ Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at <https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf>).

⁶⁹ National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/>).

On 7 February 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization (NGO) of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and accredited to participate in the Human Rights Council’s sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁷⁰ In its resolution, the IADL also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council’s sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁷¹ In its joint letter, the IADL and the AAJ also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

On 22 March 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council (“HRC”) at its 49th session in Geneva. The oral statement read:

The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

⁷⁰ International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at <https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/>).

⁷¹ International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at <https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/>).

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.⁷²

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence “concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for.”⁷³ Silence conveys consent. Since they “did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*”⁷⁴

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai‘i, which includes President Joseph Biden Jr., Governor David Ige, Hawai‘i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua‘i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and all of the named perpetrators have met the requisite element of *mens rea*.⁷⁵ Prosecution for these war crimes can occur here or abroad. At present, a member of the current administration of State of Hawai‘i Governor Josh Green, Attorney General Anne E. Lopez, was found by the RCI to have committed the war crime of *usurpation of sovereignty during military occupation* under War Criminal Report no. 23-0001.⁷⁶ The requisite elements of this war crime—*mens rea* and *actus reus*, have been met.

⁷² IADL, Video: Dr. Keanu Sai’s oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom (online at <https://iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/>).

⁷³ Nuno Sérgio Marques Antunes, “Acquiescence”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).

⁷⁴ See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

⁷⁵ Website of the Royal Commission of Inquiry at <https://hawaiiankingdom.org/royal-commission.shtml>.

⁷⁶ Royal Commission of Inquiry, *War Criminal Report no. 23-0001* (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf).

In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. “It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result.”⁷⁷

1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. Except for the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

⁷⁷ Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535 (2013).

Legal Status of the State of Hawai‘i

There is no legal basis for the existence of the State of Hawai‘i, being the direct successor of the provisional government, except for international humanitarian law that calls such a group a “civilian armed force” of the occupying State. According to Henckaerts and Doswald-Beck of the *International Committee of the Red Cross*, “[m]any military manuals specify that the armed forces of a party to the conflict consist of all organised armed groups which are under a command responsible to that party for the conduct of its subordinates. This definition is supported by official statements and reported practice.”⁷⁸ Article 1 of the 1907 Hague Regulations provides that the laws, rights and duties of war apply not only to the occupying State’s army but also to its civilian armed forces. In other words, the State of Hawai‘i can exist within the confines of international humanitarian law but not American municipal laws.

In this regard, the physical existence of the State of Hawai‘i is not a matter of law but rather a situation of facts regulated by international humanitarian law and the law of occupation. As the administration of the occupying State,⁷⁹ the State of Hawai‘i must begin to comply with the law of occupation and provisionally administer the laws of the Hawaiian Kingdom that have been brought up to date by the Council of Regency’s proclamation of provisional laws dated 10 October 2014.⁸⁰ To do so would be to transform itself into a military government in accordance with United States practice and the law of occupation. To not do so, officials of the State of Hawai‘i would become criminally culpable for war crimes, in particular, the war crime of *usurpation of sovereignty during military occupation*. With a view to bringing compliance with international humanitarian law by the State of Hawai‘i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations,⁸¹ the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The State of Hawai‘i has yet to transform itself into a military government to administer the laws of the Hawaiian Kingdom.

⁷⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* 14 (2009).

⁷⁹ Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (3 June 2019) (online https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

⁸⁰ Council of Regency, *Proclamation of Provisional Law* (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).

⁸¹ Article 42 of the 1907 Hague Regulations states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

Military Government

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by international humanitarian law while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, “[f]rom a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.”⁸²

United States practice of establishing a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention is the responsibility of the U.S. Army. This is acknowledged by letter from U.S. President Roosevelt to Secretary of War Henry Stimson dated 10 November 1943, where President Roosevelt stated, “[a]lthough other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden.”⁸³ Military governors that preside over a military government are general officers of the Army. In the current command structure of the State of Hawai‘i, that general officer is the Adjutant General whose office is currently held by Major General Kenneth Hara.⁸⁴

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals—FM 27-10, *The Law of Land Warfare*,⁸⁵ and FM 27-5, *Civil Affairs Military Government*.⁸⁶ Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states, “[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.” FM 27-10 has been superseded by FM 6-27, *The Commander’s Handbook on the Law of Land Warfare*. Chapter 6 covers occupation.

⁸² William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).

⁸³ Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* 22 (1975).

⁸⁴ State of Hawai‘i Department of Defense, *The Adjutant General—Major General Kenneth Hara* (online at <https://dod.hawaii.gov/department-info/leadership/the-adjutant-general/>).

⁸⁵ Department of the Army, *Field Manual 27-10, The Law of Land Warfare* (1956).

⁸⁶ Department of the Army, *Field Manual 27-5, Civil Affairs Military Government* (1947).

Although the field manuals provide “substantive information on the required tasks to execute in an occupation,”⁸⁷ there is no clear doctrine that gives guidance as to how to conduct a military occupation. In the absence of a clear doctrine, the command estimate process, however, should be able to provide guidance in implementing a plan to conduct a military occupation. FM 101-5, *Staff Organization and Operations*, provides guidance for a commander’s decision-making process. “The commander’s estimate [...] is an analysis of all the factors that could affect a mission. The commander integrates his personal knowledge of the situation, his analysis of METT-T factors, the assessments of his subordinate commanders, and any relevant details he gains from his staff.”⁸⁸

According to Major Burgess, a military occupation has “five mission essential tasks set forth in the Hague and Geneva Conventions [...] as follows: (1) Restore and ensure public order and safety, (2) provide medical care, supplies and subsistence, (3) ensure the care and education of children, (4) respect private property and properly manage public property, and (5) provide for the security of the occupying force to facilitate mission accomplishment.”⁸⁹

Because the Hawaiian Kingdom is a neutral State by treaty⁹⁰ and its territory inviolable, the presence of U.S. troops is a violation of Article 2 of the 1907 Hague Convention V, whereby “[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.” Therefore, the fifth task is not applicable in the Hawaiian situation given the illegal presence of 118 U.S. military sites. The remaining four essential tasks can be achieved through the governmental infrastructure of the State of Hawai‘i already in place with a few adjustments in order to align itself with the law of occupation and United States practice.

Transforming the State of Hawai‘i into a Military Government

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when there is compliance with Article 43 of the 1907 Hague Regulations and the administration of the laws of the Hawaiian Kingdom. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation, being the longest occupation in the history of international relations. Therefore, given the scope and magnitude of the unlawful nature of the prolonged occupation and the implication of international criminal law upon individuals holding offices in the State of Hawai‘i and its

⁸⁷ Major Christopher Todd Burgess, *US Army Doctrine and Belligerent Occupation* 52 (2004).

⁸⁸ Department of the Army, *Field Manual 101-5, Staff Organization and Operations*, Appendix C Staff Estimates C2 (1997). METT-T is the acronym for mission, enemy, terrain, troops, and time available.

⁸⁹ Burgess, 7.

⁹⁰ Hawaiian neutrality was expressly acknowledged in the treaties with Sweden-Norway in 1852, Spain in 1863, and Germany in 1879.

Counties, it would be the duty of the Adjutant General to proclaim the establishment of a military government. Necessity dictates such a step toward compliance with international humanitarian law and the law of occupation because war crimes are and continue to be committed with impunity. The Adjutant General is trained in Army doctrine and regulations, to include the 1907 Hague Regulations and the 1949 Fourth Geneva Conventions, for this type of a situation in occupied territory, where a civilian is not. The Adjutant General would be the military governor that presides over a military government.

This is a command decision to be made by the Adjutant General, which is where “a military commander, faced with a difficult choice or choices, taking the responsibility for a serious risk on the basis of this estimate of the situation.”⁹¹ According to Greenfield, a command decision “implies the presence of certain elements as basic ingredients of the act of decision: a desired objective or an assigned mission, a calculation of risk, exercise of authority, assumption of personal responsibility, and a decisive influence on the course of events.”⁹² Solace for this command decision to be made can be found in the words of Hawaiian Kingdom Chief Justice William Lee, in *Shillaber v. Waldo*:

For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, “*The life of the land is preserved by righteousness.*” We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, “Let justice be done though the heavens fall.” Let the laws be obeyed, though it ruin every judicial and executive office in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.⁹³

Although unlawful, the proclamation of 17 January 1893 by the so-called provisional government can be useful as to the wording of the military governor’s proclamation today because government officials continued in place with the exception of Queen Lili‘uokalani, her Cabinet, and the Marshal of the police force. The laws were also continued to be in effect. In the situation now, government officials would remain in place, with exceptions not in line with the law of occupation, and the laws would continue to be in effect as provisional laws together with Hawaiian Kingdom laws that existed prior to 1893. The military governor’s proclamation would, in a sense, be a reversal of the provisional

⁹¹ Kent Roberts Greenfield, “Introductory Essay,” in Kent Roberts Greenfield (ed.), *Command Decisions* 1 (1987).

⁹² *Id.*

⁹³ *Shillaber v. Wilder, et al.*, 1 Haw. 31, 32 (1847).

government's proclamation and in line with the law of occupation. The 1893 proclamation read:

1. The Hawaiian Monarchical system of Government is hereby abrogated.
2. A Provisional Government for the control and management of public affairs and the protection of the public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.
3. Such Provisional Government shall consist of an Executive Council of four members who are hereby declared to be

S.B. Dole,
J.A. King,
P.C. Jones,
W.O. Smith,

Who shall administer the Executive Departments of the Government, the first named acting as President and Chairman of such Council and administering the Department of Foreign Affairs, and the other severally administering the Department of Interior, Finance and Attorney-General, respectively, in the order in which they are above enumerated, according to existing Hawaiian law as far as may be consistent with this Proclamation; and also of an Advisory Council which shall consist of fourteen members who are hereby declared to be

S.M. Damon,	A. Brown,
L.A. Thurston,	J.F. Morgan,
J. Emmeluth,	H. Waterhouse,
J.A. McClandless,	E.D. Tenny,
F.W. McChesney,	F. Wilhelm,
W.R. Castle,	W.G. Ashley,
W.C. Wilder,	C. Bolte.

Such Advisory Council shall also have general legislative authority.

Such executive and Advisory Council shall, acting jointly, have power to remove any member of the either Council and to fill such or any other vacancy.

4. All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exceptions of the following named persons:

Queen Liliokalani,
Charles B. Wilson, Marshal,

Samuel Parker, Minister of Foreign Affairs,
W.H. Cornwell, Minister of Finance,
John F. Colburn, Minister of the Interior,
Arthur P. Peterson, Attorney-General,

who are hereby removed from office.

5. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils.

The Council of Regency, being the government of the occupied State, should have a working relationship with the military government. Spoerri of the *International Committee of the Red Cross* states, “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.”⁹⁴ And according to experts in the field of military occupation, “occupation law did not require authority to be exercised exclusively by the occupying power. It allows for authority to be shared by the occupant and the occupied government, provided the former continues to bear ultimate and overall responsibility for the occupied territory.”⁹⁵ Moreover, Professor Lenzerini concluded:

[T]he 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.⁹⁶

The first order of business for the military government would be to disband the legislative bodies of the State of Hawai‘i and the Counties in order to stop the enactment of American

⁹⁴ 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.

⁹⁵ International Committee of the Red Cross, *Expert Meeting—Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro Legal Adviser, ICRC 10 (2012).

⁹⁶ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Haw. J.L. & Pol* 317, 333, para. 20 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf)).

municipal laws. The function of a military government is to administer the laws of the occupied State, which in this case include certain American municipal laws, as situations of fact, that have become provisional laws of the Hawaiian Kingdom in accordance with the formula to determine which American municipal laws can be considered provisional laws of the kingdom.⁹⁷ Furthermore, these legislative bodies have as their electorate American citizens that are subject to Hawaiian Kingdom laws and not American municipal laws while within Hawaiian territory. Section 6 of the Hawaiian Civil Code provides:

The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.⁹⁸

Furthermore, according to Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States, “each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects [...] but subject always to the laws and statutes of the two countries respectively.”⁹⁹ The enactment of American municipal laws within Hawaiian territory is not only a violation of international humanitarian law and international criminal law, but also a violation of the 1849 treaty.

Second order of business is for the military governor to determine which American municipal laws can be considered the provisional laws of the Hawaiian Kingdom during the American military occupation that augments and not replaces the Civil Code,¹⁰⁰ together with the session laws of 1884¹⁰¹ and 1886,¹⁰² and the Penal Code.¹⁰³ These provisional laws will need to be made public by proclamation of the military governor. Paragraph 6-53 of FM 6-27 states that “the population of the occupied territory must be

⁹⁷ See Chairman of the Council of Regency’s Memorandum on the Formula to Determine Provisional Laws (22 March 2023) (online at https://hawaiiankingdom.org/pdf/HK_Provisional_Laws_Formula.pdf).

⁹⁸ Hawaiian Civil Code, *Chapter II—Of the Effects of Laws*, §6 (online at https://hawaiiankingdom.org/civilcode/pdf/CL_Title_1.pdf).

⁹⁹ Treaty with the United States of America, in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 305, 307 (2020).

¹⁰⁰ Civil Code of the Hawaiian Kingdom (1884) (online at <https://hawaiiankingdom.org/civilcode/index.shtml>).

¹⁰¹ Session Laws of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

¹⁰² Session Laws of the Hawaiian Kingdom (1886) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

¹⁰³ Penal Code of the Hawaiian Kingdom (1869) (online at https://hawaiiankingdom.org/pdf/Penal_Code.pdf).

informed of any alteration, suspension, or repeal of existing laws and of the enactment of new laws.” And paragraph 357 of FM 27-10 states:

In a legal sense no proclamation of military occupation is necessary. However, on account of the special relations established between the inhabitants of the occupied territory and the occupant by virtue of the presence of the occupying forces, the fact of military occupation, with the extent of territory affected, should be made known. The practice of the United States is to make this fact known by proclamation.

In light of the legal opinion on war crimes related to the United States belligerent occupation of the Hawaiian Kingdom by Professor Schabas on 25 July 2019,¹⁰⁴ a renowned jurist and expert on international criminal law, genocide and war crimes, and the oral statement given to the United Nations Human Rights Council on 22 March 2022 by two NGOs—*International Association of Democratic Lawyers* and the *American Association of Jurists* that war crimes are being committed in Hawai‘i, it should warrant the Adjutant General to take this matter seriously because of the legal consequences of the United States’ violation of international humanitarian law for over a century.



David Keanu Sai, Ph.D.

Chairman, Council of Regency

Minister of the Interior

Minister of Foreign Affairs *ad interim*

¹⁰⁴ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 157 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)); see also William Schabas, “Legal Opinion on War Crimes related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” 3 *Haw. J.L. Pol.* 334 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol334_\(Schabas\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf)).

Enclosure “4”

US Army Doctrine and Belligerent Occupation

A Monograph

by

Major Christopher Todd Burgess

United States Army

School of Advanced Military Studies



**United States Army Command and General Staff College
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CHAPTER I

INTRODUCTION

The Bush Administration's National Security Strategy (NSS) of September 2002, in much controversy, embraced a preemptive strategy to eliminate the threats to the United States. In addition to these preemptive measures, the NSS stated that, if necessary, the United States would act unilaterally to ensure its safety. The United States acted on both of these principles during Operation Iraqi Freedom. Although this monograph does not address the controversial nature of the NSS, it does look at the impact that these ideas may have on the U.S. Army particularly in the area of belligerent occupation. Additionally, it must be acknowledged that in the current state of world affairs, and with the current NSS, another occupation in the near future is not out of the question.

The challenge of such occupations is the military's need to reach the government's strategic aim while sustaining and protecting the military force. Successful termination of Operation Iraqi Freedom now depends not on the combat operations, but on how well the United States and the U.S. Army, in particular, reestablishes the Iraqi government and facilitates the building of a stable nation. Arguably, the United States has not performed a mission of belligerent occupation of this magnitude since the aftermath of World War II. Certainly, it is too soon to assess how well the United States has performed this mission, but an evaluation of U.S. Army doctrine on occupation is necessary due to the possible recurrence of this mission in the near future. This monograph examines how well current U.S. Army doctrine addresses the mission of belligerent occupation and offers recommendations.

This monograph will investigate three component elements: the law of belligerent occupation, historical case studies of occupation, and Joint and Army doctrine. The first part of this analysis is a review of the law of belligerent occupation. The review of the law serves three purposes. First, it defines the legal circumstances that constitute a belligerent occupation. Second, it establishes the essential tasks that the law requires of the occupying power. Third, it sets the minimum standard to evaluate the success or failure of all occupations.

The second part of this study is a case study of previous occupations. The monograph examines three historical cases of U.S. military occupation: the occupation of Germany after World War II, the occupation of Panama in 1990, and the occupation of Iraq in 2003. The primary focus of this part of the study is an examination of the occupation of Germany after World War II. First, the study investigates the detailed planning that led to the occupation of Germany. Second, it considers the successes and failures in that planning, which provides key lessons learned for planners of today. Third, it tracks the evolution of the doctrine of occupation that followed World War II. The study then compares the occupation of Germany with the more recent occupations of Panama and Iraq to help determine the essential tasks of such missions.

The third point of inquiry examines the doctrine of occupation. This review is designed to determine whether current doctrine adequately addresses the requirements of occupation that the first two parts of the study have generated. This portion of the monograph identifies the shortfalls in current doctrine as compared to the requirements of the law and the lessons of history. The review includes *Field Manuals (FM) 3-0, Operations; 3-07, Stability and Support Operations; and 41-10, Civil Affairs Operations*; as well as *Joint Publications (JP) 3-0, Doctrine for Joint Operations; 3-07 Joint Doctrine for Military Operations Other than War, and 3-57 Joint Doctrine for Civil-Military Operations*. *JP 3-0*¹ classifies post-conflict operations as operations other than war (OOTW).² As occupation is a post-conflict operation, military OOTW doctrine should logically encompass its requirements. This examination of current doctrine will reveal whether it adequately addresses the occupation mission. The

¹ Chairman, Joint Chiefs of Staff, *Joint Publication 3-0 Doctrine for Joint Operations*, Washington, D.C. 9 Sept 1993, III-31. The classification of post-conflict operations as OOTW is found in the 1993 edition. In the 2001 version of JP 3-0 this classification is omitted.

² Although Joint Doctrine uses the term military operations other than war (MOOTW), the Army uses the term Stability and Support Operations (SASO). According to *JP 1-02*, MOOTW is operations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war. *FM 3-07* defines SASO as the use of military capabilities for any purpose other than war. The definitions are basically the same, for purposes in this monograph, Stability and Support Operations will be the term that is used. Colonel Fastabend offers a good account of the evolution of terminology; see David Fastabend, "The Categorization of Conflict", *Parameters*, 75-87 (1997).

study will also analyze the evolution of the doctrine of military occupation since World War II and determine what lessons from prior doctrine may be applicable today.

Finally, the monograph identifies shortfalls in current doctrine and recommending critical changes. These changes, if adopted will ensure that the U.S. military is better prepared to execute the occupation mission following future conflicts, and will serve the very real needs facing the nation today.

CHAPTER 2

THE LAW OF BELLIGERENT OCCUPATION

Introduction

International law both defines belligerent occupation and places requirements and constraints on the occupying power. Understanding the international law of belligerent occupation is therefore critical to determining the specified military tasks that occupation requires military to perform. The analysis of the law of belligerent occupation focuses on three critical areas. The first section of the analysis looks at the origins of the law. The second section discusses the legal definition of belligerent occupation. The final section determines the specified tasks the occupying power must legally perform. This analysis demonstrates five pillars of occupation that provides a foundation to evaluate how the military has executed prior occupations as well as to develop a model of legally required specified tasks for future occupations.

History of Current Law

Two primary documents lay the foundation for the law of belligerent occupation. The first is the 18 October 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (HR).³ The second is the 12 August 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time

³ Hague Convention Number IV Respecting the Laws and Customs of War on Land, 18 October 1907. Further reference to this Hague Convention will be as HR.

of War (GC).⁴ The Hague Convention sums up the century of legal and military debate that preceded its passage. As such, it serves as the foundation for subsequent international law pertaining to the protection of persons during armed conflict. It also provides specific rules regarding property, finance, and general government administration, and offers guidance for military occupation. The Geneva Convention supplements The Hague rules and provides more detailed requirements for the treatment of civilians.

The occupation rules found in the Hague Convention evolved from a century of evolving custom and debate. Although the distinction between annexation and occupation occurred in the middle of the 18th century, the legal separation of the two terms did not develop until after the Napoleonic wars.⁵ As early as 1809, Russia required Swedish citizens to take an oath of allegiance.⁶ This was a clear step towards the recognition of the concept of occupation. Although current international law prevents the occupying power from forcing civilians to take a coercive oath of allegiance, the Russian efforts were a marked attempt to control the people of an occupied land.⁷

In 1828, United States Supreme Court Chief Justice John Marshall also countered traditional notions of the outcome of international armed conflict when he found that the fate of a conquered nation did not lay with annexation but instead with temporary military occupation followed by a peace agreement.⁸ In *American Insurance Company v. Canter*, he wrote, “[t]he usage of the world is, if a nation

⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Further references will be referred to as GC.

⁵ Gerhard Von Glahn, *The Occupation of Enemy Territory* (Minneapolis: The University of Minnesota press, 1957), 7.

⁶ *Ibid.*, 7.

⁷ Annexation is generally covered in Von Glahn’s background on the international law of military occupation. In the first half of the 18th century conquest of enemy territory equated to an annexation of the conqueror’s territory. The land now being under the conqueror’s control, he was able to do as he pleased in the occupied area. A greater analysis of annexation and occupation can be found in Graber, Doris A., *The Development of the Law of Belligerent Occupation 1863-1914*, (New York: Columbia University Press, 1949), 340-343.

⁸ Annexation of territory is a *permanent* appropriation of territory; whereas an occupation is the *temporary* control over another sovereign state (emphasis is mine). In fact the current U.S. interpretation of international law says, “Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty...It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.” Department of the Army, *Field Manual 27-10, The Law of Land Warfare* (Washington, D.C.: Department of the

be not entirely subdued, to consider the holding of conquered territory as mere military occupation, until its fate shall be determined at the treaty of peace.”⁹ Chief Justice Marshall’s statement directly contradicted popular custom at the time, which had held that the conquered land immediately became the property of the conquering state.

In 1844, Germany became the first country to publish a document noting the importance of occupation.¹⁰ The 1863 the United States followed suit, laying the foundations for the concept of military occupation in U.S. Army Manual, *Instructions for the Government of Armies of the United States in the Field*, commonly known as the Lieber Code.¹¹ The Lieber Code also led the way for numerous military manuals addressing the topic of warfare and occupation, including the European Brussels Declaration of 1874 and the Oxford Manual of 1880, laying the foundations for international consensus on the rules of land warfare. The 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land ultimately derived many of their provisions directly from the Brussels Declaration. All of these foundational documents legally recognized the act of occupation, and the rules they established for the occupying power remained unchanged until after World War II.

Although the 1907 Hague Convention certainly had its critics and challengers in its time, its provisions lasted throughout both World War I and World War II and continue to this day.¹² The events of World War II led the impetus for changes in the law of armed conflict to better protect civilians from the hazards of war. The Geneva Conventions of 1949 attempted to clarify some of the more vague issues

Army, 1956), 140. The issue between annexation and occupation is far from over. Benvenisti argues that the Israeli occupations in the West Bank, Gaza, Golan and East Jerusalem amount to an annexation. See, Benvenisti, Eyal, *The International Law of Occupation*, (Princeton, Princeton University Press, 1993), 112, 123-129.

⁹ American Insurance Company v. Canter, 26 U.S. 511 (Pet.) (1828).

¹⁰ Von Glahn, 8.

¹¹ Ibid.

¹² Von Glahn, 7-23. The German document is Hefter, August Wilhelm, *Das europäische Völkerrecht der Gegenwart*, 1844. An interesting thesis that argues a slightly less significance to the Lieber Code, Grant R. Doty, “The United States and the Development of the Laws of Land Warfare,” *Military Law Review* 156 (June 1998): 224-255.

from the 1907 Hague Conventions as well as address specific issues raised by the conduct of nations during World War II. Taken together, they constitute current law for the conduct of military occupations, a concept that international law has specifically recognized for nearly a century. This international law provides the foundation to further examine the exact meaning of the term, belligerent occupation.

Definition of Belligerent Occupation

The 1907 Hague Convention specifically defines belligerent occupation. “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”¹³ This simple definition does not provide much internal detail. To determine when occupation occurs instead requires analysis of the circumstances which trigger the definition.

Although the definition does not specify when a force becomes an occupying power, the common interpretation presupposes both invasion and firm control of the country at issue.¹⁴ An invasion alone is not an occupation. For example, air forces can attack a country from the air, naval forces can attack from the sea, and land forces can rapidly advance through a country, all without providing firm control of the territory being attacked. Only with firm control does an invasion create an occupation, as control allows the exercise of authority. In addition, the invasion does not necessarily need to be resisted. If the invader assumes control without resistance, then occupation still exists.¹⁵ The Hague Convention does not specify that resistance is required.¹⁶

¹³ HR, Art. 42.

¹⁴ Department of the Army, *Field Manual 27-10, The Law of Land Warfare* (Washington, D.C.: Department of the Army, 1956), 138.

¹⁵ *Ibid.* Von Glahn argues against the assumption of invasion, and argues that in addition to occupation based on a hostile invasion in time of war there are also two additional types of occupation. The first is occupation following the complete surrender of an enemy force that no longer has armed forces. The second is the occupation of a neutral that takes place as a plea of military necessity, usually following the liberation of any enemy. Von Glahn, 27.

¹⁶ HR, Art. 42. Additionally *FM 27-10*, paragraph 355, states “Military occupation is a question of fact.” Paragraph 357 states, “In a strict legal sense no proclamation of military occupation is necessary...The practice of the United States is to make this fact known by proclamation.” Once the elements are met for an occupation it is a question of fact, not law, thus a proclamation is not required.

The concept of firm control of a territory also requires explanation to be useful. The size of the force used itself is immaterial, and should be based on an analysis of the situation. *Field Manual 27-10* succinctly clarifies these issues, “The number of troops necessary to maintain effective occupation will depend on various considerations such as the disposition of the inhabitants, the number and density of the population, the nature of the terrain, and similar factors.”¹⁷

Essential Tasks

An established working definition of what constitutes an occupation permits one to examine what tasks must be accomplished during the occupation mission. As the legal documents that set out the requirements are both lengthy and difficult to understand, it is more useful to synthesize the legal requirements into a model that delineates both mission essential tasks and collective tasks that the occupying force must be prepared to perform.

The five mission essential tasks set forth in the Hague and Geneva Conventions are as follows: (1) Restore and ensure public order and safety,¹⁸ (2) provide medical care, supplies and subsistence,¹⁹ (3) ensure the care and education of children,²⁰ (4) respect private property and properly manage public property,²¹ and (5) provide for the security of the occupying force to facilitate mission accomplishment.²²

These five tasks must be examined to determine the scope of each requirement as well as the implied tasks each contain.

¹⁷ Field Manual 27-10, 139.

¹⁸ HR, Art. 42.

¹⁹ GC, Art. 55, 56.

²⁰ GC, Art. 50.

²¹ HR, Art. 23, 52.

²² GC, Art. 27, 54.

Essential Task: Restore Public Order and Safety

The first essential task is to restore public order and safety. Article 43 of The Hague Conventions states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, *public order and safety* (emphasis mine), while respecting, unless absolutely prevented, the laws in force in the country.”²³ This task is significant for three reasons. First, it allows the peaceful inhabitants of an occupied territory to continue with their day-to-day lives.²⁴ Second, it allows the occupant and the local inhabitants to form an agreement to maximize their benefits to both. Third, this task is so broad that it encompasses many of the functions associated with government administration. From this specified task there are four implied tasks that must be addressed in any occupation. These implied tasks are 1) reestablishing a domestic security force, 2) providing for the collective protection, 3) administration and enforcement of local laws, and 4) management of the courts, jails, and prisons. The analysis will address these tasks in further detail.

Implied Task: Domestic Security

The first implied task necessary to restoring public order and safety is to reestablish and supervise a form of domestic security. A trusted police force allows for a heightened sense of security in the local populace, reduces crimes against and by the inhabitants, and aids in administering military law. The process of establishing a domestic police force can take some time. Local law enforcement personnel may need to be investigated to ensure that they are reliable, that they are not associated with human rights abuses, and that they are not involved in criminal activity.²⁵ While international law does not specifically address the need for domestic police forces, their establishment is logically required as part of restoring

²³ HR, Art. 43.

²⁴ Von Glahn, 57.

²⁵ Daria Wollschlaeger, Post Conflict Governance, Microsoft PowerPoint Presentation, Slide 19, no date present on presentation. LTC Wollschlaeger is the Chair, International & Operational Law Department, The United States Army’s Judge Advocate General’s School. Presentation is on file with author.

public order and safety.²⁶ Other tasks must be conducted in order to ensure for the collective protection of the population and the occupant.

Implied Task: Collective Protection

The second implied task, providing for the collective protection of the inhabitants of the occupied country, is directly related to the establishment of a domestic police force but greater in scope. The collective protection of inhabitants also requires the occupying power to collect weapons and ammunition that may pose harm to the inhabitants and conflict with the occupant's goals. Other sub-tasks of collective protection include restricting the movement of the population,²⁷ controlling the sale of liquor and narcotics, controlling and restricting methods of communications,²⁸ controlling modes of transportation, and restoring and controlling public utilities.²⁹ This could be further interpreted as the reestablishment and manning of local fire departments and emergency services as well as public utilities as additional implied tasks. Although some of these tasks appear onerous and detailed, particularly for the occupying power, performing them serves the additional purpose of ensuring the best possible relations between the occupying power and the inhabitants of the occupied country. Providing the security for the inhabitant and the occupant is the first pillar of public order and safety. The next pillar addresses the collective protection of the inhabitants and how it cannot occur without the use of local laws.

Implied Task: Administration and Enforcement of Local Laws

The third implied task is to review the local laws in order to enforce, suspend or repeal them and enact new laws in their place as needed. The Geneva Convention provides, “[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be suspended by the Occupying

²⁶ Von Glahn, 57.

²⁷ Ibid, 141.

²⁸ Ibid, 139.

²⁹ Wollschlaeger, Slide 33.

Power in case where they constitute a threat to its security.”³⁰ Although it is United States policy to use local laws unless military necessity requires otherwise,³¹ there can be valid reasons for suspension of local laws. For example, an occupying power may suspend or repeal laws that are discriminatory or counter to the occupant’s beliefs and goals within the occupied territory.³² Although not commonly done, the occupying power may also enact their own laws in the occupied country, as both Germany and Allied forces did during World War II.³³ Clearly, certain procedures must be adhered to ensure any new laws are both effective and obeyed. Such procedures would include giving notice to the populace in their native language(s), publishing the laws in writing, and ensuring that new laws are not applied in an *ex post facto* fashion.³⁴ The last pillar addressed is a system to deal with criminals.

Implied Task: Courts, Jails, Prisons

The fourth implied task to the restoration of public order and safety is supervision of courts, jails, and prisons.³⁵ The Geneva Convention provides, “[t]he necessity of ensuring effective administration of justice, the tribunals of the occupied territory shall continue to function in respect to all offenses covered by the said laws.”³⁶ The occupying power has considerable latitude to use a variety of courts, tribunals, and local government systems to adequately enforce and administer the law. First, the occupying power may use the indigenous courts in order to enforce the domestic law of the occupied state, although the laws enforced there are only against the inhabitants and not the occupying power. The Geneva Conventions also provide the occupying power the ability to establish new courts to administer justice

³⁰ GC, Art. 64.

³¹ Field Manual 27-10, 142.

³² Ibid, 143.

³³ Von Glahn, 99-100.

³⁴ Morris Greenspan, *The Modern Law of Land Warfare*, (Berkeley, CA; University of California Press. 1959), 221.

³⁵ GC Art. 64- 78 covers courts and penal systems.

³⁶ GC, Art. 64.

over the inhabitants when the justice system in the occupied state is dysfunctional.³⁷ In addition, the occupying power may establish courts within the occupied state to deal with offenses against the occupant, or to deal with violations of the occupant's laws in the occupied nation.³⁸ Finally, the conventions specifically permit the occupying power to remove officials from public office who refuse to fulfill their duties.³⁹

In addition to establishing an effective judicial system, the occupying power must take charge of the jails and prisons to ensure the safety of both the inhabitants and the occupying forces.⁴⁰ While obviously those who were jailed prior to occupation could also pose a threat during occupation, the occupying power must review those imprisoned at the time of the occupation to ensure that those jailed did not include persons who were wrongly accused or political prisoners from the former regime.⁴¹

Essential Task: Provide Subsistence, Medical Care and Supplies

The second essential task from international law is to provide the population subsistence, medical care and supplies.⁴² The nature of war invariably stresses the occupied country's systems for providing for the basic needs of its people. By properly planning for these unavoidable tasks before the conflict begins, the occupant can prevent undue hardship and drain on their own resources while still ensuring the welfare of the civilian population. Four implied tasks stem from the requirement to provide medical care

³⁷ Ibid.

³⁸ GC, Art. 64-78

³⁹ GC, Art. 54.

⁴⁰ This is interpreted from security measures for the populace and the occupant. GC Art.78 states, "If the Occupying power considers it necessary, for *imperative reasons of security*, to take safety measures concerning protection of persons, it may, at the most, subject them to assigned residence or to internment." Emphasis is mine. FM 27-10 paragraph 432 mandates security of the forces and the duty of the inhabitants to carry on in peaceful manner.

⁴¹ John F. Burns, "Threats and Responses: The Great Escapes; Hussein and Mobs Virtually Empty Iraq's Prisons," New York Times, 21 October 2002, Sec. A, 1. Although in the Iraq, many people who disagreed with the Saddam Hussein Regime were imprisoned, there also appears to be many that were true criminals. Procedures must be in place to ensure those imprisoned are just. As Burns' article points out many criminals were released for dubious reason, which begs the questions of legitimate imprisonment in the first place.

⁴² GC, Art. 56.

and subsistence. These tasks are: 1) the distribution of food, medical supplies, and clothing; 2) the production and processing of food; 3) support of relief organizations; 4) and the (re)establishment of medical facilities and medical supply stocks.

Implied Task: Distribution of Food, Medical Supplies, Clothing

The first implied task is to obtain and distribute requisite food, medical supplies, clothing, and other humanitarian aid for civilian relief.⁴³ The scope of this requirement will necessarily vary with the number of people requiring support and the severity of the people's need. The length of the war in the area and the amount of infrastructure destruction will affect the amounts of supplies that the occupying power must provide. The occupying power may even be forced to ration supplies based on its ability to provide subsistence and care to all who require it. Providing food in the short is one challenge, another challenge is ensuring for the subsistence in the long term.

Implied Task: Production and Processing of Food

The second implied task is to encourage indigenous industries involved in the production and processing of food to continue operations.⁴⁴ This task is critical for several reasons. First, it allows for the occupied country to better transition to self-sustaining in the future. Second, it reduces the dependency that the occupied country has on the occupying power for basic food needs. Finally, doing so eliminates the significant burden on the occupying power that providing and distributing food can place.

The occupant does not have to be alone in these efforts. Assistance can come from other agencies interested in the welfare of the population.

⁴³ GC, Art. 55

⁴⁴ GC, Art. 55. Art. 55, it states "To the fullest extent of *the means available to it*, the occupying power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if *the resources of the occupied territory are inadequate*. Emphasis is mine. Also see Von Glahn, 145.

Implied Task: Support of Relief Organizations

The third implied task, encouraging the support of relief organizations, likewise relieves some of the burden of caring for the civilian population from the occupying power.⁴⁵ Relief organizations such as the International Committee of the Red Cross (ICRC) can assist in providing some of the medical and basic subsistence needs of the civilian population. It is important that the occupying power realize, however, that the services relief organizations provide do not relieve the occupant of the responsibility of ensuring that those services are provided.

Implied Task: Medical Facilities and Medical Supply Stocks

The final implied task to providing food, subsistence, and medical care and supplies is to reestablish existing medical facilities and to ensure existing medical supply stocks are properly apportioned and distributed.⁴⁶ Doing so avoids undue strain on deployed military medical services and facilitates transition of medical services to effective domestic control. Additionally, ensuring that medical services and supplies are being properly distributed to the populace has the additional benefit of reducing the likelihood that needed supplies will end up in the hands of resistance or insurgent forces still operating in the occupied territory.

Essential Task: Care and Education of Children

The third essential task of an occupying power is to ensure for the care and education of children. The Geneva Convention mandates 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.”⁴⁷ The same provision specifically directs identification of children, reunion with parents, care

⁴⁵ GC, Art 59, 60.

⁴⁶ Von Glahn, 142.

⁴⁷ GC, Art. 50. GC. Under GC, Art. 6, the duties for certain provisions cease after 1 year, one of those is GC, Art. 50. The Additional Protocol to the Geneva Convention (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977) nullify this one year provision, but the United States has not ratified the Additional Protocol of 1977. Though the requirement goes away after a year of occupation, international pressure and media coverage may deem that the care and education of children would continue past the one year requirement.

of orphans, as well as preferential medical treatment and subsistence for children under the age of 15, expectant mothers, and mothers with children under the age of seven.⁴⁸

There are two implied tasks that can be derived from these requirements. First, the occupying power must ensure that education facilities are provided and properly functioning. As with providing food and medical care, this task will vary with the type of country occupied, the status of the country before the conflict, the length of the conflict prior to occupation, and the wartime damage to civilian infrastructure. Facilities that were in use before the occupation must be examined to determine if they can still be used to meet the needs of children's education and be relocated and rebuilt as necessary. Providing teachers will also be necessary, and the occupying power is responsible for finding acceptable teachers, preferably those who share the same language and culture as the children.⁴⁹

Essential Task: Manage and Respect Property

The final essential task of the occupying power, to respect private property and manage public property, contains far fewer specific legal requirements. For private property, the Hague Convention requires the occupying power to protect it and forbids its confiscation.⁵⁰ The requirements for public property are less specific. The Hague Convention states:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁵¹

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ HR, Art. 46.

⁵¹ HR, Art. 55, 56.

There are three implied tasks that can be derived from this provision. First, the occupying power must distinguish between types of property, and must determine whether property is privately or publicly owned.⁵² Secondly, based upon this determination, the occupying power must determine if there is military value associated with the property. Property such as rail yards, forts, and airfields have direct military value that the occupying power may capitalize on as necessary, as control over such property facilitates the mission of the occupying power and prevents its use by any opposing or insurgent force.⁵³

Property that has no military value must still be safeguarded and properly administered to prevent its damage or waste.⁵⁴ Thirdly, the occupying power must take affirmative steps to prevent damage or waste to that property that has no direct military value.⁵⁵ Doing so has the collateral effect of promoting good will among the occupied people and prevents valuables from falling into the hands of the opposing force.

Essential Task: Provide Security for the Occupying Force

Although the task to provide security for the occupying forces is not directly stated in the Hague and Geneva Conventions, it can be inferred from the law. HR Art 42 states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁵⁶ Two points from this article demonstrate the essential nature of providing security for the occupying forces. First, the article states the importance of territory being placed under the authority of a hostile army. Secondly, the article further qualifies the nature of the authority mandating the establishment and exercising of the authority. It can therefore be inferred that if authority cannot be achieved, then occupation has not been achieved. Security for the occupying force is therefore a prerequisite to legal occupation, for without the proper

⁵² GC, Art. 53.

⁵³ Von Glahn, 176-180.

⁵⁴ HR, Art. 55.

⁵⁵ Von Glahn, 180-183.

⁵⁶ HR, Art. 42.

security, it is possible for the authority of the occupation to falter and prevent the occupying force's ability to execute essential tasks. Certainly this requires application as each situation calls for different security requirements.

Summary

The foregoing analysis demonstrates the five pillars of occupation (see Figure 1). The degree of application of each of these tasks may vary on the situation of the given occupation but every occupation addresses these five pillars. This analysis also provides a model in which to evaluate the United States Army's doctrine on occupation. If these tasks are mandatory, then doctrine should address these essential tasks.

The law dictates only a minimum standard. As with any operation, there is the application of forces and action based on the situational analysis. There may be further tasks based on the occupying force and its assessment of the mission. Additionally, although international law prescribes tasks to be completed, it does not tell how to complete these tasks. This is where an analysis of actual occupations can aid in a complete understanding of the occupations. The next chapter will cover this in further detail.

Restore Public Order and Safety			
Counts, Jails, and Prisons	Local Laws	Collective Protection	Domestic Security
Provide Subsistence, Medical Care and Supplies			
Medical Facilities and Medical Supply Stocks	Support of Relief Organizations	Production and Processing of Food	Distribution of Food, Medical Supplies, Clothing
Care and Education of Children			
Manage and Respect Property			
Provide Security for the Occupying Force			

Figure 1, The Five Pillars of Occupation. Essential tasks mandated by law.

CHAPTER 3

HISTORY

Introduction

Historical case studies demonstrate other additional tasks and a practical understanding of the necessary issues involved. History enables us to see how past planners approached the mission of occupation. The military professionals of other eras handled many complex missions just like the Army is facing today in Afghanistan and Iraq. Lessons from these experiences are a great value for the Army today. The challenge of today is how and what to integrate from these lessons into current and future occupation missions and possibly laying the foundation for the development of doctrine.

This chapter examines three occupations: the U.S. Army in Germany after WWII, the occupation of Panama after the US intervention in 1989, and the occupation of Iraq after the US invasion in March 2003. They were chosen for specific reasons. They all represent occupations in which the United States participated or led a coalition. Germany represents an occupation of great scope and magnitude.

Specifically, Germany was an utterly devastated country and its reconstruction was vital to the reconstruction of Europe. Panama was a much smaller scale occupation: the removal of the Manuel Noregia's government in Panama took only days. Finally, the current occupation in Iraq contrasts and highlights lessons from the other two case studies. Operation Iraqi Freedom and the subsequent occupation are unique due to the United States' unprecedented position in the world and its willingness to enforce this action without the consensus of world leaders. Additionally, Iraq, like Germany, was suppressed for years of totalitarian rule and additionally depressed economically by years of United Nations imposed sanctions.

World War II

Although some will argue that the tasks associated with an occupation are better depicted by the recent stability operations that the United States has executed in the 1990s,⁵⁷ the occupation of Germany after World War II demonstrates many lessons due to the length of the operation, the scope of tasks conducted, planning, and transition back to a German government. This analysis offers eight points of analysis which could further add to the framework for occupation: 1) the structure of military government operations; 2) the level of preparation before the actual occupation; 3) the transition from combat forces towards a constabulary force; 4) the denazification of Germany; 5) the promulgation of democratization; 6) the efforts to care and feed for the German people; a perspective on how to handle millions of displaced persons; 8) the ongoing dispute between the Department of State and the Defense establishment on who should be in charge and offers one method to solve.

The Structure of Military Government

The first lesson that the occupation of Germany offers is a organizational structure for military government forces. Specifically, two aspects of the organizational structure could serve as a model for future operations. The first was the staff and planning organization of military government within the European Theater. The second was the military government organization in the field.

The overarching military government organization was headed out of Washington by the Civil Affairs Division (CAD).⁵⁸ A corresponding theater organization was called the European Civil Affairs Division (ECAD).⁵⁹ Although the Supreme Allied Commander of the European Theater of Operations was overall in charge of the military government operation, he delegated the tasks to his Deputy Military

⁵⁷ Conrad C. Crane and W. Andrew Terrill, "Reconstruction Iraq: Insights, Challenges, and Mission for Military Forces in a Post-Conflict Scenario" (Monograph, Strategic Studies Institute, U.S. Army War College, Carlisle, PA), 2003.

⁵⁸ Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* (Washington, D.C.: Center of Military History United States Army, 1975), 14-17.

⁵⁹ *Ibid.*, 68.

Governor.⁶⁰ The deputy's staff formed the ECAD. This model of the CAD and ECAD national and theater level organizations that could be useful models for other occupations.

The command structure offers additional lessons to today's military. Initially, the heart of planning for military government of Germany within ECAD was the German Country Unit. Later the U.S. groups Control Council absorbed the German Country Unit as the Control Council was established after the allied occupational split of Germany. Due to a poor transition and overconfidence, U.S. Group Control Council experienced difficulties that the German Country Unit did not. The U.S. Group Control Council struggled for control with the G-5 of the U.S. Forces, European Theater (USFET) for direction of the Military Government programs.⁶¹ Eventually this was resolved when the Office of Military Government United States (OMGUS) was stood up to alleviate their differences.⁶² Although successful like the CAD and ECAD at higher levels, the U.S. Groups Control Council demonstrated the importance of unity of effort and continuity by the Military Government staffs.⁶³

The military government organization in the field offers a good method for employment of forces.

In the field the military government units organized into five types of detachments. The E detachment was the largest in size but the fewest in number, consisting of more than 100 officers and numerous enlisted soldiers, with a spectrum of expertise.⁶⁴ The E Detachment was able to take over *Länder* (states), *Provinzen* (provinces), and *Stadtkreise* (large cities). The F Detachments were slightly

⁶⁰ Ibid, 224.

⁶¹ Additional G-5 elements were located in the Army Groups, Army level, and Corps.

⁶² Zink, 46.

⁶³ Once SHAEF dissolved USFET was created. The military government chains of command followed two different lines under USFET. The first chain ran from Eisenhower (Commander, USFET) through the Third and Seventh Army Commanders. The second was a technical chain of command that ran through LTG Lucius Clay (Deputy Commander USFET and Deputy Military Governor) to the theater G-5, military district headquarter G-5, and to ultimately the military government detachments. See Walter M. Hudson, "The U.S. Military Government and Democratic Reform and Denazification in Bavaria, 1945-47," Master's Thesis, U.S. Army Command and General Staff College, Ft. Leavenworth, KS, 2001, 15.

⁶⁴ E Detachments specialties ranged from mining, forestry, oil refining, fisheries, public safety, public health, government and administration, food, agriculture, public finance, banking, insurance, public works, public utilities, courts and legal systems, education, religious affairs, intelligence, transportation, communications, monuments, fine arts and archives, and trade and industry. See Zink, 57-65

smaller than the E Detachment and had a greater ratio of enlisted to officers. The F Detachments could take over *Regierungsbezirke* (districts) and large *Stadtkreise*. The C Detachments covered smaller *Regierungsbezirke* and larger *Landkreise* (rural counties). The H and I Detachments were the most numerous, though only consisted of four to six officers. They were designed for the smallest *Landkreise* and the smallest *Stadtkreise*. H and I Detachment specialties were largely area dependent and they adjusted to fit the problems in specific areas.⁶⁵

Much of today's Civil Affairs team structure originated in these teams created for Germany.⁶⁶ However, the distinction between Germany and today is that today's Civil Affairs branch has a much wider complement of missions that they can perform.⁶⁷ Additionally, the team and command and control structures offer a possible method for a future occupation. Lastly, the successes of the organizational structure only came with maximum preparation and planning for the upcoming occupation.

Preparation

One of the most applicable lessons to draw from the occupation of Germany is the importance of comprehensive and early planning. In 1920, Colonel Irwin L. Hunt, Officer in Charge of Civil Affairs for Third Army after World War I stated "The American army of occupation lacked both training and organization to guide the destinies of the nearly one million civilians whom the fortunes of war had placed under its temporary sovereignty."⁶⁸ Colonel Hunt's published report that influenced the occupation planners during World War II, who did not want to repeat the mistakes of the previous occupation of Germany.⁶⁹ In the mid 1930s the U.S. Army War College took the initial lessons from the

⁶⁵ Zink, 60.

⁶⁶ Department of the Army, *Field Manual 41-10 Civil Affairs Operations*, (Washington, D.C.: Department of the Army, 14 February 2000). Chapter 3 details the organization, capabilities, and functions of Civil Affairs units.

⁶⁷ The mission for military government was occupation or civil administration. The current mission areas for civil affairs are Foreign National Support, Populace and Resource Control, Humanitarian Assistance, Military Civic Action, Emergency Services, Support to Civil Administration. See *FM 41-10* Chapter 2.

⁶⁸ Ziemke, 3.

⁶⁹ *Ibid*, 3.

Hunt Report and began looking at military government and administration of occupied territory. A new intensity was added to the War College's efforts as the Axis Powers early successes in WWII caused governments to disappear, go into exile, or become collaborators, thus pushing the issue of military occupations to the forefront.

The U.S. Army took two fundamental steps to prepare for successful military occupations. The first was the creation of two field manuals, FM 27-10, the Law of Land Warfare, and FM 27-5, Military Government, which are discussed in more detail in Chapter Four.

The U.S. Army's second step created a school designed to train personnel in military government. The school is important for three reasons. First, the creation of the school made the Army responsible for military government. President Roosevelt designated the early role belonged to the Army.⁷⁰ Second, it gave a method for selection and training of the specialists needed to perform the military governance mission. The initial program established solely at the University of Virginia fell extremely short in producing the numbers of trained soldiers who would ultimately be needed to conduct the military governance mission.⁷¹ In late 1942, the Military Government Division expanded the number of trainees by creating the Civil Affairs Training Program (CATP).⁷² This program allowed students to train at certified universities.⁷³ Third, the school established dialogue and a forum in which to plan the military occupation missions.

With the establishment of the school was the formation of the concurrent U.S. Army's Civil Affairs Division. This Division reported directly to the Secretary of War on "all matters except those of a

⁷⁰ Ziemke, 22. In a letter dated 10 November 1943 from President Roosevelt to Secretary of War Henry Stimson, President Roosevelt stated, "Although other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume the initial burden."

⁷¹ Ibid, 8.

⁷² Ibid, 18

⁷³ Ibid, 18-20.

military nature and to represent the Secretary of War to outside agencies.”⁷⁴ Shortly after this, Secretary Stimson mandated that the Civil Affairs Division ensured that all occupation plans contain planning for civil affairs. Stimson’s mandate gave the civil affairs sections within the planning staffs a boost in credibility and purpose.⁷⁵

The early planning, establishment of a school and training program, and the establishment of a national level Civil Affairs agency are useful ideas from the past that have been or could help future occupations. Clearly, the successful preparations during the early stages of WWII reveal the importance of early recognition and planning for a potential occupation. Additionally, the current U.S. Army has learned from the successful occupation of Germany (and others occupations) and created a standing Civil Affairs force that is responsible for the Civil Administration mission.⁷⁶ Furthermore, the current civil affairs community has established schools and training programs to educate and train civil affairs soldiers on all their possible missions. Both aspects have a direct connection to the efforts prior to WWII.

Possibly, another lesson from the preparation prior to the occupation of Germany that should be integrated into the current force is a national or Army level agency or staff position that has oversight or directly responsible for the Civil Affairs mission.⁷⁷

Constabulary Force

The U.S. Constabulary Force was established to “reduce the requirements for U.S. manpower and expense.”⁷⁸ Before the end of the war, the Army did not know the level of resistance and difficulty that the Germans would assemble. Initially, security vacuums and rogue bands of German military units were

⁷⁴ Ibid, 17.

⁷⁵ Ibid, 25.

⁷⁶ *FM 41-10*, Chapter 2.

⁷⁷ Similar to the Civil Affairs Division. Civil Affairs currently falls under the Special Operation Community with oversight by the U.S. Special Operations Command. No permanent staff is located in the Department of Defense or Army Staff. See *FM 41-10*, Chapter 4.

⁷⁸ Zeimke, 325.

great concerns. These concerns turned out to be overstated. Additionally, pressure from the home front urged officials to speed the American withdrawal and bring the troops back home.⁷⁹

American troops numbered over 1.6 million in Germany on V-E Day. This force quickly initiated occupation duties, making its presence known throughout the American sector.⁸⁰ As Earl Ziemke states the “combat forces became military government security troops,”⁸¹ manning checkpoints, monitoring border crossings, and enforcing curfew restrictions. In response to the pressure withdrawal American forces, General Marshall strongly urged General Eisenhower to consider a police type occupation force. Marshall suggested the possibility of using foreign troops to conduct the constabulary force.⁸² Eisenhower acted on Marshall’s suggestions but the request for foreign forces failed because of substantial concerns of language problems and increasing expenses.⁸³ As a result Eisenhower established the U.S. Constabulary force in October 1945.

The Constabulary force was created from division cavalry groups. Based on a ratio of one soldier per 450 Germans, the force was planned to number 38,000 soldiers, but reached its peak at 31,000.⁸⁴ The Constabulary plan would reduce the required occupation manning structure by 81,000 soldiers. It was envisioned to receive specialized training in law enforcement, conduct raids, serve as a quick reaction

⁷⁹ Ibid, 320.

⁸⁰ “Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany,” also known as JCS 1067, Found in United States Department of State, *Documents on Germany 1944-1985*, (Washington, DC: Office of Historian, US Department of State, 1985), 15-32. JCS 1067 was a policy of “short term and military character, in order not to prejudice whatever ultimate policies may later be determined upon.” Its object was to establish a “stern, all-powerful military administration of a conquered country, based on its unconditional surrender, impressing the Germans with their military defeat and the futility of any further aggression.” See Ziemke, 104.

⁸¹ Ziemke, 320.

⁸² Ibid, 339.

⁸³ Ibid, 340.

⁸⁴ Ibid, 341.

force, and train a new German Police force. Elite, hand picked soldiers marked with distinctive uniforms would fill the positions in the force.⁸⁵

The significance of the creation of the Constabulary force is twofold. First, its creation alleviated personnel requirements to conduct the occupation mission. Second, the Constabulary allowed for a better overall focus on occupation duties. The separation of law enforcement duties and security duties from the other occupation tasks allowed other military government forces to concentrate on denazification, democratization, and establishing the new German government. As seen in Operation Iraqi Freedom the desire to have U.S. troops returned home is a consistent theme and will be a condition that planners will need to deal with in the future. Additionally, the creation of a Constabulary force demonstrates a method of separation of duties and task organizing appropriately to better facilitate the entire occupation mission.

Denazification

In all past U.S. occupations, the legacy of the past governments has remained and created conditions that the United States had to manage. Germany had the imprint of Nazism that had to be erased. Denazification required a purging and punishing those who were Nazis, and enabling Germany to function on its own again. The controlling document for the occupation, JCS 1067 stated, “All members of the Nazi Party who have been more than nominal participants, all active supporters of Nazism or militarism and all other persons hostile to Allied purposes will be removed and excluded from public office and positions of importance in quasi-public and private enterprises.”⁸⁶ Military Government Law No. 8 went even further prohibiting the “employment of Nazi party members in business in any capacity other than common labor.”⁸⁷

⁸⁵ *ibid*, 341.

⁸⁶ Ziemke, 382. The Morgenthau Plan, created by U.S. Secretary of Treasury Henry Morgenthau, called for the post-war Germany to be stripped of its industry and return to an agriculture based state. Early in the policy development process the JCS 1067 followed the guidelines laid out in the Morgenthau Plan. See, Ziemke, 102 and Zink, xi-18.

⁸⁷ *Ibid*, 382.

The denazification policy had its impacts as military government soldiers implemented it. Local military government detachments disqualified sorely needed doctors, teachers, and policemen. In one instance, the Bremen detachment disqualified 400 of 1600 police officers.⁸⁸ In late 1945 an appeals process ultimately reinstated many who had been only nominal members in the party.⁸⁹ Those considered more hardened were, at least, theoretically, subject to greater punishment. In accomplishing this distinction, the occupation forces attempted to recognize the distinction between those who were those hardened members of the Nazi Party and those who were members for self-preservation or convenience. Military government forces had to execute other tasks to remove Nazism from Germany. The education system was stripped of any hint of Nazism. Accordingly, OMGUS rewrote textbooks and removed suspect teachers.⁹⁰ OMGUS promoted freedom of the press and airways and ensured their control by personnel with anti-Nazi backgrounds.

Democratization

Concomitant with denazification were the efforts by the military government forces to democratic and the rebuild of the German government. JCS 1067 called for Germany to be rebuilt on a democratic structure, which started quickly in the United States sector.⁹¹ Local elections for towns numbering fewer than 20,000 people were held in January 1946. Towns with population between 20,000 and 100,000 held elections March and May 1946. Given the level of destruction throughout Germany and the total collapse of their government, these elections moved with great swiftness. The elections then enabled the local populace to take ownership of their own problems and lessened the resentment that the Germany people had toward the occupying forces.

⁸⁸ Ibid, 387.

⁸⁹ Ibid, 389.

⁹⁰ Ziemke, 370.

⁹¹ Zink, 179.

The lessons from the democratization of Germany are three-fold. First, by holding elections, the people focus on acknowledging and correcting their own issues. Second, by initially establishing government at the lowest levels, it is easier to develop a sense of community with common groups and cultures which allows for critical successes early in the occupation. Lastly, the efforts of the military government soldiers in applying democratic reform demonstrate the levels which this may have to be applied in the future. In the case of Germany holding elections and other reconstruction efforts that aided in democratization reveal probable scenarios for future military occupations.

Care and Feeding of the Populace

The basis for any reconstruction effort was the proper care and feeding of the inhabitants. JCS 1067 called for the military government forces to “meet the need of the occupying forces and to ensure the production and maintenance of goods and services required to prevent disease and unrest.”⁹² Since the German Government had ceased to exist, the duty of providing economic relief also fell upon the military governors. Lieutenant General Lucius Clay, Deputy Military Governor, and his subordinates interpreted the narrow stance that JCS 1067 laid out, feeling that if they could get the German industrial capacity started then the economic benefit from it would aid with the sustenance and relief burden.⁹³ Consequently, in the U.S. sector LTG Clay ensure that the German factories and mines received a high priority. As a recent study notes, LTG “Clay and his subordinates rapidly and efficiently organized the provision of humanitarian assistance and restarted government services and economic activity. The U.S.

⁹² JCS 1067, paragraph 5.a., <<http://www.usembassy.de/usa/etexts/ga3-450426.pdf>> [12 JAN 2004].

⁹³ JCS 1067 (revision 10 May 1945) still kept the harsh occupation language from the Morgenthau Plan but also allowed the Military Governor to “protect the safety and meet the needs of the occupying forces and assure the production and maintenance of goods and services required to *prevent starvation of such disease and unrest* as would endanger these forces.” (Emphasis is mine) Lieutenant General Clay used this loophole to justify large food supplies that were brought into Germany, the reconstruction of the railroads, and the trucks that were given to German businesses on a deferred payment basis. See John Backer, “From Morgenthau Plan to Marshall Plan,” *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952*, (Carbondale, IL: Southern Illinois University Press, 1984), 157.

Army's focus on 'getting things moving' was key to minimizing humanitarian suffering and accelerating economic recovery in its zone in the immediate aftermath of World War II."⁹⁴

The care and feeding of the people is a task dictated by the law.⁹⁵ The military government leadership in Germany understood the law and its relevant importance. Additionally, they understood that the unrest of the people could quickly cause many additional problems. Lieutenant General Clay, in particular, realized the role of a productive economy in caring for the people. The last lesson to take away from the examples set by care and feeding of the people during the occupation of Germany is the importance of coalition. In the case of Germany, France and the Soviet Union's desires for the reconstruction of Germany did not mirror the United States' goals, which were counter-productive in Germany's ultimate reconstruction.

Displaced persons

Critical in the reconstruction of Germany was the management of displaced persons (DP) in the U.S. sector. The great number of DPs, the requirements the Geneva Convention⁹⁶ placed on the Military Government in respect to the DPs, and the attitude of some of the DPs were at issue. The DPs consisted of all types of people, including forced laborers migrated from German controlled areas, Russians who were forced to fight for the Germans, and recovered Allied military personnel. Their entitlements were clothing, shelter, and rations.

The number of DPs in the U.S. zone numbered 2.5 million and the resources needed for this massive number caused great strain on the military government and the German people. The amount of food that all the people received was fixed. The standard DP was required a 2000 calorie per day

⁹⁴ James Dobbins and et al., *America's Role in Nation Building: From Germany to Iraq* (Santa Monica, CA: Rand: 2003), 22.

⁹⁵ GC Art. 50, 55, and 56. Although these laws were not in effect until the United Signed the Convention in 1949, the 1943 *Field Manual 27-5 Military Government and Civil Affairs*, 11, confirms that the United States abided by this parameter even before the law was signed.

⁹⁶ GC Art., 79-90. The United States recognized the issue of displaced persons before the signing of the convention in 1949. *Handbook for Military Government in Germany*, 1945, Section III, paragraphs 700-756 state the specifics for dealing with displaced persons in Germany.

allowance. Displaced persons who were recovered allied military personnel received 3600 calories per day, the equivalent of an American soldier.⁹⁷ Additionally, the Soviets argued that Soviet DPs should receive the American soldier caloric equivalent.⁹⁸ The providers of a substantial amount of the DPs rations came from the German people. Only after the DPs received their required rations would the German people be allowed to receive their share.⁹⁹ These entitlements due the DPs strained the German production capability and further hampered the reconstruction efforts in Germany. Military government officials understood the burden caused by the DPs and realized the sooner repatriation of the DPs the quicker the reconstruction of Germany.

The repatriation of the DPs proved difficult as many of the DPs enjoyed living in the DP camps.¹⁰⁰ They were better fed and many had a greater quality of life than they had ever experienced before. So settled did some DPs become that they started to increase their daily demands for food, clothing, and shelter. These increased demands became unsustainable particularly to German populace, since all the DPs necessities were at the expense of the German people. The DPs were also the major contributor to crime, with many of the DPs forming gangs, engaging in looting sprees and in open banditry.¹⁰¹

Two lessons come from the military government soldiers dealing with the DPs. First, well-trained low ranking soldiers handled the majority of the DPs and their problems. Ziemke cites one example of a Private First Class running a camp for over 3000 DPs.¹⁰² Relatively low ranking soldiers actively searched for hidden food stores and helped reenergize the stalled German agriculture sector. As

⁹⁷ Ziemke, 205.

⁹⁸ This increase equated to another half million tons of rations. Ziemke, 205.

⁹⁹ Ziemke, 203.

¹⁰⁰ Ibid, 240. also see Zink, 108

¹⁰¹ Zink, 82.

¹⁰² Ibid, 203.

a result of such efforts by September 1945, the original 2.5 million DPs now only numbered 600,000. The second lesson is military planners must acknowledge the complexity of the DP problem and must address it in all future occupations. Some DPs may not want to be repatriated, some may demand more than their allotted shares, and some may be opposed to the established interim government.

Who's in charge?

The last lesson from the occupation of Germany demonstrated that the question over who is in charge of an occupation is not a new one and offers one possible solution. In the case of Germany, President Roosevelt settled the debate over who would have authority for military government. Initially, Department of State and Department of the Interior officials wanted less of a military monopoly on the control of the schooling and operations. However, President Roosevelt's final ruling came in November, 1943, when he stated, "Although other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume the initial burden."¹⁰³ Continuing, he assigned to the Army the planning and execution of civil relief and rehabilitation "until civilian agencies are prepared to carry out the longer range program."¹⁰⁴ Although an issue that occurred in World War II, the debate of who should be in charge of an occupation was also seen during the Operation IRAQI FREEDOM. The same debate occurred between the State Department and the Department of Defense. Additionally, President Roosevelt's ruling 1943 set a precedent that should be still followed today.

Panama

Whereas Germany was a physically devastated country following total world war, Panama, following a limited war in 1989-90 was mainly intact. Specifically Operation PROMOTE LIBERTY was the concurrent civil military operation to Operation JUST CAUSE,¹⁰⁵ the United States mission to restore

¹⁰³ Ibid, 22.

¹⁰⁴ Ibid, 22.

¹⁰⁵ John T. Fishel, *The Fog of Peace: Planning and Executing the Restoration of Panama*, (Carlisle Barracks, PA: Strategic Studies Institute, U.S. Army War College, 1992), vii.

democracy to the Panama and oust military dictator General Manuel Noriega. The occupation of Panama offers six lessons whose prior consideration would benefit future occupations: 1) the recognition of a clear objective for an occupation; 2) the relationship between different agencies within the United States government; 3) the proper role of the current Civil Affairs military professionals; 4) the conduct and integration of the occupation planning process in to the combat plan; 5) the method of unity of command; and 6) the organization and transition for a longer-term civil-military operation.

Objective

The first lesson is the importance of a clear objective. In World War II, the government provided JCS 1067 to provide the objectives for the occupation and reconstruction of Germany. In contrast, the goals for the invasion of Panama were less helpful. As Woodward describes them, “The goals in Panama were obvious: protection of U.S. citizens and interests, and installation of a friendly, democratic government.”¹⁰⁶

Although these objectives were clear and to the point, they also left much room for implementation. Defining the term “democracy” is difficult in an environment that has never known the concept of true democracy. John Fishel argues that a strategy to achieve democracy was never developed.¹⁰⁷ No one planned for a democratic Panama. The military planners planned at the operational level, shying away from the objectives at the strategic level. Equally, the civilian strategists failed to determine a strategy for democracy. Thus, the operational plan never connected back to any strategy.¹⁰⁸

Fishel recommends that this military must be part of this process to develop the strategy, but in a coordinated manner.¹⁰⁹

¹⁰⁶ Bob Woodward, *The Commanders*, (New York: Simon & Schuster, 1991), 85.

¹⁰⁷ Fishel, 5.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, 66.

This challenge to implement the objectives of military governance is not without its precedent. The same challenges were present as the Army developed doctrine and a School for Military Governance prior to WWII. In the case of the Army in WWII, it stepped forward and recognized the void in planning and attempted to fill it. In Panama, the military avoided it. In both cases the question of the responsibility in military governance arises.

Interagency Process

The question of responsibility leads to the question of the proper interagency coordination between the military and other organizations supporting an occupation. The relationship of the military and the State Department becomes especially crucial. During the planning for Operation BLIND LOGIC,¹¹⁰ the military planners realized that they had crossed over into the area that could be considered the realm of the State Department. Attempts to bring the State Department into the planning failed, only allowing information with no specifics on the plan.¹¹¹ The State Department thought the military effort to reestablishing the government was amateurish.¹¹² However, they realized that the military had a plan, whereas the State Department had none.¹¹³ The lesson of interagency coordination rose again during the early days of the occupation of Iraq. It appears that only by close coordination can problems of this nature be resolved in the future.

Role of Civil Affairs Professionals

The next lesson to be extracted from the Panama conflict is the role of the military's Civil Affairs professionals. As there is only one Civil Affairs' Battalion in the Active Army, the Civil Affairs support for Operation PROMOTE LIBERTY came from the U.S. Army Reserve.¹¹⁴ The first issue was during the

¹¹⁰ Original name for the civil-military operation, later renamed Operation PROMOTE LIBERTY.

¹¹¹ Ibid, 21. This is known as "talking around the plan."

¹¹² Ibid, 38.

¹¹³ Ibid, 38.

¹¹⁴ Ibid, 8-9.

planning for Operation PROMOTE LIBERTY. SOUTHCOM was supported by the 361st Civil Affairs Brigade, who had fostered a good working relationship with the J-5 since 1983. Although many of the Civil Affairs soldiers had a good familiarity with SOUTHCOM and its missions, it was only for two weeks every year. In an effort to accomplish the required planning on Operation BLIND LOGIC, Civil Affairs officers started to volunteer for thirty-one day planning tours to SOUTHCOM to work on the plan. Although much was accomplished during these planning sessions, it was clear the temporary and rotational nature of their work had adverse effects on continuity of planning. Exasperating the rotational nature of the planning was the constraint caused by compartmentalized classification for the planning of Operations BLUE SPOON and BLIND LOGIC, which prevented them from understanding the details of the combat plan and from going back to their unit and further collaborating on the plan.¹¹⁵ Clearly, this shortfall requires correction by allowing the Civil Affairs reservist access the compartmentalized plan and allowing a parallel Civil Affairs planning cell at the reservist home station.

Additionally, during the planning for the Operation BLIND LOGIC the assumption had been made that in the event of execution the President would exercise his authority to active selected reserve forces (the 361st) for up to 90 days. The President ultimately did not elect to exercise this power, instead approving a continued volunteer process for 139 days. The soldiers of the 361st could not execute this option due to their civilian employment requirements, leaving responsibilities for the occupation mission to the soldiers on the ground.¹¹⁶ The lesson here is to ensure that the President understands the assumptions that were made in planning and that the planners have an appropriate branch to execute if their assumption fails.

Occupation Plan vs. Combat Plan

The planners made a poor assumption deciding the Civil Military Operations plan's (BLIND LOGIC) execution separate from the combat plan (BLUE SPOON). Although on the surface this does

¹¹⁵ Ibid, 14-15.

¹¹⁶ Ibid, 35.

not seem to be a significant issue, it became so when other factors were added into the equation. Specifically, the Combatant Commander's change of command from General Woerner to General Thurman added confusion. When General Woerner executed the separation of the two plans he understood both plans and how they integrated together. When General Thurman took command he immediately focused with the combat plan to remove Noriega and not the plan to restore democracy. This is evident as the combat plan (BLUE SPOON) was approved by the JCS by 3 November 1989 after 30 days of intense planning by the SOUTHCOM staff.¹¹⁷ Whereas the Civil-Military Operation plan (OPERATION PROMOTE LIBERTY) was only approved on December 20, 1989 (the first day of the conflict).¹¹⁸

This separation of plans created problems in the relationship the US SOUTHCOM staff and the XVIII Corps (Airborne) staff. The lack of agreement between the SOUTHCOM Staff and the JTF-South (XVIII Corps) staff added significantly to this dysfunction. This was due to perceptions that each staff had regarded the significance of OPERATION BLIND LOGIC. Whereas the SOUTHCOM staff worked diligently on the BLIND LOGIC plan, the XVIII Corps planners did not perceive the BLIND LOGIC plan an approved plan. Indeed the XVIII Corps staff thought of the SOUTHCOM Staff as insignificant.¹¹⁹

The critical lessons to integrate into future operations are two fold. First, the planning of the combat operation and the follow-on civil-military operation can not be separated. It appears these two elements are now less likely to be separated by time, as many of the elements of the civil-military operations occur in unison with combat operations. Second, the staffs at different levels must

¹¹⁷ Ronald H. Cole, *Operation JUST CAUSE: The Planning and Execution of Joint Operations in Panama, February 1988-January 1990*, (Washington, D.C., Joint History Office, Office of the Chairman of the Joint Chiefs of Staff: 1995), 21-22.

¹¹⁸ Fishel, 31.

¹¹⁹ Ibid, 20.

synchronize their plans together. Failure to recognize the scope of the higher headquarters tasks is indefensible.

Unity of Command

The Civil Military Operations Task Force (CMOTF) organized civil military operations within Panama, but it had its own command and control issues. General Woerner had wanted the Commander, CMOTF (COMCMOTF) to be General Officer on his staff responsive to him.¹²⁰ The SOUTHCOM J-5 (SCJ5) had the most experience with the BLIND LOGIC plan so he became the COMCMOTF. As the plan ebbed and flowed, the J-5 tried to give the plan away to the US Army South (USARSO). USARSO would have been a great fit, as USARSO possessed a great awareness from being stationed in Panama. USARSO did not object, but additional duties as JTF-Panama kept them from focusing their full attention of the civil-military operation. On 17 December 1989, nearing D-day, the SCJ5 realized that they would have to execute as the CMOTF without handing the plan off to USARSO. Although the J-5 commanded the CMOTF, the preparation and ability to do so was at risk.

Another area of command confusion was task organization of the 361st CA Brigade. Under the PROMOTE LIBERTY Plan the 361st was tasked to staff the CMOTF. In conflict with the PROMOTE LIBERTY Plan, JTF-South had tasked the 361st to establish the Joint Civil Affairs Task Force (JCATF). To add to the confusion, the 361st fell under JTF-South for the first six days of the operation. JTF-South did not acknowledge the CMOTF mission. After six days, the bulk of civil affairs reservists arrived and the SCJ5 had secured control of the CMOTF mission.¹²¹ Although the CMOTF accomplished the mission, a confusing and uncoordinated chain of command structure certainly did not ease any the mission. Clearly, future occupations need a clear and coordinated task organization to aid the unity of command.

¹²⁰ Ibid, 18.

¹²¹ Ibid, 35.

Much of the success to correct any unity of command issues was due to the efforts of Major General (MG) Marc Cisneros. The Commander of USARSO and JTF-Panama, MG Cisneros created other initiatives that aided in the civil-military operations. First, he established the U.S. Forces Liaison Group (USFLG), a group made up of his Spanish speaking staff officers and others to coordinate and aid in the development of the Panamanian Public Force (PPF). The PPF was the security apparatus in Panama designed to replace the Panamanian Defense Force. The PPF consisted of the National Police, Maritime Services, Air Services, Immigration Services, prison system, Presidential Guard, and the Port Police.¹²² Second, he established the Judicial Liaison Group (JLG) whose function was to get the court system working, establish a night court system, and liaison between the Panamanian government and US Government on judicial matters. Only when JLG functions were fully operating could USARSO remove U.S. forces from their presence patrols and civil-military operations throughout Panama. Major General Cisneros' initiatives filled the holes in civil-military operations that the COMCMOTF and JCATF both lacked.¹²³ MG Cisneros example of leadership simply shows making a proper assessment of the conditions and positioning forces to control handle the situation. MG Cisneros acted in the void of guidance to help the Panamanians. Additionally, MG Cisneros' actions provide an excellent example of transitioning from combat operations to civil military operations.

Military Support Group-Panama

The last lesson from Panama is in the transition to a longer-term effort on behalf of the United States. On January 17, 1990, the United States Military Support Group-Panama (MSG) was activated. The MSG's mission was to gain control over the numerous organizations that the United States created to solve immediate issues after the war, and turn them into long term organizations that supported a partially structured Panamanian government and a rapidly growing U.S. government presence.¹²⁴ The MSG

¹²² Ibid, 37.

¹²³ Ibid, 36.

¹²⁴ Ibid, 43.

successfully gained control and integrated the USFLG, CMOTF, CATF, PYSOPS, and Military Police. Although the MSG was deactivated one year from its activation, the functions of the MSG continued to support the government of Panama with liaison and an advisory role. The MSG's significance was the transition from a purely military organization responsive to the CINC to an organization that was responsive to and aided the new government of Panama. The MSG offers a possible model of how to conduct the transition from combat to a small scale occupation and finally back to the legitimate government.

Operation Iraqi Freedom

Panama presents a perspective of a limited occupation after a limited war. In contrast, Germany shows a major occupation after a world war. The current occupation of Iraq allows analysis offers a further contrast from both Germany and Panama. Specifically, the occupation of Iraq offers nine lessons which could further aid planners and allow for the creation of doctrine. First, the task organization that was used to conduct the occupation of Iraq presents a different model than both German and Panama.

Second, the presence of an insurgency movement in Iraq has added a level of complexity to the occupation. Thirdly, a security structure has been created to protect the Iraqi people. Fourth, the United States and its coalition partners have taken major steps to ensure certain essential services are provided throughout the country. Fifth, the Coalition Provisional Authority has taken steps to establish a democratic form of government. Sixth, efforts have been made to energize and restore the Iraqi economy.

Seventh, steps have been taken to remove Saddam Hussein's Baath party. Eighth, the 101st Airborne Division's specific actions offer a model for specific unit conducting the occupation mission. Finally, the creation of the Commander's Emergency Response Program (CERP) is a creative way to apply funds towards occupation and reconstruction efforts.

Organization

The initial organization to handle the occupation after combat operations was a Department of Defense organization called the Office of Reconstruction and Humanitarian Assistance (ORHA), set up in January 20, 2003 to establish "links with the United Nations, specialized agencies and the non-

governmental organizations that will play a role in post-war Iraq.”¹²⁵ Retired Lieutenant General Jay Garner headed this organization. On 1 May, 2003, President Bush announced the end of combat operations, after which, on 11 May, 2003, the ORHA transformed into a new organization, the Coalition Provision Authority (CPA) led by Ambassador Paul Bremer. The mission of the CPA is to temporarily provide the effective administration of Iraq, to restore conditions of security and stability, and to create the conditions so that the Iraqi people can determine their own political future.¹²⁶ The CPA’s mission includes establishing local and national institutions for a representative government and sustainable reconstruction and development.¹²⁷ The CPA works with the military command in Iraq and the Region. Central Command (CENTCOM) forces are specifically directed to support the CPA by “detering hostilities; maintaining Iraq’s territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.”¹²⁸

Insurgency

As well as executing the military occupation mission, coalition forces are in the middle of an insurgency and terrorist activity. The insurgency is believed to consist primarily of remnants of the Former Regime Loyalists (FRL), in addition to ordinary criminals, Islamic fundamentalists, and external Arab insurgents.¹²⁹ The smallest insurgent faction appears to be the external Arab element. As of August 2003, only 250 of the 9000 detainees in Iraq appeared to be from outside the country.¹³⁰ The greatest concern, however, remains the FRL, whose goal appears to be to break the will of the United States and to

¹²⁵ "Iraq Reconstruction," <http://www.globalsecurity.org/military/ops/iraq_recon_intro/> [12 JAN 2004].

¹²⁶ Coalition Provisional Authority, *Regulation Number 1*, Section 1, (Baghdad, Iraq: 16 May 2003), <<http://www.cpa-iraq.org/regulations/REG1.pdf>> [12 January 2004].

¹²⁷ Ibid, Section 2.

¹²⁸ Ibid, Section 3.

¹²⁹ "Iraq Insurgency Groups," <http://www.globalsecurity.org/military/ops/iraq_insurgency/> [12 JAN 2004].

¹³⁰ Ibid.

hope that the U.S. will prematurely leave before Iraq can become a member of the world community.¹³¹ Insurgent elements have initiated terrorism, including the bombing of the United Nations headquarters on 19 August 2003 and the Jordanian embassy on 17 August 2003¹³²

Moreover, the fact that Iraq is a fractured society complicates the problem of insurgency. Two large Muslim religious groups dominate the country, with Shi'a, and Sunni making up 97% of the people practicing religion in the country.¹³³ This religious divide is laid over a varying ethnic background that also causes fractures within the country. Arabs make up 75% of the population, Kurds 20%, and the remainder consists of Turkomans and Assyrians. Due to the totalitarian rule by Saddam Hussein for the last twenty-four years, the society will undergo a difficult transition to democracy. In addition, Iraq's neighbors do not necessarily support or desire democratic reform and reconstruction in a country that has destabilized the Middle East for over the last decade.¹³⁴ Turkey as well has their own open hostility towards certain sectors of the Iraqi population.¹³⁵

The situation in Iraq contrast dramatically with Germany and Panama. Germany had very little insurgency after the war and resistance efforts in Panama were mopped rather quickly.¹³⁶ The significant lesson is that the counterinsurgency/security mission and the civil-military operations mission are difficult enough when conducted separately, but the difficulties are further amplified when conducted together.

¹³¹ Ibid.

¹³² Andrew England, "Explosion rocks Jordanian Embassy in Iraq, kills at least 11", Seattle Times, August 8, 2003., <http://seattletimes.nwsourc.com/html/nationworld/2001406000_webiraqexplosion07.html> [12 Jan 2004].

¹³³ "Religious Structures," <<http://www.globalsecurity.org/military/world/iraq/religion.htm>> [12 Jan 2004]

¹³⁴ "President Bush Discusses Freedom in Iraq and Middle East," Remarks by the President at the 20th Anniversary of the National Endowment for Democracy, United States Chamber of Commerce, 6 November 2003, Washington, D.C., <<http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>> [12 Jan 2004].

¹³⁵ Turkey's ongoing dispute with the Kurds as noted in, "Bush Reassures Turkey on Kurds," washingtontimes.com, 28 Jan 2004, <<http://washingtontimes.com/upi-breaking/20040128-033953-6801r.htm>> [28 Jan 2004]

¹³⁶ As Cole notes, Looting took place on 20 Dec 1989, which initiated greater civil affairs participation, 52. Fishel attributes this to the changes in plan, separating the combat plan from the civil-military plan, 31. The last PDF surrendered on 25 December 1989, Cole, 65.

Planners of future occupations should consider the impacts that possible insurgency may have on the completion of occupation tasks.

Security

The CPA has specifically focused their efforts in four areas: security, essential services, restoration of government, and economy.¹³⁷ In the first area of security, there are three components consisting of the Iraqi Security Forces, the Iraqi courts, and the Prison system. The first is the Iraqi Security Forces created to transition to and eventually provide the security for the country of Iraq. The Iraqi Security Forces consist of the National Defense Forces, Border Police, Facilities Protection services, and the Iraqi Police. Currently, there are over 200,000 Iraqis integrated into the security structure of their country. Initial tasks were to create a new Ministry of Defense and Military Industrialization, a new Iraqi National Defense Force, and a new Iraqi Army of 1000 trained soldiers, with thousands more awaiting training.¹³⁸ The defense force includes the Iraqi Civil Defense Corps, which integrates into and works with coalition military forces.

Another force ready in training and transitioning to full responsibilities in Iraq is the Border Police. Currently at full strength, the Border Police is responsible for the security of the Iraqi Borders.¹³⁹ The Facilities Protection service is responsible for securing critical areas of the infrastructure, including banks, hospitals, power stations, and oil and gas production facilities. General security and law enforcement falls under the responsibility of the Iraqi Police forces. U.S. and Coalition forces have directed training and assisted in the formation of all of these units.¹⁴⁰

¹³⁷ Iraq Weekly Update, Joint Staff/Coalition Provisional Authority, 09 Jan 2004 <<http://www.globalsecurity.org/wmd/library/news/iraq/2004/01/iraq-weekly-js-cpa-20040109.pdf>> [12 JAN 2004]. This presentation shows economic, oil, education, health care, security, governance, and power measures of effectiveness and statistics.

¹³⁸ Ibid.

¹³⁹ Ibid

¹⁴⁰ "Iraqi Military Reconstruction," <<http://www.globalsecurity.org/military/world/iraq/iraq-corps.htm>> [12 JAN 2004].

The CPA's second focus in security is the new Iraqi court system. The CPA has presided over the reestablishment of over 500 courts with over 600 judges throughout Iraq.¹⁴¹ The priority of the CPA's efforts has been to eliminate the corruption and favoritism that was associated with justice in pre-invasion

Iraq.¹⁴² In some cases, the CPA removed ex-Baathist as was permissible in international law.¹⁴³

Additionally, the U.S. appointed Iraqi Governing Council has set up an Iraqi Special Tribunal.¹⁴⁴

The CPA's final focus area in security is the prison system. Before the overthrow of the Baathists regime, the prisons failed to meet any international human rights standards.¹⁴⁵ Now there are over 4000 beds meeting international standards.¹⁴⁶

The security efforts in Iraq are not unprecedented. In Panama, Major General Cisneros initiatives also set up the three pillars of security, a security force, judicial system, and a penal system. Similarly in Germany, the United States established the constabulary force to aid in security and train new German security forces in addition to military tribunals to serve as a temporary court system until the German reestablished their courts.¹⁴⁷ The security issues will occur every time an occupation occurs and they must be appropriately planned for.

Essential Services

The second area that the CPA is focused on is the reestablishment of essential services. The CPA breaks the essential services down into six sub-areas to track more effectively: electricity, telecommunications, health care, education, water, and oil.

¹⁴¹ John D. Banusiewicz, "Bremer: 'Future of Hope' in Iraq includes Justice," *Armed Forces Information Service*, November 14 2003, <http://www.defenselink.mil/news/Nov2003/n11142003_200311147.html> [12 JAN 2004].

¹⁴² Ibid.

¹⁴³ GC, Art. 54.

¹⁴⁴ "Building Justice," <<http://www.cpa-iraq.org/security/justice.html>> [12 Jan 2004].

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Zink, 108, 125.

Electricity

The United States has received much criticism for failing to provide electricity in a reasonable amount of time.¹⁴⁸ Actually, the electrical situation in Iraq was in a woeful state of disrepair before the U.S. occupation, due to poor investment in infrastructure, sanctions, and because only relatively minor repairs occurred after the first Gulf War.¹⁴⁹ Looting and sabotage after the war further deteriorated the electrical infrastructure. The CPA has set up goals to ensure it restores the electrical system and prepares for future demands. The CPA monitors the electrical situation in Iraq daily and although the electrical supply has not met the electrical demands the goal to meet the increased demand for the summer of 2004 is on schedule. The CPA has also pushed hard on electrical issues to ensure that repairs and money are dedicated toward their goals.¹⁵⁰ In comparison to Germany, the reliance on electricity is much more prevalent today than in was in 1945. The reconstruction of Iraq represents a new era reliant on electrical support to sustain the community and is an excellent example of the needs in future occupations.

Telecommunications

Another area that is in dire need of repair is the telecommunication's sector. Prior to the war telecommunication services were privileges for the selected few. The CPA has now initiated new contracts to aid in country wide connectivity. The CPA is emplacing fiber-optic links to meet the initial countrywide need. International service has been restored with Intelsat satellite equipment.¹⁵¹ In 2004, telecommunications is a priority as it reestablishes Iraq with the world and in turn financial networks, business and education opportunities, information services, and health care systems.

¹⁴⁸ Alissa J. Rubin, "U.S. Struggles in Quicksand of Iraq," *Los Angeles Times*, May 5 2003, sec. A, p. 1. Her commentary is not alone. In the aftermath of the war (combat phase) most of the news services concentrated on the difficulties and challenges the United States faced as an occupation force.

¹⁴⁹ Gerry J. Gilmore, "'Incredible Progress' Made Restoring Iraq's Infrastructure, Officials Say," *American Forces Information Services*, July 7 2003. <http://www.defenselink.mil/news/Jul2003/n07072003_200307075.html> [12 JAN 2004].

¹⁵⁰ Iraq Weekly Update, Joint Staff/Coalition Provisional Authority, 09 Jan 2004

¹⁵¹ "Telecoms," <http://www.cpa-iraq.org/essential_services/telecoms.html> [12 JAN 2004].

Health Care

One of the greatest successes comes in the area of health care. Only \$16 million was spent on health care under the Saddam Hussein's regime, causing the neglect of most individuals. The most telling figure was an infant mortality rate of 1 in 10,¹⁵² which places Iraq as the country with the highest infant mortality rate in western Asia. Additionally, as a collateral consequence of the war, looting eliminated most hospitals supplies and equipment. Spending on health care is twenty-six times what was spent under the old regime. All 240 Iraqi hospitals and over 1200 clinics have been reopened. Doctors pay has increased eight times over their previous pre-war pay. Over 22 million immunizations have been given since the end of the war and UNICEF started vitamin distribution in January 2004. Furthermore, Iraq now has a renewed emphasis on preventive medicine procedures and disease management.¹⁵³ The health care efforts demonstrated in Iraq has set the example for future occupations to follow.

Education

In the realm of education, the great hurdle to overcome was the indoctrination which consisted of praising Saddam Hussein. In order to accomplish this every textbook had to be replaced, and teachers had to be retrained on new teaching methods. By the end of the 2004 school year, the CPA will have distributed 72 million new textbooks. Additionally, pay has increased for teachers to 12 to 25 times their former salaries.¹⁵⁴ As of October 2003, the universities, technical institutes, and colleges were reopened and 1500 elementary schools had been renewed. These efforts show a regard for the law¹⁵⁵ and mirror the efforts in Germany after WWII. In Germany, they were challenged to keep the children occupied, finding and screening teachers, and locating suitable buildings for schools.¹⁵⁶

¹⁵² United Nations Statistical database, <http://millenniumindicators.un.org/unsd/mi/mi_goals.asp> [12 Feb 2004]. This rate is 20 times higher than most western governments, and compares readily to most central African states.

¹⁵³ Iraq Weekly Update, Joint Staff/Coalition Provisional Authority, 09 Jan 2004

¹⁵⁴ Iraq Weekly Update, Joint Staff/Coalition Provisional Authority, 09 Jan 2004

¹⁵⁵ GC, Art. 50.

¹⁵⁶ Ziemke, 358. Average age of the teachers in Munich was 57 and the student-teacher ratio was 89 to 1.

Water

Water resources mirror the substandard state of the electrical infrastructure. Pump stations and generators are 20-30 years old and were poorly maintained for the last ten years. Moreover, Iraq's water distribution system is one of the most complex systems in the world. The CPA is conducting an extensive program clearing irrigation canals and water transportation until the system is working at reasonable levels.¹⁵⁷ Quartermaster unit's reverse osmosis water purification has had a major effect in areas where the water system has failed.¹⁵⁸ Additionally, Iraqi engineers have been training with the Army Corps of Engineers in California to test new models for the Tigris-Euphrates water system.¹⁵⁹ Units have energized the Iraqi population to find better methods to improve their water supply issues.¹⁶⁰ The supply of suitable water will continued to challenge future occupation forces.

Oil

The last essential service is Iraq's most lucrative asset, oil. Although the Coalition forces were very conscious of the dangers to the oil fields during the war and realized that they needed preserve the field with minimal damage, thefts from looting after the war were widespread. Efforts to increase the production of oil back to pre-Gulf War capacity is the goal for the end of 2004. The sale of the oil is critical to cover Iraq's reconstruction costs. To this end, LOGPAC contracts have been put in place to assist in the repair of the oil fields. Immediately following the war, U.S. forces patrolled the oil fields and pipelines. As of January 2004 Iraqi Force Protection services took over the security for these areas.¹⁶¹

¹⁵⁷ Iraq Weekly Update, Joint Staff/Coalition Provisional Authority, 09 Jan 2004

¹⁵⁸ Cpl. Jeff Hawk, "Water Flows from the Desert," *USMC News*, April 15 2003. <<http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030415-usmc01.htm>> [12 JAN 2004].

¹⁵⁹ "Water Resources," <http://www.cpa-iraq.org/essential_services/water-management.html> [12 JAN 2004].

¹⁶⁰ United States Central Command, "Conference Seeks Ways to Improve Iraq's Water Supply," *News Release*, January 21 2004, Release Number 04-01-52. <http://www.centcom.mil/CENTCOMNews/release_list.asp> [23 JAN 2004].

¹⁶¹ Jackie Spinner, "Iraqi Oil Gets Its Own Police Force," *Washington Post*, 17 January 2004, sec. E, p. 1, <<http://www.washingtonpost.com/ac2/wp-dyn/A23664-2004Jan16>> [24 Jan 2004]. Also see Charles Recknegel, "Iraq: Oil Production Strengthens But Remains Problematic," Radio Free Europe/Radio Liberty, 31 July 2003, <<http://www.globalsecurity.org/wmd/library/news/iraq/2003/07/iraq-030731-rfel-151445.htm>> [24 Jan 2004]. Additionally, on

The United States' emphasis on oil may initially appear duplicitous, only focused on oil for the benefit of the United States. However, the CPA understands that oil is the key to Iraq's economy and the sooner the oil flows to bring in money the better will be Iraq's economy and people. This is a lesson learned in contrast to Germany and a change from the reparations that Germany was forced to pay immediately to Russia and France.

Government

The next specified area that the CPA is developing is the Iraqi Government. Approved by the United Nations, 25 representatives were selected to form the Iraqi Governing Council (IGC). Broadly representing the Iraqi people, this council serves two purposes. The first purpose is to shorten the duration of the CPA's interim administration so that the Iraqi people can elect and administer a government with a viable constitution. To this end, it is important that the Iraqis see a timeline with specific events leading restoration of sovereignty. Critical in this process is the agreement upon the Iraqi Fundamental Law that the future Constitution will be based upon. Secondly, the IGC represents Iraq internationally and to international organizations. Since the formation of the IGC, it has represented Iraq to the UN General Assembly, the Arab League, the World Bank and IMF and the Organization of the Islamic Conference Summit. This representation will include reopening Iraqi embassies around the world.¹⁶²

At the local government level, Iraqis are now conducting daily operations. A majority of the towns and cities have functioning local governments. The CPA holds up Baghdad as the example for local representative based government. "In each of Baghdad's 88 neighborhoods, citizens have freely selected representatives for local governing councils. They, in turn, choose members of 9 District

the Global Security website, they present all the week update briefings that show oil production and goals, <<http://www.globalsecurity.org/wmd/library/news/iraq/2004/01/iraq-weekly-js-cpa-20040109.pdf>> [12 Jan 2004].

¹⁶² Associated Press, "Iraq Council Members Meet With U.N," *Fox News Channel*, July 22, 2003, <<http://www.foxnews.com/story/0,2933,92589,00.html>> [24 Jan 2004].

Councils and a 37-member City Council. All told, over 800 democratically selected Council Members are now hard at work serving their fellow citizens.”¹⁶³

Economy

The last specific focus area for the CPA is the economy. Much effort has been expended in erasing old corrupt methods while trying to increase growth in the economy. In the public sector, all transactions and budgeting is now in the open for all to see. The CPA has overhauled commercial laws to prevent corruption. Additionally, the CPA has enacted laws to ensure equal pay for equal work. In the private sector the CPA has encouraged the establishment of goals to increase wealth and income and provide for a stable government. Moreover, they focused efforts on assisting state-operated firms to resume normal operations and transition into the private sector. Development of foreign investment and businesses has and will lead to further economic growth. Banks have expanded their transactions to the international level.¹⁶⁴

Debaathification

Saddam Hussein and his Baath Party caused the Iraqi people severe hardships which require the removal of their imprint on society. Two primary tasks are associated with the debaathification of Iraq. The first task is the removal of the plethora of images and views of Saddam Hussein etched into the Iraqi infrastructure and culture. Saddam Hussein’s widespread image was removed from the physical structures throughout Iraq. As mentioned before, the writing of textbooks has reinforced debaathification of Iraq. Additionally, Saddam Hussein’s image was erased from the Iraqi currency. In many ways the elimination of the Baath party is similar to the efforts to rid Germany of the Nazi Party after WWII. Like the Nazi party, the Baath party had a huge membership of 2.5 million people intertwined with every part of the society. Many had duplicitous reasons for joining. Not all members were Saddam loyalists, but

¹⁶³ "Representative Government at the local level," <http://www.cpa-iraq.org/government/local_level.html> [12 JAN 2004].

¹⁶⁴ "Economy," <<http://www.cpa-iraq.org/economy.html>> [12 JAN 2004].

joined the party to fulfill their ambitions, to provide protection to themselves and their family, or to avoid punishment for disloyalty. The hard question is what to do with this percentage of the population. Some would fire them from their jobs to demonstrate justice, which could have a negative effect by pushing the ex-Baathists and their families to the side of the insurgents. The impact of otherwise firing such a great number of people could not only have a bad effect on security, but would hurt the reconstruction effort, as many of these Baath Party members were in critical positions in society. In an effort to control the impact some Coalition units have administered ex-Baath denunciations of the Baath party by voluntary loyalty oaths ¹⁶⁵

101st Airborne Division (Air Assault)

Interestingly, the 101st Airborne Division has set the standard for the rest of the theater in many of the occupation tasks they have executed. Creatively, they have restored trade with Syria and initiated taxes to support the customs forces required to man the crossing sites. The 101st also set up an employment agency to assist in the reemployment of out of work military officers. In many cases, the CPA has followed the 101st's actions. As the CPA civilian coordinators have increased their presence in the 101st's region, the 101st realized that they still had the manpower and worked with the CPA to accomplish joint goals. ¹⁶⁶

Commander's Emergency Response Program

MG Petraeus said, "Money is ammunition."¹⁶⁷ The Commander's Emergency Response Program (CERP) is a method of providing governmental appropriations directly to tactical units for meeting the emergency needs for the local Iraqi population. The initial money for this program was captured U.S. dollars from the Iraqi regime's hidden coffers, which allowed units to meet the urgent humanitarian needs of the populace. Eventually, appropriated funds were approved for the same purpose. The benefits in

¹⁶⁵ United States Central Command, "120 Baathists Renounce Political Party," *News Release*, January 20 2004, Release Number 04-01-50, <http://www.centcom.mil/CENTCOMNews/release_list.asp> [23 JAN 2004]

¹⁶⁶ Michael R. Gordon, "101st Airborne Scores Success in northern Iraq," *New York Times*, 4 Sept 2003, Sec. A, p. 8.

¹⁶⁷ Gordon, p. 8.

Iraq were remarkable. Purchases of air conditioners, generators, building materials, and road construction materials and equipment all went to the benefit of the Iraqi people. As of mid-October 2003, the 101st completed over 3600 CERP projects at a cost of 28 million dollars, a one-third of the total CERP activity in Iraq.¹⁶⁸

Summary

This analysis has shown the lessons learned from the application of two past occupations and of one ongoing. The occupation of Germany, pre-1949 Geneva protocol, shows application without the mandate of the current law. It is also reflective of an occupation of a huge magnitude after a completely devastating war, including restoration of the German infrastructure, a reestablishment of the government, the repatriation of millions of displaced people, and the dissolving of a dangerous ideology. In contrast, Panama shows an occupation after a limited war and a country with only slight damage to the infrastructure. Currently, Iraq offers another model of a large occupation overlaid on a multiethnic, religiously divisive country repressed by more than 20 years of totalitarian rule.

Most importantly these occupations further build a model for occupation doctrine. These occupations reveal issues regarding organizational structures, treatment of international law, the importance of planning and having an objective, the importance of the interagency team, command and control issues, the role and use of the soldiers, establishment of government, and the removal of dangerous ideologies. All of these are common trends that permeate all the occupations.

In Chapter 2, this monograph established, based on international law, the minimum standard for all occupation. This chapter has added specific tasks conducted in an occupation, which can further add to doctrine. The law establishes the framework for doctrine and the application fills in the possible gaps.

¹⁶⁸ Mark Martins, "No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan," *Army Lawyer*, February 2004, 8.

CHAPTER 4

DOCTRINE

Introduction

Joint Publication 1-02, Dictionary for Military and Associated Terms defines doctrine as “[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application.”¹⁶⁹ The Army definition amplifies and provides more clarity, saying, it “is the concise expression of how Army forces contribute to unified action in campaigns, major operations, battles, and engagements...facilitates communication among soldiers no matter where they serve...must be well known and commonly understood.”¹⁷⁰ Military doctrine appears expansive at first glance, encompassing thousands of documents on areas of military art and science. Accordingly, it is appropriate to assume that doctrine should include basic principles of a military occupation. In this chapter the paper will review current doctrine and past doctrine offering guidance on military occupation and determine if doctrine meets the criteria set forth from the law and history.

Current Doctrine

An examination of current doctrine begins with reviewing joint publications to determine what, if any, joint doctrine is available, followed by a similar examination of Army doctrine. The review will examine doctrine from general to specific terms, and will consider Joint Publications (JP) *3-0, Doctrine for Joint Operations*; *3-07 Joint Doctrine for Military Operations Other than War*, and *3-57 Joint Doctrine for Civil-Military Operations* as well as *Field Manuals (FM) 3-0, Operations*; *3-07, Stability and Support Operations*; *41-10, Civil Affairs Operations*, and *27-10 Law of Land Warfare*.

¹⁶⁹ Department of Defense, *Joint Publication 1-02, Dictionary for Military and Associated Terms*, Headquarters, Joint Chiefs of Staff, 17 December 2003, <http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf> [24 JAN 2004]

¹⁷⁰ Department of the Army, *Field Manual 3.0 Operations*, Headquarters, Department of the Army, Washington, D.C., June 2001, Chapter 1, 14.

Joint Doctrine

The first document to be examined is *JP 3-0 Operations*.¹⁷¹ *Joint Publication 3-0* says nothing about the mission of occupation, and makes only slight reference to military government. In referring to termination criteria, in strategic context, *JP 3-0* states that military government should be considered in the political exploitation of the completed military action. Additionally, *JP 3-0* describes the necessity for early planning, liaison, and coordination at the national and theater level between diplomatic, military, and political leadership prior to conducting these operations.¹⁷² Being a very broad document, *JP 3-0*, does frame the scope of military operations from war to military operations other than war (MOOTW),¹⁷³ but does not address the mission of occupation.

Like *JP 3-0*, *JP 3-07, Joint Doctrine for Military Operations Other than War*, also does not specifically refer to the mission of occupation. Unlike *JP 3-0*, *JP 3-07* does not even reference military government. The manual does briefly describe post-conflict operations in the context of transition from wartime activities, and discusses the possible need to realign forces as missions change as well as the possibility that military forces may be in the support role to other agencies. Unfortunately, it offers tasks only in generalities.¹⁷⁴ Like *JP 3-0*, *JP 3-07* may be deferring the details of military occupation doctrine for a more specific manual.

JP 3-57, Joint Doctrine for Civil-Military Operations and *JP 3-57.1, Joint Doctrine for Civil Affairs* appears to offer more specifics on military occupation. *Joint Publication 3-57* provides a framework what an occupation is, although it avoids the word occupation and refers instead to a civil administration, under the task of support to civil operations. The manual breaks down civil

¹⁷¹ Department of Defense, *Joint Publication 3-0 Doctrine for Joint Operations*, Headquarters, Joint Chiefs of Staff, Washington D.C., 10 September 2001.

¹⁷² *JP 3-0*, I 12.

¹⁷³ *JP 3-0*, I 2.

¹⁷⁴ *JP 3-07*, IV 11-12. In states potential tasks as 1) transition to civil authorities, 2) support to truce negotiations, 3) Civil Affairs support to reestablish a civil government, 4) Psychological operations to foster continued peaceful relations, and 5) Continuing logistic support from engineering and transportation units.

administration further into two parts: civil administration in friendly territory, and civil administration in enemy territory. The manual also discusses who will provide civil administration, asserting that this is not a military decision and that the military is generally in a support effort. At the same time, the manual also realizes that the military is the only element that can stabilize the situation in order to execute a civil administration. Finally, the document notes that planning must occur early and be integrated with other operations and with other agencies.¹⁷⁵ Beyond this informality, it offers little to aid in planning or executing an occupation.

Joint Publication 3-57.1 offers slightly more detail than *JP 3-57*. It makes reference to the applicable international law, including a glancing reference to the Geneva and Hague Regulations referenced in Chapter 1 of this monograph. It goes on to state however, that civil administration is the responsibility of the civil affairs community.¹⁷⁶ The manual further elaborates that the President is the only one to authorize a civil administration. Like *JP 3-57*, it makes the distinction between civil administration in friendly territory and civil administration in hostile or occupied territory. In a friendly territory it states the importance of coordination with the Host Nation. In occupied territory, *JP 3-57.1* describes the importance of the parameters set by international law. Finally, *JP 3-57.1* states the role of and analysis required by the Joint Force Commander when the military is in control of the territory.¹⁷⁷

Both *JP 3-57* and *JP 3-57.1* avoid the term and only touch upon the potential complexities associated with mission of occupation. The introduction of Joint Doctrine has not added much to occupation doctrine.

¹⁷⁵ Department of Defense, *Joint Publication 3-57 Joint Doctrine for Civil-Military Operations*, Headquarters, Joint Chiefs of Staff, Washington D.C., 8 Feb 2001, I 17-20.

¹⁷⁶ Department of Defense, *Joint Publication 3-57.1 Joint Doctrine for Civil Affairs*, Headquarters, Joint Chiefs of Staff, Washington D.C., 14 April 2003, I 9.

¹⁷⁷ *JP 3-57.1*, I 10.

Army Doctrine

The Army's bedrock of operational doctrine is *Field Manual 3-0, Operations*.¹⁷⁸ Although *FM 3-0* states nothing about an occupation, or civil administration, or military government it does offer the parameter of full spectrum operations to provide a framework for the mission of occupation. The inference could easily be made that the occupation mission should fall under the stability and support range of full spectrum operations. However, further research into *Field Manual 3-07, Stability and Support Operations* does not refer to the occupation mission.¹⁷⁹ The most beneficial Army Manual is *Field Manual 41-10 Civil Affairs Operations*. *Field Manual 41-10* marks the separation between civil administration in friendly territory and civil administration in occupied territory. In both cases *FM 41-10* offers broad guidance. For friendly territory, *FM 41-10* reiterates some of the same guidance as the *JP3-57.1*. Additionally, the manual stresses the importance of non-governmental organizations (NGOs) and international organizations and the importance of the civil-military relationship.¹⁸⁰ For occupied territory it offers a little more guidance than either *JP 3-57* or *JP 3-57.1*. It makes the distinction that the civil administration in occupied territory is imposed by force. Second, it notes a need for a goal to create an effective government. Lastly, it offers three methods for executing an occupation. The first keeps the existing government in place; the second selectively removes and replaces suspect personnel; and the third creates a completely new government. Ultimately, the Army doctrine relevant to is only little more comprehensive than the Joint doctrine. It also needs noted that *FM 41-10* individually covers some of the tasks outlined in Chapters 2 and 3 of this monograph.¹⁸¹

¹⁷⁸ *FM 3-0*, Chapter 1, 15.

¹⁷⁹ Department of the Army, *Field Manual 3-07 Stability and Support Operations*, Headquarters, Department of the Army, Washington, D.C., 20 February 2003.

¹⁸⁰ Department of the Army, *Field Manual 41-10 Civil Affairs Operations*, Headquarters, Department of the Army, Washington, D.C., February 2000, Chapter 2, 29-30.

¹⁸¹ *FM 41-10* is a very thorough document and covers the structure and capabilities of the U.S. Army's Civil Affairs units. Many of the tasks that this monograph derives from the law and historical case studies can be found *individually* in *FM 41-10*, but there is no overarching structure in *FM 41-10* that brings these tasks together to apply to the specific mission of occupation. Emphasis is mine.

Field Manual 27-10, The Law of Land Warfare should also be examined. This document was created after World War II and the approval of the Geneva conventions of 1949. *Field Manual 27-10* offers the applicable international law and the United States' interpretation of those laws. Chapter 6 is dedicated towards occupation and outlines the law very well. However, the manual focuses on the law and does not describe how to apply that law on the battlefield or occupied territory.¹⁸² Nonetheless, there are two benefits in *FM 27-10*. It is grounded in the law and makes specific references throughout the manual to the Geneva and Hague protocols, which were approved out of the aftermath of World War II. Additionally, it offers the Army interpretation of those international laws providing guidance on what tasks must be done. Indeed, *FM 27-10* is the only current doctrine that offers any substantive information on the required tasks to execute in an occupation. Conversely, none, including *FM 27-10*, of the current doctrine presents substantive guidance on how to execute an occupation. Obviously, there are glaring deficiencies in current occupation doctrine. Other than *FM 27-10*, current doctrine offers nothing on how to conduct an occupation.

Past Doctrine

The most significant occupation examined in this monograph is post-World War II Germany and from that occupation came many examples of relevant doctrine. Especially when compared with current doctrine on occupation, two documents from the World War II era offer outstanding examples of how occupation should be executed. First, *FM 27-5, Civil Affairs Military Governance* originally published in 1940. The scope of *FM 27-5* differs dramatically from its current doctrinal counterparts.¹⁸³ *Field Manual 27-5* specifically laid out the scope and purpose of civil affairs and military government activities, organization, personnel, operations orders, proclamation, and tribunals. Where current doctrine only

¹⁸² Department of the Army, *Field Manual 27-10 The Law of Land Warfare*, Headquarters, Department of the Army, Washington, D.C., July 1956, 138-164.

¹⁸³ In 1958, *FM 41-5, Joint Manual of Civil Affairs/Military Government* superceded and removed some of the detail that *FM 27-5* had. In 1962, *FM 41-10 Civil Affairs Operations* replaced *FM 41-5* and there was further removal of the specifics for military government. By the next revision in 1969, military government became even further indistinct.

starts to sketch the concept of what an occupation is, *FM 27-5* demonstrates the application of legally required occupation tasks on the battlefield including medical care, government, administration, and security. Unlike the lack of current doctrine on occupation, *Field Manual 27-5* provided one reference source for anyone needing information on the conduct of an occupation.¹⁸⁴ *Field Manual 27-5* was superseded by *FM 41-10 Civil Affairs*, provided “procedural and doctrinal framework within which the Army could conduct civil affairs and military government should the need arise.”¹⁸⁵ The current *FM 41-10* is certainly not the procedural and doctrinal framework for occupation. However, the earlier version still has worth today.

The second doctrinal document is the *Handbook for Military Government in Germany* written by the German Country Unit in 1944,¹⁸⁶ which provided complete guidance and direction for the military government soldier on the battlefield. Moreover, the very existence of this handbook demonstrates that the planners and military government soldiers had completely thought through their upcoming actions. The *Handbook for Military Government in Germany* is a specific application of the principles outlined in *FM 27-5*, and was the specific resource for the occupation in Germany. The *Handbook* provided the framework for execution and the training for military government soldiers, and set forth policy and provided the basic documents such as proclamations, law, ordinances applicable for every military governance officer in Germany.¹⁸⁷

Summary

Field Manual 27-5 and the *Handbook* produced for Germany were products that discussed what to do and how to do it. However, a quick review of current doctrine on occupations shows a disturbing

¹⁸⁴ Departments of the Army and Navy, *Field Manual 27-5 Civil Affairs Military Government*, Washington D.C., 14 OCT 1947.

¹⁸⁵ Ziemke, vi.

¹⁸⁶ Supreme Headquarters Allied Expeditionary Force, *Handbook for Military Government in Germany*, December 1944, <<http://www-cgsc.army.mil/carl/resources/books.asp#military>> [12 JAN 2004].

¹⁸⁷ The Handbook for Military Government in Germany.

lack of guidance. Currently, the military has no more than a few pages on the subject. As such, the civil affairs and military communities have grown and adjusted into an environment based on Cold War thinking, which conjectured military occupation would never again take place, and had grown away from the possibility of conducting an occupation. It is time to reconsider this lack of doctrine and consider the law, history, and past doctrine offer a method to resolve this problem.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

As demonstrated in Chapter 4, there is a substantial lack of doctrine on occupation. This takes on incredible importance because combat victory today may well not achieve the strategic goals set by the President and the Secretary of Defense. Only winning the peace will fulfill those goals. More importantly, this monograph has outlined tasks that could readily form current doctrine. Chapter 2 has outlined the international law requirements that must be fulfilled. Chapter 3 has shown major lessons of past occupations that could benefit future planners. Chapter 4 has shown that there was occupation doctrine and that it was a benefit to the Army during the occupation of Germany.

Additionally, Chapters 2 and 3 show trends and relationships that offer a rudimentary model that could assist planners and operators in the next occupation. The model consists of two parts. First, there are the essential tasks that the law and experience dictate. Second, there are the occupational considerations which describe characteristic of successful occupations.

Of course the essential tasks are focused around the five essential tasks from The Hague and Geneva Conventions as outlined in Chapter 2. As a quick review these five essential tasks are: (1) restore and ensure public order and safety, (2) provide medical care, supplies and subsistence, (3) ensure the care and education of children, (4) respect private property and properly manage public property, and (5) provide for the security of the occupying force to facilitate mission accomplishment. Each of these essential tasks has implied tasks, dictated by the law, that support them directly.

However, there are four additional essential tasks that the lessons from the case studies have directed. These tasks are: (1) the establishment of a new government, (2) the reestablishment of essential services, (3) reestablishment of the economy, (4) and removal of dangerous ideologies. Each one of these will be addressed individually (see Figure 2).

One critical task that will routinely occur is the establishment of a new government. Obviously, this is a by product of an invasion and occupation. Therefore, the objectionable government must be replaced or at a minimum the influencing official need to be replaced. In Germany, the government had collapsed Allied forces surged into Germany. Local government was subsequently re-established first at the local level and slowly expanded to the national level. In Panama with the removal of Manuel Noriega and the fall of his power source, the PDF left a void in government responsibilities. A new leader was emplaced, and the U.S. assisted in the setting up of government actions, such as security and emergency services. In Iraq, the ruling government disintegrated after the fall of Baghdad. The U.S. assisted in the establishment of local leaders, a governing council, and most recently in the approval of an interim constitution.

The second task is that of essential services. The CPA correctly identified essential services that in their absence or failure would cause tremendous hardship on the inhabitant and the occupiers. In Iraq, the CPA identified electricity, telecommunications, health care, education, water, and oil. In the case of health care and education, they are already essential tasks that are dictated by the law. Without these essential services the occupation and reconstruction would be severely hampered.

Another task that the law does directly address but should be considered an essential task is the restoration of the economy. The restoration of the economy infuses money into the hands of people, allowing them to provide for themselves and buying goods and services, which places more money in the society, which causes businesses to grow, creating work and thus more money in the community. The CPA has focused their effort to restore Iraq's oil capability, financial markets, accounting procedures, and market reforms.

The last essential task that should be included is the removal of dangerous ideologies. In Germany it was Nazism and in Iraq it was Saddam Hussein and his Baath Party. This will routinely occur in an occupation since the reasons that led up to the invasion and removal were reasons that the United States took issue with. If the ideologies are powerful, they filtered through all aspects of society, into the education system, business practices, local government, and religious practices. An understanding of the ideology and the integration within society is then necessary in order to properly eradicate the ideology's impact. Much like Germany and Iraq, this must be balanced with the need for further restoration of the country. A required vetted process should be implemented to ensure the removal of this ideology is balanced with retribution, punishment, and restoration of the society. As with an objectionable government, dangerous ideologies tend to be a collateral reason for invasion and the subsequent occupation and will have to be dealt with by occupation forces.

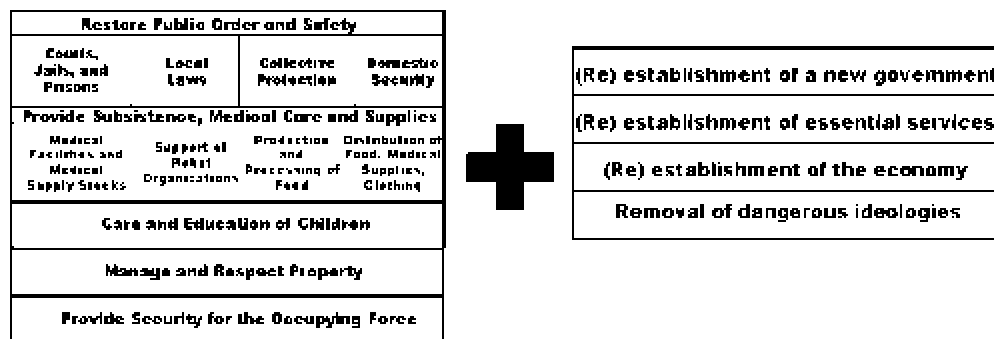


Figure 2, Essential tasks based on law and case analysis

The lessons from the case studies also show us considerations for occupation. In contrast to the essential tasks that state what must be done, these occupational considerations describe characteristics for a successful occupation. These considerations are critical in planning and in execution; disregarding them ensures increased risk. From the lessons of history, there are ten tenets that are revealed. These considerations have been a reoccurring theme throughout the case studies. These tenets are: (1)

organization, (2) preparation, (3) objective, (4) unity of command, (5) integration with combat operations, (6) role of civil affairs, (7) interagency, (8) economy of force, and (9) financial ability (see Figure 3).

- **Organization**
- **Preparation**
- **Objective**
- **Unity of command**
- **Integration with
combat operations**
- **Role of civil affairs**
- **Interagency**
- **Economy of force**
- **Financial ability**

Figure 3, Considerations for occupations

The first consideration is that of organization. This monograph has presented three different organization structures for occupation. In all three cases they started as another structure and eventually transformed into the final organization. Each transformation was for different reasons. In Germany, the consolidation into OMGUS was primarily done to prevent duplication of effort. In Panama the MSG was created to assist the Panamanian Government over the long term. In Iraq, the CPA was established after what appears to be a failure to acknowledge the magnitude of the occupation. One could make the assumption that these changes were due to faulting planning, but one could also draw the lesson that there is a natural shift necessary in the organization to better facilitate command and control and occupational tasks. For example, the starting organization is responsible for the initial international law mandated occupation tasks or for occupation tasks while still in an area under conflict. The transition could occur as the activities and conditions become more stable. Not that any of these models were perfect, but all three offered models for future use. The consideration from the analysis of these organizational structures

is the importance of the early creation of an organization and the understanding that it will transform as the occupation grows.

The second consideration is that of preparation. The model for preparation should be the actions taken prior to the occupation in Germany. The reason the United States preparation was so successful in Germany was three-fold: 1) establishing a military governance school; 2) training military government soldiers; and 3) publishing doctrine for their specific missions and areas.

The third area for consideration is the importance of a clear objective established for the occupation. As was demonstrated in WWII, there was much ado caused by the position presented in the Morgenthau plan. If the Morgenthau plan was going to set the objectives for the occupation then the occupation forces actions would have been completely different than if they were to fully restore Germany. In one case they would have forced the German people into an agrarian existence, whereas the other regenerated the German people and society without the Nazi dogma. This is also reflected in the occupation of Iraq. As numerous sources have stated, the last priority for the Bush administration was the occupation following the overthrow of Saddam Hussein and the Baath party.¹⁸⁸ Without a clear objective the occupation is left floundering with no discernable direction. The situation in Iraq was eventually corrected with the CPA and the establishment of its measures of effectiveness.

One of the nine principles of war, unity of command, is the fourth area of consideration. The intent here is not to restate this principle, but to reemphasize its importance in the transition from combat to occupation. Panama offers a great lesson when the unity of command was not adhered to, as a Civil-military command was created and not resourced or synchronized with other efforts going on in the area of operations. Ultimately, MG Cisneros' leadership and vision filled the void.

The fifth area for consideration is the integration of the occupation with combat operations. The occupation plan must be integrated with the combat plan. As in Panama, the separation of the two caused

¹⁸⁸ James Fallows, "Blind into Baghdad," *Atlantic Monthly*, January/February, 2004, 52-74.

a lack of staff synchronization and cooperation as the plans did not support each other. This will become more critical in the future the time and space separating the two phases condenses.

The sixth area for consideration is the role of civil affairs and the role of the common soldier. Many of the documents addressed in this monograph point to civil affairs soldiers as the responsible party for an occupation. This is important as they hold the expertise and training in all the stability and support tasks. As such, it is important to integrate them into combat arms team. However, the civil affairs soldier cannot do everything, as the common soldier in infantry and artillery battalions need to perform these missions as readily as a civil affairs soldier.

The seventh area is the importance of the interagency team. In all three cases, the development of the interagency team could have been better. In Germany, the State Department struggled with the Secretary of War for control in Germany. The case was the same in Iraq as Colonel Kevin Benson, C-5 CFLCC, OIF, has repeatedly stated the difficulties in working with other government agencies.¹⁸⁹ In Panama, the struggle for a correct operational tempo and synergy with the other government agencies was at issue. This is not just a problem with an occupation, it occurs at all levels of war and all missions. It needs to be fixed in order to fully implement the United States' instruments of power.

The eighth area for consideration, another principle of war, is economy of force. The definition of economy of force is to "allocate minimum essential combat power to secondary efforts."¹⁹⁰ In an occupation economy of force additionally means taking appropriate risk in employing forces across the occupied territory. As an example in Germany, a Constabulary force was established to better distribute manpower. However, the insurgency movement in Iraq poses an unacceptable risk with such a distribution.

¹⁸⁹ Author's notes taken from SAMS lecture on Operation Iraqi Freedom, December 2003, Fort. Leavenworth, KS.

¹⁹⁰ *FM 3.0* 4-13.

The last area for consideration is that of financial procedures for the occupation forces. As Major General Petraeus stated, “money is ammunition.”¹⁹¹ The Commander’s Emergency Response Program is one method that has worked in Iraq. Not only does the injection of money fix the problems it was aimed at, it also creates jobs and infuses the economy with money. Measures should be taken to ensure that money is expedited to the places where it can do the most good. Planning for these activities should be included in future occupations.

This monograph has offered a model to examine and plan future occupations. It has distilled the law and case studies into essential tasks and considerations that could form the basis of occupation doctrine. It has also pointed out that occupation doctrine does not currently exist. This is a void that needs to be filled. The United States has an unprecedented position of power in world and has been the target of terrorism. As such the United States has stated its intent to protect itself to ensure its safety. The current chaotic state of world affairs will continue and the possibility of the United States removing rogue governments and reestablishing nations is high. The United States Army must take the lead again as it did prior to World War II and create doctrine that will aid in the highly probable future occupations.

¹⁹¹ Gordon, 8.

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Enclosure “5”



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

Professor Federico Lenzerini*

- I. INTRODUCTION
- 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?
- 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?
- IV. COMMENT ON THE WORKING RELATIONSHIP BETWEEN THE REGENCY AND THE ADMINISTRATION OF THE OCCUPYING STATE UNDER INTERNATIONAL HUMANITARIAN LAW.

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.

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 1933⁵: 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.

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

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

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

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](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

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](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

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

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

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

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

⁵⁴ *Ibid.*, Section 367(b).

⁵⁵ See *supra*, text following n. 37.

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

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

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

24 May 2020

Professor Federico Lenzerini

Enclosure “6”



Larsen v. Hawaiian Kingdom

Case name	Larsen v. Hawaiian Kingdom
Case description	<p>Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency (“Hawaiian Kingdom”) on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom.</p> <p>In determining whether to accept or decline to exercise jurisdiction, the Tribunal considered the questions of whether there was a legal dispute between the parties to the proceeding, and whether the tribunal could make a decision regarding that dispute, if the very subject matter of the decision would be the rights or obligations of a State not party to the proceedings.</p> <p>The Tribunal underlined the many points of agreement between the parties, particularly with respect to the propositions that Hawaii was never lawfully incorporated into the United States, and that it continued to exist as a matter of international law. The Tribunal noted that if there existed a dispute, it concerned whether the respondent has fulfilled what both parties maintain is its duty to protect the Claimant, not in the abstract but against the acts of the United States of America as the occupant of the Hawaiian islands. Moreover, the United States’ actions would not give rise to a duty of protection in international law unless they were themselves unlawful in international law. The Tribunal concluded that it could not determine whether the Respondent has failed to discharge its obligations towards the Claimant without ruling on the legality of the acts of the United States of America – something the Tribunal was precluded from doing as the United States was not party to the case.</p>
Name(s) of claimant(s)	Lance Paul Larsen (Private entity)
Name(s) of respondent(s)	The Hawaiian Kingdom (State)
Names of parties	
Case number	1999-01
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Other proceedings
Subject matter or economic sector	Treaty interpretation
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Other The 1849 Treaty of Friendship, Commerce and Navigation with the United States of America
Language of proceeding	English
Seat of arbitration (by country)	Netherlands
Arbitrator(s)	Dr. Gavan Griffith QC Professor Christopher J. Greenwood QC Professor James Crawford SC (President of the Tribunal)
Representatives of the claimant(s)	Ms. Ninia Parks, Counsel and Agent
Representatives of the respondent(s)	Mr. David Keanu Sai, Agent

Mr. Peter Umialiloa Sai, First deputy agent
Mr. Gary Victor Dubin, Second deputy agent and counsel

Representatives of the parties

Number of arbitrators in case 3

Date of commencement of proceeding [dd-mm-yyyy] 08-11-1999

Date of issue of final award [dd-mm-yyyy] 05-02-2001

Length of proceedings 1-2 years

Additional notes

Attachments **Award or other decision**

> [Arbitral Award](#) 15-05-2014 English

Other

> [Annex 1 - President Cleveland's Message to the Senate and the House of Representatives](#) 18-12-1893 English

> [Joint Resolution - To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.](#) 23-11-1993 English



Enclosure “7”



Permanent Court of Arbitration

PCA Case Repository

The Republic of Ecuador v. The United States of America

Case name	The Republic of Ecuador v. The United States of America
Case description	On June 28, 2011, the Republic of Ecuador instituted arbitral proceedings concerning the interpretation and application of Article II(7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (US-Ecuador BIT), pursuant to Article VII of the US-Ecuador BIT. The Permanent Court of Arbitration acted as Registry in this arbitration.
Name(s) of claimant(s)	The Republic of Ecuador (State)
Name(s) of respondent(s)	The United States of America (State)
Names of parties	
Case number	2012-05
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Inter-state arbitration
Subject matter or economic sector	International investment law
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Bilateral treaty Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment Country A: United States Country B: Ecuador
Language of proceeding	English Spanish
Seat of arbitration (by country)	
Arbitrator(s)	Professor Luiz Olavo Baptista (Presiding Arbitrator) Professor Donald McRae Professor Raúl Emilio Vinuesa
Representatives of the claimant(s)	Dr. Diego García Carrión, Procurador General del Estado Ms. Christel Gaibor, Directora de Asuntos Internacionales y Arbitraje, Encargada Ms. Cristina Viteri PROCURADURÍA GENERAL DEL ESTADO Mr. Paul S. Reichler Mr. Mark A. Clodfelter Mr. Andrew B. Loewenstein FOLEY HOAG LLP Mr. Bruno Leurent FOLEY HOAG AARPI

Representatives of the respondent(s)	Mr. Harold Hongju Koh, Legal Adviser Mr. Jeffrey D. Kovar, Assistant Legal Adviser Ms. Lisa J. Grosh, Deputy Assistant Legal Adviser Mr. Jeremy K. Sharpe, Chief of Investment Arbitration Mr. Lee M. Caplan, Attorney Adviser Ms. Karin L. Kizer, Attorney-Adviser Ms. Neha Sheth, Attorney-Adviser U.S. DEPARTMENT OF STATE
Representatives of the parties	
Number of arbitrators in case	3
Date of commencement of proceeding [dd-mm-yyyy]	28-06-2011
Date of issue of final award [dd-mm-yyyy]	
Length of proceedings	1-2 years
Additional notes	
Attachments	<p>Notice of arbitration</p> <ul style="list-style-type: none"> "Request for Arbitration and Statement of Claim" - 28-06-2011 (English) "Request for Arbitration and Statement of Claim" - 28-06-2011 (Spanish) <p>Written submission</p> <ul style="list-style-type: none"> "Statement of Defense" - 29-03-2012 (Spanish) "Statement of Defense" - 29-03-2012 (English) "Expert Opinion of Prof. W. Michael Reisman - Respondent's Memorial on Jurisdiction" - 24-04-2012 (English) "Expert Opinion of Prof. W. Michael Reisman - Respondent's Memorial on Jurisdiction" - 24-04-2012 (Spanish) "Expert Opinion of Prof. Christian Tomuschat - Respondent's Memorial on Jurisdiction" - 24-04-2012 (English) "Expert Opinion of Prof. Christian Tomuschat - Respondent's Memorial on Jurisdiction" - 24-04-2012 (Spanish) "Respondent's Memorial on Jurisdiction" - 25-04-2012 (English) "Respondent's Memorial on Jurisdiction" - 25-04-2012 (Spanish) "Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (Spanish) "Witness Statement of Mr. Luis Benigno Gallegos - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (Spanish) "Expert Opinion of Prof. Alain Pellet - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (English) "Expert Opinion of Prof. Alain Pellet - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (Spanish) "Expert Opinion of Prof. Stephen McCaffrey - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (English) "Expert Opinion of Prof. Stephen McCaffrey - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (Spanish) "Expert Opinion of Prof. C.F. Amerasinghe - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (English) "Expert Opinion of Prof. C.F. Amerasinghe - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (Spanish) "Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (English) "Witness Statement of Mr. Luis Benigno Gallegos - Claimant's Counter-Memorial on Jurisdiction" - 23-05-2012 (English)



Enclosure “8”



Ilya Levitis (United States) v. The Kyrgyz Republic

Case name	Ilya Levitis (United States) v. The Kyrgyz Republic
Case description	The PCA acted as registry in this arbitration, which was conducted under the UNCITRAL Arbitration Rules 1976 pursuant to the Treaty between the United States of America and the Republic of Kyrgyzstan concerning the Encouragement and Reciprocal Protection of Investment, signed on January 19, 1993, and the Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic.
Name(s) of claimant(s)	Ilya Levitis (United States) (Private entity)
Name(s) of respondent(s)	The Kyrgyz Republic (State)
Names of parties	
Case number	2012-21
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Investment arbitration
Subject matter or economic sector	
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Bilateral treaty Encouragement and Reciprocal Protection of Investment, signed on January 19, 1993 Country A: United States Country B: Kyrgyzstan
	Other Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic
Language of proceeding	
Seat of arbitration (by country)	
Arbitrator(s)	Professor Andrew Newcombe (Presiding Arbitrator) Mr. Richard DeWitt Samuel Wordsworth QC
Representatives of the claimant(s)	Santiago A. Cueto, Esq. CUETO LAW GROUP Edward W. Miller, Esq.
Representatives of the respondent(s)	Dr. Andrei Yakovlev Mr. W. Gordon Dobie Mr. Matthew Page Ms. Kari Rollins Mr. Daniel Meagher WINSTON & STRAWN LLP Mr. Anvar Askarov Mr. Ulan Satarov RULE OF LAW CONSULTING LTD.

Representatives of the parties

Number of arbitrators in case 3

Date of commencement of proceeding [dd-mm-yyyy] 2013

Date of issue of final award [dd-mm-yyyy]

Length of proceedings

Additional notes

Attachments



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Enclosure “9”

CRIMINAL REPORT NO. 22-0001

The Insurgency of 1893 and Attainder of Treason

THE ROYAL COMMISSION OF INQUIRY:

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

Dr. David Keanu Sai, Ph.D.

HEAD, ROYAL COMMISSION OF INQUIRY

Dr. Federico Lenzerini, Ph.D.

DEPUTY HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

CRIMINAL REPORT No. 22-0001

GUILTY OF TREASON:

Lemuel Clark Ables; W.C. Achi; H.L. Achilles; H.L. Adams; W.Y. Afong; L. Ahlborn; H.J. Ahu; P.J. Aiken; W.O. Aiken; E.P. Aikue; Thomas Aiu; D. Alawa; Sister M. Albina; E.H. Allen; George L. Allen; William Fessenden Allen; W.D. Alexander; L.F. Alvarez; T.K.R. Amalu; H.K. Anahu; Dickson Anderson; James Anderson; J. Anderson; J.F. Anderson; L.A. Andrews; R.W. Andrews; G. Armstrong; William N. Armstrong; S.W.K. Apua; F.K. Archer; William George Ashley; Joseph B. Atherton; R.H. Atkins; A.L.C. Atkinson; A.T. Atkinson; B.C. Atkinson; L.S. Aungst; H.C. Austin; H.L. Austin; H.Z. Austin; J.H. Babcock; E.H. Bailey; E.D. Baldwin; Henry Perrin Baldwin; L.M. Baldwin; Manuel Jose Barbosa; J.H. Barenaba; E.W. Barnard; Robert James Barney; Sister M. Benedicta; Dwight Benton; Richard Frederick Bickerton; E. Biesterfeld; Charles Reed Bishop; C.H. Bishop; Charles Blake; J. Blanpain; Ernest de Boissac; Crister Bolte; Sister M. Bonaventure; E.C. Bond; F.A. Bonet; Geo. M. Boote; C. Borchgrevink; P.J. Bouwman; J. Bovey; W.A. Bowen; Edward S. Boyd; J.H. Boyd; T. Brandt; A.L. Bresler; James Bright; Cecil Robert Broad; H.H. Broadie; M. Bronc; A. Brown; A.B. Brown; Andrew Brown; A.M. Brown; Cecil Brown; B. Brown; B.H. Brown; H.H. Brown; Henry Brown; J.F. Brown; Robert H. Bruce; E.G.J. Bryant; A. Buckholtz; K. Buchholtz; Sterns Buck; J.K. Burkett; P.H. Burnette; John E. Bush; John Bush; George A. Cadell; Joseph M. Camara; J.M. Camara, Jr.; D. Campbell; J.T. Campbell; Victor J. Capron; J. Carden; A.W. Carter; F.W. Carter; Charles Lunt Carter; John H. Carter; V.A. Carvalho; James B. Castle; William Richards Castle; David Center; A. Chalmers; W. Chamberlain; Jules Chavasse; Li Cheung; S.F. Chillingworth; Byron O. Clark; G. Clark; J.F. Clay; Ed. F. Clements; J.C. Cluney; J. Coerper; George Collins; Wm. B. Colville; E.E. Conant; J.H. Coney; Charles M. Cooke; Henry Ernest Cooper; Audley Coote; E. Coppieters; Andrew Cox; H.G. Crabbe; Allan O. Crookshank; F.L. Crosby; Charles Crozier; W.H. Cummings; F.I. Cutter; Sister M. Cyrilla; F.B. Damon; Samuel M. Damon; A. da Silva Moreira; Miss Rose Davidson; James Davis; Robert H. Davis; G.A. Davis; Henry Davis; Chas. Davison; George B. Dawson; F.R. Day; Bernardo Machado de Faria Maia; E. de Harrie; Antonio C. de las Casas; Raphael de Luchi; F.T. de Navarra; A.F. de Serpa; H. Deacon; W.E.H. Deverill; George L. Desha; H.

Dickenson; Mrs. A.E. Dickey; C.H. Dickey; Lyle A. Dickey; Mrs. B.F. Dillingham; W.F. Dillingham; Frank S. Dodge; E.P. Dole; Sanford Ballard Dole; H.M. Dow; C.A. Doyle; G.H. Dunn; J.E. Eldarts; J.S. Emerson; N.B. Emerson; John Emmeluth; John Ena; W.S. Endings; G.H. Fairchild; Charles J. Falk; J.K. Farley; W.J. Feary; W.P. Fennell; Wm. Fennell; Antonio Fernandes; N. Fernandez; Narciso T.M. Ferro; J.T. Figueredo; Joseph Henry Fisher; Wm. Fisher; Captain Fitzgerald; D. Forbes; W.J. Forbes; Victor Forge; T.C. Forsyth; Walter Francis Frear; Captain A. Fuller; J.L. Garcin; J.S. Garnett; J. Gasper; A.V. Gear; G.D. Gear; F.W. Gearde; Alexander George; J.B. Gibson; T.H. Gibson; W.J. Gillam; Gorham D. Gilman; J.W. Girvin; H.F. Glade; Chas. Goheir; H. Goldberg; M.A. Gonsalves; E.S. Goodhue; G.R.M. Graham; W.M. Graham; J. Greig; Col. W.J. De Gress; C.B. Greenfield; J. Grunwald; C.K. Haae; S. Haanio; S. Haanio, Jr.; W.P. Haia; R. Hall; L.K. Halualani; F. Halstead; J.B. Hanaike; E.M. Hanuna; G.W.A. Hapai; Henry Hapai; S.R. Hapuku; F.W. Hardy; J. Hardy; E.H. Hart; J.A. Hassinger; Francis March Hatch; J.K. Haupū; Hawaiian Gazette Company (Ltd.); Hawaiian Gazette; A.N. Hayselden; Geo. W. Hayseldon; H.T. Hayselden; Mrs. T.L. Hayselden; Henry Hempell; William Henry; A. Herbert; George Herbert; G.C. Hewitt; A.W. Heydtmann; J. Hind; R. Hind, Jr.; D.H. Hitchcock; A.W. Hobson; A. Hocking; C.B. Hofguard; J. Holi; H. Holmes; H.L. Holstein; C.J. Holt; J. Holt; George Hons; S. Hookano; Wm. Hookuanui; Archibald Hopkins; Cyril Hopkins; Edward Hore; George Hore; William Y. Horner; W. Horner; Frank A. Hosmer; Alfred Houle; H.W. Howard; Dr. G. Herbert; Conrad Hughes; S. Hundley; S.N. Hundely; James H. Hunt; Geo. K. Hunukau; Ambrose Hutchinson; Curtiss P. Iaukea; J. Ikaika; Jose Kekahuna Iosepa; Sister M. Irene; A. Irvine; J.J. Bell Irving; R.W. Irwin; D.P.R. Isenberg; P.R. Isenberg; N.P. Jacobsen; Harold Janion; Fred W. Job; J.W. Jones; H.D. Johnson; Arthur Johnstone; J.W. Jones; Peter Cushman Jones; E.W. Jordan; Mrs. E.W. Jordan; Albert Francis Judd; S.W. Kaai; D.H. Kaailaau; D.W. Kaaemoku; Charles Kaanoi; S.M. Kaaukai; J. Kaelemakule; S.K. Kaeo; David Haili Kahaulelio; D. Kahaulelio; G. Kahaulelio; J. Kahaulelio; S.H. Kahaulelio; H.K. Kahele; John Kahoa; J.E. Kahoa; P.N. Kahokuoluna; S. Kahoohalahala; D.S. Kahookano; A. Kaili; D. Kailua; S. Kaiu; J.H.K. Kaiwi; B.K. Kaiwiaea; S.N.K. Kakina; J. Kakina; Z. Kakina; S.H. Kalamakee; S.E. Kaleikau; G. Kaleikini;

Agnes Kalua; John William Kalua; M. Kaluna; William Kamau; G.P. Kamauoha; S.M. Kakanui; J. Kanakaoluna; J.L. Kanakaoluna; S.K. Kane; S.U. Kaneole; K. Kaniwai; D.W. Kanui; J.B. Kaomea; David Kapaku; D.M. Kapalau; A.N. Kepoikai; J.W. Kapolohu; D. Kapohakimohewa; Samuel Kapu; J.H. Kapukui; J.K. Kapuniai; John Kauhane; S. Kauhane; A. Kauhi; Kaula; S.E. Kaula; J.L. Kaulukou; J. Kauwe; H. Kawaimaka; J.M. Kea; Charles Kealoha; J.M. Kealoha; P. Keaupuni; J. Kekahuna; Susan Kekela; S.W. Kekuewa; T.W. Kekuewa; S.L. Kekumano; J.H.S. Kaleo; M. Keliiaa; Moses Keliiaa; J.W. Keliikoa; L.D. Keliipio; P.D. Kellett; James J. Kelly; L.T. Kenake; James N.K. Keola; J.A. Kennedy; William A. Kinney; James Anderson King; Thomas King; W.H. King; J.N. Koomoa; J. Kopp; Gustaf Kraak; A. Ku; Sam Ku; David Kua; Joseph Liwai Kukahi; Albert Kukailimoku Kunuiakea; G.K. Kunukau; Jos. Kula; Charles Lake; Theodore F. Lansing; L.L. La Pierre; S. Lazaro; Peter Lee; R. Lee-Brice; J. Lenhart; J.W. Leonhart; A. Lidgate; H.A. Lindley; Andres Lindsay; A.B. Lindsay; D.C. Lindsay; C.R. Lindsey; A.B. Lobenstein; J.W. Loka; C.A. Long; Captain J.C. Lorenzen; J.W. Lota; D. Lovell; E.P. Low; Nellie M. Lowrey; W.J. Lowrie; George Lucas; J. Lucas; Frederick S. Lyman; H.J. Lyman; R.A. Lyman; Miss E.W. Lyons; J.H. Maby; Captain A. Macauley; James Macfarlane; A. St. M. Mackintosh; B.B. Macy; J.W. Maele; J.A. Magoon; A.S. Mahaulu; P. Mahaulu; S. Mahaulu; J.H. Mahoe; S.H. Mahuka; S.M. Mahuka; W.E. Maikai; W.K. Makakoa; Peter Makia; George Manson; Joseph Marsden; J.W. Mason; W. Mattson; J. Mattoon; A. McBryde; W.D. McBryde; John Andrew McCandless; Frederick W. McChesney; D. McCorrison; H. McCorrison; J. McCracken; R.J. McGettigan; J.W. McFarland; W.A. McKay; Mrs. W.A. McKay; S. McKeague; P. McLean; P.M. McMahan; F.B. McStocker; J.D. McVeigh; A. McWayne; H.K. Meemanu; C. Meinecke; Joseph P. Mendonca; W.C. Meyer; R.P. Meyers; H.T. Mills; Enrique Minguez; J.W. Moanauli; H.K. Molale; James Mookens; Frederick H. Moore; W.L. Moore; James M. Monsarrat; William T. Monsarrat; W. Moran; James Francis Morgan; H. Morrison; Ethel C. Mossman; W.F. Mossman; E.A. Mott-Smith; John Mott-Smith; A. Mouritz; J.F. Muller; R. James Murphy; H.C. Meyers; J.K. Nahale; D. Nahoolewa; M.K. Nakookoo; D.L. Naone; J. Nakila; J.K. Nakila; M. Nakuaau; Emma M. Nakuina; D.H. Napihaa; W. Napihaa; J.U. Napoulou; K. Narita; George W. Nawaakoa; S.H.K. Ne; J.W. Neal;

W.G. Neil; J.H. Nishwitz; F. Northrup; C. Notley; William Notley; John Nott; P. Nowlein; G.N. Oakley; F.B. Oat; Joseph M. Oat; W.G. Ogg; R. Oliver; Edwin Omstead; J.A.M. Osorio; H.C. Ovenden; H.S. Overend; T.K. Pa; J. Paakaula; Z. Paakiki; Pacific Commercial Advertiser; Bishop Pahia; F. Pahia; R. Pahia; A. Pali; S.E.K. Papaii; J. Paris; Miss Ella Paris; J.D. Paris; H. Peelua; Antonio Perry; C.F. Peterson; W.L. Peterson; R.C.A. Peterson; John Phillips; J.K. Piimanu; R.W. Podmore; J.M. Poepoe; William Fawcett Pogue; Major George C. Potter; Daniel Porter; T.C. Porter; George C. Potter; J.N. Pouliot; J.W. Pratt; Francis William Prescott; C.D. Pringle; Charles H. Pulaa; R.W.T. Purvis; D. Quill; William Rathburn; Wm. R. Rathburn; R.H. Reid; Sister M. Renata; G.F. Renton; J.R. Renton; M.H. Reuter; C.B. Reynolds; William Hyde Rice; W.H. Rice, Jr.; J. Richard; E.E. Richards; W.J. Rickard; Frederick Ringer; C.B. Ripley; R.P. Rithet; Alexander George Morison Robertson; Morison Robertson; A.G.M. Robinson; M.P. Robinson; W.T. Robinson; Charles T. Rodgers; Dr. C.T. Rodgers; E. Morales Rodriguez; C.N. Rose; Gus Rose; George C. Ross; W.A. Ross; W.E. Rowell; A.P. Russ; H.R. Rycroft; R. Rycroft; Mrs. R. Rycroft; Captain M.N. Sanders; L. Samson; Geo. P. Sarff; J.K. Saunders; C. Schaessler; Jno. C. Searle; R.C. Searle; L. Severance; W.H. Shipman; H.W. Schmidt; W.D. Schmidt; D.H. Schmull; Hugo Schonberger; J.A. Scott; J.F. Scott; M.F. Scott; J. Shaw; Col. George A. Shaw; J.R. Shaw; Jona Shaw; P. Silva; William R. Sims; A.N. Sinclair; Joseph P. Sisson; David Bowers Smith; Geo. W. Smith; Henry Smith; J.W. Smith; William Owen Smith; A.J. Smithies; John S. Smithies; Julio Soler; John Harris Soper; R.C. Spalding; James G. Spencer; Joe Spencer; K. Spencer; Manuel Spencer; E.R. Stackable; Wm. F.L. Stanley; W.L. Stanley; J.T. Steeb; Edward Strehz; Edward Suhr; James G. Swan; L.E. Swain; S.M. Sylva; A. Tagliavia; A.F. Tavares; H.T. Taylor; Wray Taylor; Edward Davies Tenney; A.N.H. Teyssier; Mrs. Ana Thomas; David Thomas; A.D. Thompson; J.A. Thompson; J. Enoch Thompson; L.S. Thompson; Thomas G. Thrum; Lorrin Andrews Thurston; J. Todd; H.S. Townsend; Thomas Treadway; George Trimble; G.P. Tulloch; George A. Turner; E. Van Den Brande; H.F.J. Vieilhomme; John Mark Vivas; H.M. von Holt; W. Vredenburg; J. Wagner; R.W. Waialeale; John Waiamau; J.H. Waipuilani; M.P. Waiwaiole; F.M. Wakefield; W.G. Walker; A. Wall; W.E. Wall; R. Wassmann; Henry Waterhouse; J. Watt; John W. Waughop; E.F. Weber; J.

Weddick; Richard Weedon; George Weight; C.B. Wells; H. Wharton; H.E. Wilson; F. Wittrock; H.P. Wood; William Austin Whiting; Mark Whitwill; Albert Spencer Wilcox; Charles Wilcox; George Norton Wilcox; S.W. Wilcox; W.L. Wilcox; Charles T. Wilder; Harriet E. Wilder; G.K. Wilder; G.P. Wilder; William Chauncey Wilder, Jr.; N.C. Wilfong; F. Wilhelm; Charles Williams; W.H. Williams; C.H. Willis; C.J. Willis; T.C. Willis; C.H. Wills; T.A.L. Wills; E.J. Wilson; H.E. Wilson; William Wilson; E.C. Winston; F.L. Winter; W.S. Wise; F. Wittrock; A.B. Wood; C.B. Wood; Jasper M. Wood; Miss W.R. Woods; J.N. Wright; W.J. Wright; W.H. Wright; T.H. Wright; L. Falcon y Quevedo; W.J. Yates; Alexander Young; Charles William Ziegler; J.G. Zoller; and J.W.L. Zumwalt

CRIME COMMITTED: Treason—Levying of War (Chapter VI, Penal Code)

LOCATION OF CRIME: Hawaiian Islands and Diplomatic Missions Abroad

INTRODUCTION

This criminal report of the Royal Commission of Inquiry (“RCI”) on the *attainder* of high treason, the reversion of property, and the doctrine of the *corruption of blood* addresses the actions taken by the insurgents committing the high crime of treason and the effects of *attainder* and *corruption of blood* under English common law and its statutory incorporation into Hawaiian Kingdom law.

GOVERNING LAW

In the Statute Laws of 1846, section 7, it was enacted: “[I]and so patented [that is purchased from the Government] shall never revert to the king of these islands, nor escheat to this government, for any other cause than *attainder of high treason*, as defined in the criminal code (emphasis added).”¹ Among the prerogatives of the king that affect lands is “[t]o punish for high treason by forfeiture, if so the law decrees.”² The King’s superior right to forfeiture was transferred to the government when the Hawaiian Kingdom became a constitutional monarchy. Under the treason statute, which has no degrees, the Penal Code states:

1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King’s government, or the adhering to the enemies

¹ Section 7, Article II—*Of the Disposition of Government Lands*, Chapter VII, Statute Laws of His Majesty Kamehameha III, Vol. 1 (1846).

² Resolution of the Legislative Council approving the principles adopted by the Board of Commissioners to quiet Land Titles 85 (1846).

thereof, giving them aid and comfort, the same being done by a person owing allegiance to this kingdom.

2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.
4. Ambassadors and other ministers of foreign states, and their alien secretaries, servants and members of their families, do not owe allegiance to this kingdom, though resident therein, and are not capable of committing treason against this kingdom.
5. To constitute the levying of war, contemplated in the first section of this chapter, it shall be requisite that the persons concerned therein be parties to some overt act, in or towards procuring, preparing or using force, or putting themselves in a condition in readiness to use force, either by being present at such overt act, or by promoting, aiding in, or being otherwise accessory before the fact to the same.
6. In order to constitute the levying of war, the force must be employed or intended to be employed for the dethroning or destruction of the King or in contravention of the laws, or in opposition to the authority of the King's government, with an intent or for an object affecting some of the branches or departments of said government general, or affecting the enactment, repeal or enforcement of laws in general, or of some general law; or affecting the people, or the public tranquility generally; in distinction from some special intent or object, affecting individuals other than the King, or a particular district.
7. An accessory before the fact to treason is guilty of treason, and shall be subject to prosecution, trial and punishment therefor, though the principals more directly concerned have not been convicted, or are not amendable to justice.
8. No person shall be convicted of treason but by the testimony of two or more lawful witnesses to the same overt act of treason whereof he stands charged, unless he shall in open court, confess such treason.
9. Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.
10. If any person who shall have knowledge of the commission of treason against this kingdom, shall conceal the same, and shall not, as soon as may be, disclose and make known such treason to the Governor of the island on which he resides, he is guilty of a

great crime, and shall be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor not exceeding ten years, in the discretion of the court.³

By specific reference to the term *attainder*, the Hawaiian legislature adopted the English common law on high treason. In *The King v. Agnee et al.*, the Hawaiian Supreme Court stated, “[w]e do not recognize as conclusive the common law nor the authorities of the courts of England or of the United States, any farther than the principles which they support may have become incorporated in our system of laws, and recognized by the adjudication of the Supreme Court.”⁴ In *Agnee*, the Court cited English common law commentators on criminal law such as Chitty and Bishop as well as English criminal cases.

Under English common law, *attainder* of high treason is a metaphor that has the effect of the *corruption of blood* resulting from the commission of high treason along with reversion of property by escheat, both real and personal, to the king or government. *Attainder* is under “common law, that extinction of civil rights and capacities which took place whenever a person who had committed treason or felony received sentence of death for his crime. The effect of ‘attainder’ upon such felon was, in general terms, that all his estate, real and personal, was forfeited. At the common law, attainder resulted in three ways, viz: by confession, by verdict, and by *process* or outlawry (emphasis added).”⁵

By “process,” *attainder* resulted by an act of Parliament called a *bill of attainder*, which Edward Coke critiqued as a process that lacked provable evidence but acknowledged that the Parliament did have the authority to *attaint* for high treason. When Henry VIII ascended to the throne in 1509, “attainder by parliament was an established means of dealing with special offenders, particularly those who posed a threat to the security of the king and his realm.”⁶ John Hatsell’s *Precedents of Proceedings in the House of Commons* that was published in 1781 explains:

Although it is true, that this measure of passing Bills of Attainder...has been used as an engine of power...it is not therefore just to conclude, that no instances can occur, in which it ought to be put in practice. Cases have arisen...and may again arise, where the public safety, which is the first object of all government, has called for this extraordinary interference; and, in such instances, where can the exercise of an extraordinary power be vested with more security, than in the three branches of the legislature [Monarch, House of Lords, House of Commons]? It should, however, always be remembered, that this deviation from the more ordinary forms of proceeding by indictment or impeachment, ought never to be adopted, but in cases of absolute necessity; and in those instances only, where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public

³ Penal Code of 1850 8-9 (1869).

⁴ *The King v. Agnee et al.*, 3 Haw. 106, 112 (1869).

⁵ Black’s Law 126 (6th ed. 1990).

⁶ Stanford E. Lehmborg, “Parliamentary Attainder in the Reign of Henry VIII,” 18(4) *The Historical Journal* 675-702, 677 (1975).

mischief to suffer the offence to pass unpunished, than even to over-step the common boundaries of law; and...by an exemplary through extraordinary proceeding, to mark with infamy and disgrace, perhaps to punish with death, even the highest and most power offenders.⁷

In Coke's commentary on the 1352 Statute of Treasons in the Third *Institute*, he explains that the term "attaint" in the statute "necessarily implieth that he be proceeded with, and attainted according to the due course, and proceedings of law, and not by absolute power."⁸ The suspect, according to Coke, had to be *attainted* with direct proof of evidence and not *attainted* with the probability of evidence. He explains, "This doth also strengthen the former exposition of the word (*provablement*,) that it must be provably, by an open act, which must be manifestly proved."⁹

According to William Blackstone, "ANOTHER immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor."¹⁰

Section 8 of the Hawaiian treason statute addresses the first two ways where *attainder* results by conviction by trial or confession without trial. The third way is by "process" or "outlawry." The latter was a process during the medieval period in England for the county court or by writ declared a fugitive on the run for the commission of treason an "outlaw." The former could be done by a *bill of attainder* or *law of attainder* enacted by the English Parliament and signed into law by the Monarch. While the United States constitutionally prohibits *bills of attainder*, where "[n]o bill of attainder or ex post facto Law shall be passed,"¹¹ and Great Britain abolished practically all the law of forfeiture and escheat for treason and felony in 1870,¹² the Hawaiian Kingdom has no such prohibition, which would allow *bills of attainder* to be enacted by the Legislative Assembly, but no such bill has ever been enacted.

While *bills of attainder* were a product of domestic law of a State and not the courts, they could also result as a consequence of a "process" of international law by virtue of a treaty between the governments of two States where the negotiations and agreement included, *inter alia*, the subject of high treason as defined by a State's domestic law. This was precisely the case of the *Agreement*

⁷ 4 John Hatsell, *Precedents of Proceedings in the House of Commons* 90 (1796).

⁸ Edward Coke, *The Third Part of the Institutes* 12 (6th ed. 1680).

⁹ *Id.*

¹⁰ William Blackstone, *Commentaries on the Laws of England*, vol. 4 381 (1769).

¹¹ U.S. Constitution, article 1, section 9.

¹² An Act to abolish Forfeiture for Treason and Felony, and to otherwise amend the Law relating thereto (1870).

of Restoration entered into between Queen Lili‘uokalani and President Grover Cleveland on 18 December 1893.

APPLICATION

The day after U.S. troops invaded, without cause, the Hawaiian Kingdom on 16 January 1893, Queen Lili‘uokalani conditionally surrendered to the United States and called for a Presidential investigation.

I, Liliuokalani, by the Grace of God, and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government. Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

Done at Honolulu this 17th day of January, A.D. 1893.

Liliuokalani, R.
Samuel Parker,
Minister of Foreign Affairs.
Wm. H. Cornwell,
Minister of Finance.
Jno. F. Colburn,
Minister of the Interior.
A.P. Peterson,
*Attorney General.*¹³

After receiving the conditional surrender, President Grover Cleveland initiated an investigation by appointing James Blount as Special Commissioner on 11 March 1893. In a dispatch from the Secretary of State Walter Gresham to Special Commissioner Blount the following was written:

¹³ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* 586 (1895) (hereafter “Executive Documents”).

The situation created in the Hawaiian Islands by the recent deposition of Queen Liliuokalani and the erection of a Provisional Government demands the fullest consideration of the President, and in order to obtain trustworthy information on the subject, as well as for the discharge of other duties herein specified, he has decided to dispatch you to the Hawaiian Islands as his special commissioner, in which capacity you will herewith receive a commission...¹⁴

Special Commissioner Blount initiated his investigation on 1 April 1893, where he provided periodic reports to the Secretary of State. On 17 July 1893, the Special Commissioner submitted his final report. These reports were a trove of provable evidence of the high crime of treason and United States' intervention, which included sworn testimonies. On 18 October 1893, the investigation was completed, and the Secretary of State reported to the President the findings of the Special Commissioner, which placed blame squarely on U.S. Minister John Stevens and Naval Captain Gilbert Wiltse, commander of the USS Boston "with evidence, documentary and oral, contained in Mr. Blount's reports."¹⁵

The Provisional Government was recognized 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. Mr. Steven's well-known hostility and the threatening presence of the force landed from the *Boston* was all that could then have excited serious apprehension in the minds of the Queen, her officers, and loyal supporters.¹⁶

...

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.¹⁷

A recent discovery of a note dated 17 January 1893, from Minister Stevens to Sanford Dole, the so-called President of the Provisional Government, that escaped the Special Commissioner's investigation of the records of the U.S. Legation in Honolulu, confirms Minister Stevens' premature recognition of the insurgents as a *de facto* government. Dole inquired:

¹⁴ *Id.*, 567.

¹⁵ *Id.*, 461.

¹⁶ *Id.*, 462.

¹⁷ *Id.*, 463.

Sir: I acknowledge the receipt of your valued communication of this day, recognizing the Hawaiian Provisional Government, and express deep appreciation of the same.

We have conferred with the ministers of the late government and have made demand upon the marshal to surrender the station house. We are not actually yet in possession of the station, but as night is approaching and our forces may be insufficient to maintain order, we request the immediate support of the United States forces, and would request that the commander of the United States forces take command of our military forces so that they may act together for the protection of the city.¹⁸

Minister Stevens responded, “Judge Dole: I would advise not to make known of my recognition of the de facto Provisional Government until said Government is in possession of the Police Station.”¹⁹ It appears that Minister Stevens did not make a copy of the note to Dole for the records of the U.S. Legation as he should have done, but unbeknownst to the Special Commissioner, the insurgency retained Minister Stevens’ note that was not discovered until 2017.²⁰ Special Commissioner Blount notified the Secretary of State on 19 July 1893, that he requested of Dole Minister Stevens’ response to Dole’s letter.²¹ In that communication, the Special Commissioner stated that his request of Dole “was several days ago and I presume I shall hear nothing further from him on the subject.”²² Dole never divulged Minister Stevens’ response to the Special Commissioner because it would have revealed what was gathered by Dole’s own letter to Minister Stevens and corroborating evidence of interviews and testimonies the fact that the recognition was premature and unlawful under international law.

“Premature recognition is a tortious act against the lawful government,” explains Lauterpacht, which “is a breach of international law.”²³ And according to Stowell, a “foreign state which intervenes in support of [insurgents] commits an act of war against the state to which it belongs, and steps outside the law of nations in time of peace.”²⁴ Furthermore, Stapleton concludes, “[o]f all the principles in the code of international law, the most important—the one which the independent existence of all weaker States must depend—is this: no State has a right forcibly to INTERFERE in the internal concerns of another State.”²⁵

¹⁸ *Id.*, 565.

¹⁹ Letter from United States Minister, John L. Stevens, to Sanford B. Dole, January 17, 1893, W.O. Smith Collection, HEA Archives, HMCS, Honolulu, available at <http://hmha.missionhouses.org/items/show/889>.

²⁰ David Keanu Sai, “Book Review of *Nation Within: The History of the American Occupation of Hawai‘i*,” 51 *Hawaii. J. Hist.* 186, 188 (2017) (“The Hawaiian Mission Houses Archives is processing a collection of documents given to them by a descendent of William O. Smith. Smith was an insurgent who served as the attorney general for Sanford Dole, so-called president of the provisional government. The “smoking gun” is a note to Dole signed by Stevens marked “private,” written under the letterhead of the “United States Legation” in Honolulu, and dated January 17, 1893”).

²¹ Executive Documents, 605.

²² *Id.*

²³ E. Lauterpacht, *Recognition in International Law* 95 (1947)

²⁴ Ellery C. Stowell, *Intervention in International Law* 349, n. 75 (1921).

²⁵ Augustus Granville Stapleton, *Intervention and Non-Intervention* 6 (1866).

Minister Stevens response to Dole also reveals that he intentionally misled Secretary of State John Foster. In a dispatch telegraphed to Minister Stevens dated 28 January 1893, from Washington, D.C., Secretary of State Foster stated, “[y]our course in recognizing an unopposed *de facto* government appears to have been discreet and in accordance with the facts. The rule of this government has uniformly been to recognize and enter into relation with any actual government in full possession of effective power with the assent of the people.”²⁶ President Cleveland, however, told the Congress:

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had...declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister’s recognition of the provisional government, and states that it is not yet in possession of the station house (the place where a large number of the Queen’s troops were quartered), though the same had been demanded of the Queen’s officers in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and 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, while the Committee of Safety, by actual search, had discovered that there were but very few arms in Honolulu that were not in the service of the Government.²⁷

In international law, a fundamental rule exists according to which diplomats have a duty to not intervene in the internal affairs of the sovereign State they are accredited to. Every sovereign State has a right “to establish, alter, or abolish, its own municipal constitution and form of government. ... And from the same course or reasoning, it will be inferred, that no foreign State can interfere with the exercise of this right, no matter what political or civil institutions such sovereign State may see fit to adopt for the government of its own subjects or citizens.”²⁸ For a foreign diplomat, a violation of this rule would have grave consequences. While diplomats enjoy diplomatic immunity from the courts of the territorial State, there are exceptions such as “offences committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country.”²⁹ And an offended State could proceed “against an ambassador as a public enemy...if justice should be refused by his own sovereign.”³⁰

²⁶ *Id.*, 1179.

²⁷ *Id.*, 453.

²⁸ Sherston Baker, *Halleck’s International Law*, vol. 1 94 (3rd ed. 1893).

²⁹ Henry Wheaton, *Elements of International Law* 301 (8th ed. 1866).

³⁰ *Id.*

Supplementing the general instructions given to U.S. Minister Albert Willis who was commissioned as the U.S. diplomat assigned to the Hawaiian Kingdom, Secretary of State Gresham stated,

After a patient examination of Mr. Blount's reports the President is satisfied that the movement against the Queen, if not instigated, was encouraged and supported by the representative of this Government at Honolulu; that he promised in advance to aid her enemies in an effort to overthrow the Hawaiian Government and set up by force a new government in its place; and that he kept his promise by causing a detachment of troops to be landed from the *Boston* on the 16th of January, and by recognizing the Provisional Government the next day when it was too feeble to defend itself and the constitutional government was able to successfully maintain its authority against any threatening force other than that of the United States already landed.

...

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination, making known to her the President's sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course of granting full amnesty to all who participated in the movement against her, including persons who are, or have been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All the obligations created by the Provisional Government in due course of administration should be assumed.³¹

At the first meeting between the Queen and Minister Willis on 13 November 1893, at the U.S. Legation in Honolulu, Willis explained the "President's sincere regret that, through the unlawful intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."³² He then asked the Queen, "Should you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government[?]."³³

³¹ Executive Documents, 464.

³² *Id.*, 1242.

³³ *Id.*

In this meeting, the Queen refused to grant amnesty and instead referred to “Chapter VI, section 9 of the Penal Code, as follows: Whoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government. There are, under this law, no degrees of treason. Plotting alone carries with it the death sentence.”³⁴ When asked again if she would reconsider, she responded, “these people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”³⁵

After several more meetings, however, the Queen, on 18 December 1893, agreed to the conditions of restoration. In her letter to Minister Willis, she stated:

Sir: Since I had the interview with you this morning I have given the most careful and conscientious thoughts as to my duty, and I now of my own free will give my conclusions.

I must not feel vengeful to any of my people. If I am restored by the United States I must forgive and forget the past, permitting no proscription or punishment of any one, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.³⁶

Willis dispatched the Queen’s agreement to the condition of restoration to the Secretary of State on 20 December 1893, stating the Queen “unreservedly consented, when restored as the constitutional sovereign, to grant amnesty and assume all obligations of the Provisional Government.”³⁷ President Cleveland, however, did not follow through with the United States’ obligation to restore the Queen under the treaty, which emboldened the insurgents’ unfettered control of Hawaiian territory and resources that has led to the commission of war crimes and crimes against humanity, in particular, denationalization, which had a devastating effect upon Hawaiian subjects. Denationalization is a war crime under customary international law but today, according to Professor William Schabas, it would “be prosecuted as the crime against humanity of persecution and, in the most extreme cases where physical ‘denationalization,’ genocide.”³⁸

In 1906, the Territory of Hawai‘i intentionally sought to “Americanize” the school children throughout the Hawaiian Islands. To accomplish this, they instituted a policy of denationalization. Under the policy titled “Programme for Patriotic Exercises in the Public Schools,” the national

³⁴ *Id.*, 1243.

³⁵ *Id.*, 1242.

³⁶ *Id.*, 1269.

³⁷ *Id.*

³⁸ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 161 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

language of Hawaiian was banned and replaced with the American language of English.³⁹ Young students who spoke the Hawaiian language in school were severely disciplined. One of the leading newspapers for the insurgents, who were now officials in the territorial regime, printed a story on the plan of denationalization. The *Hawaiian Gazette* reported:

As a means of inculcating patriotism in the schools, the Board of Education [of the territorial government] has agreed upon a plan of patriotic observance to be followed in the celebration of notable days in American history, this plan being a composite drawn from the several submitted by teachers in the department for the consideration of the Board. It will be remembered that at the time of the celebration of the birthday of Benjamin Franklin, an agitation was begun looking to a better observance of these notable national days in the schools, as tending to inculcate patriotism in a school population that needed that kind of teaching, perhaps, more than the mainland children do.⁴⁰

Within three generations since its implementation, the national consciousness of the Hawaiian Kingdom had become erased. This was the ultimate aim of the insurgency, which was evidenced in the record of a Council of State meeting of the so-called Republic of Hawai‘i in 1895. Samuel Damon, who served as the group’s Vice-President, stated, “[i]f we are ever to have peace and annexation the first thing to do is to obliterate the past.”⁴¹ According to Beamer, the events that occurred after 1893 “were not colonial; they were active attempts at obliterating Hawaiian nationalism. The goal was to replace all forms of Hawaiian nationality in the population with a new identity as something similar to colonial subjects.”⁴² As Gonschor accurately states, “American indoctrination of the people of Hawai‘i had profound negative consequences not only on Hawaiian culture and identity, but also on the islands’ historiography. As soon as the Missionary Party—or, as loyalist newspaper editor Edmund Norrie called them, the *American Mafia*—had taken the reins of power, they began to systemically rewrite the country’s history and obscure and discredit the achievements of the Hawaiian Kingdom (emphasis added).”⁴³

The investigation of “those persons who have been...in the Provisional Government, or who have been instrumental in the overthrow of [the] government” conducted by President Cleveland, provided clear and, as Coke remarked, “provable” evidence “by the testimony of two or more lawful witnesses” that the crime of high treason had been committed. As the President stated to the Congress, if it was not for “the landing of the United States forces upon false pretexts respecting the danger to life and property the [insurgents] would never have exposed themselves to the pains

³⁹ *Programme for Patriotic Exercises in the Public Schools*, Territory of Hawai‘i, adopted by the Department of Public (1906) (online at: http://hawaiiakingdom.org/pdf/1906_Patriotic_Exercises.pdf).

⁴⁰ *Patriotic Program for School Observance*, *Hawaiian Gazette* 5 (3 Apr. 1906) (online at http://hawaiiakingdom.org/pdf/Patriotic_Program_Article.pdf).

⁴¹ Kamanamaikalani Beamer, *No Mākou Ka Mana* 197 (2014).

⁴² *Id.*

⁴³ Lorenz Gonschor, *A Power in the World—The Hawaiian Kingdom in Oceania* 158 (2019).

and penalties of treason by undertaking the subversion of the Queen’s Government,”⁴⁴ and “if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable.”⁴⁵

Of the three modes of *attainting* a person or persons of the high crime of treason under English common law, the insurgents were *attainted* by “process” as evidenced in President Cleveland’s six-month investigation from 1 April to 18 October 1893, and acknowledged by Queen Lili‘uokalani in the *Agreement of Restoration* of 18 December 1893. The condition of the *Agreement of Restoration* for the Queen, after being restored to the throne, “to grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government,” presupposes that these persons were guilty of committing the high crime of treason, and, therefore, were *attainted*. According to Black’s Law Dictionary, amnesty is a “sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been *guilty of...treason*. ... Included in the concept of pardon is ‘amnesty,’ which is similar in all respects to a full pardon, insofar as when it is granted both the crime and punishment are abrogated; however, unlike pardons, an amnesty usually refers to a class of individuals irrespective of individual situations (emphasis added).”⁴⁶ The Queen, however, was not restored and, therefore, amnesty was not granted to those found guilty of treason by a “process.”

As a person who is *attainted* by a conviction of treason by a court of law whereby escheat occurs at the moment of the commission of the crime so that all intervening dealings with the property are avoided, escheat for a person *attainted* by a “process,” like a *bill of attainder* or the *Agreement of Restoration*, occurs at the moment of the commission of the crime as well. Section 9 of the treason statute states, “[w]hoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.” The term “property” in the statute includes both real and personal.

According to Thomas Tomlins, in the *Law-Dictionary explaining the Rise, Progress, and Present State of the British Law*, vol. 1 (1835), as “to *Corruption of Blood*, this operates upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king’s superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.” Therefore, all persons who were guilty of the crime of high treason, their real property escheated to the Hawaiian government, and their ownership to personal property vested in the Hawaiian government at the moment they committed

⁴⁴ Executive Documents, 455.

⁴⁵ *Id.*, 453.

⁴⁶ Black’s Law, 82-83.

the crime of treason since 17 January 1893 and suffers the pains and penalties from the effects of the doctrine of the *corruption of blood* thereafter.

PERSONS FOUND GUILTY OF THE HIGH CRIME OF TREASON BY PROCESS

When the insurgency, with the assistance of U.S. troops, seized control of the Executive and Judicial branches of government they began to search out and remove royalists from the government ranks. William O. Smith, the so-called Attorney-General, oversaw this process. On August 5, 1893, Deputy Sheriff Richard P. Hose of Maui stated in a letter to Smith:

I hereby informs [sic.] you that i have made and [sic.] investigation of all the Police Officers under my control this morning upon the information I received from you on April 20 and May 20 1893 relating to the identification of the Police to assist the Hawaiian Patriotic League and would say, to assure you, that I am well satisfied upon my investigation of them separately, that the information that you received to be true. And I find five of them did identified [sic.] themselves to support the Hawaiian Patriotic League and still forms [sic.] that opinions [sic.] which you will see by enclosed statements of each.⁴⁷

The royalists were eventually all removed from holding any offices or employment in the so-called Republic of Hawai‘i, and, therefore, the RCI will limit those persons who were found guilty of the high crime of treason by the aforementioned “process” to the leadership and officers of the Provisional Government and those holding offices in its successor the Republic of Hawai‘i in 1898.

The leadership of the Provisional Government is revealed in its proclamation of 17 January 1893:

We, citizens and residents of the Hawaiian Islands, organized and acting for the public safety and the common good, hereby proclaim as follows:

1. The Hawaiian Monarchical system of Government is hereby abrogated.
2. A Provisional Government for the control and management of public affairs and the protection of the public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.
3. Such Provisional Government shall consist of an Executive Council of Four Members, who are hereby declared to be

S.B. [Sanford Ballard] DOLE,

⁴⁷ Richard P. Hose to William O. Smith, August 5, 1893, Attorney General Letterbook, Hawai‘i State Archives, Honolulu.

J.A. [James Anderson] KING,
P.C. [Peter Cushman] JONES,
W.O. [William Owen] SMITH.

Who shall administer the Executive Departments of the Government, the first named as acting as President and Chairman of such Council and administering the Department of Foreign Affairs, and the others severally administering the Department of Interior, Finance and Attorney General, respectively, in the order in which they are above enumerated, according to existing Hawaiian Law as far as may be consistent with this Proclamation; and also of an Advisory Council, which shall consist of fourteen members, who are hereby declared to be

S. [Samuel] M. DAMON,
A. [Andrew] BROWN,
L.A. [Lorrin Andrews] THURSTON,
J.F. [James Francis] MORGAN,
J. [John] EMMELUTH,
H. [Henry] WATERHOUSE,
J. [John] A. McCANDLESS,
E.D. [Edward Davies] TENNEY,
F. [Frederick] W. McCHESNEY,
F. WILHELM,
W.R. [William Richards] CASTLE,
W.G. [William George] ASHLEY,
W.C. [William Chauncey] WILDER,
C. [Crister] BOLTE.

Such Advisory Council shall also have general legislative authority.

Such Executive and Advisory Councils shall, acting jointly, have power to remove any member of either Council and to fill such or any other vacancy.

4. All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named persons:

QUEEN LILIUOKALANI,
CHARLES B. WILSON, Marshal,
SAMUEL PARKER, Minister of Foreign Affairs,
W.H. CORNWELL, Minister of Finance,
JOHN F. COLBURN, Minister of the Interior,
ARTHUR P. PETERSON, Attorney-General,

Who are hereby removed from office.

5. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils.

(Signed) HENRY E. [Ernest] COOPER, Chairman,
ANDREW BROWN,
THEODORE F. LANSING,
JOHN EMMELUTH,
C. [Crister] BOLTE,
ED. [Edward] SUHR,
HENRY WATERHOUSE,
W.C. [William Chauncey] WILDER,
F. [Frederick] W. McCHESNEY,
WM. O. [William Owen] SMITH,
LORRIN A. [Andrews] THURSTON,
WM. R. [William Richards] CASTLE,
J.A. [John Andrew] McCANDLESS,
*Committee of Safety.*⁴⁸

Supreme Court Justices:

Albert Francis Judd, Chief Justice and Chancellor⁴⁹
Richard Frederick Bickerton, First Associate Justice⁵⁰
Walter Francis Frear, Second Associate Justice⁵¹
William Austin Whiting, Second Associate Justice⁵²

The *Hawaiian Gazette*, published by *The Hawaiian Gazette Company* (Ltd.), became the insurgents' newspaper that published the proclamation on 24 January 1893. The headline of the proclamation on the front page read "Citizens Rise and Seize the Government Building [...] The Monarchy Abrogated—Enthusiastic Volunteers Rally Round the New Government."⁵³ *The Hawaiian Gazette Company* (Ltd.) also published the *Pacific Commercial Advertiser*. On 31 January 1893, the *Hawaiian Gazette* published a Notice of "*A Brief History of the Revolution to be Issued*" that stated:

⁴⁸ Executive Documents, 210; see also Robert C. Lydecker, *Roster Legislatures of Hawaii 1841-1918: Constitutions of Monarchy and Republic—Speeches of Sovereigns and President 187* (1918).

⁴⁹ Thomas O. Thrum, *Hawaiian Almanac and Annual for 1894* 153 (1893).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Thomas O. Thrum, *Hawaiian Almanac and Annual for 1897* 168 (1897).

⁵³ *Hawaiian Gazette*, "The New Era! The Revolution Terminated by the Establishing of a Provisional Government," (24 Jan. 1893) (online at https://chroniclingamerica.loc.gov/data/batches/hihouml_damسل_ver01/data/sn83025121/00211108976/1893012401/0038.pdf).

The Hawaiian Gazette Co. has now in press an important publication which is destined to meet the hearty approval of the general public here and elsewhere. It is entitled “A Brief History of the Revolution,” and it will be issued in a convenient pamphlet form.

The unprecedented large sales of the *Advertiser* and the *Hawaiian Gazette*, both of which contained the only true and extended account of the late revolution is the cause of the new publication.⁵⁴

The actions taken by the insurgents, to include *The Hawaiian Gazette Company* (Ltd.), the *Hawaiian Gazette*, the *Pacific Commercial Advertiser*, and eye-witness accounts have been preserved in the President’s investigation that was based on the periodic reports of Special Commissioner Blount to Secretary of State Gresham. Additional insurgents that are not aforementioned served as members of the so-called Executive and Advisory Councils until 22 May 1895.⁵⁵ They included:

Executive Council

T.C. Porter (15 March 1893 – 29 May 1893)
F.M. [Francis March] Hatch (15 February 1894)

Advisory Council

William [Fessenden] Allen (18 January 1893 – 22 May 1895)
Cecil Brown (25 January 1893 – 25 October 1894)
Charles L. [Lunt] Carter (18 January 1893 – 18 January 1893)
Charles M. Cooke (18 January 1893 – 1 February 1893)
Frank A. Hosmer (16 January 1895 – 22 May 1895)
Jos. [Joseph] P. Mendonca (5 June 1893 – 22 May 1895)
John Nott (27 February 1893 – 22 May 1895)
David Bowers Smith (8 March 1894 – 22 May 1895)
C.B. Wood (16 January 1895 – 22 May 1895)
Alexander Young (18 January 1893 – 22 May 1895)

In the record of *Proceedings of the Executive and Advisory Councils of the Provisional Government of the Hawaiian Islands* dated 17 January 1893, it stated:

During the evening the Executive and Advisory Councils held a regular meeting. The advisability of sending Commissioners to Washington at once to negotiate a treaty of political union between the United States and Hawaii was thoroughly discussed. It was

⁵⁴ *Id.*, “Important Notice—A Brief History of the Revolution to be Issued,” (31 Jan. 1893) (online at https://chroniclingamerica.loc.gov/data/batches/hihouml_damsel_ver01/data/sn83025121/00211108976/1893013101/0051.pdf).

⁵⁵ Lydecker, 189.

moved and carried that the Steamer 'Claudine' should be chartered, and a committee of three, Messrs. L. A. Thurston, W. R. Castle and W. C. Wilder, should go to Washington for the aforesaid purpose.

The following day, it was "moved and carried that to the names of L. A. Thurston, W. R. Castle and W. C. Wilder Messrs. Charles L. Carter and Joseph Marsden be added as Commissioners to Washington, making a Committee of five." These individuals boarded the Claudine on 19 January and arrived in San Francisco on the 28th and in Washington, D.C., on 3 February. While in Washington, D.C., they were joined by William A. Kinney, Charles Reed Bishop, William N. Armstrong, Archibald Hopkins, and Dr. John Mott-Smith, who served as the insurgents' minister to Washington. On 14 February 1893 a treaty was signed by five of the so-called commissioners and John W. Foster, the Secretary of State. The treaty was, thereafter, submitted to the U.S. Senate for ratification. In a letter from Mott-Smith to Dole dated 25 February 1893, he wrote "Hon. Charles R. Bishop who has been in this city for three weeks left today for San Francisco. Mr. Bishop's advice, counsel and support have been valuable to the Commissioners."⁵⁶

U.S. President Benjamin Harrison's successor, Grover Cleveland, entered office on 4 March and withdrew the treaty from further consideration by the Senate on the 9th after receiving the Queen's conditional surrender. He appointed Blount as Special Commissioner on 11 March and delivered his message to the Congress on 18 December 1893. In his message, Cleveland explained:

I conceived it to be my duty therefore to withdraw the treaty from the Senate for examination, and meanwhile to cause an accurate, full, and impartial investigation to be made of the facts attending the subversion of the constitutional Government of Hawaii, and the installment in its place of the provisional government. I selected for the work of investigation the Hon. James H. Blount, of Georgia, whose service of eighteen years as a member of the House of Representatives, and whose experience as chairman of the Committee of Foreign Affairs in that body, and his consequent familiarity with international topics, joined with his high character and honorable reputation, seemed to render him peculiarly fitted for the duties entrusted to him. His report detailing his action under the instructions given to him and the conclusions derived from his investigation accompany this message.⁵⁷

The leader of the insurgency, Sanford B. Dole, stated that the provisional government "was organized for the administration of public affairs until such time as terms of union with United States of America should have been agreed upon. Unexpected delays in the consummation of such union having occurred, the Republic of Hawaii was organized and proclaimed on the 4th day of

⁵⁶ J. Mott Smith, Hawn Minister at Washington, D.C., to Sanford B. Dole, 25 Feb. 1893, Series 404-53-834: Hawn Officials Abroad: Washington D.C. Jan-May 1893, Hawai'i Archives (online at [https://hawaiiankingdom.org/pdf/Mott-Smith_to_Dole_\(2.25.1893\).pdf](https://hawaiiankingdom.org/pdf/Mott-Smith_to_Dole_(2.25.1893).pdf)).

⁵⁷ Executive Documents, 447.

July, A.D. 1894.”⁵⁸ Additional insurgents joined the leadership ranks by actively participating in the drafting of the so-called constitution and participating in its legislature.

*Participants of the Constitutional Convention*⁵⁹

Lemuel Clark Ables
Henry Perrin Baldwin
John Ena
Antonio Fernandes
William Horner
Jose Kekahuna Iosepa
David Haili Kahalelio
John William Kalua
John Kauhane
James Anderson King
Albert Kukailimoku Kunuiakea
Frederick S. Lyman
William Fawcett Pogue
William Hyde Rice
Alexander George Morison Robertson
Charles T. Rodgers
John Mark Vivas
Albert Spencer Wilcox
George Norton Wilcox

Senate and House of Representatives of the Republic of Hawaii ‘⁶⁰

W.C. Achi
A.T. Atkinson
E.C. Bond
J.F. Clay
J.C. Cluney
James Davis
A.V. Gear
W.P. Haia
L.K. Halualani
E.M. Hanuna
A. Hocking
H.L. Holstein
S.W. Kaai

⁵⁸ Lydecker, 237.

⁵⁹ *Id.*, 225-226.

⁶⁰ *Id.*, 231, 236, 239, 247.

S.K. Kaeo
G.P. Kamauoha
J.L. Kaulukou
James N.K. Keola
A.B. Lobenstein
W.D. McBryde
D.L. Naone
F. Northrup
C. Notley
A. Pali
J.D. Paris
E.E. Richards
R. Rycroft
E.C. Winston
J.N. Wright

The insurgents occupying offices in the so-called Republic of Hawai‘i are provided by *1898: Husted's Directory and Handbook of Honolulu and the Hawaiian Islands*, which is attached hereto as an appendix.⁶¹

EXECUTIVE DEPARTMENT

Executive Council

Sanford B. Dole, President of the Republic of Hawai‘i
Henry E. Cooper, Minister of Foreign Affairs
James A. King, Minister of the Interior
Samuel M. Damon, Minister of Finance
William O. Smith, Attorney-General

Council of State

Cecil Brown, John Ena, J.A. Kennedy, A.G.M. Robinson, P.C. Jones, John Nott, C. Bolte,
M.P. Robinson, S.K. Kane, John Phillips, J.L. Kaulukou, A.V. Gear, W.C. Achi, M.A.
Gonsalves, D.P.R. Isenberg

JUDICIARY DEPARTMENT

Supreme Court

Chief Justice, A.F. Judd
First Associate Justice, W.F. Frear
Second Associate Justice, W.A. Whiting
Clerk Judiciary Department, Henry Smith

⁶¹ *1898: Husted's Directory and Handbook of Honolulu and the Hawaiian Islands* xlvii-xlix (1898) (online at <https://evols.library.manoa.hawaii.edu/handle/10524/35849>).”

Circuit Judges

First Judge, First Circuit, O'ahu, Antonio Perry
Second Judge, First Circuit, O'ahu, Wm. F.L. Stanley
Second Circuit, Maui, J.W. Kalua
Third and Fourth Circuits, Hawai'i, G.K. Wilder
Fifth Circuit, Kaua'i, J. Hardy

Clerks of Supreme and Circuit Courts

H. Smith, ex-officio
First Clerk, First Circuit, O'ahu, George Lucas
Second Clerk, First Circuit, O'ahu, J.A. Thompson
Third Clerk, First Circuit, O'ahu, P.D. Kellett
Second Circuit, Maui, A.F. Tavares
Third and Fourth Circuits, Hawai'i, Daniel Porter
Fifth Circuit, Kaua'i, R.W.T. Purvis

Interpreters, etc.

Hawaiian, John E. Bush
Chinese, Li Cheung
Japanese, C.A. Doyle
Stenographers, J.W. Jones and P.M. McMahon

District Magistrates

W.L. Wilcox, Honolulu, O'ahu
C.F. Peterson (Deputy), Honolulu, O'ahu
S. Ho'okano, 'Ewa, O'ahu
J. Kekahuna, Waianae, O'ahu
William Rathburn, Ko'olaupoko, O'ahu
Edward Hore, Waialua, O'ahu
E.P. Aikue, Ko'olaupoko, O'ahu
W.A. McKay, Wailuku, Maui
D. Kahaulelio, Lahaina, Maui
P.N. Kahokuoluna, Makawao, Maui
J.K. Iosepa, Hana, Maui
J.K. Piimanu, Kipahulu, Hana, Maui
S.E. Kaleikau, Honuauia, Maui
J.H. Mahoe, Molokai
S. Kahoohalahala, Lanai
H.K. Kahele, Lihue, Kaua'i
Charles Blake, Koloa, Kaua'i
J.W. Lota, Hanalei, Kaua'i
J.K. Kapuniaia, Waimea, Kaua'i
David Kua, Kawaihau, Kaua'i

G.W.A. Hapai, Hilo, Hawai'i
Joseph P. Sisson (Deputy), Hilo, Hawai'i
R.H. Atkins, North Kohala, Hawai'i
S.M. Mahuka, South Kohala, Hawai'i
E.W. Barnard, North Hilo, Hawai'i
J.W. Moanauli, Hamakua, Hawai'i
William Kamau, Puna, Hawai'i
J.H. Waipuilani, Ka'u, Hawai'i
A. McWayne, North Kona, Hawai'i
T.H. Wright, South Kona, Hawai'i

DEPARTMENT OF FOREIGN AFFAIRS

Minister of Foreign Affairs, Henry E. Cooper
Secretary of Department, Major George C. Potter
Clerk of Department, A. St. M. Mackintosh

United States

Washington, D.C., Envoy Extraordinary and Minister Plenipotentiary, James B. Castle,
Charge d'Affaires and Secretary of Legation
New York, E.H. Allen, Consul-General
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and Wisconsin
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Port Townsend, James G. Swan, Consul
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Dover (and the Cinque Ports) Francis William Prescott, Consul
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Superintendent Water Works, A. Brown
Clerk of Water Works, J.W. Pratt
Electoral Registrar, Wray Taylor
Inspector Electric Lights, Sterns Buck
Road Supervisor, Honolulu, W.H. Cummings
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Physician Insane Asylum, Dr. G. Herbert

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Deputy Tax Assessor and Collector, O‘ahu, A.D. Thompson
Tax Assessor and Collector, Maui, C.H. Dickey
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Henry Davis, Deputy Postmaster and Secretary
E.R. Stackable, Savings Bank Department
F.B. Oat, Money Order Department
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H.S. Overend; South Kohala, Z. Paakiki; North Kohala, Charles H. Pulaa; North
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Hanalei, Kaua‘i, W.E.H. Deverill
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On 16 January 1895, John Harris Soper, Adjutant-General, by order of Sanford B. Dole, Commander-in-Chief, issued Special Order No. 25 establishing a Military Commission for the prosecution of Queen Lili‘uokalani and others for misprision of treason and treason.⁶² The Military Commission was comprised of Colonel William Austin Whiting, Lieutenant Colonel Joseph Henry Fisher, Captain Charles William Ziegler, Captain Joseph M. Camara, Jr., Captain J.W. Pratt, Captain William Chauncey Wilder, Jr., First Lieutenant J.W. Jones, and Captain William A. Kinney. On 11 February 1895, under Special Orders No. 31, Captain A.G.M. Robertson replaced Kinney who thereafter served as prosecutor of the Queen and others.⁶³ In the trial of the Queen, Albert Francis Judd, Chief Justice and Chancellor, served as an expert witness against the Queen. These individuals were the leaders of the military arm of the insurgency.

The following persons are guilty of the high crime of treason and have suffered the pains and penalties of *attainder* and the *corruption of blood* that was triggered on the day they committed the high crime:

Lemuel Clark Ables; W.C. Achi; H.L. Achilles; H.L. Adams; W.Y. Afong; L. Ahlborn; H.J. Ahu; P.J. Aiken; W.O. Aiken; E.P. Aikue; Thomas Aiu; D. Alawa; Sister M. Albina; E.H. Allen; George L. Allen; William Fessenden Allen; W.D. Alexander; L.F. Alvarez; T.K.R. Amalu; H.K. Anahu; Dickson Anderson; James Anderson; J. Anderson; J.F. Anderson; L.A. Andrews; R.W. Andrews; G. Armstrong; William N. Armstrong; S.W.K. Apua; F.K. Archer; William George Ashley; Joseph B. Atherton; R.H. Atkins; A.L.C.

⁶² The Daily Bulletin, *By Authority—Proclamation 2* (4 Feb. 1895) (online at https://chroniclingamerica.loc.gov/data/batches/hihouml_azure_ver01/data/sn82015415/00237284124/1895021101/0144.pdf).

⁶³ The Hawaiian Star, *Notice—Special Orders No. 31 2* (11 Feb. 1895) (online at https://chroniclingamerica.loc.gov/data/batches/hihouml_azure_ver01/data/sn82015415/00237284124/1895021101/0144.pdf).

Atkinson; A.T. Atkinson; B.C. Atkinson; L.S. Aungst; H.C. Austin; H.L. Austin; H.Z. Austin; J.H. Babcock; E.H. Bailey; E.D. Baldwin; Henry Perrin Baldwin; L.M. Baldwin; Manuel Jose Barbosa; J.H. Barenaba; E.W. Barnard; Robert James Barney; Sister M. Benedicta; Dwight Benton; Richard Frederick Bickerton; E. Biesterfeld; Charles Reed Bishop; C.H. Bishop; Charles Blake; J. Blanpain; Ernest de Boissac; Crister Bolte; Sister M. Bonaventure; E.C. Bond; F.A. Bonet; Geo. M. Boote; C. Borchgrevink; P.J. Bouwman; J. Bovey; W.A. Bowen; Edward S. Boyd; J.H. Boyd; T. Brandt; A.L. Bresler; James Bright; Cecil Robert Broad; H.H. Broadie; M. Bronc; A. Brown; A.B. Brown; Andrew Brown; A.M. Brown; Cecil Brown; B. Brown; B.H. Brown; H.H. Brown; Henry Brown; J.F. Brown; Robert H. Bruce; E.G.J. Bryant; A. Buckholtz; K. Buchholtz; Sterns Buck; J.K. Burkett; P.H. Burnette; John E. Bush; John Bush; George A. Cadell; Joseph M. Camara; J.M. Camara, Jr.; D. Campbell; J.T. Campbell; Victor J. Capron; J. Carden; A.W. Carter; F.W. Carter; Charles Lunt Carter; John H. Carter; V.A. Carvalho; James B. Castle; William Richards Castle; David Center; A. Chalmers; W. Chamberlain; Jules Chavasse; Li Cheung; S.F. Chillingworth; Byron O. Clark; G. Clark; J.F. Clay; Ed. F. Clements; J.C. Cluney; J. Coerper; George Collins; Wm. B. Colville; E.E. Conant; J.H. Coney; Charles M. Cooke; Henry Ernest Cooper; Audley Coote; E. Coppieters; Andrew Cox; H.G. Crabbe; Allan O. Crookshank; F.L. Crosby; Charles Crozier; W.H. Cummings; F.I. Cutter; Sister M. Cyrilla; F.B. Damon; Samuel M. Damon; A. da Silva Moreira; Miss Rose Davidson; James Davis; Robert H. Davis; G.A. Davis; Henry Davis; Chas. Davison; George B. Dawson; F.R. Day; Bernardo Machado de Faria Maia; E. de Harrie; Antonio C. de las Casas; Raphael de Luchi; F.T. de Navarra; A.F. de Serpa; H. Deacon; W.E.H. Deverill; George L. Desha; H. Dickenson; Mrs. A.E. Dickey; C.H. Dickey; Lyle A. Dickey; Mrs. B.F. Dillingham; W.F. Dillingham; Frank S. Dodge; E.P. Dole; Sanford Ballard Dole; H.M. Dow; C.A. Doyle; G.H. Dunn; J.E. Eldarts; J.S. Emerson; N.B. Emerson; John Emmeluth; John Ena; W.S. Endings; G.H. Fairchild; Charles J. Falk; J.K. Farley; W.J. Feary; W.P. Fennell; Wm. Fennell; Antonio Fernandes; N. Fernandez; Narciso T.M. Ferro; J.T. Figueredo; Joseph Henry Fisher; Wm. Fisher; Captain Fitzgerald; D. Forbes; W.J. Forbes; Victor Forge; T.C. Forsyth; Walter Francis Frear; Captain A. Fuller; J.L. Garcin; J.S. Garnett; J. Gasper; A.V. Gear; G.D. Gear; F.W. Gearde; Alexander George; J.B. Gibson; T.H. Gibson; W.J. Gillam; Gorham D. Gilman; J.W. Girvin; H.F. Glade; Chas. Goheir; H. Goldberg; M.A. Gonsalves; E.S. Goodhue; G.R.M. Graham; W.M. Graham; J. Greig; Col. W.J. De Gress; C.B. Greenfield; J. Grunwald; C.K. Haae; S. Haanio; S. Haanio, Jr.; W.P. Haia; R. Hall; L.K. Halualani; F. Halstead; J.B. Hanaike; E.M. Hanuna; G.W.A. Hapai; Henry Hapai; S.R. Hapuku; F.W. Hardy; J. Hardy; E.H. Hart; J.A. Hassinger; Francis March Hatch; J.K. Haupū; Hawaiian Gazette Company (Ltd.); Hawaiian Gazette; A.N. Hayselden; Geo. W. Hayselden; H.T. Hayselden; Mrs. T.L. Hayselden; Henry Hempell; William Henry; A. Herbert; George Herbert; G.C. Hewitt; A.W. Heydtmann; J. Hind; R. Hind, Jr.; D.H. Hitchcock; A.W. Hobson; A. Hocking; C.B. Hofguard; J. Holi; H. Holmes; H.L. Holstein; C.J. Holt; J. Holt; George Hons; S. Hookano; Wm. Hookuanui; Archibald Hopkins; Cyril Hopkins; Edward Hore; George Hore; William Y. Horner; W. Horner; Frank A. Hosmer; Alfred Houle; H.W. Howard; Dr. G. Herbert; Conrad Hughes; S. Hundley; S.N. Hundely; James H. Hunt; Geo. K. Hunukau; Ambrose Hutchinson; Curtiss P. Iaukea; J. Ikaika; Jose Kekahuna Iosepa; Sister M. Irene; A. Irvine; J.J. Bell Irving; R.W. Irwin; D.P.R. Isenberg;

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By being found guilty of the high crime of treason by “process,” the aforementioned insurgents have been *attainted* as a consequence of Hawaiian law. Therefore, “all the property of one attainted, real and personal, is forfeited [and has escheated to the Hawaiian government at the time the crime of treason was committed]; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him; ...and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches.”⁶⁴ On the subject of escheat, *Holdsworth: A Historical Introduction to the Land Law* (1935) says:

⁶⁴ Joel Prentiss Bishop, *Bishop on Criminal Law* §967, 716 (9th ed. 1923).

All land is held of some lord. That lord, or some one of his predecessors in title, is supposed to have given the land to the tenant, or some one of his predecessors in title. Therefore, if the tenant dies without heirs, it is only right that the lord should have back again that which he gave to the tenant. This is escheat *propter defectum sanguinis*. Similarly, if the tenant commits any gross breach of the feudal bond—commits, that is, a “felony” in the original sense of that term—the lord may take again that which he gave. This is escheat *propter delictum tenentis*. The right of escheat was thus a tenurial right, which was dependent upon the fact that the freehold had no tenant. Therefore it could only arise when a tenant in fee simple died without heirs or committed felony.⁶⁵

Black’s Law states that escheat is a “reversion of property”⁶⁶ that “arises by act of the law.”⁶⁷ Escheat does not require any physical act by the Hawaiian government to seize the property but rather escheat occurs as a consequence of being *attainted* in similar fashion as to how lands escheat to the Hawaiian government when a person dies without any heirs. Section 1451 of the Hawaiian Civil Codes provides, “[i]f the intestate leave no kindred, his estate *shall escheat* to the Hawaiian Government (emphasis added).”⁶⁸ The operative word is *shall*, which is by definition “mandatory.”⁶⁹ All real property throughout the Hawaiian Islands originates from the Hawaiian government that were acquired by a Land Commission Award or by a Patent in fee simple.⁷⁰

Some of the insurgents came to be known as the Big Five, a collection of five large businesses, that wielded considerable political and economic power after 1893 to benefit themselves. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Co., American Factors (now Amfac), and Theo H. Davies & Co. Other insurgents served in the United States proxy government of the Territory of Hawai‘i implementing policies and laws that ran contrary to the laws of the Hawaiian Kingdom and in violation of the international laws of occupation.



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

4 November 2022

⁶⁵ William Searle Holdsworth, *An Historical Introduction to the Land Law* 33 (1935).

⁶⁶ Black’s Law, 545.

⁶⁷ *Id.*, 1320.

⁶⁸ The Civil Code of the Hawaiian Islands §1451 (1884).

⁶⁹ Black’s Law, 1375.

⁷⁰ See Royal Commission of Inquiry, *Preliminary Report: Legal Status of Land Titles throughout the Realm* (July 16, 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).

Appendix

.. HUSTED'S ..

Directory and Hand-Book

OF

HONOLULU

AND THE

HAWAIIAN ISLANDS

GIVING

The Name, Occupation, Place of Business, and Residence of the
Adult Population of the Entire Islands,

ALSO

A Complete Classified Business Register of all the Islands,
with other Valuable Descriptive and
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THE HAWAIIAN ISLANDS.

xlvii

MAUI.

Haleakala	10,032	Mrs. C. H. Alexander's	2150
West Maui, about	5820	Puu Nianiau, Makawao	6850
Piiholo, Makawao	2256	Puu Kapuai, Hamakua	1150
Puu Io, near Ulupalakua	2841	Puu o Umi, Haiku	629
Ulupalakua, about	1800	Puu Pane, Kula	2568
Puu Olai, (Miller's Hill)	355	Lahainaluna Seminary	600
Makawao Female Seminary	1900	Kauiki, Hana	392
Grove Ranch, Makawao	981	"Sunnyside," Makawao	930
Puu Olai, near Makena	250	Paia Foreign Church, about	850

REPUBLIC OF HAWAII.

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Samuel M. Damon, Minister of Finance.
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Kipahulu, J. K. Nakila.

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Ix

THE HAWAIIAN ISLANDS.

MOLOKAI.

Molokai—Kalaupapa, Ambrose Hutchinson.
 Kamalo, D. McCorriston.

HAWAII.

North Kohala, D. S. Kahookano, C. H. Pulaa, S. H. K. Ne.
 South Kohala,
 Hamakua, J. W. Leonhart.
 Hilo, G. W. A. Hapai, B. B. Macy.
 Puna,
 Kau, C. Meinecke.
 Kona, D. Alawa, T. K. R. Amalu, J. W. Keliikoa.

KAUAI.

Koloa,
 Waimea,
 Lihue, S. W. Wilcox, J. B. Hanaike.
 Hanalei, E. G. J. Bryant.
 Niihau, J. B. Kaomea.

AGENTS TO GRANT MARRIAGE LICENSES.

HAWAII.

Hilo, J. H. Maby, V. A. Carvalho, L. Severance, H. H. Brown.
 North Hilo, L. E. Swain.
 Puna, H. E. Wilson, H. J. Lyman.
 Hamakua, J. W. Moanauli, J. W. Kapolohu, J. Kanakaoluna.
 North Kohala, H. K. Molale, William Wilson, J. S. Smithies,
 E. de Harrie J. A. M. Osorio.
 South Kohala, James Bright.
 North Kona, D. Alawa, S. Haanio, J. Kaelemakule.
 South Kona, D. W. Kanui, J. Holi, H. T. Mills, W. J. Wright.
 Kau, T. C. Willis, C. Meinecke.

MAUI.

Wailuku, G. Hons, S. E. Kaleikau, M. P. Waiwaiole, Agnes
 Kalua, W. E. Maikai, Geo. K. Hunukau.
 Makawao, T. K. Pa, H. Kawaimaka, J. Anderson, W. F. Moss-
 man.
 Hana, J. K. Iosepa, J. K. Saunders, Charles Lake, J. K. Nakila.
 Kaanapali, S. M. Sylva.
 Molokai, William Notley, D. Kailua, K. Kainuwai, H. Peelua.

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OAHU.

Honolulu, J. M. Vivas, Emma N. Nakuina, J. H. Boyd, J. M. Camara.
 Koolauloa, William Henry, M. Nakuaau.
 Koolaupoko, E. P. Aikue.
 Ewa and Waianae, H. D. Johnson, H. K. Meemanu, Mrs. Susan Kekela.

KAUAI.

Koloa, Edward Strehz.
 Kawaihau, H. Z. Austin, W. H. Williams, S. U. Kaneole.
 Hanalei, P. Nowlein, H. K. Anahu, S. N. K. Kakina.
 Waimea, S. E. Kaula.
 Niihau, J. B. Kaomea.
 Lihue, J. H. K. Kaiwi.

AGENTS TO ACKNOWLEDGE LABOR CONTRACTS.

OAHU.

Honolulu, J. A. Hassinger, J. Lucas, M. Keliiaa, Moses Keliiaa, H. G. Crabbe, Harriet E. Wilder.
 Waialua, S. H. Kalamakee.
 Ewa and Waianae, J. Kahoa, H. T. Taylor.

KAUAI.

Koloa, E. Strehz.
 Lihue, J. B. Hanaike.
 Kawaihau, J. M. Kealoha, S. Kaiu, H. L. Austin.
 Hanalei, J. W. Loka, J. Kakina.
 Waimea, C. D. Pringle, S. E. Kaula, J. H. Kapukui.

MAUI.

Makawao, F. W. Hardy.
 Hana, B. K. Kaiwiaeae, J. K. Nakila.
 Wailuku, S. E. Kaleikau, M. P. Waiwaiiole, D. Quill, A. N. Kepoikai, George Hons.
 Lahaina, T. C. Forsyth, L. M. Baldwin, H. Dickinson.

HAWAII.

Hilo, L. Severance, J. H. Maby, J. Mattoon, A. V. Carvalho.
 North Hilo, L. E. Swain.
 Kau, W. J. Yates, T. A. L. Wills.

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Hamakua, J. L. Kanakaoluna, Charles Williams.
North Kohala, D. S. Kahookano, G. P. Tulloch, S. W. Keku-
ewa.

South Kohala, James Bright.

North Kona, J. W. Smith, T. Aiu.

South Kona, W. J. Wright, H. T. Mills.

NOTARIES PUBLIC.

OAHU.

J. M. Monsarrat, J. A. Hassinger, W. J. Forbes, J. M. Camara, Jr., C. F. Peterson, Emma M. Nakuina, N. Fernandez, H. Holmes, W. L. Peterson, A. M. Brown, A. Perry, J. M. Vivas, W. G. Ashley, A. W. Carter, J. H. Barenaba, S. H. Kalamakee, C. A. Long, J. W. Girvin, W. M. Graham, J. M. Poe-poe, W. Henry, W. R. Castle, W. L. Stanley, A. B. Wood, R. C. A. Peterson, S. K. Ka-ne, C. A. Doyle, J. W. Jones, Harriet E. Wilder, G. A. Davis, J. H. Fisher, C. P. Iaukea, Miss Nellie M. Lowrey, J. A. Magoon, G. D. Gear, A. F. Tavares, E. A. Mott-Smith, J. K. Haupū, E. H. Hart, W. S. Edings, Lyle A. Dickey.

MAUI.

C. H. Dickey, W. F. Mossman, F. W. Hardy, J. H. Babcock, S. E. Kaleikau, P. N. Kahokuoluna, H. C. Ovenden, E. H. Bailey, M. P. Waiwaiole, J. H. S. Kaleo, George Hons, G. K. Kunukau, B. K. Kaiwiaea, G. H. Dunn, J. K. Saunders, H. T. Hayselden, A. N. Kepoikai, S. H. Kahauelio.

HAWAII.

J. S. Smithies, S. Haanio, Jr., J. Bright, G. P. Tulloch, W. P. Fennell, J. H. Waipuilani, D. H. Kahauelio, Thomas Aiu, T. W. Kekuewa, T. H. Wright, W. Vredenburg, H. J. Ahu, S. H. Mahuka, H. T. Mills, J. Greig, S. Lazaro, J. K. Nahale, A. W. Heydtmann, W. Hookuanui, D. Porter, E. W. Barnard, R. A. Lyman, D. H. Hitchcock, G. K. Wilder, C. Williams, R. W. Podmore, W. Horner, F. L. Winter, H. E. Wilson, F. M. Wakefield, Z. Paakiki, A. W. Hobson, S. W. Kekuewa, E. D. Baldwin, W. S. Wise, W. J. Rickard.

KAUAI.

W. E. H. Deverill, T. Brandt, E. Strehz, J. M. Kealoha, P. Nowlein, H. Z. Austin, Charles Blake, R. W. T. Purvis, C. H. Bishop, Z. Kakina, Edwin Omsted, J. W. Neal, E. J. G. Bryant.

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Puna, J. W. Mason, H. R. Rycroft, H. J. Lyman.
Kau, S. Kauhane, G. C. Hewitt, J. Ikaika.
Hamakua, A. Lidgate, J. Watt, D. Forbes.
North Kohala, J. Hind, G. F. Renton, R. Hall.
South Kohala, W. Vredenburg, J. Kauwe.
North Kona, G. Clark, J. Lenhart, J. K. Nahale.
South Kona, E. J. Wilson, S. Lazaro, K. Buchholtz.

MAUI.

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Wailuku, C. B. Wells, W. T. Robinson, L. M. Baldwin.
Hana, D. H. Napihaa, P. McLean, J. S. Garnett.
Makawao, C. H. Dickey, W. H. King, P. J. Aiken.
Molokai, D. McCorriston, G. Trimble, J. H. Mahoe.

OAHU.

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Koolaupoko, F. Pahia, D. M. Kapalau, E. P. Aikue.
Koolauloa, George Weight, W. Rathburn, M. Nakuaau.
Waialua, Edward Hore, H. Wharton, A. Cox.
Ewa and Waianae, J. T. Campbell, D. Center, W. J. Lowrie.

KAUAI.

Koloa, J. K. Farley, A. McBryde, M. Kaluna.
Lihue, J. H. K. Kaiwi, F. W. Carter, W. H. Rice.
Kawaihau, S. N. Hundley, D. Lovell, J. W. Neal.
Hanalei, C. H. Willis, J. Kakina.
Waimea, J. K. Kapuniaia, T. Brandt, E. E. Conant.
Niihau, J. B. Kaomea.

DEPARTMENT OF FINANCE.

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Registrar of Public Accounts, W. H. Wright.
Auditor-General, H. C. Austin.

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 Collector-General of Customs, F. B. McStocker.
 Clerk of Registrar, Henry Hapai.
 Tax Assessor and Collector, Oahu, Jona Shaw.
 Deputy Tax Assessor and Collector, Oahu, A. D. Thompson.
 Tax Assessor and Collector, Maui, C. H. Dickey.
 Tax Assessor and Collector, Hawaii, H. C. Austin.
 Tax Assessor and Collector, Kauai, J. K. Farley.
 Collector Port of Hilo, Geo. A. Turner.
 Collector Port of Kahului, E. H. Bailey.
 Collector Port of Lahaina,
 Collector Port of Mahukona, J. S. Smithies.
 Collector Port of Kealahakua,
 Collector Port of Kawaihae,
 Collector Port of Koloa, E. Strehz.
 Collector Port of Waimea, C. B. Hofgaard.
 Port Surveyor Kahului, J. W. L. Zumwalt.
 Port Surveyor, Hilo, Capt. Fitzgerald.

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 Deputy Collector, J. F. Clay.
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 Store Keepers, James J. Kelly, S. McKeague.
 Appraiser, Richard Weedon.
 Harbor Master, Capt. A. Fuller.
 Pilots—Captains M. N. Sanders, J. C. Lorenzen, A. Macauley.
 Port Surveyor, G. C. Stratemeyer.

THE NATIONAL TREASURY.

CURRENT ACCOUNT BALANCE SHEET FOR 1896-1897.

Cash on hand December 31, 1895. \$ 22,496 30

RECEIPTS.

Customs Revenue	\$1,365,388 87	
Taxes	1,458,547 83	
Internal Revenue	1,340,211 97	\$4,164,148 67

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THE HAWAIIAN ISLANDS.

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EXPENDITURES.

General Expenses...	\$3,330,523 80	
Interest on all Loans	479,951 71	
Matured Bonds Paid	18,100 00	
		\$3,828,575 51
Cash on hand December 31, 1897.	358,069 46	
		\$4,186,644 97
		\$4,186,644 97

LOAN FUND BALANCE SHEET FOR 1896 AND 1897.

Cash on hand December 31, 1895.	\$	46,729 46
---------------------------------	----	-----------

RECEIPTS.

Sale of Bonds.....	\$727,200 00	
Postal Savings Bank Deposits	151,156 27	
		878,356 27

EXPENDITURES.

Treasury Notes Paid..	\$ 58,000 00	
Postal Savings Bank Withdrawals	60,200 00	
Expenses placing loan, 1896	18,290 03	
Payments for Public Works	689,860 73	
		\$ 826,350 76
Cash on Hand December 31, 1897.	98,734 97	
		\$ 925,085 73
		\$ 925,085 73

GENERAL BALANCE SHEET FOR 1896 AND 1897.

Total Treasury Balance December 31, 1895	\$	69,225 76
---	----	-----------

RECEIPTS.

Current Account....	\$4,164,148 67	
Loan Fund.....	878,356 27	
		5,042,504 94



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THE HAWAIIAN ISLANDS.

EXPENDITURES.

Current Account....	\$3,828,575	51	
Loan Fund.....	826,350	76	
			\$4,654,926 27
Total Treasury Balance December			
31, 1897.....		456,804	43
			\$5,111,730 70
			\$5,111,730 70

LIST OF ANNUAL LICENSE FEES.

Agents	\$ 500	under \$20,000; when \$20,-	
Alcohol	50	000 or over $\frac{3}{8}$ per cent.	
Auction, 1 Honolulu.....	600	of the gross amount.	
Auction outer districts....	15	Hack, each passenger capa-	
Awa, 2 Honolulu.....	500	city	1
" Wailuku or Hilo, each	500	Horse, each.....	5
" Lahaina	250	Live stock, Honolulu.....	500
" outer districts.....	100	" " outer districts.	250
Banking	750	Livery Stable.....	50
Billiards, each table.....	25	Lodging and Tenement....	2
Bowling alley.....	25	Milk	2½
Boat, 4 oars.....	8	Physician	10
" 2 oars.....	4	Pork Butcher.....	20
Butcher	10	Public show, each perform-	
Cake Peddling.....	25	ance	5
Dray	2½	Salmon	10
Driver	1	Shipping	50
Drug, Honolulu.....	40	Spirit, wholesale or dealers	500
" other districts	20	" retail	1000
Fire Arms.....	5	Steam Laundry.....	50
Gen'l mdse, based on annual		Victualling	50
sales from \$50 for sales		Wine, Beer and Ale.....	200

1 Auction Licenses have an additional tax of $\frac{1}{2}$ per cent. on amount of sales.
 2 Awa Licenses are limited: 3 For Honolulu, 2 each for Lahaina, Wailuku and Hilo.
 If applications exceed the limit, they are then sold at public auction at the above upset price.

POST OFFICE DEPARTMENT.

- J. M. Oat, Postmaster-General.
- Henry Davis, Deputy Postmaster and Secretary.
- E. R. Stackable, Savings Bank Department.
- F. B. Oat, Money Order Department.
- L. T. Kenake, General Delivery Department.

HAWAIIAN ISLANDS POSTAL SERVICE.

General Postoffice, Honolulu, Oahu; Joseph M. Oat, Postmaster-General; Henry Davis, Secretary; E. R. Stackable, Superintendent Savings Bank Department; A. J. Smithies, Assistant; F. B. Oat, Superintendent Money Order Department;

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The general postoffice is located on the corner of Merchant and Bethel streets, Honolulu. Office open daily from 8 a. m. till 4 p. m. Closed on all Hawaiian holidays and Sundays.

On Sunday the postoffice will be open from 7 till 8 o'clock a. m. for the sorting and delivery of island mails arriving on that day.

On Saturday the office is closed at 1 o'clock p. m., except on the arrival or departure of a foreign mail steamer on the afternoon of that day.

Postage stamps of the following denominations can be purchased: 1, 2, 5, 10 and 25 cents. Also postal cards of 1 and 2 cents each.

All letters and newspapers sent abroad must be prepaid by Hawaiian stamps only, and should be sent only to the postoffice—not on board the steamers.

UNIVERSAL POSTAL UNION.

The following countries comprise the Universal Postal Union:

Argentine Republic, Australasia Colonies (British), Austria, Bagomoyo (German East Africa), Belgium, Bermuda, Bolivia, Brazil, British North Borneo, Bulgaria.

Cameroons, Canada, Ceylon, Chile, Colombia (U. S. of), Congo, Costa Rica, Cyprus.

Danish Colonies, Dar-es-Salaam (German East Africa), Denmark, Dutch Colonies.

Ecuador, Egypt.

Falkland Islands, France, French Colonies.

Gambia, Germany, Gibraltar, Gold Coast, Greece, Guatemala, Guiana (British).

Hawaii, Hayti, Holland, Honduras (British) Honduras (Republic of), Hongkong and British office in China, Hungary.

India (British), Italy.

Japan.

Labuan, Lagos, Liberia, Lindi (German East Africa), Luxemburg.

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Tanga (German East Africa), Togo (West Africa), Tunis, Turkey.
United Kingdom, United States of America, Uruguay.
Venezuela.
West Indies (British).

Letter rate postage to the above countries, 5 cents for each $\frac{1}{2}$ ounce or fraction. Newspapers, tubes, pamphlets, etc., 2 cents for each 2 ounces, excepting United States, Mexico and Canada, which is 1 cent for each 2 ounces or fraction.

RATES OF POSTAGE.

DOMESTIC.

Letters to any part of the Republic, for each half ounce	2 cents
Drop or city letters, or printed circulars, per $\frac{1}{2}$ oz. or fraction	1 cent
Unsealed printed circulars, to any part of the Republic, per 4 ozs., or fractions thereof	1 cent
Newspapers, printed in the Republic and sent from the office of publication to subscribers residing in the Republic	Free
Books, cards, photographs, etc., for each oz.	1 cent
Merchandise, samples of all kinds, for each ounce	1 cent
Newspapers, pamphlets, almanacs, calendars, handbills, magazines, maps, occasional and other publications (not bound) for each 4 ozs., or fraction thereof	1 cent
Registry fee, in addition to above charges	10 cents

RATES OF FOREIGN POSTAGE.

To United States, Canada, Mexico and Colonies, letters, each $\frac{1}{2}$ oz., or fraction	5 cents
Postal cards, each	2 cents
Commercial papers, each 2 ozs., or fraction (with a minimum charge of 5 cents)	2 cents
Books, each 2 ozs.	1 cent
Photographs, each 2 ozs.	1 cent
Newspapers, each 2 ozs.	1 cent
Registration fee in addition to above charges	10 cents
Registration fee with return receipts in addition to above charges	15 cents

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THE HAWAIIAN ISLANDS.

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Letters, each $\frac{1}{2}$ oz.....	5 cents
Postal cards, each.....	2 cents
Newspapers each 2 ozs., or fraction.....	2 cents
Photographs, each 2 ozs., or fraction.....	2 cents
Samples (Limit of weight 12 oz., limit of size 12x8x4), each 2 oz.....	2 cents
Registration fee in addition to above charges.....	10 cents
Registration fee with return receipts in addition to above charges.....	15 cents

All liquids, explosives and articles liable to damage the mails, are strictly prohibited being posted.

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Domestic postal money orders are furnished on application at any of the following money order offices, payable at any other money order office named below.

On Hawaii—Hilo, Kohala, Honokaa, Waimea, Kealakekua, Waiohinu, Pahala, Paauilo, Kukuihaele, Hookena, Kailua, Laupahoehoe, Ookala, Mahukona, Naalehu, Hakalau, Pohiki.

On Maui—Lahaina, Wailuku, Hamakuapoko, Hana, Makawao, Paia, Kipahulu, Hamoa, Ulupalakua. On Molokai—Kaunakakai and Kamalo.

On Oahu—Honolulu, Waianae, Waiialua, Kahuku, Heeia and Honouliuli.

On Kauai—Lihue, Koloa, Waimea, Kealia, Hanalei, Makaweli, Kekaha and Mana.

Foreign money orders are issued on written application, at the general Post Office in Honolulu, on the United States, England, Scotland, Ireland, Portugal, including Madeira and Azores Islands, Germany, Norway, Netherlands, Denmark, China and Hongkong.

Postal Money Order Rates.

Inter-Island Denominations.	Inter-Island or Domestic.	Foreign Denominations.	Orders on U. S.	Orders on Eng. Ger. Portugal and Hongkong.
Orders not over \$ 5	5 cents	Not exceeding \$5	25 cts.	25 cts.
Over \$ 5, not over 10	10 "	\$ 5 to \$10	40 "	40 "
Over 10, not over 15	15 "	10 to 20	60 "	70 "
Over 15, not over 20	20 "	20 to 30	80 "	1 00
Over 20, not over 50	25 "	30 to 40	1 00	1 30
Over 50, not over 500	25c for ea \$50	40 to 50	1 25	1 60

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Holbrook, Merrill & Stetson

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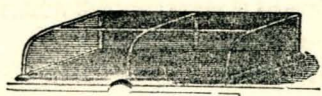
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Enclosure “10”

WAR CRIMINAL REPORT NO. 22-0005

The War Crime of Usurpation of Sovereignty during Occupation

THE ROYAL COMMISSION OF INQUIRY:

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

Dr. David Keanu Sai, Ph.D.

HEAD, ROYAL COMMISSION OF INQUIRY

Dr. Federico Lenzerini, Ph.D.

DEPUTY HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0005

GUILTY OF WAR CRIME: DAVID YUTAKE IGE as Governor of the State of Hawai‘i
TY NOHARA as Commissioner of Securities of the State of Hawai‘i
ISAAC W. CHOY as Director of the Department of Taxation of the State of Hawai‘i

WAR CRIME COMMITTED: *Usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll¹

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry (“RCI”) on the war crime of *usurpation of sovereignty during military occupation* under “particular” customary international law addresses the actions and omissions taken by David Yutake Ige as Governor of the State of Hawai‘i (“Governor Ige”), Ty Nohara as Commissioner of Securities of the State of Hawai‘i (“Commissioner Nohara”), and Isaac W. Choy as Director of the Department of Taxation of the State of Hawai‘i (“Director Choy”) whose jurisdiction extends over the islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll. This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,² that has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.³

¹ See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.

² Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).

³ Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf); see also Proclamation of the Council of Regency of 17 April 2019 establishing the Royal Commission of Inquiry (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 (“1907 Hague Regulations”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (“Fourth Geneva Convention”).⁴ All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are imposed upon an occupying power. Only the Fourth Geneva Convention contains provisions that can be described as penal or criminal, by which responsibility is imposed upon individuals. Article 147 of the Fourth Geneva Convention provides a list of *grave breaches*, that is, violations of the Convention that incur individual criminal responsibility and that are known colloquially as *war crimes*: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

According to Schindler, “the existence of an [international] armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. ... Any kind of use of arms between two States brings the Conventions into effect.”⁵ Casey-Maslen further concludes that an international armed conflict “also exists whenever one state uses any form of armed force against another state, irrespective of whether the latter state fights back.”⁶

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops “supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies.”⁷ President Grover Cleveland determined that the invasion “upon the soil of Honolulu was ... an act of war,”⁸ which coerced Queen Lili‘uokalani, executive monarch of the

⁴ The Royal Commission of Inquiry’s governing law as to war crimes under particular customary international law is drawn from Professor William Schabas’ legal opinion on war crimes. See William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁵ Dietrich Schindler, “The different types of armed conflicts according to the Geneva Conventions and Protocols,” *Recueil des cours, Hague Academy of International Law* 131 (1979).

⁶ Stuart Casey-Maslen, ed., “Armed conflicts in 2012 and their impacts,” in *The War Report 2012* 7 (2013).

⁷ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* 451 (1895) (online at <http://libweb.hawaii.edu/digicoll/annexation/blount.php>).

⁸ *Id.*

Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, “Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.”⁹

Military occupation stems from an international armed conflict under international humanitarian law and the law of occupation is triggered when the occupying State is in effective control of territory of the occupied State pursuant to Article 42 of the 1907 Hague Regulations. By virtue of the conditional surrender on the 17th, the United States came into effective control of Hawaiian territory pending a treaty of peace. There is no treaty of peace, and the occupation became prolonged.

There are other treaties that codify war crimes relevant to the conduct of an occupying Power but these have not been ratified by the United States. This notwithstanding, the United States is bound by the pre-existing rules of customary international law corresponding to the following article. Article 85 of the first Additional Protocol to the Geneva Conventions of 1977 defines the following as *grave breaches*, producing individual criminal responsibility when perpetrated against “persons in the power of an adverse Party,” including situations of occupation:

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

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

⁹ *Id.*, 586.

As previously noted, in addition to crimes listed in applicable treaties, war crimes are also prohibited by customary international law. Customary international law applies generally to States regardless of whether they have ratified relevant treaties. The customary law of war crimes is thus applicable to the situation in Hawai‘i. Many of the war crimes set out in the first Additional Protocol and in the Rome Statute codify pre-existing customary international law and are therefore applicable to the United States despite its failure to ratify the relevant treaties.

Crimes under general customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.¹⁰ Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.¹¹ Article 11(2) of the Universal Declaration of Human Rights states that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.” Applying this provision or texts derived from it, tribunals have recognized “a penal offence, under national or international law” where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over “violations of the laws or customs of war.” Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in Security Council Resolution 827, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private

¹⁰ See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).

¹¹ See ICRC concerning the identification of rules of customary international humanitarian law (online at <https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf>; and <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>).

property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.¹²

The Appeals Chamber of the International Criminal Tribunal explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to incur individual criminal responsibility, the Tribunal said that the “violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.”¹³ As an example of a violation that would not be serious enough, it provided the example of the appropriation of a loaf of bread belonging to a private individual by a combatant in occupied territory. It said that to meet the threshold of seriousness, it was not necessary for violations to result in death or physical injury, or even the risk thereof, although breaches of rules protecting important values often result in distress and anxiety for the victims.¹⁴ Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,¹⁵ there is no authority to support this rule being considered a war crime for which individuals are punishable. Moreover, the incidents of coerced swearing of allegiance in Hawai‘i appear to date to the late nineteenth century, making criminal prosecution today entirely theoretical, as explained further below.

Evidence of recognition of crimes under general customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of “violations of the laws and customs of war” was developed by the Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions of 1899 and 1907, although the preparatory work does not provide any precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was “not regarded as complete and exhaustive.”¹⁶ The Commission was especially concerned with acts perpetrated in occupied territories against non-

¹² *Prosecutor v. Brdanin*, Judgment of 1 September 2004 (Trial Chamber II), para. 595, and in *Prosecutor v. Strugar*, judgment of 31 January 2005 (Trial Chamber II), para. 229.

¹³ *Kunarac, Kovac and Vokovic*, (Appeals Chamber), para. 66 (12 June 2002), “Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”

¹⁴ *Prosecutor v. Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).

¹⁵ 1907 Hague Regulations, 3 *Martens Nouveau Recueil* (3d) 461, Art. 45. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988.

¹⁶ Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919 18 (1919) (“Commission of Responsibilities”).

combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

- Murders and massacres; systematic terrorism.
- Torture of civilians.
- Deliberate starvation of civilians.
- Rape.
- Abduction of girls and women for the purpose of enforced prostitution.
- Deportation of civilians.
- Internment of civilians under inhuman conditions.
- Forced labour of civilians in connection with the military operations of the enemy.
- Usurpation of sovereignty during military occupation.
- Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- Attempts to denationalize the inhabitants of occupied territory.
- Pillage.
- Confiscation of property.
- Exaction of illegitimate or of exorbitant contributions and regulations.
- Debasement of the currency, and issue of spurious currency.
- Imposition of collective penalties.
- Wanton destruction of religious, charitable, educational, and historic buildings and monuments.¹⁷

Temporal issues

As a preliminary matter, two temporal issues require attention. First, international criminal law, like criminal law in general, is a dynamic phenomenon. Conduct that may not have been criminal at a certain time can become so, reflecting changing values and social development, just as certain acts may be decriminalized. It is today widely recognized that the recruitment and active use of child soldiers is an international crime. A century ago, the practice was not necessarily viewed in the same way. There is no indication of prosecution of child soldier offences relating to the Second World War, for example. Similarly, some acts that were once prohibited and that might even be viewed as criminal are now accepted as features of modern warfare.

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁸ Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Since the RCI’s establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or

¹⁷ Commission of Responsibilities, 17-18

¹⁸ *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary international law.¹⁹ The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.²⁰ In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that “under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.”²¹

War Crime of Usurpation of Sovereignty during Military Occupation

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

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the Bolshevik hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and administration ousted;” “Taxes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library,

¹⁹ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d’information déposé en application de l’article 145 du Règlement par la Mission d’information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d’autres pays et l’ONU au Rwanda entre 1990 et 1994*, 286 (1999).

²⁰ United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

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

Serbian Legation at Sofia, French Consulate at Uskub);” “Prohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.,” “Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”²²

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that “[t]his rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.”²³ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.²⁴ In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.²⁵

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

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

²² Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

²³ *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

²⁴ Major Harold D. Cunningham, Jr., “Civil Affairs—A Suggested Legal Approach,” *Military Law Review* 115-137, 127, n. 33 (1960).

²⁵ Australia’s War Crimes Act of 1945, *Annex—Australian Law Concerning Trials of War Criminals by Military Courts* (online at <https://www.legal-tools.org/doc/45b4ed/pdf/>).

The Commentary to the Fourth Geneva Convention describes Article 64 as giving “a more precise and detailed form” to Article 43 of the Hague Regulations.²⁶

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under “particular” customary international law. According to the International Law Commission, “[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”²⁷ In the 1919 report of the Commission on Responsibilities, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission’s position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.²⁸

The RCI views *usurpation of sovereignty during military occupation* as a war crime under “particular” customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Thailand, Czech Republic, formerly known as Czechoslovakia, and Uruguay.²⁹

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.”³⁰ The Court also concluded that “[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction.”³¹ The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied Spanish territories. The Court

²⁶ Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).

²⁷ Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

²⁸ Commission of Responsibilities, Annex II, 58-79.

²⁹ Treaty of Versailles (1919), preamble.

³⁰ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

³¹ *The Apollon*, 22 U.S. 362, 370 (1824).

restated General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. ... Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.³²

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also serves as a source for the commission of other war crimes within the territory of an occupied State, *i.e.* *compulsory enlistment, denationalization, pillage, destruction of property, deprivation of fair and regular trial, deporting civilians of the occupied territory, and transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions of the occupying State is addressed by Professor Eyal Benvenisti:

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.³³

Usurpation of sovereignty during military occupation came before the Permanent Court of Arbitration (“PCA”) in 1999. In *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration convened an arbitral tribunal to resolve a dispute where Larsen, the claimant, alleged that the Government of the Hawaiian Kingdom, by its Council of Regency, the respondent, was liable “for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom.”³⁴ The PCA accepted the case as a dispute between a “State” and a “private party” and acknowledged the Hawaiian Kingdom to be a non-

³² *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

³³ Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

³⁴ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (<https://pca-cpa.org/en/cases/35/>). Regarding the Permanent Court of Arbitration’s institutional jurisdiction in acknowledging the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 PCA Convention, see David Keanu Sai, “Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001),” 4 *Hawaiian Journal of Law and Politics* 133 (2022).

Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done “Pursuant to article 47 of the 1907 Convention.”³⁵ According to Bederman and Hilbert:

At the center of the PCA proceeding was the argument that ... the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States’ “unlawful imposition [over him] of [its] municipal laws” through its political subdivision, the State of Hawai‘i [and its County of Hawai‘i].³⁶

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but their denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.³⁷ The Tribunal explained that it “could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.”³⁸ Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the situation of Hawai‘i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. It might be argued that *usurpation of sovereignty* is a continuing offence, committed as long as the *usurpation of sovereignty* persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is “characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred.” Therefore, it is not “an

³⁵ Permanent Court of Arbitration, Annual Reports, <https://pca-cpa.org/en/about/annual-reports/>.

³⁶ David J. Bederman and Kurt R. Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii,” 95 *American Journal of International Law* 927-933, 928 (2001).

³⁷ David Keanu Sai, “Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 25-26 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

³⁸ *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

‘instantaneous’ act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.”³⁹

The RCI views that it is an ongoing crime; the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power is therefore entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.⁴⁰ The occupying Power is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

This report has examined the application of the international law on the war crime of *usurpation of sovereignty during military occupation* as a result the United States occupation of the Hawaiian Kingdom since 17 January 1893. It has identified the sources of this body of law in both treaty and custom, and described the two elements—*actus reus* and *mens rea*—with respect to the international crime of *usurpation of sovereignty during military occupation*.

The Elements of Crimes is one of the legal instruments applicable to the International Criminal Court. The initial draft of the Elements was prepared by the United States, which participated actively in negotiating the final text and joined the consensus when the text was finalized. This instrument provides a useful template for summarizing the *actus reus* and *mens rea* of international crimes.

It has been relied upon in producing the following summary of the crimes discussed in this report:

With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation*:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

³⁹ *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

⁴⁰ Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”

Elements of the *war crime of usurpation of sovereignty during military occupation*:

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with a military occupation.
4. The perpetrator was aware of factual circumstances that established the existence of the military occupation.

Ascertaining the Mens Rea

The elements of war crimes describe their material scope of application as well as the accompanying mental elements. The first common element states that “[t]he conduct took place in the context of and was associated with [a military] occupation.” This is to discern the conduct of war crimes from the conduct of ordinary crimes. As stated by the Appeals Chamber of the ICTY, “international humanitarian law applies from the initiation of ... armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”⁴¹

The second common element provides that the perpetrator must be aware of factual circumstances that established the existence of a military occupation. In order to meet this particular element of awareness, which in a normal situation would be obvious, further explanation is necessary given the unique situation of the American occupation and the devastating effect of the war crime of denationalization had upon the population of the Hawaiian Kingdom since the beginning of the twentieth century. This denationalization through *Americanization* led to the false belief that the Hawaiian Islands were not under a prolonged American occupation since 17 January 1893, but rather had become an incorporated territory of the United States in 1898 during the Spanish-American War. Chapter 2 of *The Royal Commission of Inquiry: Investigating War Crimes and*

⁴¹ *Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Decision on the defense motion for interlocutory appeal on jurisdiction, IT-94-1-AR72, para. 70 (2 Oct. 1995).

Human Rights Violations in the Hawaiian Kingdom provides a comprehensive and historical narrative that rectifies this false information.⁴²

In 1906, the United States, as the occupying State, implemented a policy of *Americanization* through its proxy the Territory of Hawai‘i, which was the successor of its puppet government called the provisional government who later changed its name to the so-called Republic of Hawai‘i.⁴³ Called *Programme for Patriotic Exercises*, the purpose of this policy was to obliterate the national consciousness of the Hawaiian Kingdom in the minds of school children throughout the islands in order to conceal the occupation in the minds of future generations. The purpose of this policy was to inculcate the children into believing they were nationals of the United States and to speak in the American English language. If the children spoke in the national language of Hawaiian, they were severely punished. Within three generations, the national consciousness and history of the Hawaiian Kingdom had become obliterated and awareness of the American occupation was erased. However, due to the decision of the Council of Regency, after returning from arbitral proceedings at the Permanent Court of Arbitration in December of 2000, to counter the effects of denationalization through academic research, publications and classroom instruction at the University of Hawai‘i at Manoa, the awareness of the American occupation soon became widespread.⁴⁴

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the occupation. In light of the effects of *Americanization* through denationalization, a change in awareness of the United States occupation by the accused must be evidence based.

The element of awareness is not an outcome of a moral or legal conclusion on the part of the accused. As the International Criminal Court’s Pre-Trial Chamber stated, “it is not necessary for the perpetrator to have made the necessary value judgment to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.”⁴⁵ While there is, however, “only a requirement for the awareness of the factual circumstances,” the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, e.g. court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because

⁴² David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 97-121 (2020).

⁴³ *Id.*, 114.

⁴⁴ Sai, “The Royal Commission of Inquiry,” 29-33.

⁴⁵ *Prosecutor v. Germain Katanga et al.*, ICC Pre-Trial Chamber, Decision on the confirmation of charges, ICC-01/04-01/07, para. 305 (30 Sep. 2008).

in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.⁴⁶

For the purpose of determining the severity of culpable mental states—*mens rea*, the RCI adopts Professor Mohamed Badar’s recommendations of *dolus directus* of the first degree, *dolus directus* of the second degree, and *dolus eventualis*.⁴⁷ According to Professor Badar:

[...] *Dolus directus* of the first degree

[T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result. *Dolus directus* of the first degree is also defined as a ‘purpose-bound will’. It is irrelevant in this type of intent whether the intended result is the defendant’s final goal or just a necessary interim goal in order to achieve the final one.

[...] *Dolus directus* of the second degree

In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator’s primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.

[...] *Dolus eventualis*

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides

⁴⁶ Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, 107 Stat. 1510 (Public Law 103-150—Nov. 23, 1993) (online at https://hawaiiankingdom.org/pdf/1993_Apology_Resolution.pdf). See also Annexure 2, Arbitral Award, Larsen v. Hawaiian Kingdom, 119 International Law Reports 566, 610-615 (2001).

⁴⁷ Mohamed Elewa Badar, The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach 535-537 (2013).

further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject matter jurisdiction of the International Criminal Court. According to the Lubanga Pre-Trial Chamber, *dolus eventualis* encompasses,

Situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.

Dolus eventualis must be distinguished from the common law notion of recklessness. The former requires not only that the perpetrator is aware of the risk, but that he accepts the possibility of its occurrence (volitive element). Unlike *dolus eventualis*, recklessness requires an affirmative aversion to the harmful side effect. This position is supported by a recent judgment of the International Criminal Tribunal for the Former Yugoslavia in which the *Orić* Trial Chamber agreed with the defense submission that intent does not include recklessness.

Dolus eventualis, as perceived by Fletcher, is defined as ‘a particular subjective posture toward the result. The tests ... vary; the possibilities include everything from being indifferent to the result, to “being reconciled” with the result as a possible cost of attaining one’s goal’. However, the present author is of the opinion that in the sphere of international criminal law *dolus eventualis* must be interpreted as a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence. This element of acceptance brings *dolus eventualis* within the contour of intention in its broader sense and ruled out the common law recklessness as a culpable mental state under Article 30 of the ICC Statute.⁴⁸

The RCI will confine its inquiry into the aforementioned war crimes together with the requisite material elements in order to categorize the mental element of *mens rea* as either *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*.

APPLICATION

The Council of Regency’s strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and

⁴⁸ *Id.*

satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the author of this report entered the Political Science graduate program, where he received a master’s degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master’s theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i*,⁴⁹ to *Nation Within—The History of the American Occupation of Hawai‘i*.⁵⁰ Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book’s subtitle, the word Annexation has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, “The challenge for ... the fields of political science, history, and law is to distinguish between the rule of law and the politics of power.” In the history of the Hawai‘i, the might of the United States does not make it right.⁵¹

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i dated 25 February 2018.⁵² Dr. deZayas stated:

As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, *The United Nations Human Rights Committee Case Law 1977-2008*, and currently serving as the UN Independent Expert on the promotion of a

⁴⁹ Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i* (1998).

⁵⁰ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

⁵¹ *Id.*, xvi.

⁵² Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

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

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁵³ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁵⁴

In a letter to Governor Ige dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency’s proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency’s proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that

⁵³ Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at <https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf>).

⁵⁴ National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/>).

comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and accredited to participate in the Human Rights Council’s sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁵⁵ In its resolution, the IADL also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”), who is also a non-governmental organization with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council’s sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁵⁶ In its joint letter, the AAJ also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

On 22 March 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council at its 49th session in Geneva. The oral statement read:

The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

⁵⁵ International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at <https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/>).

⁵⁶ International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at <https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/>).

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

Notwithstanding the aforementioned actions taken to seek compliance with international humanitarian law and the law of occupation, the United States, the State of Hawai'i, and its Counties refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Governor Ige, Commissioner Nohara, and Director Choy who were named as defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai'i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al.*⁵⁷ The complaint sought the Court to:

- a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI'I and its Counties, to include the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
- b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI'I and its Counties, to include the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
- c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN

⁵⁷ Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at [https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_\(2021\)_with_Exhibits.pdf](https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf).)

- KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
- d. Award such additional relief as the interests of justice may require.

Preliminary to the court’s consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the “court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA.”⁵⁸ Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.⁵⁹ According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.⁶⁰ “Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops.”⁶¹

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Governor Ige, Commissioner Nohara, and Director Choy filed a motion to dismiss on 10 November 2022.⁶² In their motion to dismiss, Governor Ige, Commissioner Nohara, and Director Choy acknowledged the factual circumstances that established the existence of the military occupation. In their memorandum in support of their motion to dismiss, they stated:

On May 20, 2021, Plaintiff, Hawaiian Kingdom (“Plaintiff”), filed its Complaint seeking an order from this Court granting declaratory and injunctive relief against multiple international, federal and state governmental defendants. ECF No. 1 Plaintiff is seeking, among other relief, an order (1) declaring that all laws of the United States and the State of Hawaii, and the maintenance of the United States’ military installations are unauthorized and contrary to the constitution and treaties of the United States; and (2) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawaii, and enjoining the maintenance of the United States’ military installations across the territory of the “Hawaiian Kingdom.”

⁵⁸ *Id.*, para. 3.

⁵⁹ David J. Bederman, “Article II Courts,” 44 *Mercer Law Review* 825-879 (1992-1993).

⁶⁰ *Id.*, 837.

⁶¹ *Id.*, 849.

⁶² Defendants David Yutake Ige, in his official capacity as Governor of the State of Hawai‘i, Ty Nohara, in her official capacity as Commissioner of Securities, Isaac W. Choy, in his official capacity as the Director of the Department of Taxation of the State of Hawai‘i, and State of Hawaii’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief, filed on August 11, 2021 (10 November 2022) [ECF 262] (online at [https://hawaiiankingdom.org/pdf/\[ECF 262\] SOH's Motion to Dismiss \(Filed 2022-11-10\).pdf](https://hawaiiankingdom.org/pdf/[ECF 262] SOH's Motion to Dismiss (Filed 2022-11-10).pdf)).

Plaintiff filed its Amended Complaint on August 11, 2021. ECF No. 55 Relevant to the State Defendants, the relief requested in the Amended Complaint was an order (1) declaring that all laws of the United States and the State of Hawai‘i, and the maintenance of the United States’ military installations are unauthorized and contrary to the constitution and treaties of the United States; (2) declaring that the Supremacy Clause prohibits the State of Hawai‘i from interfering with the United States’ “explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM;” and (3) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawai‘i, and enjoining the maintenance of the United States’ military installations across the territory of the “Hawaiian Kingdom.”⁶³

Governor Ige, Commissioner Nohara, and Director Choy, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for his dismissal before a court that doesn’t have jurisdiction in the first place. Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. As explained by Judge James Crawford, “[t]here is a presumption that the State continues to exist, with its right and obligations ... despite a period in which there is ... no effective government.”⁶⁴ Judge Crawford further concludes that “[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State.”⁶⁵ “If one were to speak about a presumption of continuity,” explains Craven, “one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.”⁶⁶

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Governor Ige, Commissioner Nohara, and Director Choy is evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is “clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom.” At the time of their admissions to the date of this report, Governor Ige, Commissioner Nohara, and Director Choy continued to enforce American laws throughout the islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau,

⁶³ Memorandum in Support of Motion [ECF 262-1] (10 November 2022), 4-5 (online at [https://hawaiiankingdom.org/pdf/\[ECF_262-1\]_Memo_in_Support%20Filed_2022-11-10\).pdf](https://hawaiiankingdom.org/pdf/[ECF_262-1]_Memo_in_Support%20Filed_2022-11-10).pdf)).

⁶⁴ James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

⁶⁵ *Id.*

⁶⁶ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll with impunity.

Governor Ige, Commissioner Nohara, and Director Choy have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree. “It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result.” The term “guilty” is defined as “[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault.”⁶⁷ It is distinguished from a criminal prosecution where “guilty” is used by “an accused in pleading or otherwise answering to an indictment when he confesses to the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime.”⁶⁸

1. Governor Ige, Commissioner Nohara, and Director Choy imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. Governor Ige, Commissioner Nohara, and Director Choy was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. Governor Ige, Commissioner Nohara, and Director Choy was aware of factual circumstances that established the existence of the military occupation.

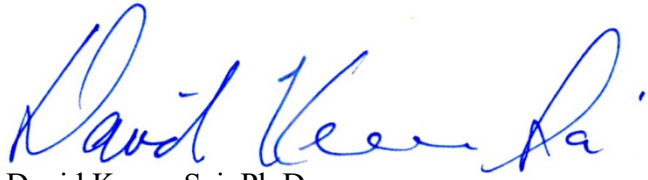
As neither Governor Ige, Commissioner Nohara, nor Director Choy are heads of State, they have no claim to immunity from criminal jurisdiction and is subject to prosecution by foreign States under universal jurisdiction, if they are not prosecuted by the territorial State where the war crime has been committed. The severity of the war crime of *usurpation of sovereignty during military occupation* has led to, among other war crimes, the obliteration of the national consciousness of the Hawaiian Kingdom called the war crime of *denationalization*. According to Professor Schabas, “the offense of ‘denationalization’ consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population.”⁶⁹ The offense “would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical ‘denationalization’ is involved, genocide.”⁷⁰

⁶⁷ Black’s Law 708 (6th ed. 1990).

⁶⁸ *Id.*

⁶⁹ Schabas, 161.

⁷⁰ *Id.*



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

18 November 2022

Enclosure “11”

WAR CRIMINAL REPORT NO. 23-0001

The War Crime of Usurpation of Sovereignty during Occupation

THE ROYAL COMMISSION OF INQUIRY:

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

Dr. David Keanu Sai, Ph.D.

HEAD, ROYAL COMMISSION OF INQUIRY

Dr. Federico Lenzerini, Ph.D.

DEPUTY HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 23-0001

GUILTY OF WAR CRIME: ANNE E. LOPEZ as Attorney General of the State of Hawai‘i
CRAIG Y. IHA as Deputy Attorney General of the State of Hawai‘i
RYAN K.P. KANAKA‘OLE as Deputy Attorney General of the State of Hawai‘i
ALYSSA-MARIE Y. KAU as Deputy Attorney General of the State of Hawai‘i
PETER KAHANA ALBINIO, JR. as Department of Hawaiian Home Lands Acting Administrator of the Land Management Division
JOSEPH KUALI‘I LINDSEY CAMARA as Department of Hawaiian Home Lands Property Development Agent

WAR CRIME COMMITTED: *Usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Island of Hawai‘i¹

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry (“RCI”) on the war crime of *usurpation of sovereignty during military occupation* under “particular” customary international law addresses the actions and omissions taken by Anne E. Lopez as Attorney General of the State of Hawai‘i, Craig Y. Iha as Deputy Attorney General of the State of Hawai‘i, Ryan K.P. Kanaka‘ole as Deputy Attorney General of the State of Hawai‘i, Alyssa-Marie Y. Kau as Deputy Attorney General of the State of Hawai‘i, Peter Kahana Albinio, Jr. as Department of Hawaiian Home Lands (“DHHL”) Acting Administrator of the Land Management Division, and Joseph Kualii Lindsey Camara as DHHL’s Property Development Agent (collectively known as “Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara”) on the island of Hawai‘i.

This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,² that has been under a prolonged belligerent occupation by the United States

¹ See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.

² Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).

since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.³

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 (“1907 Hague Regulations”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 (“Fourth Geneva Convention”).⁴ All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are imposed upon an occupying power. Only the Fourth Geneva Convention contains provisions that can be described as penal or criminal, by which responsibility is imposed upon individuals. Article 147 of the Fourth Geneva Convention provides a list of *grave breaches*, that is, violations of the Convention that incur individual criminal responsibility and that are known colloquially as *war crimes*: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

According to Schindler, “the existence of an [international] armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. ... Any kind of use of arms between two States brings the Conventions into effect.”⁵ Casey-Maslen further concludes that an international armed conflict “also exists whenever one state uses any form of armed force against another state, irrespective of whether the latter state fights back.”⁶

³ Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at

https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf); see also Proclamation of the Council of Regency of 17 April 2019 establishing the Royal Commission of Inquiry (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

⁴ The Royal Commission of Inquiry’s governing law as to war crimes under particular customary international law is drawn from Professor William Schabas’ legal opinion on war crimes. See William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁵ Dietrich Schindler, “The different types of armed conflicts according to the Geneva Conventions and Protocols,” *Recueil des cours, Hague Academy of International Law* 131 (1979).

⁶ Stuart Casey-Maslen, ed., “Armed conflicts in 2012 and their impacts,” in *The War Report 2012* 7 (2013).

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops “supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies.”⁷ President Grover Cleveland determined that the invasion “upon the soil of Honolulu was ... an act of war,”⁸ which coerced Queen Lili‘uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States the following day. The Queen proclaimed, “[n]ow, 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.”⁹

Military occupation stems from an international armed conflict under international humanitarian law and the law of occupation is triggered when the occupying State is in effective control of territory of the occupied State pursuant to Article 42 of the 1907 Hague Regulations. By virtue of the conditional surrender on the 17th, the United States came into effective control of Hawaiian territory pending a treaty of peace. There is no treaty of peace, and the occupation became prolonged.

There are other treaties that codify war crimes relevant to the conduct of an occupying State but these have not been ratified by the United States. This notwithstanding, the United States is bound by the pre-existing rules of customary international law corresponding to the following article. Article 85 of the first Additional Protocol to the Geneva Conventions of 1977 defines the following as *grave breaches*, producing individual criminal responsibility when perpetrated against “persons in the power of an adverse Party,” including situations of occupation:

- (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53,

⁷ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* 451 (1895) (online at <http://libweb.hawaii.edu/digicoll/annexation/blount.php>).

⁸ *Id.*

⁹ *Id.*, 586.

subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
(e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

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

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

Crimes under general customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.¹⁰ Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.¹¹ Article 11(2) of the Universal Declaration of Human Rights states that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.” Applying this provision or texts derived from it, tribunals have recognized “a penal offence, under national or international law” where the crime was not codified but rather was recognized under international law.

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

¹⁰ See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).

¹¹ See ICRC concerning the identification of rules of customary international humanitarian law (online at <https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf>; and <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>).

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over “violations of the laws or customs of war.” Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in Security Council Resolution 827, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.¹²

The Appeals Chamber of the International Criminal Tribunal explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to incur individual criminal responsibility, the Tribunal said that the “violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.”¹³ As an example of a violation that would not be serious enough, it provided the example of the appropriation of a loaf of bread belonging to a private individual by a combatant in occupied territory. It said that to meet the threshold of seriousness, it was not necessary for violations to result in death or physical injury, or even the risk thereof, although breaches of rules protecting important values often result in distress and anxiety for the victims.¹⁴ Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,¹⁵ there is no authority to support this rule being considered a war crime for which individuals are punishable. Moreover, the incidents of coerced swearing of allegiance in Hawai‘i appear to date to the late nineteenth century, making criminal prosecution today entirely theoretical, as explained further below.

Evidence of recognition of crimes under general customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of “violations of the laws and customs of war” was developed by the

¹² *Prosecutor v. Brdanin*, Judgment of 1 September 2004 (Trial Chamber II), para. 595, and in *Prosecutor v. Strugar*, judgment of 31 January 2005 (Trial Chamber II), para. 229.

¹³ *Kunarac, Kovac and Vokovic*, (Appeals Chamber), para. 66 (12 June 2002), “Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”

¹⁴ *Prosecutor v. Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).

¹⁵ 1907 Hague Regulations, 3 *Martens Nouveau Recueil* (3d) 461, Art. 45. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988.

Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions of 1899 and 1907, although the preparatory work does not provide any precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was “not regarded as complete and exhaustive.”¹⁶ The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

- Murders and massacres; systematic terrorism.
- Torture of civilians.
- Deliberate starvation of civilians.
- Rape.
- Abduction of girls and women for the purpose of enforced prostitution.
- Deportation of civilians.
- Internment of civilians under inhuman conditions.
- Forced labour of civilians in connection with the military operations of the enemy.
- Usurpation of sovereignty during military occupation.
- Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- Attempts to denationalize the inhabitants of occupied territory.
- Pillage.
- Confiscation of property.
- Exaction of illegitimate or of exorbitant contributions and regulations.
- Debasement of the currency, and issue of spurious currency.
- Imposition of collective penalties.
- Wanton destruction of religious, charitable, educational, and historic buildings and monuments.¹⁷

Temporal issues

As a preliminary matter, two temporal issues require attention. First, international criminal law, like criminal law in general, is a dynamic phenomenon. Conduct that may not have been criminal at a certain time can become so, reflecting changing values and social development, just as certain acts may be decriminalized. It is today widely recognized that the recruitment and active use of child soldiers is an international crime. A century ago, the practice was not necessarily viewed in the same way. There is no indication of prosecution of child soldier offences relating to the Second World War, for example. Similarly, some acts that were once prohibited and that might even be viewed as criminal are now accepted as features of modern warfare.

¹⁶ Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919 18 (1919) (“Commission of Responsibilities”).

¹⁷ Commission of Responsibilities, 17-18

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁸ Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Since the RCI’s establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary international law.¹⁹ The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.²⁰ In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that “under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.”²¹

War Crime of Usurpation of Sovereignty during Military Occupation

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

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the

¹⁸ *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

¹⁹ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d’information déposé en application de l’article 145 du Règlement par la Mission d’information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d’autres pays et l’ONU au Rwanda entre 1990 et 1994*, 286 (1999).

²⁰ United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

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

Bolshevist hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and administration ousted;” “Taxes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);” “Prohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.,” “Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”²²

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that “[t]his rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.”²³ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.²⁴ In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.²⁵

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

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under

²² Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

²³ *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

²⁴ Major Harold D. Cunningham, Jr., “Civil Affairs—A Suggested Legal Approach,” *Military Law Review* 115-137, 127, n. 33 (1960).

²⁵ Australia’s War Crimes Act of 1945, *Annex—Australian Law Concerning Trials of War Criminals by Military Courts* (online at <https://www.legal-tools.org/doc/45b4ed/pdf/>).

the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The Commentary to the Fourth Geneva Convention describes Article 64 as giving “a more precise and detailed form” to Article 43 of the Hague Regulations.²⁶

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of *usurpation of sovereignty during military occupation* is a war crime under “particular” customary international law. According to the International Law Commission, “[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”²⁷ In the 1919 report of the Commission on Responsibilities, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission’s position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.²⁸

The RCI views *usurpation of sovereignty during military occupation* as a war crime under “particular” customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Thailand, Czech Republic, formerly known as Czechoslovakia, and Uruguay.²⁹

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.”³⁰ The Court also concluded that “[t]he laws of no nation can justly

²⁶ Oscar M. Uhler, Henri Coursier, Frédéric Sordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).

²⁷ Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

²⁸ Commission of Responsibilities, Annex II, 58-79.

²⁹ Treaty of Versailles (1919), preamble.

³⁰ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction.”³¹ The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied Spanish territories. The Court restated General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

The first effect of the military occupation of the enemy’s territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. ... Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.³²

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and, in the case of the Hawaiian Kingdom, also serves as a source for the commission of secondary war crimes of *compulsory enlistment, denationalization, pillage, destruction of property, deprivation of fair and regular trial, deporting civilians of the occupied territory, and transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions of the occupying State is addressed by Professor Eyal Benvenisti:

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.³³

Usurpation of sovereignty during military occupation came before the Permanent Court of Arbitration (“PCA”) in 1999. In *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration convened an arbitral tribunal to resolve a dispute where Larsen, the claimant, alleged that the Government of the Hawaiian Kingdom, by its Council of Regency, the respondent, was liable “for allowing the unlawful imposition of American municipal laws over the claimant’s person within

³¹ *The Apollon*, 22 U.S. 362, 370 (1824).

³² *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

³³ Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

the territorial jurisdiction of the Hawaiian Kingdom.”³⁴ The PCA accepted the case as a dispute between a “State” and a “private party” and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done “Pursuant to article 47 of the 1907 Convention.”³⁵ According to Bederman and Hilbert:

At the center of the PCA proceeding was the argument that ... the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States’ “unlawful imposition [over him] of [its] municipal laws” through its political subdivision, the State of Hawai‘i [and its County of Hawai‘i].³⁶

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but their denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.³⁷ The Tribunal explained that it “could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.”³⁸ Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the situation of the Hawaiian Kingdom, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. It might be argued that *usurpation of sovereignty* is a continuing offence, committed as long as the *usurpation of sovereignty* persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation

³⁴ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (<https://pca-cpa.org/en/cases/35/>). Regarding the Permanent Court of Arbitration’s institutional jurisdiction in acknowledging the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 PCA Convention, see David Keanu Sai, “Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001),” 4 *Hawaiian Journal of Law and Politics* 133 (2022).

³⁵ Permanent Court of Arbitration, Annual Reports, <https://pca-cpa.org/en/about/annual-reports/>.

³⁶ David J. Bederman and Kurt R. Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii,” 95 *American Journal of International Law* 927-933, 928 (2001).

³⁷ David Keanu Sai, “Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 25-26 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

³⁸ *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is “characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred.” Therefore, it is not “an ‘instantaneous’ act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.”³⁹

The RCI views that it is an ongoing crime; the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power is therefore entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.⁴⁰ The occupying State is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

This report has examined the application of the international law on the war crime of *usurpation of sovereignty during military occupation* as a result the United States occupation of the Hawaiian Kingdom since 17 January 1893. It has identified the sources of this body of law in both treaty and custom, and described the two elements—*actus reus* and *mens rea*—with respect to the international crime of *usurpation of sovereignty during military occupation*.

The Elements of Crimes is one of the legal instruments applicable to the International Criminal Court. The initial draft of the Elements was prepared by the United States, which participated actively in negotiating the final text and joined the consensus when the text was finalized. This instrument provides a useful template for summarizing the *actus reus* and *mens rea* of international crimes.

It has been relied upon in producing the following summary of the crimes discussed in this report:

³⁹ *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

⁴⁰ Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation*:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”

Elements of the *war crime of usurpation of sovereignty during military occupation*:

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with a military occupation.
4. The perpetrator was aware of factual circumstances that established the existence of the military occupation.

Ascertaining the Mens Rea

The elements of war crimes describe their material scope of application as well as the accompanying mental elements. The first common element states that “[t]he conduct took place in the context of and was associated with [a military] occupation.” This is to discern the conduct of war crimes from the conduct of ordinary crimes. As stated by the Appeals Chamber of the ICTY, “international humanitarian law applies from the initiation of [...] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”⁴¹

The second common element provides that the perpetrator must be aware of factual circumstances that established the existence of a military occupation. In order to meet this particular element of awareness, which in a normal situation would be obvious, further explanation is necessary given the unique situation of the American occupation and the devastating effect of the war crime of denationalization had upon the population of the Hawaiian Kingdom since the beginning of the

⁴¹ *Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Decision on the defense motion for interlocutory appeal on jurisdiction, IT-94-1-AR72, para. 70 (2 Oct. 1995).

twentieth century. This denationalization through *Americanization* led to the false belief that the Hawaiian Islands were not under a prolonged American occupation since 17 January 1893, but rather had become an incorporated territory of the United States in 1898 during the Spanish-American War. Chapter 2 of *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* provides a comprehensive and historical narrative that rectifies this false information.⁴²

In 1906, the United States, as the occupying State, implemented a policy of *Americanization* through its proxy the Territory of Hawai‘i, which was the successor of its puppet government called the provisional government who later changed its name to the so-called Republic of Hawai‘i.⁴³ Called *Programme for Patriotic Exercises*, the purpose of this policy was to obliterate the national consciousness of the Hawaiian Kingdom in the minds of school children throughout the islands in order to conceal the occupation in the minds of future generations. The purpose of this policy was to inculcate the children into believing they were nationals of the United States and to speak in the American English language. If the children spoke in the national language of Hawaiian, they were severely punished. Within three generations, the national consciousness and history of the Hawaiian Kingdom had become obliterated and awareness of the American occupation was erased. However, due to the decision of the Council of Regency, after returning from arbitral proceedings at the Permanent Court of Arbitration in December of 2000, to counter the effects of denationalization through academic research, publications and classroom instruction at the University of Hawai‘i at Manoa, the awareness of the American occupation soon became widespread.⁴⁴

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian Kingdom situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the occupation. In light of the effects of *Americanization* through denationalization, a change in awareness of the United States occupation by the accused must be evidence based.

The element of awareness is not an outcome of a moral or legal conclusion on the part of the accused. As the International Criminal Court’s Pre-Trial Chamber stated, “it is not necessary for the perpetrator to have made the necessary value judgment to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.”⁴⁵ While there is, however, “only a requirement for the awareness of the factual circumstances,” the RCI will satisfy this

⁴² David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 97-121 (2020).

⁴³ *Id.*, 114.

⁴⁴ Sai, “The Royal Commission of Inquiry,” 29-33.

⁴⁵ *Prosecutor v. Germain Katanga et al.*, ICC Pre-Trial Chamber, Decision on the confirmation of charges, ICC-01/04-01/07, para. 305 (30 Sep. 2008).

element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, e.g. court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.⁴⁶

For the purpose of determining the severity of culpable mental states—*mens rea*, the RCI adopts Professor Mohamed Badar’s recommendations of *dolus directus* of the first degree, *dolus directus* of the second degree, and *dolus eventualis*.⁴⁷ According to Professor Badar:

[...] *Dolus directus* of the first degree

[T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result. *Dolus directus* of the first degree is also defined as a ‘purpose-bound will’. It is irrelevant in this type of intent whether the intended result is the defendant’s final goal or just a necessary interim goal in order to achieve the final one.

[...] *Dolus directus* of the second degree

In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator’s primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.

[...] *Dolus eventualis*

⁴⁶ Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, 107 Stat. 1510 (Public Law 103-150—Nov. 23, 1993) (online at https://hawaiiankingdom.org/pdf/1993_Apology_Resolution.pdf). See also Annexure 2, Arbitral Award, Larsen v. Hawaiian Kingdom, 119 International Law Reports 566, 610-615 (2001).

⁴⁷ Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535-537 (2013).

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject matter jurisdiction of the International Criminal Court. According to the Lubanga Pre-Trial Chamber, *dolus eventualis* encompasses,

Situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.

Dolus eventualis must be distinguished from the common law notion of recklessness. The former requires not only that the perpetrator is aware of the risk, but that he accepts the possibility of its occurrence (volitive element). Unlike *dolus eventualis*, recklessness requires an affirmative aversion to the harmful side effect. This position is supported by a recent judgment of the International Criminal Tribunal for the Former Yugoslavia in which the *Orić* Trial Chamber agreed with the defense submission that intent does not include recklessness.

Dolus eventualis, as perceived by Fletcher, is defined as ‘a particular subjective posture toward the result. The tests ... vary; the possibilities include everything from being indifferent to the result, to “being reconciled” with the result as a possible cost of attaining one’s goal’. However, the present author is of the opinion that in the sphere of international criminal law *dolus eventualis* must be interpreted as a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence. This element of acceptance brings *dolus eventualis* within the contour of intention in its broader sense and ruled out the common law recklessness as a culpable mental state under Article 30 of the ICC Statute.⁴⁸

The RCI will confine its inquiry into the aforementioned war crimes together with the requisite material elements in order to categorize the mental element of *mens rea* as either *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*.

APPLICATION

The Council of Regency’s strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international.

⁴⁸ *Id.*

Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the author of this report entered the Political Science graduate program, where he received a master’s degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master’s theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i*,⁴⁹ to *Nation Within—The History of the American Occupation of Hawai‘i*.⁵⁰ Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book’s subtitle, the word Annexation has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, “The challenge for ... the fields of political science, history, and law is to distinguish between the rule of law and the politics of power.” In the history of the Hawai‘i, the might of the United States does not make it right.⁵¹

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i dated 25 February 2018.⁵² Dr. deZayas stated:

⁴⁹ Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i* (1998).

⁵⁰ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

⁵¹ *Id.*, xvi.

⁵² Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

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

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁵³ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁵⁴

In a letter to Governor David Ige, Governor of the State of Hawai‘i, dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency’s proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency’s proclamation of October 10, 2014

⁵³ Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at <https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf>).

⁵⁴ National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/>).

that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and accredited to participate in the Human Rights Council’s sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁵⁵ In its resolution, the IADL also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”), who is also a non-governmental organization with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council’s sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁵⁶ In its joint letter, the AAJ also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

On 22 March 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council at its 49th session in Geneva. The oral statement read:

The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the

⁵⁵ International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at <https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/>).

⁵⁶ International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at <https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/>).

Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

Notwithstanding the aforementioned actions taken to seek compliance with international humanitarian law and the law of occupation, the United States, the State of Hawai‘i, and its Counties continue to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. Because all war crimes committed in Hawaiian territory stem from *usurpation of sovereignty during military occupation*, it is a war crime that triggers secondary war crimes.

In a letter dated 8 April 2022, William J. Aila, Jr., Chairman of the Hawaiian Homes Commission (“Chairman Aila”), being an agency of the State of Hawai‘i, notified Lawrence Costa, Jr., an aboriginal Hawaiian subject, that the DHHL “is aware that you have illegally accessed, entered and continue to occupy without authorization portions of [the ahupua‘a of Humu‘ula] of Hawaiian Home Lands on Hawai‘i Island for cattle grazing operations.”⁵⁷ Chairman Aila then demanded:

1. By no later than Friday, April 22, 2022, remove: a) all branded cattle registered under Reg#831 as referenced on page12 of Department of Agriculture, State of Hawaii, Hawaii Brand Book 2016-2020; b) all equipment, brought onto the properties; and
2. IMMEDIATELY CEASE AND DESIST from any unauthorized use of access to the subject properties.⁵⁸

Chairman Aila’s authority, as Chairman of the Hawaiian Homes Commission, is based entirely on United States municipal laws that have been unlawfully imposed over Hawaiian territory, which constitutes the *actus reus* of the war crime of *usurpation of sovereignty during military occupation*. On 13 April 2022, Mr. Costa responded to Chairman Aila’s letter of 8 April 2022. Mr. Costa stated:

⁵⁷ Department of Hawaiian Home Lands Letter to Lawrence Costa, Jr. (8 April 2022) (online at [https://hawaiiankingdom.org/pdf/Aila_to_Costa_\(4.8.2022\).pdf](https://hawaiiankingdom.org/pdf/Aila_to_Costa_(4.8.2022).pdf)).

⁵⁸ *Id.*, 2.

You claim in your letter that the Department of Hawaiian Home Lands (DHHL) “is the sole owner” of the ahupua‘a of Humu‘ula, and as “the landowner, DHHL holds exclusive rights to exercise its authority over the subject properties as governed under the Hawaiian Homes Commission Act of 1920, as amended; Hawaii Administrative Rules Title 10, as amended; and Hawaii Revised Statutes, Section 171, as amended.” DHHL is not the owner of the ahupua‘a of Humu‘ula, which is a portion of Crown Lands. Also, your claim to ownership is through United States municipal laws and not Hawaiian Kingdom law. Despite the unlawful overthrow of my government on January 17, 1893, my country and its laws continue to exist under international law despite being belligerently occupied by the United States for over a century.

Under Hawaiian Kingdom law, the Hawaiian Supreme Court stated, in *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 725 (1864), that Crown Lands “descend in fee, the inheritance being limited however to the successors to the throne.” The Court also concluded that Crown Lands are not public lands but rather “private” lands. Under the *Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable* (1865), Crown Lands became “inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever.” DHHL is not a successor to the Hawaiian Crown.

The Council of Regency, established by proclamation on February 28, 1997, is the provisional successor to the Crown, and therefore is provisionally vested with the title to Crown Lands. The Permanent Court of Arbitration, The Hague, Netherlands, prior to forming the arbitration tribunal in *Larsen v. Hawaiian Kingdom*, acknowledged that the Hawaiian Kingdom continues to exist and that the Council of Regency is its government. In these proceedings, the United States also acknowledged the continuity of the Hawaiian Kingdom and the Council of Regency as its government.⁵⁹

In his closing statement, Mr. Costa’s stated, “[c]onsider my letter as evidence that you and your department have been made aware that your actions constitute the war crime of *usurpation of sovereignty*.” In disregard of Mr. Costa’s letter, Hawai‘i Attorney General Lopez and Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau filed a complaint for ejectment against Mr. Costa on 4 January 2023 in the District Court of the Third Circuit, North and South Hilo Division of the State of Hawai‘i.⁶⁰ Mr. Costa’s letter to Chairman Aila was included in the complaint as Exhibit 13. Hawai‘i Attorney General Lopez and Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau relied on information provided by DHHL’s Acting Administrator Albinio and Property Development Agent Camara in their declarations attached to the complaint. Specifically, the complaint claims the District Court has jurisdiction under Hawai‘i Revised Statutes §§604-5, 604-6 and 604-7(d) and that DHHL is responsible for administering the

⁵⁹ Lawrence Costa, Jr. Letter to Department of Hawaiian Home Lands (13 April 2022) (online at [https://hawaiiankingdom.org/pdf/Costa_to_Aila_\(4.13.22\).pdf](https://hawaiiankingdom.org/pdf/Costa_to_Aila_(4.13.22).pdf)).

⁶⁰ *State of Hawai‘i, Department of Hawaiian Home Lands, v. Lawrence Costa*, complaint for ejectment (4 January 2023) (online at [https://hawaiiankingdom.org/pdf/State_v_Costa_Complaint_\(1.4.23\).pdf](https://hawaiiankingdom.org/pdf/State_v_Costa_Complaint_(1.4.23).pdf)).

Hawaiian Homes Commission Act, 1920, all of which are municipal laws of the United States and not municipal laws of the Hawaiian Kingdom.

A hearing was held at the District Court on 22 February 2023, where Mr. Costa stated his answer to the complaint in open court, which was filed thereafter with the court clerk. He stated:

For the record, I would like to read a brief statement regarding this matter. I have been ordered to appear here against my will by Anne Lopez, Craig Iha, Ryan Kanaka'ole, and Alyssa-Marie Kau from the State of Hawai'i Attorney General's office. I also invoke my rights as a protected person under 1949 Fourth Geneva Convention.

On April 13, 2022, I sent a letter by certified mail to William Aila, Chairman of the Hawaiian Homes Commission, which is Exhibit 13 in the Complaint against me. In that letter I provided evidence that the Hawaiian Kingdom continues to exist and that the Department of Hawaiian Home Lands is not the owner of the ahupua'a of Humu'ula. I also referenced the federal lawsuit Hawaiian Kingdom v. Biden and others, which included the State of Hawai'i as a defendant, making Mr. Aila aware that he was committing the war crime of usurpation of sovereignty. This case was not dismissed by the court. Instead, the complaint was withdrawn by the Council of Regency representing the Hawaiian Kingdom because Governor David Ige and Holly Shikada and Amanda Weston of the Attorney General's are war criminals and the Council of Regency could not get any relief in their complaint from these individuals. I have here those war criminal reports by the Royal Commission of Inquiry that was also filed in the federal court that named Ige, Shikada and Weston as war criminals. If the Hawaiian Kingdom's filings were frivolous, then they and their attorney general would have been sanctioned under Rule 11 of the Federal Rules of Civil Procedure. They weren't.

This court, like the federal court in Honolulu, is not a lawful court unless it transforms into an Article II occupation court. I have met the burden of State of Hawai'i versus Lorenzo that the Hawaiian Kingdom currently exists as a State under international law and if these proceedings continue this court is committing the war crime of depriving me, as a protected person, of a fair trial because this court does not have lawful jurisdiction. I also have here a war criminal report by the Royal Commission of Inquiry that identify Glenn Hara and Greg Nakamura of the Third Circuit as war criminals for depriving other individuals a fair trial. Also named as war criminals are the judges on the Supreme Court. If you can show me clear evidence that the Hawaiian Kingdom does not exist as a State under international law, I will submit to the court's jurisdiction. But if you don't and proceed anyway, I am making the record for your prosecution. There are no statutes of limitations for war crimes. Last year, Germany convicted a 97-year-old ex-secretary at a Nazi camp for war crimes.

This is all I have to say.⁶¹

⁶¹ Lawrence Costa, Jr.'s Answer to the State of Hawai'i Complaint for Ejectment (22 February 2023) (online at https://hawaiiankingdom.org/pdf/Costa_Answer_to_Complaint.pdf).

Mr. Costa’s reference to *State of Hawai‘i v. Lorenzo* is a precedent case since 1994 that placed the burden on defendants that are challenging the jurisdiction of State of Hawai‘i courts to provide evidence of a “factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state’s sovereign nature.”⁶² The *Lorenzo* Court, however, did acknowledge that its “rationale is open to question in light of international law.”⁶³ Whether or not the Hawaiian Kingdom “exists as a state in accordance with recognized attributes of a state’s sovereign nature,” it is international law that applies, not State of Hawai‘i common law or United States municipal laws. Under international law, there is a presumption that the Hawaiian Kingdom continues to exist as a State, which shifts the burden from the defendant to provide evidence of the Kingdom’s existence to the prosecution to provide evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. On 7 June 2022, the RCI published a Preliminary Report on the *Lorenzo* doctrine that can be accessed at its website.⁶⁴

With utter disregard to Mr. Costa’s challenge to the jurisdiction of the court, the Attorney General moved for summary judgment, and District Court Judge M. Kanani Laubach agreed. On 10 March 2023, the Attorney General filed its motion for summary judgment relying on information provided by Acting Administrator Albinio in a declaration attached to the motion.⁶⁵ The motion was granted. A proposed order granting plaintiff’s motion for summary judgment was sent by mail to Mr. Costa by Hawai‘i Deputy Attorney General Kau on 24 March 2023.⁶⁶

This office received a letter from Lawrence Costa Jr. by certified mail 7019 0700 0001 3053 8992 dated 22 February 2023, enclosing his answer to the complaint for ejectment. After reviewing Mr. Costa’s statement and his letter to Chairman Aila it was clear that Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were made aware that their action’s constituted forethought of the war crime of *usurpation of sovereignty during military occupation*. In a letter from this office to Hawai‘i Attorney General Lopez and Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau dated 15 March 2023, they were apprised of the mandate of the RCI and that this office did receive evidence of the war crime of *usurpation of sovereignty during military occupation* committed against Mr. Costa.⁶⁷

⁶² *State of Hawai‘i v. Lorenzo*, 77 Hawai‘i 219, 221; 883 P.2d 641, 643 (Ct. App. 1994) (online at: https://hawaiiankingdom.org/pdf/State_of_HI_v.%20Lorenzo_77_Haw_219.pdf).

⁶³ *Id.*, 220; 642.

⁶⁴ Royal Commission of Inquiry, *Preliminary Report—The Lorenzo doctrine on the Continuity of the Hawaiian Kingdom as a State* (7 June 2022) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Lorenzo_Doctrine.pdf).

⁶⁵ Plaintiff’s Motion for Summary Judgment (10 March 2023) (online at https://hawaiiankingdom.org/pdf/Motion_for_Summary_Judgment.pdf).

⁶⁶ Proposed Writ of Possession (24 March 2023) (online at [https://hawaiiankingdom.org/pdf/Proposed_Writ_of_Possession_\(3.24.23\).pdf](https://hawaiiankingdom.org/pdf/Proposed_Writ_of_Possession_(3.24.23).pdf)).

⁶⁷ Royal Commission of Inquiry Letter to State of Hawai‘i Attorney General Lopez (15 March 2023) (online at [https://hawaiiankingdom.org/pdf/RCI_Ltr_to_HI_AG_re_Costa\(3.15.23\).pdf](https://hawaiiankingdom.org/pdf/RCI_Ltr_to_HI_AG_re_Costa(3.15.23).pdf)).

The evidence that Acting Administrator Albinio and Property Development Agent Camara were made aware of the military occupation was by Mr. Costa's letter to Chairman Aila, which was attached to the complaint as Exhibit 13. In paragraph 19 of Acting Administrator Albinio's declaration attached to the complaint and motion for summary judgment, he stated, "[o]n April 13, 2022, Defendant [Costa] provided an 'Acknowledgment of Letter dated April 8, 2022,' to DHHL, in part, acknowledging receipt of its April 8, 2022 letter. A true and correct copy the letter, without enclosures, is attached hereto as Exhibit '13.'"

Neither by letter nor in pleadings that were filed in the District Court, Hawai'i Attorney General Lopez and Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. As explained by Judge James Crawford, "[t]here is a presumption that the State continues to exist, with its rights and obligations ... despite a period in which there is ... no effective government."⁶⁸ Judge Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State."⁶⁹ "If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."⁷⁰

War crimes have a direct nexus to the continuity of the Hawaiian Kingdom as a State that is currently under a prolonged military occupation by the United States. As Professor Schabas explains, his legal opinion on war crimes related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893, "is premised on the assumption that the Hawaiian Kingdom was occupied by the United States in 1893 and that it remained so since that time. Reference has been made to the expert report produced by Prof. Matthew Craven dealing with the legal status of Hawai'i and the view that it has been and remains in a situation of belligerent occupation resulting in application of the relevant rules of international law, particularly those set out in the Hague Conventions of 1899 and 1907 and the fourth Geneva Convention of 1949."⁷¹

⁶⁸ James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

⁶⁹ *Id.*

⁷⁰ Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

⁷¹ William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Hawaiian Journal of Law and Politics* 334, 335 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_Schabas.pdf).

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The exchange of letters and the filing of pleadings, by omission, in the District Court by Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara constitute evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is “clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom.” At the time of their admissions to the date of this report, Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara have continued to proceed against Mr. Costa with impunity and satisfies the requisite element of criminal intent—*mens rea*. They were “aware of factual circumstances that established the existence of the military occupation.”

Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, and Acting Administrator Albinio have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree. The term “guilty” is defined as “[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault.”⁷² It is distinguished from a criminal prosecution where “guilty” is used by “an accused in pleading or otherwise answering to an indictment when he confesses to the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime.”⁷³

Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara have met the volitional element and the cognitive element of knowledge when they represented the State of Hawai‘i Department of Hawaiian Home Lands against Mr. Cost.

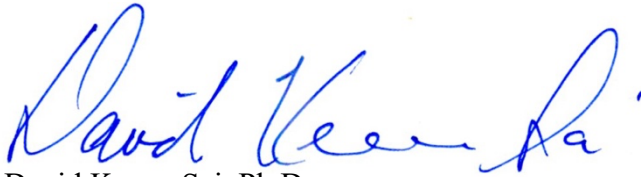
1. Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.

⁷² Black’s Law 708 (6th ed. 1990).

⁷³ *Id.*

4. Hawai'i Attorney General Lopez, Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were aware of factual circumstances that established the existence of the military occupation.

As neither Hawai'i Attorney General Lopez, Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara are heads of State, they have no claim to immunity from criminal jurisdiction and are subject to prosecution by foreign States under universal jurisdiction, if they are not prosecuted by the territorial State where the war crime has been committed. The severity of the war crime of *usurpation of sovereignty during military occupation* has led to, among other war crimes, the obliteration of the national consciousness of the Hawaiian Kingdom called the war crime of *denationalization*. According to Professor Schabas, "the offense of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population."⁷⁴ The offense "would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide."⁷⁵



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

29 March 2023

⁷⁴ Schabas, *Royal Commission of Inquiry* 161.

⁷⁵ *Id.*