

## FACTS NECESSARY TO UNDERSTAND THE HAWAIIAN SITUATION

Fundamental to deciphering the Hawaiian situation is to discern between a state of peace and a state of war. 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 126 years by the positive rules of international law, notwithstanding the absence of effectiveness, which is required during a state of peace.<sup>1</sup>

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 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,"<sup>2</sup> 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]."<sup>3</sup>

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.<sup>4</sup> The United States crime of aggression since 1893 is in fact *a priori*, and underscores Judge Greenwood's statement, "[c]ountries were either in a state of peace or a state of war; there was no intermediate state."<sup>5</sup> The Hawaiian Kingdom, a neutral and independent State, has been subject to an illegal war with the United States for the past 126 years without a peace treaty, and thus, the United States must begin to comply with the rules of *jus in bello*.

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<sup>1</sup> James Crawford, *The Creation of States in International Law* 34 (2<sup>nd</sup> ed., 2007); Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (2<sup>nd</sup> ed., 1968).

<sup>2</sup> *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.

<sup>3</sup> *Id.*, Article 41(1).

<sup>4</sup> Choe Sang-Hun, *North Korea Calls Hawaii and U.S. Mainland Targets*, New York Times (26 March 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 March 30, 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.

<sup>5</sup> Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck (ed.), *The Handbook of the International Law of Military Operations* 45 (2<sup>nd</sup> ed., 2008).

The first allegations of war crimes, committed in Hawai‘i, being unfair trial, unlawful confinement and pillaging,<sup>6</sup> were made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian Kingdom* at the Permanent Court of Arbitration (“PCA”).<sup>7</sup> Oral hearings were held at the PCA on December 7, 8 and 11, 2000. As an intergovernmental organization, the PCA must possess institutional jurisdiction, before it can form *ad hoc* tribunals, in order to ensure that the dispute is international. 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.<sup>8</sup> 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 HC I.<sup>9</sup> As stated on the PCA’s website:

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.<sup>10</sup>

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<sup>6</sup> Memorial of Lance Paul Larsen (May 22, 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](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).

<sup>7</sup> Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at <https://pca-cpa.org/en/cases/35/>).

<sup>8</sup> United Nations, United Nations Conference on Trade and Development: Dispute Settlement 15 (United Nations, 2003).

<sup>9</sup> PCA Annual Report, Annex 2, 51, n. 2. (2011) (online at <https://pca-cpa.org/wp-content/uploads/sites/6/2015/12/PCA-annual-report-2011.pdf>).

<sup>10</sup> *Larsen v. Hawaiian Kingdom*, Cases, Permanent Court of Arbitration (online at <https://pca-cpa.org/en/cases/35/>).

*From a State of Peace to a State of War*

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.”<sup>11</sup> As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.<sup>12</sup> 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.”<sup>13</sup>

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. Hence, provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway (1852),<sup>14</sup>

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<sup>11</sup> *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Reports 566, 581 (2001) (hereafter “Larsen case”).

<sup>12</sup> The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate States), June 18, 1875; Belgium, October 4, 1862; Bremen (succeeded by Germany), March 27, 1854; Denmark, October 19, 1846; France, September 8, 1858; French Tahiti, November 24, 1853; Germany, March 25, 1879; New South Wales (now Australia), March 10, 1874; Hamburg (succeeded by Germany), January 8, 1848; Italy, July 22, 1863; Japan, August 19, 1871, January 28, 1886; Netherlands & Luxembourg, October 16, 1862 (William III was also Grand Duke of Luxembourg); Portugal, May 5, 1882; Russia, June 19, 1869; Samoa, March 20, 1887; Spain, October 9, 1863; Sweden-Norway (now separate States), April 5, 1855; and Switzerland, July 20, 1864; the United Kingdom of Great Britain and Northern Ireland) March 26, 1846; and the United States of America, December 20, 1849, January 13, 1875, September 11, 1883, and December 6, 1884.

<sup>13</sup> 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, Chili, 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.

<sup>14</sup> 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.” (online at [http://hawaiiankingdom.org/pdf/Sweden\\_Norway\\_Treaty.pdf](http://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf)).

Spain (1863)<sup>15</sup> and Germany (1879).<sup>16</sup> “A nation that wishes to secure her own peace,” says Vattel, “cannot more successfully attain that object than by concluding treaties [of] neutrality.”<sup>17</sup>

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 (36 Stat. 2310), 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.”<sup>18</sup> As such, the Hawaiian Kingdom’s territory could not be trespassed or dishonored, and its neutrality “constituted a guaranty of independence and peaceful existence.”<sup>19</sup>

“Traditional international law was based upon a rigid distinction between the state of peace and the state of war,” says Judge Greenwood.<sup>20</sup> “Countries were either in a state of peace or a state of war; there was no intermediate state.”<sup>21</sup> 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 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.”<sup>22</sup>

The Hawaiian Kingdom enjoyed a state of peace with all States. This state of peace, however, was violently interrupted January 16, 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. The Queen’s protest stated:

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

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<sup>15</sup> 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.” (online at [http://hawaiiankingdom.org/pdf/Spanish\\_Treaty.pdf](http://hawaiiankingdom.org/pdf/Spanish_Treaty.pdf)).

<sup>16</sup> 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.” (online at [http://hawaiiankingdom.org/pdf/German\\_Treaty.pdf](http://hawaiiankingdom.org/pdf/German_Treaty.pdf)).

<sup>17</sup> Emerich De Vattel, *The Law of Nations* 333 (6th ed., 1844).

<sup>18</sup> Nicolas Politis, *Neutrality and Peace* 27 (1935).

<sup>19</sup> *Id.*, at 31.

<sup>20</sup> Greenwood, at 45.

<sup>21</sup> *Id.*

<sup>22</sup> Vattel, at 301.

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.<sup>23</sup>

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.”<sup>24</sup> 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?

According to Brownlie, “[t]he right of war, as an aspect of sovereignty, 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.”<sup>25</sup> The United States had no dispute with the Hawaiian Kingdom, a neutral and independent State, 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.<sup>26</sup> Of significance in the resolution was a particular preamble clause, which stated: “[w]hereas, 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

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<sup>23</sup> United States House of Representatives, 53<sup>rd</sup> Congress, Executive Documents on Affairs in Hawai‘i: 1894-95, 586 (1895) (hereafter “Executive Documents”).

<sup>24</sup> Quincy Wright, “Changes in the Concept of War,” 18 Am. J. Int’l. L. 755, 756 (1924).

<sup>25</sup> Ian Brownlie, *International Law and the Use of Force* 41 (1963).

<sup>26</sup> 107 Stat. 1510 (1993).

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."<sup>27</sup>

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 Cleveland from the Hawaiian Patriotic League dated December 27, 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.<sup>28</sup>

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 to the Congress:

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).<sup>29</sup>

As part of this plan, the U.S. diplomat, John Stevens, would prematurely recognize the small group of insurgents on January 17, 1893 as if the insurgents were successful revolutionaries thereby

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<sup>27</sup> *Id.*, at 1511.

<sup>28</sup> Executive Documents, at 1295. Petition of the Hawaiian Patriotic League (online at [http://hawaiiankingdom.org/pdf/HPL\\_Petition\\_12\\_27\\_1893.pdf](http://hawaiiankingdom.org/pdf/HPL_Petition_12_27_1893.pdf)).

<sup>29</sup> *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)).

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 January 17, 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."<sup>30</sup> 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 government 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."<sup>31</sup>

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 January 28, 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."<sup>32</sup> 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 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."<sup>33</sup>

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<sup>30</sup> Letter from United States Minister, John L. Stevens, to Sanford B. Dole, January 17, 1893, W. O. Smith Collection, HEA Archives, HMCS, Honolulu, (online at <http://hmha.missionhouses.org/items/show/889>).

<sup>31</sup> Marek, at 114.

<sup>32</sup> Executive Documents, at 1179.

<sup>33</sup> *Id.*, at 455.

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.”<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

“Premature recognition is a tortious act against the lawful government,” explains Lauterpacht, which “is a breach of international law.”<sup>37</sup> 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.”<sup>38</sup> 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.”<sup>39</sup>

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 command at least five

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<sup>34</sup> E. Lauterpacht, *Recognition in International Law* 93 (1947).

<sup>35</sup> Executive Documents, at 453.

<sup>36</sup> *Id.*, at 454.

<sup>37</sup> E. Lauterpacht, at 95.

<sup>38</sup> Ellery C. Stowell, *Intervention in International Law* 349, n. 75 (1921).

<sup>39</sup> 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.



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.<sup>40</sup>

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 January 16, 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."<sup>41</sup> 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*—the 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.<sup>42</sup>

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."<sup>43</sup> 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."<sup>44</sup> 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

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<sup>40</sup> Executive Documents, at 453.

<sup>41</sup> H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 Brit. Y.B. Int'l L. 206 (1953).

<sup>42</sup> *USA v. William List et al.* (Case No. 7), Trials of War Criminals before the Nuremburg Military Tribunals (hereafter "Hostages Trial"), Vol. XI, p. 1247 (1950).

<sup>43</sup> *Id.*

<sup>44</sup> Wright, at 758.

a situation regarded by one or both parties to a conflict as constituting a 'state of war.'"<sup>45</sup> 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 overthrown,"<sup>46</sup> means the action was not justified, but a state of war nevertheless ensued.

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 U.S. Justice Marshall, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>47</sup> 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 you 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, "[i]n 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, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."<sup>48</sup> Therefore, "[b]elligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."<sup>49</sup>

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."<sup>50</sup> 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 November 13, 1893 between the Queen and U.S. diplomat Albert Willis and an agreement was reached on December 18, 1893.<sup>51</sup> The President was not aware of this agreement until after he

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<sup>45</sup> Brownlie, at 38.

<sup>46</sup> Executive Documents, at 456.

<sup>47</sup> 10 Annals of Cong. 613 (1800).

<sup>48</sup> Marek, at 102.

<sup>49</sup> *Id.*

<sup>50</sup> Executive Documents, at 458.

<sup>51</sup> 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, at 119-127.

delivered his message.<sup>52</sup> 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.

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."<sup>53</sup> 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."<sup>54</sup> A state of war "automatically brings about the full operation of all the rules of war and neutrality."<sup>55</sup> 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."<sup>56</sup> "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."<sup>57</sup>

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."<sup>58</sup> 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.<sup>59</sup> An attempt to transform the state of war to a state of peace was made by executive agreement on December 18, 1893. President Cleveland, however, was unable to carry out his duties and obligations under this agreement to restore the

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<sup>52</sup> Executive Documents, at 1283. In this dispatch to U.S. Diplomat Albert Willis from Secretary of State Gresham on January 12, 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.

<sup>53</sup> Greenwood, at 45.

<sup>54</sup> *Id.*, at 46.

<sup>55</sup> Myers S. McDougal and Florentino P. Feliciano, "The Initiation of Coercion: A Multi-temporal Analysis,"

52 Am. J. Int'l. L. 241, 247 (1958).

<sup>56</sup> 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).

<sup>57</sup> Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* 224 (1996).

<sup>58</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), § 70 (2 October 1995).

<sup>59</sup> 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).

situation, that existed before the unlawful landing of American troops, due to political wrangling in the Congress.<sup>60</sup> Hence, the state of war continued.

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.”<sup>61</sup> 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.”<sup>62</sup> 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 December 7, 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.

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.”<sup>63</sup> Therefore, the conclusion reached by President Cleveland 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 overthrown,”<sup>64</sup> 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 January 16, 1893, was the same as the “political determination” by President Roosevelt regarding actions taken by the military forces of Japan on December 7, 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.”<sup>65</sup> 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.”<sup>66</sup> 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

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<sup>60</sup> Sai, *A Slippery Path*, at 125-127.

<sup>61</sup> Lord McNair and A.D. Watts, *The Legal Effects of War* 7 (1966).

<sup>62</sup> Brownlie, at 40.

<sup>63</sup> *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).

<sup>64</sup> Executive Documents, at 456.

<sup>65</sup> Quincy Wright, “The Status of Germany and the Peace Proclamation,” 46(2) Am. J. Int’l L. 299, 307 (Apr. 1952).

<sup>66</sup> Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* 17 (1989).

is ... no effective, government.”<sup>67</sup> 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.”<sup>68</sup>

### *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.”<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> These States include: Austria-Hungary (January 1 1895);<sup>72</sup> Belgium (October 17 1894);<sup>73</sup> Brazil (September 29, 1894);<sup>74</sup> Chile (September 26, 1894);<sup>75</sup> China (October 22, 1894);<sup>76</sup> France (August 31, 1894);<sup>77</sup> Germany (October 4, 1894);<sup>78</sup> Guatemala (September 30, 1894);<sup>79</sup> Italy (September

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<sup>67</sup> Crawford, at 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.

<sup>68</sup> *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 restore.” *Id.*, n. 157.

<sup>69</sup> L. Oppenheim, *International Law*, vol. II—War and Neutrality 401 (3rd ed., 1921).

<sup>70</sup> *Id.*, at 496.

<sup>71</sup> Greenwood, at 45.

<sup>72</sup> 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/>).

<sup>73</sup> 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/>).

<sup>74</sup> 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/>).

<sup>75</sup> 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/>).

<sup>76</sup> 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/>).

<sup>77</sup> 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/>).

<sup>78</sup> 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/>).

<sup>79</sup> 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/>).

23, 1894);<sup>80</sup> Japan (April 6, 1897);<sup>81</sup> Mexico (August 8, 1894);<sup>82</sup> Netherlands (November 2, 1894);<sup>83</sup> Norway-Sweden (December 17, 1894);<sup>84</sup> Peru (September 10, 1894);<sup>85</sup> Portugal (December 17, 1894);<sup>86</sup> Russia (August 26, 1894);<sup>87</sup> Spain (November 26, 1894);<sup>88</sup> Switzerland (September 18, 1894);<sup>89</sup> and the United Kingdom (September 19, 1894).<sup>90</sup>

“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.”<sup>91</sup> 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.

#### *Obligation of the United States to Administer Hawaiian Kingdom laws*

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

<sup>80</sup> 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/>).

<sup>81</sup> 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/>).

<sup>82</sup> 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/>).

<sup>83</sup> 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/>).

<sup>84</sup> 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-sweden-norway/>).

<sup>85</sup> 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/>).

<sup>86</sup> 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/>).

<sup>87</sup> 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/>).

<sup>88</sup> 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/>).

<sup>89</sup> 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/>).

<sup>90</sup> 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/>).

<sup>91</sup> Oppenheim, at 497.

State is alone in a position to maintain order there.” This definition was later codified under Article 42 of the 1899 Hague Convention, II, and then superseded by Article 42 of the HC IV, which provides that “[t]erritory 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.

Article 43 of the 1907 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.”<sup>92</sup> Graber also states, that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”<sup>93</sup> The United States government also recognizes that this principle is customary international law that predates the Hague Conventions.

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.<sup>94</sup>

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.”<sup>95</sup> 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.”<sup>96</sup> Many other authorities also viewed the Hague Regulations (HC IV) as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and subsequent occupation.<sup>97</sup> Commenting on the occupation of the Hawaiian Kingdom, Dumberry states,

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<sup>92</sup> Eyal Benvenisti, *The International Law of Occupation* 8 (1993).

<sup>93</sup> Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914* 143 (1949).

<sup>94</sup> Opinion on the Legality of the Issuance of AMG (Allied Military Government) Currency in Sicily, Sept. 23, 1943, reprinted in *Occupation Currency Transactions: Hearings Before the Committees on Appropriations Armed Services and Banking and Currency, U.S. Senate, 80<sup>th</sup> Congress, First Session, 73, 75* (Jun. 17-18, 1947).

<sup>95</sup> Georg Schwarzenberger, “The Law of Belligerent Occupation: Basic Issues,” 30 *Nordisk Tidsskrift Int’l Ret* 11 (1960).

<sup>96</sup> Munroe Smith, “Record of Political Events,” 13(4) *Pol. Sci. Q.* 745, 748 (1898).

<sup>97</sup> 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

[T]he 1907 Hague Convention protects the international personality of the occupied [s]tate, even in the absence of effectiveness. Furthermore, the legal order of the occupied [s]tate 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.<sup>98</sup>

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.” 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.<sup>99</sup> 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* 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*. 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.”<sup>100</sup> 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 56 and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that ‘the principle of conquest shall not... be recognised as admissible under American public law’. It had,

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States Judge Advocate General's School Tex 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”).

<sup>98</sup> Dumberry, at 682.

<sup>99</sup> 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 January 24, 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.

<sup>100</sup> Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*. Vol. II: The Law of Armed Conflict 167 (1968).



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.<sup>101</sup>

When United States troops were removed from Hawaiian territory on April 1, 1893, by order of President Cleveland's special investigator, 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."<sup>102</sup>

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. Despite 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. With the oversight of United States troops, all Hawaiian government officials remained in place and were coerced into signing oaths of allegiance to the new regime.<sup>103</sup> This continued when the American puppet changed its name to the so-called Republic of Hawai'i on July 4, 1894 with alien mercenaries replacing American troops.

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 August 12, 1898. According to the United States Supreme Court, "[t]hough the [annexation] resolution was passed July 7, [1898] the formal transfer was not made until August 12, when, at noon of that

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<sup>101</sup> Matthew Craven, *Continuity of the Hawaiian Kingdom* 12 (2002) (online at [https://hawaiiankingdom.org/pdf/Continuity\\_Hawn\\_Kingdom.pdf](https://hawaiiankingdom.org/pdf/Continuity_Hawn_Kingdom.pdf)).

<sup>102</sup> Executive Documents, at 1296.

<sup>103</sup> *Id.*, at 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."

day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States.”<sup>104</sup> Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony and “they protested annexation occurring without the consent of the governed.”<sup>105</sup>

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.”<sup>106</sup> 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.”<sup>107</sup> 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 Hawai‘i*.<sup>108</sup>

#### *Extraterritorial Application of United States Municipal Laws*

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 Hawai‘i into the Union*.<sup>109</sup> 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 1907 HC IV, and the GC IV. The governmental infrastructure of the Hawaiian Kingdom continued as the governmental infrastructure of the 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, falsely 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.”<sup>110</sup> This extraterritorial application

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<sup>104</sup> *Territory of Hawai‘i v. Mankichi*, 190 U.S. 197, 212 (1903).

<sup>105</sup> 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.

<sup>106</sup> Marek, at 110.

<sup>107</sup> Douglas Kmiec, “Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” 12 Op. O.L.C. 238, 262 (1988).

<sup>108</sup> 31 Stat. 141 (1900).

<sup>109</sup> 73 Stat. 4 (1959).

<sup>110</sup> 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, p. 2 (24 September 1959).

of American laws is not only in violation of *The Lotus* case principle,<sup>111</sup> 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.<sup>112</sup>

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.”<sup>113</sup> “By military government,” according to Winthrop, “is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof.” 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.<sup>114</sup>

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.

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<sup>111</sup> *Lotus*, 1927 PCIJ Series A, No. 10, p. 18.

<sup>112</sup> Benvenisti, at 19.

<sup>113</sup> United States Army Field Manual 27-10, sec. 362 (1956).

<sup>114</sup> *Ex parte Miligan*, 71 U.S. 2, 141-142 (1866).

### *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.<sup>115</sup> 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].<sup>116</sup>

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, 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!"<sup>117</sup>

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<sup>115</sup> *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](http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf)).

<sup>116</sup> *Patriotic Program for School Observance*, Hawaiian Gazette 5 (3 Apr. 1906) (online at [http://hawaiiankingdom.org/pdf/Patriotic\\_Program\\_Article.pdf](http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf)).

<sup>117</sup> 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).

## *Dismantling Universal Health Care*

On July 31, 1901 an article was published in *The Pacific Commercial Advertiser* in Honolulu.<sup>118</sup> 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 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 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

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<sup>118</sup> 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/>).

State—the Hawaiian Kingdom. This requirement comes under Article 43 of the 1907 Hague Convention, IV, and Article 64 of the 1949 Geneva Convention, IV.

Article 55 of the Hague Convention provides, “The 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 crime of genocide.

*The State of Hawai‘i is 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.”<sup>119</sup> The legislation of every State, including the United States by its Congress, are not sources of international law. In *The Lotus* case, the Permanent Court of International Justice stated that “[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.”<sup>120</sup> According to Judge Crawford, derogation of this principle will not be presumed.<sup>121</sup>

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.”<sup>122</sup> 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.”<sup>123</sup> Therefore, the State of Hawai‘i cannot claim to

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<sup>119</sup> Benvenisti, at 19.

<sup>120</sup> See *Lotus*.

<sup>121</sup> Crawford, at 41.

<sup>122</sup> *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>123</sup> *The Apollon*, 22 U.S. 362, 370 (1824).

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.<sup>124</sup>

“[O]rganized armed groups ... are under a command responsible to that party for the conduct of its subordinates.”<sup>125</sup> 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,”<sup>126</sup> 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.”<sup>127</sup> Article 1 of the 1907 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,<sup>128</sup> with “*whatever may be said regarding the lawfulness*” of its origins, “*the State of Hawai‘i ... is now, a lawful government* [emphasis added].”<sup>129</sup> Unable to rebut the factual evidence being presented by defendants, the highest court of the State of Hawai‘i could only resort to fiat and not juridical facts.

This fiat of the 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.”<sup>130</sup>

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<sup>124</sup> Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.

<sup>125</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, 14 (2009).

<sup>126</sup> *Id.*, at 5.

<sup>127</sup> *Id.*

<sup>128</sup> *State of Hawai‘i v. Dennis Kaulia*, 128 Hawai‘i 479, 486 (2013).

<sup>129</sup> *Id.*, at 487.

<sup>130</sup> Marek, at 102.

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."<sup>131</sup> According to Ferraro, "occupation—as a species of international armed conflict—must be determined solely on the basis of the prevailing facts."<sup>132</sup>

### *The Restoration of the Hawaiian Kingdom Government*

On December 10, 1995, David Keanu Sai ("Sai") 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).<sup>133</sup> This partnership was named the Perfect Title Company ("PTC") and functioned as a land title abstracting company.<sup>134</sup> 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."<sup>135</sup> 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 January 17, 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 within 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

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<sup>131</sup> 1907 Hague Convention, IV, Article 42.

<sup>132</sup> 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).

<sup>133</sup> Co-partnership Act (1880) (online at [http://hawaiiankingdom.org/pdf/1880\\_Co-Partnership\\_Act.pdf](http://hawaiiankingdom.org/pdf/1880_Co-Partnership_Act.pdf)).

<sup>134</sup> PTC's articles of agreement (Dec. 10, 1995) (online at [http://hawaiiankingdom.org/pdf/PTC\\_\(12.10.1995\).pdf](http://hawaiiankingdom.org/pdf/PTC_(12.10.1995).pdf)).

<sup>135</sup> Black's Law Dictionary 26 (1990).



Council, together with the other Cabinet Ministers. Article 43 of the 1864 Hawaiian constitution, as amended, provides that, "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." 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.<sup>136</sup> 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]."<sup>137</sup>

On December 15, 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").<sup>138</sup> The partners intended that this registered partnership would serve as a provisional surrogate for the Council of Regency. 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."

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 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

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<sup>136</sup> 1864 constitution (online at [http://hawaiiankingdom.org/pdf/1864\\_Constitution.pdf](http://hawaiiankingdom.org/pdf/1864_Constitution.pdf)).

<sup>137</sup> Black's Law, at 1282.

<sup>138</sup> HKTC articles of agreement (Dec. 15, 1995) (online at [http://hawaiiankingdom.org/pdf/HKTC\\_\(12.15.1995\).pdf](http://hawaiiankingdom.org/pdf/HKTC_(12.15.1995).pdf)).

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.”<sup>139</sup> 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.”<sup>140</sup>

In a meeting of the HKTC, it was agreed that Sai 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 Sai 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, Sai 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 February 28, 1996.<sup>141</sup> On March 1, 1996, the Trustees of HKTC appointed David Keanu Sai as *acting* Regent.<sup>142</sup>

On the same day, Sai, as *acting* Regent, proclaimed himself, as the successor of the HKTC to the aforementioned covenant of agreement, for carrying out the quieting of all land titles in the Hawaiian Islands.<sup>143</sup> As a *de facto* officer, representing the original warrantor of all lands in fee-simple—the Hawaiian Kingdom government, the *acting* Regent was empowered, to remedy rejected claims to title that have been properly investigated by PTC, in accordance with the aforementioned covenant of agreement.

On May 15, 1996, the Trustees conveyed by deed, all of its right, title and interest acquired by thirty-eight deeds of trust, to Sai, then as *acting* Regent, and stipulated that the company would be

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<sup>139</sup> Thomas Cooley, *A Treatise on the Law of Taxation* 185 (1876).

<sup>140</sup> *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

<sup>141</sup> Deed from David Keanu Sai to Donald A. Lewis (Feb. 27, 1996) (online at [http://hawaiiankingdom.org/pdf/Sai\\_to\\_Lewis\\_Deed.pdf](http://hawaiiankingdom.org/pdf/Sai_to_Lewis_Deed.pdf)), Deed of Donald A. Lewis to Nai‘a-Ulumaimalu’s (Feb. 27, 1996) (online at [http://hawaiiankingdom.org/pdf/Nai%E2%80%98a\\_to\\_Lewis\\_Deed.pdf](http://hawaiiankingdom.org/pdf/Nai%E2%80%98a_to_Lewis_Deed.pdf)).

<sup>142</sup> Notice of appointment of Regent by HKTC (Mar. 1, 1996) (online at [http://hawaiiankingdom.org/pdf/HKTC\\_Appt\\_Regent.pdf](http://hawaiiankingdom.org/pdf/HKTC_Appt_Regent.pdf)).

<sup>143</sup> HKTC notice of proclamation no. 1 by the Regent (Mar. 1, 1996) (online at [http://hawaiiankingdom.org/pdf/Proc\\_\(3.1.1996\).pdf](http://hawaiiankingdom.org/pdf/Proc_(3.1.1996).pdf)).

dissolved in accordance with the provisions of its deed of general partnership on or about June 30, 1996.<sup>144</sup>

On February 28, 1997, a Proclamation by the *acting* Regent announcing the restoration of the provisional Hawaiian government was printed in the Honolulu Sunday Advertiser on March 9, 1997.<sup>145</sup> The international law of occupation allows for an occupied State's government and the military government of an occupying State to co-exist within the same territory. According to Marek, "it is always the legal order of the [s]tate 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] [s]tate nor any rule of international law other than the one safeguarding the continuity of an occupied [s]tate. The relation between the legal order of the [occupying] [s]tate and that of the occupied [s]tate...is not one of delegation, but of co-existence."<sup>146</sup>

Notwithstanding the prolonged occupation of the Hawaiian Kingdom since January 17, 1893, the establishment of an *acting* Regent—an officer *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."<sup>147</sup> 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."<sup>148</sup> 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."<sup>149</sup> 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."<sup>150</sup>

On September 7, 1999, the *acting* Regent, commissioned Mr. Peter Umialiloa Sai, a Hawaiian subject, as *acting* Minister of the Interior, and Mrs. Kau'i P. Goodhue, later to be known as Mrs.

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<sup>144</sup> Deed from HKTC to Regent (May 15, 1996) (online at [http://hawaiiankingdom.org/pdf/HKTC\\_Deed\\_to\\_Regent.pdf](http://hawaiiankingdom.org/pdf/HKTC_Deed_to_Regent.pdf)).

<sup>145</sup> Proclamation by the Regent, Honolulu Advertiser newspaper (Feb. 28, 1997) (online at [http://hawaiiankingdom.org/pdf/Proc\\_\(2.28.1997\).pdf](http://hawaiiankingdom.org/pdf/Proc_(2.28.1997).pdf)).

<sup>146</sup> Marek, at 91.

<sup>147</sup> Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).

<sup>148</sup> *Id.*

<sup>149</sup> F.W. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l. L.* 568, 581 (1942).

<sup>150</sup> See *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 732 (1969). See also *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88–89 (1986); and *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokotso v. HM King Moshoeshe II*, LRC (Const) 24, 132 (1989).

Kau‘i P. Sai-Dudoit, a Hawaiian subject, as *acting* Minister of Finance.<sup>151</sup> On September 9, 1999, the *acting* Regent commissioned Mr. Gary Victor Dubin, Esquire, a Hawaiian denizen, as *acting* Attorney General.<sup>152</sup> Dubin resigned on July 21, 2013, and was replaced Mr. Dexter Ka‘iama, Esquire, on August 11, 2013.<sup>153</sup>

On September 26, 1999, the *acting* Regent, the *acting* Minister of Foreign Affairs, the *acting* Minister of Finance, and the *acting* Attorney General, in Privy Council, passed a resolution establishing an *acting* Council of Regency, whereby the *acting* Regent would resume the office of *acting* Minister of the Interior and serve as Chairman of the Council (“Chairman Sai”).<sup>154</sup>

The *acting* Council of Regency (“Hawaiian government”), 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 resulting from some great necessity, and its authority is limited to the necessity.<sup>155</sup>

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.<sup>156</sup> 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

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<sup>151</sup> Hawaiian Minister of Foreign Affairs commission—Peter Umialiloa Sai (Sep. 5, 1999) (online at [http://hawaiiankingdom.org/pdf/Umi\\_Sai\\_Min\\_Foreign\\_Affairs.pdf](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\\_i\\_Min\\_of\\_Finance.pdf](http://hawaiiankingdom.org/pdf/Kau_i_Min_of_Finance.pdf)).

<sup>152</sup> Hawaiian Attorney General commission—Gary V. Dubin (Sep. 9, 1999) (online at [http://hawaiiankingdom.org/pdf/Dubin\\_Att\\_General.pdf](http://hawaiiankingdom.org/pdf/Dubin_Att_General.pdf)).

<sup>153</sup> Hawaiian Attorney General commission—Dexter Ke‘eaumoku Ka‘iama (Aug. 11, 2013) (online at [https://www.hawaiiankingdom.org/pdf/Kaiama\\_Att\\_General.pdf](https://www.hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf)).

<sup>154</sup> Privy Council Resolution establishing a Council of Regency (Sep. 26, 1999) (online at [http://hawaiiankingdom.org/pdf/Council\\_of\\_Regency\\_Resolution.pdf](http://hawaiiankingdom.org/pdf/Council_of_Regency_Resolution.pdf)).

<sup>155</sup> Thomas M. Cooley, “Grave Obstacles to Hawaiian Annexation,” *The Forum*, 389, 390 (1893).

<sup>156</sup> 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 available at [http://hawaiiankingdom.org/pdf/HK\\_Strategic\\_Plan.pdf](http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).

all the Powers which are constitutionally vested in the King,” the convening of the Legislative Assembly was not possible 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 rather in situ.<sup>157</sup> 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.<sup>158</sup>

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 to 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.

#### *Lance Larsen v. Hawaiian Kingdom—Permanent Court of Arbitration*

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

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<sup>157</sup> David Keanu Sai, *The Continuity of the Hawaiian State and the Legitimacy of the acting Government of the Hawaiian Kingdom*, para. 8.1-8.17 (2013) (online at [https://hawaiiankingdom.org/pdf/Continuity\\_Brief.pdf](https://hawaiiankingdom.org/pdf/Continuity_Brief.pdf)).

<sup>158</sup> F.E. Oppenheimer, “Governments and Authorities in Exile,” 36 Am. J. Int’l L. 569 (1942).

submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States had committed against him.<sup>159</sup>

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 [s]tate when its judgment would imply an evaluation of the lawfulness of the conduct of another [s]tate which is not a party to the case.”<sup>160</sup>

The Tribunal, however, acknowledged that the parties could pursue fact-finding. The Tribunal stated, “[a]t 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.”<sup>161</sup> The Tribunal noted “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.”<sup>162</sup> The Tribunal pointed out that “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.”<sup>163</sup>

#### *Meeting with the Rwandan Government in Brussels*

After the last day of the *Larsen* hearings were held at the Permanent Court of Arbitration (“PCA”) on December 11, 2000, 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 December 8, 2000, (*Democratic Republic of the Congo v. Belgium*),<sup>164</sup> where he became aware of the Hawaiian arbitration case taking place in the hearing room of the PCA.

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<sup>159</sup> Bederman & Hibert, at 928.

<sup>160</sup> *Larsen* case, at 596.

<sup>161</sup> *Id.*, at 597.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*, at n. 28.

<sup>164</sup> *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Rep. 2000, at 182.

The following day, the Council, which included Chairman Sai 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.<sup>165</sup> In that meeting, he explained that since he accessed the pleadings and records of the *Larsen* case on December 8 from the PCA's secretariat, he had been in communication with his government. This prompted our meeting where he conveyed to Chairman Sai, 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. Chairman Sai requested a short break of the meeting in order to consult with the other members of the Council who were present.

After careful deliberation, the Council decided that it could not, in good conscience, accept this offer. It 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, Chairman Sai graciously thanked Ambassador Bihozagara for his government's offer, but stated that the Council first needed to address over a century of denationalization. After exchanging salutations, the meeting ended, and the Council returned that afternoon to The Hague.

#### *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."<sup>166</sup> 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",<sup>167</sup> and "the existence of an armed conflict

<sup>165</sup> David Keanu Sai, *A Slippery Path towards Hawaiian Indigeneity*, 10 J. L. & Soc. Challenges 69, 130-131 (2008).

<sup>166</sup> "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).

<sup>167</sup> C. Ryngaert and R. Fransen, "EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts," [2018] 2(1): 7. *Europe and the World: A law review* [20], p. 8. (online at [https://www.scienceopen.com/document\\_file/e5cc1ac6-41ee-40de-bbe9-25c9df97ab1e/ScienceOpen/EWLR-2-7.pdf](https://www.scienceopen.com/document_file/e5cc1ac6-41ee-40de-bbe9-25c9df97ab1e/ScienceOpen/EWLR-2-7.pdf)).

is an objective test and not a national ‘decision.’”<sup>168</sup> 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: (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. U.S. President Grover Cleveland’s manifesto to the Congress, which is Annexure 1 in the *Larsen v. Hawaiian Kingdom Award*,<sup>169</sup> 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 “institutional jurisdiction.” This jurisdiction required that the Hawaiian Kingdom be a “State.”<sup>170</sup> This finding authorized the Hawaiian Kingdom’s access to the PCA pursuant to Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, as a non-Contracting Power to the convention. The PCA accepted the *Larsen* case as a dispute between a State and private entity,<sup>171</sup> and, in its annual reports from 2001 to 2011,<sup>172</sup> acknowledged the Hawaiian Kingdom as a non-Contracting Power under Article 47 of the 1907 Hague Convention, I. This acknowledgement is significant on two levels, first, the Hawaiian Kingdom had to 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 as the governing body 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,<sup>173</sup> but also in a 2002 legal brief by Dr. Matthew Craven, Professor of Law from the University of London, SOAS, titled *Continuity of the Hawaiian Kingdom*. Professor Craven wrote the brief for the Council of Regency as part of the latter’s focus on exposure of the Hawaiian Kingdom’s legal status under international law through academic research after returning from The Hague in 2000. Professor Craven’s memo was also referenced

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<sup>168</sup> Stuart Casey-Maslen (ed.), *The War Report* 2012 ix (2013).

<sup>169</sup> U.S. President Grover Cleveland’s Message to Congress (Dec. 18, 1893) (online at [https://hawaiiankingdom.org/pdf/Cleveland's\\_Message\\_\(12.18.1893\).pdf](https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf)); see also *Larsen v. Hawaiian Kingdom*, 119 *International Law Reports* (2001) 566, at 598-610.

<sup>170</sup> 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](https://unctad.org/en/Docs/edmmisc232add26_en.pdf)).

<sup>171</sup> *Lance Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, Case Repository (online at <https://pca-cpa.org/en/cases/35/>).

<sup>172</sup> *Annual Reports of the PCA* (online at <https://pca-cpa.org/en/about/annual-reports/>).

<sup>173</sup> *Larsen v. Hawaiian Kingdom* Arbitration Log Sheet (available at <http://www.alohaquest.com/arbitration/log.htm>).



in Judge Crawford's seminal book, *The Creation of States in International Law* (2nd ed.). Judge Crawford wrote, "Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States."<sup>174</sup> In his brief, Professor 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.
- 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.<sup>175</sup>

In order to carry into effect the Council's policy, it was decided that since Chairman Sai already had a B.A. degree from the University of Hawai'i at Manoa and 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 an M.A. degree specializing in international relations, and then a Ph.D. with focus on the continuity of the Hawaiian Kingdom as an independent and sovereign State that has been under a prolonged occupation. Chairman Sai received his M.A. degree in 2004, and his Ph.D. degree in 2008. He is currently a faculty member of the University of Hawai'i where he teaches undergraduate and graduate courses on the Hawaiian Kingdom. Through the Council's policy, it has been able to effectively shift the discourse to belligerent occupation.

The Council's objective was to engage over a century of denationalization through the medium of academic research and publications, both peer review and law review. As a result, awareness of

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<sup>174</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed., 623, n. 83 (2006).

<sup>175</sup> Craven, at 2.

the Hawaiian Kingdom's political status has grown exponentially with multiple master's theses, doctoral dissertations, and publications being written on the subject. What the world knew, before the *Larsen* case was held from 1999-2001, was drastically transformed to now. 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 recognize 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.<sup>176</sup>

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*.<sup>177</sup> 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.

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<sup>176</sup> Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* xvi (2016).

<sup>177</sup> 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 81-131, 89 (2016).

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, on July 4, 2017, at the annual assembly of the National Education Association (“NEA”) in Boston, Massachusetts. 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.<sup>178</sup>

When the HSTA delegates in attendance returned to Hawai‘i, they asked me to write three articles for the NEA to publish: first, *The Illegal Overthrow of the Hawaiian Kingdom Government* (April 2, 2018);<sup>179</sup> second, *The U.S. Occupation of the Hawaiian Kingdom* (October 1, 2018);<sup>180</sup> and, third, *The Impact of the U.S. Occupation on the Hawaiian People* (October 13, 2018).<sup>181</sup> 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*.

#### *Russian Government Acknowledges Illegal Annexation by the United States*

This exposure also prompted the Russian government, on October 4, 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. Professor Niklaus Schweizer, who is also the Hawaiian Kingdom’s Envoy Extraordinary and Minister Plenipotentiary, was invited to participate in the seminar. Dr. Schweizer is a former Swiss Consul and professor at the University of Hawai‘i at Manoa. His task was to provide the history of Fort Elizabeth from a Hawaiian and Pacific point of view.

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<sup>178</sup> NEA New Business Item 37 (2017) (online at <https://ra.nea.org/business-item/2017-nbi-037/>).

<sup>179</sup> Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NEA Today (Apr. 2, 2018) (online at <http://neatoday.org/2018/04/02/the-illegal-overthrow-of-the-hawaiian-kingdom-government/>).

<sup>180</sup> Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom*, NEA Today (Oct. 1, 2018) (online at <http://neatoday.org/2018/10/01/the-u-s-occupation-of-the-hawaiian-kingdom/>).

<sup>181</sup> Keanu Sai, *The Impact of the U.S. Occupation on the Hawaiian People* NEA Today (Oct. 13, 2018) (online at <http://neatoday.org/2018/10/13/us-occupation-of-hawaii/>).

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 his report to the Hawaiian Minister of Foreign Relations, H.E. Peter Umialiloa Sai, dated October 12, 2018, Dr. Schweizer wrote, "In his concluding remarks Dr. Orlov, who incidentally referred to the military installations at Barking Sands, mentioned as an aside and in a relatively low voice: '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 M. deZayas, to send a communication, dated February 25, 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.<sup>182</sup> In that communication, 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 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. The State of Hawai'i is a *de facto* proxy for the United States and maintains effective control over Hawaiian territory. *The War Report 2017* refers to such entities as an armed 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."<sup>183</sup>

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<sup>182</sup> Letter from U.N. Independent Expert Dr. deZayas to Members of the Judiciary of the State of Hawai'i (Feb. 25, 2018) (online at [https://hawaiiakingdom.org/pdf/Dr\\_deZayas\\_Memo\\_2\\_25\\_2018.pdf](https://hawaiiakingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf)).

<sup>183</sup> *The War Report 2017*, 22.

Furthermore, from 1893 to 1898, the Hawaiian Kingdom was occupied by an American puppet of insurgents. There is no treaty of peace between the Hawaiian Kingdom and the United States except for the unilateral annexation of the Hawaiian Islands by a joint resolution of Congress. 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, while the war continues.”<sup>184</sup>

The ICRC Commentary on Article 47 also emphasize, “It 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.”<sup>185</sup> The “Occupying Power 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 a peace treaty. This is a universally-recognized rule and is endorsed by jurists and confirmed by numerous rulings of international and national courts.”<sup>186</sup> 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.”<sup>187</sup> As there is no treaty of peace between the Hawaiian Kingdom and the United States, this international armed conflict continues to date.

To understand what the UN Independent Expert called a “fraudulent annexation,” attention is drawn to the floor of the United States Senate on July 4, 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.”<sup>188</sup>

Two years later, on February 28, 1900, during a debate on senate bill no. 222 that proposed the establishment of a U.S. government to be called 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.”<sup>189</sup> In response, Senator John Spooner of Wisconsin, a constitutional lawyer, dismissively remarked, “that is a political question, not subject to review by the courts.”<sup>190</sup> Senator Spooner explained, “The Hawaiian Islands were annexed to

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<sup>184</sup> Oppenheim, *International Law*, vol. II, 6<sup>th</sup> ed., 237 (1921).

<sup>185</sup> International Committee of Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 276 (1958).

<sup>186</sup> *Id.*, 275.

<sup>187</sup> *Id.*, 276.

<sup>188</sup> 31 Cong. Rec. 6635 (1898).

<sup>189</sup> 33 Cong. Rec. 2391 (1900).

<sup>190</sup> *Id.*

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.”<sup>191</sup> 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 exchange between the two Senators is troubling, but it acknowledges the limitation of congressional laws and the political means by which to conceal an internationally wrongful act. The Territory of Hawai‘i is the predecessor of the State of Hawai‘i.

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 examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored this opinion for Abraham D. 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, Assistant Attorney General Kmiec concluded:

“Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. ... It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”<sup>192</sup>

### *State of Hawai‘i Official Reports War Crimes*

On August 21, 2018, State of Hawai‘i County of Maui Councilmember Jennifer Ruggles (“Ms. Ruggles”) requested a legal opinion from the government’s attorney whether she has incurred criminal liability for committing war crimes.<sup>193</sup> In her letter she requested “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;

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<sup>191</sup> *Id.*

<sup>192</sup> Douglas W. Kmiec, *Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea*, 12 Opinions of the Office of Legal Counsel 238, 252 (1988) (online at [https://hawaiiankingdom.org/pdf/1988\\_Opinion\\_OLC.pdf](https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf)).

<sup>193</sup> Letter from Stephen Laudig, attorney for Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to Hawai‘i County Corporation Counsel Joe Kamelamela (Aug. 21, 2018) (online at <https://jenruggles.com/wp-content/uploads/Stephen-Laudigs-Letter-to-Corporation-Counsel-8-21-18.pdf>).

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 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 letter to Ms. Ruggles dated August 22, 2018, Corporation Counsel Joe 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).<sup>194</sup>

According to Ms. Ruggles, Corporation Counsel's response was unacceptable. In a letter, by her attorney, dated August 28, 2018, it 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 and your office.<sup>195</sup>

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<sup>194</sup> Letter from Hawai'i County Corporation Counsel Joe Kamelamela to Jennifer Ruggles, Hawai'i County Council member, State of Hawai'i, to (Aug. 22, 2018) (online at <http://jenruggles.com/wp-content/uploads/Kamelamela-Response-Letter-2018-08-22.pdf>).

<sup>195</sup> Letter from Stephen Laudig, attorney for Jennifer Ruggles, Hawai'i County Council member, State of Hawai'i, to Hawai'i County Corporation Counsel Joe Kamelamela (Aug. 28, 2018) (online at [http://jenruggles.com/wp-content/uploads/Laudig\\_Ltr\\_to\\_Corp\\_Counsel\\_8.28.2018-.pdf](http://jenruggles.com/wp-content/uploads/Laudig_Ltr_to_Corp_Counsel_8.28.2018-.pdf)).

Corporation Counsel refused to respond to this letter, which prompted Ms. Ruggles to become a whistle blower. 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 and the 1949 Geneva Conventions—18 U.S.C. §2441. Her story was broadcasted on television by KGMB news,<sup>196</sup> Big Island Video News,<sup>197</sup> and published by the British news outlet *The Guardian*.<sup>198</sup> Ms. 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.<sup>199</sup> She also reported additional war crimes of pillaging committed by State of Hawai‘i tax collectors, in violation of §2441,<sup>200</sup> the war crime of unlawful appropriation of property by the President of the United States and the Internal Revenue Service, in violation of §2441,<sup>201</sup> and the war crime of destruction of property by the State of Hawai‘i on the summit of Mauna Kea, in violation of §2441.<sup>202</sup>

These actions taken by Ms. Ruggles prompted the International Committee of the National Lawyers Guild to form the Hawaiian Kingdom Subcommittee.<sup>203</sup> Established in 1937, the National Lawyers Guild is equal in standing with the American Bar Association. 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

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<sup>196</sup> KGMB News (Sep. 24, 2018) (online at <https://www.youtube.com/watch?v=-YiXpiwVHr0>).

<sup>197</sup> Big Island Video News (Sep. 25, 2018) (online at <http://www.bigislandvideonews.com/2018/09/25/video-jen-ruggles-holds-community-meeting-on-war-crimes/>).

<sup>198</sup> Breena Kerr, *Hawaii politician stops voting, claiming islands are ‘occupied sovereign country,’* *The Guardian* (Nov. 30, 2018) (online at <https://www.theguardian.com/us-news/2018/nov/29/hawaii-politician-jennifer-ruggles-sovereign-country>).

<sup>199</sup> Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to Sean Kaul, FBI Special Agent in Charge (Oct. 11, 2018) (online at [https://jenruggles.com/wp-content/uploads/Reporting\\_to\\_FBI\\_10.11.18.pdf](https://jenruggles.com/wp-content/uploads/Reporting_to_FBI_10.11.18.pdf)).

<sup>200</sup> Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to State of Hawai‘i officials regarding unlawful collection of taxes (Nov. 15, 2018) (online at <https://jenruggles.com/wp-content/uploads/Ltr-to-State-of-HI-re-Taxes.pdf>).

<sup>201</sup> Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to U.S. President Trump regarding unlawful appropriation of property (Nov. 28, 2018) (online at [https://jenruggles.com/wp-content/uploads/Ltr\\_to\\_President\\_Trump.pdf](https://jenruggles.com/wp-content/uploads/Ltr_to_President_Trump.pdf)).

<sup>202</sup> Letter from Jennifer Ruggles, Hawai‘i County Council member, State of Hawai‘i, to State of Hawai‘i Governor Ige and Supreme Court Justices regarding unlawful destruction of property on the summit of Mauna Kea (Dec. 3, 2018) (online at <https://jenruggles.com/wp-content/uploads/Ltr-to-Gov.-and-Sup.-Ct.pdf>).

<sup>203</sup> NLG launches new Hawaiian Kingdom Subcommittee, NLG International Committee (online at <https://nlginternational.org/2019/04/nlg-launches-new-hawaiian-kingdom-subcommittee/>).



Cross, and NGOs addressing U.S. violations of international law and the rights of Hawaiian nationals and other Protected Persons.<sup>204</sup>

### *Recognition De Facto of the Restored Hawaiian Government*

In March of 2000, the United States government, through its Department of State (“State Department”), explicitly recognized the Hawaiian government by exchange of *notes verbales*. This recognition stemmed from *Larsen v. Hawaiian Kingdom* international arbitration proceedings.<sup>205</sup> *Notes verbales* are official communications between governments of states and international organizations.

Before the *Larsen ad hoc* tribunal was formed on June 9, 2000, Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with Chairman Sai, 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 consented, which resulted in a conference call meeting on March 3, 2000 in Washington, D.C., between the Chairman Sai, Larsen’s counsel, Mrs. Ninia Parks, and Mr. John Crook from the State Department. The meeting was reduced to a formal note and mailed to Mr. Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Hawaiian government to the PCA Registry for record that the United States was invited to join in the arbitral proceedings.<sup>206</sup> The note was signed off by Chairman Sai as “Acting Minister of Interior and Agent for the Hawaiian Kingdom.”

Under international law, this note served as an offering instrument that contained the text of the proposal.

“[T]he reason for our visit was the offer by the...Hawaiian Kingdom, by consent of the Claimant [Mr. 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

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<sup>204</sup> Hawaiian Kingdom Subcommittee, National Lawyers Guild International Committee (online at <https://nlginternational.org/hawaiian-kingdom-subcommittee/>).

<sup>205</sup> *Larsen* case, at 581. The *notes verbales* are part of the arbitral records at the Registry of the Permanent Court of Arbitration.

<sup>206</sup> A true and correct copy of the note (online at [http://hawaiiankingdom.org/pdf/State\\_Dpt\\_Ltr\\_\(3.3.2000\).pdf](http://hawaiiankingdom.org/pdf/State_Dpt_Ltr_(3.3.2000).pdf)).

International Bureau of the Permanent Court of Arbitration for the record, and you acknowledged.”

Thereafter, the PCA’s Deputy Secretary General, Mrs. Phyllis Hamilton, informed Sai, as agent for the Hawaiian government, by telephone, that the United States, through its embassy in The Hague, notified the PCA, by *note verbale*, that the United States would not accept the invitation to join the arbitral proceedings. Instead, the United States, through its embassy in The Hague, requested permission from the Hawaiian government to have access to the pleadings and records of the case. The Hawaiian government consented to this request. Thus, the PCA, represented by Deputy Secretary General Hamilton, served as an intermediary to secure an agreement between the Hawaiian Kingdom and the United States.

Legally 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.<sup>207</sup>

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.<sup>208</sup>

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, 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.”<sup>209</sup>

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 of *notes verbales*. According to Corten & Klein, “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.”<sup>210</sup> 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 treaty of the *de facto* recognition of the restored Hawaiian government.

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<sup>207</sup> Johst Wilmanns, “Note,” in 9 *Encyclopedia of Public International Law* 287 (1986).

<sup>208</sup> *Id.*

<sup>209</sup> J.L. Weinstein, “Exchange of Notes,” 20 *Brit. Y.B. Int’l L.* 205, 207 (1952).

<sup>210</sup> The Vienna Conventions on the Law of Treaties, A Commentary, Vol. I, Corten & Klein, eds. (2011), p. 261.

Moreover, the United States has entered into other treaties by exchange of *notes verbales*. In 1946, the United States and Italy entered into a treaty by exchange of *notes verbales* at Rome regarding an *Agreement relating to internment of American military personnel in Italy*.<sup>211</sup> In 1949, the United States and Italy entered into another treaty by exchange of *notes verbales* at Rome regarding an *Agreement between the United States of America and Italy, interpreting the agreement of August 14, 1947, respecting financial and economic relations*.<sup>212</sup> Both of these bi-lateral treaties remain in force as of January 1, 2017.<sup>213</sup>

Since the United States' *de facto* recognition, the following States and an international organization have also provided *de facto* recognition of the Hawaiian government. On December 12, 2000, Rwanda recognized the Hawaiian government. This recognition occurred in a meeting in Brussels, called by His Excellency Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium, with Chairman Sai, Agent for the Hawaiian Kingdom, the Minister of Foreign Affairs, His Excellency Mr. Peter Umialiloa Sai, First Deputy Agent for the Hawaiian Kingdom, and the Minister of Finance, Her Excellency Mrs. Kau'i Sai-Dudoit, Third Deputy Agent.<sup>214</sup>

On July 5, 2001, China, as President of the United Nations Security Council, recognized the Hawaiian government when China accepted the Hawaiian government's complaint submitted by Sai, as agent for the Hawaiian Kingdom, in accordance with Article 35(2) of the United Nations Charter.<sup>215</sup> 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."

By exchange of *notes*, through email, Cuba also recognized the Hawaiian government when on November 10, 2017, the Cuban government received Chairman Sai, as Ambassador-at-large for the Hawaiian Kingdom, at the Cuban embassy in The Hague, Netherlands.<sup>216</sup> Also, by exchange of *notes*, through email, the Universal Postal Union in Bern, Switzerland, recognized the Hawaiian government.<sup>217</sup> The Universal Postal Union is a specialized agency of the United Nations. The Hawaiian Kingdom has been a member State of the Universal Postal Union since January 1, 1882.

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<sup>211</sup> 61 Stat. 3750.

<sup>212</sup> 63 Stat. 2415.

<sup>213</sup> United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2017*, 218.

<sup>214</sup> Sai, *A Slippery Path*, at 130-131.

<sup>215</sup> David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 Haw. J.L. & Pol. 74 (2004).

<sup>216</sup> 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](http://hawaiiankingdom.org/pdf/Cuban_Embassy_Corresp.pdf)).

<sup>217</sup> Email notes with the Universal Postal Union (Feb. 2018) (online at [http://hawaiiankingdom.org/pdf/UPU\\_Communication.pdf](http://hawaiiankingdom.org/pdf/UPU_Communication.pdf)).

*Sai v. Trump—Petition for Writ of Mandamus*

On June 25, 2019, Chairman Sai filed, on behalf of the Council, an emergency petition for a writ of mandamus against President Donald Trump with the United States District Court of the District of Columbia.<sup>218</sup> 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 September 11, 2018, Judge Chutkan issued an order, *sua sponte*, dismissing the case as a political question.<sup>219</sup> 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.<sup>220</sup> Judge Chutkan stated, "Because 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 frivolous 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

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<sup>218</sup> *Sai v. Trump*, Petition for Writ of Mandamus, case no. 1:18-cv-01500 (June 25, 2019) (online at [https://hawaiiankingdom.org/pdf/Petition\\_for\\_Mandamus.pdf](https://hawaiiankingdom.org/pdf/Petition_for_Mandamus.pdf)).

<sup>219</sup> *Sai v. Trump*, Order (Sep. 11, 2018) (online at: [https://hawaiiankingdom.org/pdf/Order\\_Mandamus.pdf](https://hawaiiankingdom.org/pdf/Order_Mandamus.pdf)).

<sup>220</sup> *Sai v. Trump*, Minute Order (Sep. 11, 2018) (online at [https://hawaiiankingdom.org/pdf/Minute\\_Order\\_Mandamus.pdf](https://hawaiiankingdom.org/pdf/Minute_Order_Mandamus.pdf)).

hear the issue.”<sup>221</sup> 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(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*.<sup>222</sup> 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, “We 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 otherwise familiar task.”<sup>223</sup>

What is significant 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. 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.”<sup>224</sup> 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.”<sup>225</sup> 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.”<sup>226</sup>

### *Royal Commission of Inquiry*

On January 19, 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

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<sup>221</sup> Cornell Law School, Legal Information Institute, *Political Question Doctrine* (online at [https://www.law.cornell.edu/wex/political\\_question\\_doctrine](https://www.law.cornell.edu/wex/political_question_doctrine)).

<sup>222</sup> *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008)

<sup>223</sup> *Lin v. United States*, 561 F.3d 506 (2009).

<sup>224</sup> 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.

<sup>225</sup> *Eletronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59.

<sup>226</sup> *Id.*, art. 15, cmt. 2.

Parties agreed to the rules provided under Part III—*International Commissions of Inquiry* (Articles 9-36), 1907 HC I. According to Article III of the Special Agreement:

The Commission is requested to determine: *First*, what is the function and role of the Government of the Hawaiian Kingdom in accordance with the basic norms and framework of international humanitarian law; *Second*, what are the duties and obligations of the Government of the Hawaiian Kingdom toward Lance Paul Larsen, and, by extension, toward all Hawaiian subjects domiciled in Hawaiian territory and abroad in accordance with the basic norms and framework of international humanitarian law; and, *Third*, what are the duties and obligations of the Government of the Hawaiian Kingdom toward Protected Persons who are domiciled in Hawaiian territory and those Protected Persons who are transient in accordance with the basic norms and framework of international humanitarian law.<sup>227</sup>

Since humanitarian law is a set of rules that seek to limit the effects of war on persons, who are not participating in the armed conflict, such as civilians of an occupied State, the *Larsen* case and the fact-finding proceedings must stem from an actual state of war—a war not in theory but a war in fact. More importantly, the application of the principle of *intertemporal law* is critical to understanding the arbitral dispute between Larsen and the Hawaiian Kingdom. That dispute stemmed from an illegal state of war with the United States that began in 1893. Judge Huber famously stated 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.”<sup>228</sup>

In what appears to be obstruction by the PCA’s Secretary General, a complaint was filed in 2017 by the Hawaiian government with one of the member States of the PCA’s Administrative Council at its embassy in The Hague, Netherlands.<sup>229</sup> The name of the State is being kept confidential at its request.

The unfortunate circumstances of the PCA proceedings stemming from the *Larsen* case prompted the Council to exercise its prerogative of the Crown and established a Royal Commission of Inquiry (“Commission”) on April 17, 2019. Its mandate is to investigate the consequences of the prolonged occupation. The 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.”

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<sup>227</sup> Special Agreement (Jan. 19, 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)).

<sup>228</sup> *Island of Palmas* arbitration case (Netherlands and the United States of America), R.I.A.A., vol. II, 829 (1949).

<sup>229</sup> A true and correct copy of the complaint (online at [http://hawaiiankingdom.org/pdf/Hawaiian\\_Complaint\\_PCA\\_Admin\\_Council.pdf](http://hawaiiankingdom.org/pdf/Hawaiian_Complaint_PCA_Admin_Council.pdf)).

Chairman Sai has been designated as Head of the Commission, and Professor Federico Lenzerini has been appointed as Deputy Head. Pursuant to Article 3—*Composition of the Royal Commission*, Dr. Sai 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.