PRELIMINARY REPORT

The Right of Self-Determination of the Hawaiian People in a State of War

THE ROYAL COMMISSION OF INQUIRY:

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

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HAWAIIAN KINGDOM

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This preliminary report of the Royal Commission of Inquiry addresses the principle and right of self-determination as it applies to Hawaiian subjects during a state of war with the United States of America that has unlawfully lasted for over a century.

THE PRINCIPLE AND RIGHT OF SELF-DETERMINATION

The principle of self-determination is a human right that has two facets, external and internal. The former relates to the right of a people of a colonized territory or a territory under foreign occupation to sovereignty and independence, and the latter applies to the peoples within a sovereign State to "freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and [the] State has the duty to respect this right."[1] Under international law, the principle of self-determination applies differently over the national population of an existing State and the population of peoples residing within a non-self-governing territory, a colonial situation.

Regarding the citizenry of an established State, Article 1(2) of the United Nations Charter provides that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights states that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Therefore, the right of self-determination, as a right of continuing character, attributes the national population of an established State that right to "choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves."[2] And only when the national population of an existing State "are afforded these rights can it be said that the whole people enjoys the right of internal self-determination."[3] "As a right of continuing character," explains Professor Lenzerini, "the right of self-determination must be interpreted as implying that 'a State's domestic political institutions must be free from outside interference […] [and prohibiting] States from invading and occupying the territory of other […] States in such a manner as to deprive the people living there of their right of self-determination.'"[4]

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[1] GA Resolution 26/25 (XXV) (Oct. 24, 1970), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.
[2] Antonio Cassese, *Self-determination of peoples* 53 (1995).
[3] *Id*.
[4] Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom," in *The Royal Commission of Inquiry: Investigating War Crimes and*

The second application of the right of self-determination applies to people that reside within territory that is considered non-self-governing and comes under the colonial or administering power of a State, *i.e.*, the Sahrawi people of Western Sahara and the colonial power of Morocco. In this instance, the right of self-determination is external, not internal, and is guided by the United Nations resolution 1514 called decolonization.[5] As a dependent people who have not exercised their right of external self-determination, resolution 1514 provides:

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.[6]

U.N. resolution 1514 only applies to territories which are not independent because they are subjected to foreign domination. This resolution does not apply to the citizenry of independent States or to indigenous peoples.[7] The legal personality of a non-State territory is distinct from an independent State as stated in the 1975 Friendly Relations Declaration, which provides:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.[8]

Where East Timor exercised its right of self-determination and chose to be an independent State in 2002, the Sahrawi people of Western Sahara retain that right but have not been able to exercise this type of right, through a United Nations referendum, due to the colonial power of Morocco that opposes it. According to Professor Lenzerini:

> In the recent Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice […] held that the

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Human Rights Violations Committed in the Hawaiian Kingdom, ed. David Keanu Sai 212 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[4] Larsen v. Hawaiian Kingdom, 119 *Inter'l L. Reports* 566, 581 (2001).

[5] GA Resolution 1514 (Dec. 14, 1960), Declaration on the Granting of Independence to Colonial Countries and Peoples.

[6] *Id*., section 5.

[7] Article 4, *United Nations Declaration on the Rights of Indigenous People* (2007), states that "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their *internal* and local affairs, as well as ways and means for financing their autonomous functions (emphasis added)."

[8] GA Resolution 26/25 (XXV) (Oct. 24, 1970), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

> right to self-determination of peoples, where it has not been properly exercised and the current political situation does not reflect "the free and genuine expression of the will of the people concerned," cannot be considered as having been extinguished with the passing of time, as the fact of impeding a people to exercise its right to self-determination over time "is an unlawful act of continuing character" resulting from the fact of maintaining the situation of alien domination.[9]

HAWAIIAN SELF-DETERMINATION IN AN ESTABLISHED STATE

The arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, acknowledged that "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."[10] As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.[11] 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."[12]

The Hawaiian Kingdom was a mixed economy whose political economy was based on Professor Francis Wayland's theory of economics. Professor Wayland was interested in "defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members."[13] The Hawaiian Kingdom did not adopt Adam Smith's theory of capitalism as espoused by his publication *Wealth of Nations*.

To address such vexing problems of the Hawaiian Kingdom with foreigners and their governments, King Kamehameha III turned to his religious advisors—the missionaries—for

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[9] Lenzerini, 212.
[10] Larsen v. Hawaiian Kingdom, 581.
[11] The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate States), 18 June 1875; Belgium, 4 Oct. 1862; Bremen (succeeded by Germany), 27 Mar. 1854; Denmark, 19 Oct. 1846; France, 8 Sept. 1858; French Tahiti, 24 Nov. 1853; Germany 25 Mar. 1879; New South Wales (now Australia), 10 Mar. 1874; Hamburg (succeeded by Germany), 8 Jan. 1848; Italy, 22 July 1863; Japan, 19 Aug. 1871, 28 Jan. 1886; Netherlands & Luxembourg, 16 Oct. 1862 (William III was also Grand Duke of Luxembourg); Portugal, 5 May 1882; Russia, 19 June 1869; Samoa, 20 Mar. 1887; Spain, 9 Oct. 1863; Sweden-Norway (now separate States), 5 Apr. 1855; and Switzerland, 20 July 1864; the United Kingdom of Great Britain and Ireland, now Northern Ireland) 26 Mar. 1846; and the United States of America, 20 Dec. 1849, 13 Jan. 1875, 11 Sept. 1883, and 6 Dec. 1884.
[12] John Westlake, *Chapters on the Principles of International Law*, 81 (1894). In 1893, there were 44 other independent and sovereign States in the *Family of Nations*: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Hawaiian Kingdom, Haiti, Honduras, Italy, Liberia, Liechtenstein, Luxembourg, Netherlands, Mexico, Monaco, Montenegro, Nicaragua, Orange Free State that was later annexed by Great Britain in 1900, Paraguay, Peru, Portugal, Romania, Russia, San Domingo, San Salvador, Serbia, Spain, Sweden-Norway, Switzerland, Turkey, United States of America, Uruguay, and Venezuela.
[13] Juri Mykkänen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* 154 (2003).

advice on the matter. One of those missionaries, William Richards, volunteered to travel to the United States in search of someone who would instruct the Chiefs on government reform. Unable to secure an instructor in this way, Richards committed himself, at the urging of Kamehameha III, to instruct the Chiefs on political economy and governance. Commenting on the change in Great Britain brought about by the Industrial Revolution, Smellie states, that when "population was so rapidly increasing and when trade and industry were expanding faster than they had ever done before, two problems were always to the fore: to understand the scope and nature of the changes which were taking place, and to adjust the machinery of government to a new social order."[14] Richards, who had no formal education in political science, relied on the work of Francis Wayland, President of Brown University.

William Richards developed a curriculum based upon the Hawaiian translations of Wayland's two books, *Elements of Moral Science* (1835) and *Elements of Political Economy* (1837). According to Richards, the "lectures themselves were mere outlines of general principles of political economy, which of course could not have been understood except by full illustration drawn from Hawaiian custom and Hawaiian circumstances."[15] Through his instruction, Richards sought to theorize governance from a foundation of *natural rights* within an agrarian society based upon capitalism that was not only cooperative in nature, but also morally grounded in Christian values. In Richards translation of Wayland's *Elements of Political* Economy, he stated, "[p]eace and tranquility are not maintained when righteousness is not maintained. The righteousness of the chiefs and the people is the only basis for maintaining the laws of the government."[16]

From the premise that governance could be formed and established to acknowledge and protect the rights of all the people and their property, it was understood that laws should be enacted to maintain a society for the benefit of all and not the few. Richards asserted that "God did not establish man as servants for the government leaders and as a means of government leaders to become rich. God provided for the occupation of government leaders in order to bless the people and so that the nation benefits."[17] The *ali'i'ana*, which bore a remarkable resemblance to the feudal system of Medieval Europe, came to an end in 1848 by voluntary grant of the King and nobility.[18] As a result, the commoner class had unfettered access in acquiring landed property from the Government in fee-simple.

[14] K.B. Smellie, *A Hundred Years of English Government* 8 (1950).
[15] William Richards, "William Richards' Report to the Sandwich Islands Mission on His First Year in Government Service, 1838-1839," *Fifty-first Annual Report of the Hawaiian Historical Society for the Year 1942* 66 (1943).
[16] William Richards, *No ke Kalaiaina* 123 (1840). "Aole hoi e mau ka malu ana a me ka kuapapa nui ana o ka aina ke malama ole ia ka pono. O ka pono o na 'lii a me na kanaka, o ia wale no ke kumu e paa ai na kanawai a me ke aupuni." Translation by Dr. Keao NeSmith, University of Hawai'i at Mānoa.
[17] *Id*., 64.
[18] David Keanu Sai, "Hawaiian Constitutional Governance," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai 68-72 (2020).

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

> CABINET. The Cabinet consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom. The Cabinet is the Monarch's Special Advisers in the Executive affairs of the Kingdom and are *ex officio* members of the Privy Council of State. The Ministers are appointed and commissioned by the Monarch, and hold office during the Monarch's pleasure, subject to impeachment. No act of the Monarch has any effect unless countersigned by a Minister, who by that signature makes himself responsible. Each member of the Cabinet keeps an office at the seat of Government and is accountable for the conduct of his/her deputies and clerks. The Ministers also hold seats *ex officio*, as Nobles, in the Legislative Assembly. On the first day of the opening of the Legislative Assembly, the Minister of Finance presents the Financial Budget in the Hawaiian and English languages.
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> PRIVY COUNCIL OF STATE. The Monarch, by Royal Letters Patent, can appoint any of his subjects, who have attained the age of majority, a member of the Privy Council of State. Every member of the Privy Council of State, before entering upon the discharge of his/her duties as such, takes an oath to support the Constitution, to advise the Monarch honestly, and to observe strict secrecy in regard to matters coming to his/her knowledge as a Privy Counselor. The duty of every Privy Counselor is: to advise the Monarch according to the best of his knowledge and discretion; to advise for the Monarch's honor and the good of the public, without partiality through friendship, love, reward, fear or favor; and, finally, to avoid corruption—and to observe, keep, and do all that a good and true counselor ought to observe, keep, and do to his Sovereign.

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

> NOBLES. The Nobles sit together with the elected Representatives of the people and cannot exceed thirty in number. Nobles also have the sole power to try impeachments made

by the Representatives. Nobles are appointed by the Monarch for a life term and serve without pay. A person eligible to be a Noble must be a Hawaiian subject or denizen, resided in the Kingdom for at least five years, and attained the age of twenty-one years. Nobles can introduce bills and serve on standing or special Committees established by the Legislative Assembly. Each Noble is entitled to one vote in the Legislative Assembly.

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

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

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

Hawaiian governance is based on respect for the *Rule of Law*. Hawaiian subjects rely on a society based on law and order and are assured that the law will be applied equally and impartially. Impartial courts depend on an independent judiciary. The independence of the judiciary means that

Judges are free from outside influence, and notably from influence from the Crown. Initially, the first constitution of the country in 1840 provided that the Crown serve as Chief Justice of the Supreme Court, but this provision was ultimately removed by amendment in 1852 to provide separation between the executive and judicial branches. Article 65 of the 1864 Constitution of the country provides that only the Legislative Assembly, although partially appointed by the Crown, can remove Judges by impeachment. The *Rule of Law* precludes capricious acts on the part of the Crown or by members of the government over the just rights of individuals guaranteed by a written constitution. According to Hawaiian Supreme Court Justice Alfred S. Hartwell:

> The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null and void.[19]

Although the constitution provided that the executive, legislative and judicial branches be distinct, they are nevertheless component agencies of a constitutional monarchy that exercises together the "Supreme Power of the Kingdom." Unlike the United States theory of separation of power, according to which the branches of government are assumed independent of each other with "certain discretionary rights, privileges, prerogatives,"[20] the Hawaiian theory views the branches as coordinate in function, but distinct in form. Hawaiian constitutional law provides for the following interactions of the three powers in the administration of governance:

> The Crown conducts "Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among his subjects;"[21] the Crown "shall never proclaim war without the consent of the Legislative Assembly;"[22] the "[Crown] has the power to make Treaties," but when treaties involve "changes in the Tariff or in any law of the Kingdom [it] shall be referred for approval to the Legislative Assembly;"[23] the Crown's "Ministers are responsible,"[24] and "hold seats ex officio, as

[19] *In Re Gip Ah Chan*, 6 Haw. 25 (1870).
[20] Charles Haines, "Ministerial Responsibility Versus the Separation of Powers," 16(2) *Am. Political Sci. Rev.* 194, 199 (1922).
[21] "Constitution" (1864), Art. 13, in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai 220 (2020).
[22] *Id*., Art. 26, 221.
[23] *Id*., Art. 29.
[24] *Id*., Art. 31.

> Nobles, in the Legislative Assembly;"[25] the "Legislative power of the Three Estates of this Kingdom is vested in the [Crown], and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the [Crown], and of the Representatives of the People, sitting together;"[26] the Chief Justice of the Supreme Court "shall be ex officio President of the Nobles in all cases of impeachment, unless when impeached himself;"[27] and the "[Crown], His Cabinet, and the Legislative Assembly, shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions."[28]

As the officers of the *Hawaiian Patriotic League* stated in a petition to U.S. President Grover Cleveland on 27 December 1893:

> Last January [17, 1893], a political crime was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government. 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 a revenge for being a hopeless minority in the country, resolved to "rule or ruin" through foreign help.
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> The facts of this "revolution," as it is improperly called I are now a matt er of history. Under the false pretense of protecting American interests, which were in no way endangered, troops were landed regardless of international rights from the U.S.S. Boston on the afternoon of January 16, 1893, and so placed as to intimidate the Queen and interfere with the forces at her command, which were ample to quell any domestic disturbance. At about 3 o'clock p.m. on the next day, the 17th of January, a mob of a dozen aliens, principally Germans of a desperate character, paid by the conspirators, invaded the Government building, which was virtu ally commanded by the United States troops. They then went through the farce of proclaiming the Provisional Government, which Minister Stevens hastened to recognize and support before they had obtained possession of any of the other public buildings, all strongly occupied by the armed police and the Queen's guard. The Queen and her Government, realizing the situation, but unwilling to make war with the United States forces and to occasion useless bloodshed of innocent Hawaiian subjects, yielded under protest to the superior force and moral power of the United States. And while waiting for the result of this appeal, with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government.

[25] *Id*., Art. 43, 222.
[26] *Id*., Art. 45, 223.
[27] *Id*., Art. 68, 225.
[28] *Id*., Art. 70.

> The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers. No; the traditional virtue of the aborigines is respect and obedience to their rulers, and it has been fully tested in the present crisis; and when the Hawaiian Patriotic League, whose representatives the present memorialists are, formed its enthusiastic branches all over the islands, the first watchword was to maintain a dignified peace pending the arbitrament of the United States. Had it not been for this request of our Sovereign, there would doubtless have been a tremendous uprising throughout the islands to crush the usurpers, but it would have been a sad tale of blood and destruction, which, from the first, it was sought avoid if possible.[29]

What this memorial reflects is that Hawaiian subjects were enjoying the right of self-determination up to the American invasion and subsequent overthrow of their government on 17 January 1893. Prior to the American invasion, the government of the Hawaiian Kingdom was a progressive constitutional monarchy with a representative democracy.

THE UNITED STATES CONCEALMENT OF THE BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM

To conceal the illegal and prolonged occupation of the Hawaiian Kingdom and the denial of Hawaiian subjects from exercising their right of self-determination in their own political and economic system, a deliberate attempt by the United States to conceal the status of the Hawaiian Kingdom, as an independent and sovereign State, was accomplished by categorizing aboriginal Hawaiians, which comprised the majority of the Hawaiian national population, as a race and not as a citizenry of their own State.

When the United States assumed control of its installed regime calling themselves the Republic of Hawai‘i, which was formerly known as the Provisional Government, under the new heading of the Territory of Hawai‘i in 1900,[30] and later the State of Hawai‘i in 1959,[31] it surpassed “its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts.”[32]

[29] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* 1295 (1895) (hereafter “Executive Documents”).
[30] 32 Stat. 141.
[31] 73 Stat. 4.
[32] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

On 31 July 1901, an article was published in *The Pacific Commercial Advertiser* in Honolulu regarding Queen's Hospital.[33] 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 municipal laws. The *Advertiser* reported:

> The Queen's Hospital was founded in 1859 by their Majesties Kamehameha IV and his consort Emma Kaleleonalani. The hospital is organized as a corporation and by the terms of its charter the board of trustees is composed of ten members elected by the society and ten members nominated by the Government, of which the President of the Republic (now Governor of the Territory) shall be the presiding officer. The charter also provides for the "establishing and putting in operation a permanent hospital in Honolulu, with a dispensary and all necessary furniture and appurtenances for the reception, accommodation and treatment of indigent and disabled Hawaiians, as well as such foreigners and others who may choose to avail themselves of the same."
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> 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 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 municipal 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 are a direct violation of the laws of occupation, whereby the United States was and continues to be obligated to administer the laws of the occupied State—the Hawaiian Kingdom. This requirement comes under Article 43 of the Hague Regulations, and Article 64 of the Fourth Geneva Convention.

[33] 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/).

Article 55 of the Hague Regulations provides, "[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the [occupied] State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." The term "usufruct" is to administer the property or institution of another without impairing or damaging it.

Despite these unlawful changes, aboriginal Hawaiian subjects, whether pure or part, were 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 risk in the State of Hawai'i [that] stems from…late or lack of access to health care" to the crime of genocide.

When the U.S. Senate opened its 2007 session, Senator Daniel Akaka (D-Hawai'i) re-introduced a bill entitled "The Native Hawaiian Government Reorganization Act of 2007" (S. 310). This piece of legislation was brought before the Senate on January 17 to mark the one hundred and fourteenth anniversary of the United States' overthrow of the Hawaiian Kingdom government. The bill's purpose was to form a native Hawaiian governing entity to negotiate with the State of Hawai'i and the Federal government on behalf of the native people of the Hawaiian Islands. According to Senator Akaka, the bill "would provide parity in federal policies that empower other indigenous peoples, American Indians, and Alaskan Natives, to participate in a government-to-government relationship with the United States."[34] An earlier version of the bill (S. 147) failed to receive enough votes in the Senate in June 2006. The act, otherwise known as the "Akaka Bill," is a by-product of a 1993 resolution passed by Congress in apology to native Hawaiians for the 1893 overthrow of the Hawaiian Kingdom.[35]

The Akaka Bill provided that the "Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States," and that the native Hawaiians are "the native people of the Hawaiian archipelago that is now part of the United States, [and] are indigenous, native people of the United States."[36] The bill, like the 1993 resolution, assumes the native Hawaiian population to be an indigenous people within the United States similar to Native Americans, and served as the foundation of political thought regarding native Hawaiians' relationship with the Federal and State governments. In the seminal case *Cherokee Nation v. Georgia*, the Supreme Court recognized Native American tribes as "domestic dependent nations," and not independent and sovereign States.[37] The court explained:

[34] Press Release, Office of Senator Daniel Akaka, Akaka Bill Introduced in Senate and House (Jan. 17, 2007).
[35] S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993), reprinted in 1 *Haw. J.L. & Pol.* 290 (Summer 2004).
[36] Native Hawaiian Government Reorganization Act, S. 310, 110th Cong. (2007).
[37] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1832).

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[38]

Although the Akaka Bill failed, it represents initiatives that only serve to bolster a history of domination by the United States that further relegates aboriginal Hawaiian subjects, as an indigenous group of people, to a position of inferiority and at the same time elevates the United States to a position of political and legal superiority, notwithstanding the United States' recognition of the Hawaiian Kingdom as a co-equal sovereign State and a subject of international law. Indigenous sovereignty, being a subject of United States municipal law, had become the lens through which Hawai'i's legal and political history was filtered.

UNITED STATES INVASION AND THE ENSUING BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM

The United States' illegal overthrow of the government of the Hawaiian Kingdom on 17 January 1893 violated the international obligation of non-intervention, whereby the United States committed acts of war, without justification, against the government of the Hawaiian Kingdom. On the 17th, Queen Lili'uokalani proclaimed, by government decree, a conditional surrender:

> I, Liliuokalani, by the Grace of God, and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.
>
> Done at Honolulu this 17th day of January, A.D. 1893.
>
> Liliuokalani, R.

[38] *Id*.

Samuel Parker,
Minister of Foreign Affairs.
Wm. H. Cornwell,
Minister of Finance.
Jno. F. Colburn,
Minister of the Interior.
A.P. Peterson,
Attorney General.[39]

After completing an investigation into the overthrow of the Hawaiian government, the new U.S. Minister assigned to the Hawaiian Kingdom, Albert Willis, was tasked, by President Cleveland, to negotiate with the Queen for resolution and settlement through executive mediation. The negotiations began on 13 November 1893 at the U.S. Legation in Honolulu and lasted until 18 December 1893.

At the first meeting in the U.S. Legation, Minister Willis opened with a statement from the President. He made known to the Queen of "the President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her people might be redressed."[40] It should be noted that, because sovereignty is vested in the State, as a subject of international law, what the Queen yielded was not the sovereignty of the Hawaiian Kingdom but rather the exercise of that sovereignty by its government.[41] Willis stated to the Queen that the President would expect a full granting of amnesty to the insurgents after she would be restored. She responded, "[t]here are, under this [Penal Code], no degrees of treason. Plotting alone carries with it the death sentence."[42] She countered that amnesty would not be granted.

This first day of negotiations came to an end and after Willis notified the Secretary of State, Walter Gresham, of the Queen's position. Gresham sent a telegram dated 24 November 1893, stating that "[t]he brevity and uncertainty of your telegram are embarrassing. You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration. All interests will be promoted by prompt action."[43] After several meetings, the Queen, on 18 December 1893, agreed to the conditions of restoration. She wrote:

> Sir: Since I had the interview with you this morning I have given the most careful and conscientious thoughts as to my duty, and I now of my own free will give my conclusions.

[39] Executive Documents, 586.
[40] *Id*., 1242.
[41] In a statement by the United Kingdom Government, "Sovereignty is an attribute which under international law resides inherently in any independent State recognized as such. By virtue and in exercise of their sovereignty, states conduct dealings with on another internationally." *HL Debs*, vol. 566, *WA* 85, 16 Oct. 1995.
[42] Executive Documents, 1243.
[43] *Id*., 1191.

> I must not feel vengeful to any of my people. If I am restored by the United States I must not forget myself and remember only my dear people and my country. I must forgive and forget the past, permitting no proscription or punishment of any one, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.
>
> Asking you to bear to the President and to the Government he represents a message of gratitude from me and my people, and promising, with God's grace, to prove worthy of the confidence and friendship of your people.
>
> I am, etc.,
>
> Liliuokalani.[44]

The 1864 Constitution vests the Executive Monarch of the Hawaiian Kingdom, "by and with the advice of His Privy Council, […] the power to grant reprieves and pardons, after conviction, for all offences, except in cases of impeachment."[45] However, the constitution also provides that "[n]o act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible."[46] President Cleveland's pardoning power derives from the United States Constitution that vests the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[47] The difference between the two pardoning powers is that, under Hawaiian law, a pardon takes place after the conviction, while under United States law, a pardon can take place prior to the conviction.

In *Burdick v. United States* (1915), the U.S. Supreme Court distinguished amnesty from a pardon where the former "overlooks [the] offense; the other remits punishment."[48] Amnesty "is usually addressed to crimes against the sovereignty of the state, to political infractions, forgiveness being deemed more expedient for the public welfare than prosecution and punishment."[49] Amnesty is carried out by the pardoning power.

Unbeknownst to President Cleveland of the settlement and agreement of restoration, he notified the Congress, by message, of his findings on the very same day, 18 December 1893. The President concluded "that the provisional government owes its existence to an armed invasion by the United States."[50] He also determined that on 17 January, "the Government of the Queen…was undisputed and was both the *de facto* and the *de jure* government,"[51] while the insurgency "was neither a

[44] *Id*., 1269.
[45] 1864 Constitution, Art. 27, 221.
[46] *Id*., Art. 42, 222.
[47] Article II, Section 2, Clause 1, U.S. Constitution.
[48] *Burdick v. United States,* 236 U.S. 79, 95 (1915).
[49] *Id*.
[50] Executive Documents, 454.
[51] *Id*., 451.

government *de facto* nor *de jure*," but merely declared themselves to exist.[52] He concluded his message with:

> Actuated by these desires and purposes, and not unmindful of the inherent perplexities of the situation nor of the limitations upon my power, I instructed Minister Willis to advise the Queen and her supporters of my desire 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. The condition suggested, as the instructions show, contemplate a general amnesty to those concerned in setting up the provisional government and a recognition of all its *bona fide* acts and obligations. In short, they require that the past be buried, and that the restored Government should reassume its authority as if its continuity had not been interrupted. These conditions have not proved acceptable to the Queen, and though she has been informed that they will be insisted upon, and that, unless acceded to, the efforts of the President to aid in the restoration of her Government will cease, I have not thus far learned that she is willing to yield them her acquiescence.[53]

After receiving Willis' telegram of the Queen's agreement to the conditions of restoration, Gresham responded to Willis on 12 January 1894:

> On the 18th ultimo the President sent a special message to Congress communicating copies of Mr. Blount's reports and the instructions given to him and to you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens' No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her, and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.
>
> 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 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, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will,

[52] *Id*., 453.
[53] *Id*., 458.

> until further notice, consider that your special instructions upon this subject have been fully complied with.[54]

Under Hawaiian Kingdom laws, the Monarch "has the power to make Treaties" or international agreements that binds the Hawaiian Kingdom.[55] However, treaties or international agreements "involving changes in the Tariff or in any law of the Kingdom shall be referred for approval to the Legislative Assembly."[56] United States laws provide 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, under his sole authority, that does not require ratification by the Senate.

In *United States v. Belmont*,[57] Justice Sullivan explained that there are different kinds of treaties that do not require Senate approval. The case involved a Russian corporation that deposited some of its funds in a New York bank prior to the Russian revolution of 1917. After the revolution, the Soviet Union nationalized the corporation and sought to seize its assets in the New York bank with the assistance of the United States. The assistance was "effected by an exchange of diplomatic correspondence between the Soviet government and the United States [in which the] purpose was to bring about a final settlement of the claims and counterclaims between the Soviet government and the United States."[58] Justice Sutherland explained:

> That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.[59]

Justice Douglas, in *U.S. v. Pink*,[60] cautioned how to interpret executive agreements. He explained:

> The exchanges between the President and M. Litvinov must be read not in isolation, but as the culmination of difficulties and dealings extending over fifteen years. And they must

[54] *Id*., 1283-1284.
[55] 1864 Constitution, Art. 29, 221.
[56] *Id*.
[57] *United States v. Belmont*, 310 U.S. 324 (1937).
[58] *Id.,* 326.
[59] *Id*., 330.
[60] *United States v. Pink*, 315 U.S. 203 (1942).

> be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.[61]

In other words, the form and substance of executive agreements are determined by an exchange of diplomatic notes and not laid out in a single document such as a formal contract or treaty.

The Queen's yielding of her executive authority on 17 January was conditional and two-fold. The first part was that the yielding of authority was limited "until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative." The second part was restoring the Queen "as the constitutional sovereign of the Hawaiian Islands." The first part was met after President Cleveland initiated an investigation with the appointment of Special Commissioner Blount on 11 March 1893,[62] and presented his findings to the Congress. The second part of reinstatement, while achieved by executive agreement, was not carried out on the part of the United States. Therefore, the Queen's yielding of Hawaiian executive authority to the President was terminated and the state of war ensued.

The Hawaiian State, as a legal fact, continues to exist despite the unlawful overthrow of its government by the United States. According to Professor Rim, the State continues "to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain."[63] On 28 February 1997, Hawaiian subjects took the necessary steps to restore the Hawaiian Kingdom Government, as a Regency, by executive authority under the doctrine of necessity and Hawaiian constitutional law.[64] The steps taken to restore the Hawaiian Government in accordance with the legal order of the Hawaiian Kingdom was an exercise of the right of internal self-determination and the limitations prescribed by international humanitarian law. The international law of occupation allows for an occupied State's government and the occupying State to co-exist within the same territory. According to Professor Marek,

> [I]t is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the [occupying] State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the [occupying] State…is not one of delegation, but of co-existence.[65]

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[61] *Id.,* 241.
[62] Executive Documents, 1185.
[63] Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," 20(20) *Eur. J. Int. Law* 1, 4 (2021).
[64] David Keanu Sai, "The Royal Commission of Inquiry," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai 18-23 (2020).
[65] Krystyna Marek, *Identity and Continuity of States in Public International Law* 91 (2nd ed., 1968).

Belligerent rights, under the laws of war, stem from war as a legal concept as opposed to a material fact. The U.S. Supreme Court distinguished between war in "the material sense" and war "in the legal sense."[66] Justice Nelson, in the *Prize Cases*, although dissenting, made the distinction.

> An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district or country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war […].
>
> Now in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the General Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a […] war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State.[67]

To constitute a war in the legal sense, there must be an act that proceeds from a State's competent authority under its municipal law to recognize or to make war. In the United States, the competent authority to declare war is the Congress, but the competent authority to recognize war is the President. "As Commander-in-Chief," says Professor Wright, "he may employ the armed forces in defense of American citizens abroad, as he did in the bombardment of Greytown, the Koszta case and the Boxer rebellion, and thereby commit acts of war, which the government they offend may consider the initiation of a state of war."[68]

In similar fashion to the United States, the competent authority to recognize war in the Hawaiian Kingdom is the Executive Monarch and the competent authority to declare war is the Legislative Assembly. According to Hawaiian constitutional law, the Monarch "is the Commander-in-Chief of the Army and Navy, and of all other Military Forces of the Kingdom, by sea and land; and has full power by Himself, or by any officer or officers He may appoint, to train and govern such

[66] *The Prize Cases*; *The Three Friends*, 166 U.S. 1 (1897).
[67] *The Prize Cases*, 690.
[68] Quincy Wright, *The Control of Foreign Relations* 285 (1922).

forces, as He may judge best for the defense and safety of the Kingdom. But he shall never proclaim war without the consent of the Legislative Assembly."[69]

"Action by one state is enough. The state acted against may be forced into a state of war against its will."[70] The Queen's conditional surrender of 17 January 1893 was an act of cessation of hostilities—*commercia belli,*[71] and it was countersigned by the members of her cabinet pursuant to Article 42, which made the conditional surrender under Hawaiian municipal law valid and legal. It did not require approval from the Legislative Assembly. This act was a recognition of a state of war, not a declaration of war. According to McNair and Watts, "the absence of a declaration […] will not of itself render the ensuing conflict any less a war."[72] In *New York Life Ins. Co. v. Bennion*, the Court 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" the previous day.[73]

Although the United States Government did not know that U.S. troops committed "acts of war" on Hawaiian territory until after President Cleveland conducted an investigation, customary international law "leads to the conclusion that in so far as a 'state of war' had any generally accepted meaning it was a situation regarded by one or both of the parties to a conflict as constituting a 'state of war.'"[74] By its conditional surrender, the Hawaiian Government manifestly regarded the situation as a state of war. Furthermore, the Council of Regency, being the successor to Queen Lili'uokalani, as the Executive Monarch, also regards the situation of a state of war as unchanged.

A "victim of an act of war, if a recognized state, may always if it wishes, regard the act as instituting a state of war, and if it does, a state of war exists. States victims of […] intervention have usually been much weaker than the state employing such methods."[75] The Hawaiian Kingdom was, at the time of the invasion, a "recognized state" and in a "state of war," which was clearly acknowledged by Secretary of State Walter Gresham in his correspondence to President Cleveland on 18 October 1893. The Secretary of State stated:

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

[69] 1864 Constitution, Art. 26, 221.
[70] Quincy Wright, "When Does War Exist?," 26 *Am. J. Int'l. L.* 327, 363, n. 6 (1932).
[71] *Black's Law Dictionary*, 270 (6th ed. 1990).
[72] Lord McNair and A.D. Watts, *The Legal Effects of War* 7 (1966).
[73] *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (C.C.A. 10th, 1946).
[74] Ian Brownlie, *International Law and the Use of Force by States*, n. 7 at 38 (1963).
[75] Wright, "When Does War Exist," 365.

> Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.[76]

The President's confirmation that the invasion on 16 January 1893, was an "act of war," transformed the situation from a state of peace to a state of war on that date. The Hawaiian Government's conditional surrender took place because of the invasion the previous day. The Hawaiian Government's conditional surrender was not a termination of the state of war. Only by means of a treaty of peace proclaimed by both States can the situation return to a state of peace. An attempt to end the state of war was made by the agreement of restoration, but it was not carried out.

In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, the Supreme Court concluded that the United States' war power does not end in "a technical state of war, [but] only with the ratification of a treaty of peace or a proclamation of peace."[77] And in *J. Ribas y Hijo v. United States*, the Supreme Court stated, in the case of the Spanish-American War, that a "state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, does not terminate the war, but it is one of the *commercia belli* which suspends operations […]. At the expiration of the truce, hostilities may recommence […].'"[78]

The United States' overthrow of the Hawaiian government did not affect, in the least, the continuity of the Hawaiian State. Wright asserts that "international law distinguishes between the government and the state it governs."[79] "The state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law."[80] As Judge Crawford explains, "[t]here is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no […] effective, government,"[81] and "[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[82]

Accordingly, in *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration ("PCA") acknowledged the continuity of the Hawaiian Kingdom as a non-Contracting State "[p]ursuant to article 47 of the 1907 Convention" of the Pacific Settlement of International Disputes that was specifically stated in the PCA Annual Reports from 2000-2011.[83] Article 47 provides that the

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[76] Executive Documents, 462-463.
[77] *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919).
[78] *J. Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904).
[79] Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) *Am. J. Int'l L.* 299, 307 (Apr. 1952).
[80] Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* 17 (1989).
[81] James Crawford, *The Creation of State in International Law* 34 (2nd, ed. 2007).
[82] *Id*.
[83] PCA Annual Reports online at https://pca-cpa.org/en/about/annual-reports/.

"jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting [States] or between Contracting [States] and non-Contracting [States]."[84] While the United States is a Contracting [State] and the Hawaiian Kingdom is a non-Contracting [State] to the 1907 Convention, both are States for the purposes of international law.

The PCA Administrative Council's annual reports from 2000-2011 clearly states that the United States, as a member of the PCA Administrative Council, explicitly acknowledged the continued existence of the Hawaiian Kingdom as a non-Contracting State to the 1907 PCA Convention as evidenced in the PCA Administrative Council's annual reports. The PCA did apply international law in their determination of the continued existence of the Hawaiian Kingdom as an independent and sovereign State for jurisdictional purposes. As such, the treaties between the Hawaiian Kingdom and the United States remain in full force and effect except where the law of occupation supersedes them. The other Contracting States with the Hawaiian Kingdom in its treaties, which include Austria,[85] Belgium,[86] Denmark,[87] France,[88] Germany,[89] Great Britain,[90] Hungary,[91] Italy,[92] Japan,[93] Luxembourg,[94] Netherlands, Norway,[95] Portugal,[96] Russia,[97] Spain,[98] Sweden,[99] and Switzerland,[100] are also members of the PCA Administrative Council with Diplomatic Missions to the Netherlands and, therefore, their acknowledgment of the continuity of the Hawaiian State is also an acknowledgment of the full force and effect of their treaties with the Hawaiian Kingdom except where the law of occupation supersedes them.[101]

Since the invasion on 16 January 1893 there has been no "treaty of peace or a proclamation of peace" ending the state of war between the Hawaiian Kingdom and the United States. Instead, and in violation of the laws of war, the United States unilaterally seized the territory of the Hawaiian

[84] 36 Stat. 2199 (1907).
[85] Embassy of Austria, whose address is Van Alkemadelaan 342, 2597 AS Den Haag, Netherlands.
[86] Embassy of Belgium, whose address is Johan van Oldenbarneveltlaan 11, 2582 NE Den Haag, Netherlands.
[87] Embassy of Denmark, whose address is Koninginnegracht 30, 2514 AB Den Haag, Netherlands.
[88] Embassy of France, whose address is Anna Paulownastraat 76, 2518 BJ Den Haag, Netherlands.
[89] Embassy of Germany, whose address is Groot Hertoginnelaan 18-20, 2517 EG Den Haag, Netherlands.
[90] Embassy of Great Britain, whose address is Lange Voorhout 10, 2514 ED Den Haag, Netherlands.
[91] Embassy of Hungary, whose address is Hogeweg 14, 2585 JD Den Haag, Netherlands.
[92] Embassy of Italy, whose address is Parkstraat 28, 2514 JK Den Haag, Netherlands.
[93] Embassy of Japan, whose address is Tobias Asserlaan 5, 2517 KC Den Haag, Netherlands.
[94] Embassy of Luxembourg, whose address is Nassaulaan 8, 2514 JS Den Haag, Netherlands.
[95] Embassy of Norway, whose address is Eisenhowerlaan 77J, 2517 KK Den Haag, Netherlands.
[96] Embassy of Portugal, whose address is Zeestraat 74, 2518 AD Den Haag, Netherlands.
[97] Embassy of Russia, whose address is Andries Bickerweg 2, 2517 JP Den Haag, Netherlands.
[98] Embassy of Spain, whose address is Lange Voorhout 50, 2514 EG Den Haag, Netherlands.
[99] Embassy of Sweden, whose address is Johan de Wittlaan 7, 2517 JR Den Haag, Netherlands.
[100] Embassy of Switzerland, whose address is Lange Voorhout 42, 2514 EE Den Haag, Netherlands.
[101] For treaties of the Hawaiian Kingdom with Austria, Belgium, Denmark, France, Germany, Great Britain,Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland see "Treaties with Foreign States," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020).

Kingdom and has since imposed its municipal laws, being the war crime of usurpation of sovereignty, throughout Hawaiian territory. American municipal laws became the weapon employed by the United States that led to the obliteration of the national consciousness of Hawaiian subjects, which concealed the United States' intentional violations of the laws of war and human rights violations for over a century.

Notwithstanding the blatant violation of Hawai'i's sovereignty since 16 January 1893, the U.S. never intended to comply with international laws when it annexed Hawai'i by joint resolution, and proceeded to treat the Hawaiian Islands as if it were an incorporated territory by cession. On 30 April 1900, the U.S. Congress passed an act establishing a civil government to be called the Territory of Hawai'i.[102] Regarding U.S. nationals, section 4 of the 1900 Act stated:

> all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.[103]

In addition to this Act, the Fourteenth Amendment of the United States Constitution was applied to individuals born in the Hawaiian Islands.[104] Under these U.S. laws, the putative population of U.S. "citizens" in the Hawaiian Kingdom exploded from a meager 1,928 (not including native Hawaiian nationals) out of a total population of 89,990 in 1890, to 423,174 (including native Hawaiians, who were now so-called "citizens" of the U.S.) out of a total population of 499,794 in 1950.[105] The native Hawaiian population, which accounted for 85% of the total population in 1890, accounted for a mere 20% (only 86,091 of 423,174) of the total population by 1950.[106]

According to international law, the migration of U.S. citizens to these islands, which included both military personnel and civilians, is a direct violation of Article 49 of the Fourth Geneva Convention, which provides that the occupying power shall not "transfer parts of its own civilian population into the territory it occupies."[107] Benvenisti asserts that the purpose of Article 49 "is to protect the interests of the occupied population, rather than the population of the occupant."[108] Benvinisti also goes on to state that civilian migration and settlement in an occupied State is

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[102] *An Act to Provide a Government for the Territory of Hawaii*, 31 Stat. 141 (1900).
[103] *Id*.
[104] *See Territory of Hawai'i v. Mankichi*, 190 U.S. 197 (1903); the 14th Amendment states, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. Const. amend. XIV, §1.
[105] United States Bureau of the Census, *General characteristics—Hawaii*, 18 (1952.
[106] *Id*.
[107] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[108] Benvenisti, 140.

questionable under Article 43 of the Hague Regulations, since it cannot be "deemed a matter of security of the occupation forces, and it is even more difficult to demonstrate its contribution to 'public order and civil life.'"[109]

Shortly after the l900's, when the American citizens who migrated to the Territory of Hawai'i began to settle and reside there, an attempt began to transform the Islands into a State of the American union. "For most people," according to Tom Coffman, "the fiction of the Republic of Hawaii successfully obscured the nature of the conquest, as it does to this day. The act of annexation became something that just happened."[110] The first statehood bill was introduced in Congress in 1919, but failed, as Congress did not view the Hawaiian Islands as an incorporated territory at the time.[111] This puzzled the advocates for statehood in the islands who assumed the Hawaiian Islands were a part of the United States since 1898, but they were unaware of the Senate's secret session that clearly viewed Hawai'i to be an occupied state and not an incorporated territory acquired by a treaty of cession.[112] Thus, the legislature of the imposed civil government in the Islands, without any knowledge of the Senate secret session transcripts, enacted a "Bill of Rights," on 26 April 1923, asserting their perceived right of becoming an American State of the Union.[113] Beginning with the passage of this statute, a concerted effort was made by residents in the Hawaiian Islands to seek entry into the Federal union. The object of American statehood was finally accomplished in 1950 when two special elections were held in the occupied kingdom. As a result of the elections, 63 delegates were elected to draft a constitution that was then ratified on 7 November 1950.[114]

On 12 March 1959, the U.S. Congress approved the statehood bill. It was signed into law on 15 March 1959, and in a special election held on 27 June 1959, three propositions were submitted to vote.

> 1. [Whether Hawai'i should] immediately be admitted into the Union as a State;
> 2. The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved March 18, 1959, and all claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States;
> 3. All provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the

[109] *Id*.
[110] Coffman 322.
[111] Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America, G.A. Res. 14/I, Annex, U.N. Doc. A/4226, 100 (Sept. 24, 1959) [hereinafter Cessation of Info.].
[112] "Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898," 1 *Haw. J.L. & Pol.* 230, 280 (2004).
[113] Act 86 (H.B. No. 425), Territory of Hawai'i, 26 April 1923.
[114] Cessation of Info., 100.

> grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people.[115]

The residents in the Islands accepted all three propositions by 132,938 votes to 7,854. On 28 July 1959, two U.S. Hawai‘i Senators and one Representative were elected to office, and on 21 August 1959, President Dwight Eisenhower proclaimed that the process of admitting Hawai‘i as a State of the Federal Union was complete.[116]

In 1988, Kmiec, of the Office of Legal Counsel within the Department of Justice raised questions concerning not only the legality of congressional action in annexing the Hawaiian Islands by joint resolution, but also Congress' authority to establish boundaries for the State of Hawai'i that lie beyond the territorial seas of the United States' western coastline. Although he acknowledged congressional authority to admit new states into the union and its inherent power to establish state boundaries, Kmiec did caution that it was the "President's constitutional status as the representative of the United States in foreign affairs," not Congress, "which authorizes the United States to claim territorial rights in the sea for the purpose of international law."[117] Likewise, congressional legislation, absent a treaty of cession, creates no legal basis for any U.S. claim of sovereignty over the Hawaiian Islands, even under acquisitive prescription.

In 1946, prior to the passage of the Statehood Act, the United States once again misrepresented the relationship which existed between the federal government and the Hawaiian Islands. In a report to the United Nations, the United States Ambassador to the U.N. identified Hawai‘i as a non-self-governing territory, in accordance with Article 73(e), which had been under the administration of the United States since 1898.[118] The problem, however, is that Hawai‘i should never have been placed on the list in the first place, as it had already achieved self-governance as a "sovereign independent State" since 1843—a recognition explicitly granted by the United States itself in 1844 and confirmed by the U.S. 9th Circuit Court of Appeals in 2004.[119]

It would appear that Hawai‘i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States' prolonged occupation of an independent and sovereign State for military purposes. The reporting of Hawai‘i as a non-self-governing territory also coincided with the United States establishment of the headquarters for the Indo-Pacific Command (PACOM) on the Island of O‘ahu. If the United Nations had been aware of Hawai‘i's continued legal status as an occupied State, the United States would have been prevented from maintaining their military presence.

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[115] Cessation of Info., 100.
[116] *Id*.
[117] Douglas Kmiec, Department of Justice, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238, 252 (1988).
[118] G.A. Res. 66(I), U.N. GAOR, 14th Sess., U.N. Doc. A/64 (Dec. 14, 1946).
[119] *Kahawaiola‘a v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004).

The initial Article 73(e) list was comprised of non-sovereign territories under the control of sovereign States such as Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom, and the United States. In addition to Hawai‘i, the U.S. also reported their territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands.[120] The U.N. General Assembly, in a resolution entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter," defined self-governance in three forms: a sovereign independent State; free association with an independent State; or integration with an independent State.[121] None of the territories on the list of non-self-governing territories, with the exception of Hawai‘i, were recognized sovereign States.

According to Article 13 of the U.N. Charter, the "General Assembly shall initiate studies and make recommendations for the purpose of…promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." U.N. resolutions are not a source of international law but are merely recommendations that cannot impede or alter the obligations of the United States under the law of occupation. As Crawford states, "Of course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States."[122]

The Hawaiian Kingdom, as an independent State, did not lose its independence and became non-self-governing because of the United States illegal overthrow of its government and the ensuing occupation, just as the German and Japanese States did not lose their independence and became non-self-governing when their governments were destroyed by the Allied Powers that brought the hostilities of the Second World War to an end. Furthermore, Germany and Japan were not de-colonized when the Allied Powers ended their occupation of both their territories in 1952 and 1955, respectively. These States were de-occupied according to the rules of international law, which should apply with equal force to the Hawaiian Kingdom.

Furthermore, U.N. resolution 1514 does not apply to the Hawaiian situation, despite the United States deliberate attempt to conceal its prolonged occupation by reporting Hawai‘i as a non-self-governing territory in 1946 under Article 73(e). The United States did not report Japan as a non-self-governing territory when it occupied Japanese territory from 1945 until 1952. Therefore, resolution 1469 (XIV) of 1959, in which the General Assembly expressed "the opinion, based on its examination of the documentation and the explanations provided, that the people of…Hawaii

[120] G.A. Res. 66(I).
[121] Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter, G.A. Res. 1541(XV), U.N. GAOR, 15th Sess., 948 plen. Mtg., U.N. Doc. (Dec. 15, 1960).
[122] Crawford, 113.

have effectively exercised their right to self-determination and have freely chosen their present status" as the State of Hawai'i, is just an opinion and is non-binding under international law.[123]

Notwithstanding past misrepresentations of Hawai'i before the United Nations by the United States, there are two juridical facts that still remain. First, inclusion of Hawai'i on the United Nations list of non-self-governing territories was an inaccurate depiction of a sovereign State whose rights had been violated. And, second, Hawai'i remains a sovereign and independent State and a subject of international law despite the illegal overthrow of its government and the prolonged occupation of its territory for military purposes.

Considering the foregoing, the Hawaiian people—as a people subjected to uninterrupted foreign occupation since 1893—retains its rights to self-determination, recovering its status as an independent State, and implying that its legitimate government is reinstated as well as that its "political institutions must be free from outside interference."[124]

HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL HUMANITARIAN LAW

In 1970, the U.N. General Assembly affirmed in its resolution on "[b]asic principles for the protection of civilian populations in armed conflict" that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."[125] The International Committee of the Red Cross also accepted that "[h]uman rights continue to apply concurrently [with international humanitarian law] in time of armed conflict."[126] In the *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*, the International Court of Justice stated:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6

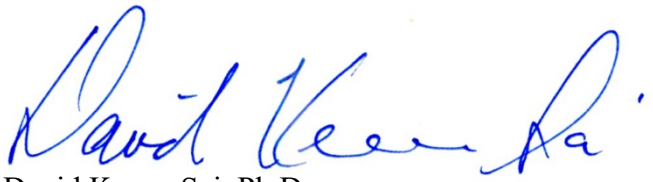
[123] GA Resolution 1416 (XIV) (Dec. 12, 1959), Cessation of the transmission of information under Article 73 e of the Charter in respect of Alaska and Hawaii.
[124] Cassese, 55.
[125] G.A. Res. 2675 (XXV), Principles for the Protection of Civilian Populations in Armed Conflict U.N. Doc. A/8028Basic (9 Dec. 1970.
[126] Y. Sandoz, C. Swinarski, and B. Zimmermann eds., *Commentary on the Additional Protocols* (1987).

> of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[127]

Regarding the extraterritoriality of human rights conventions, the U.N. Human Rights Committee explained:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operations.[128]

In a 2005 resolution, the Commission on Human Rights urged "all parties to armed conflicts to comply with their obligations under international humanitarian law, in particular to ensure respect for and protection of the civilian population, and also urges all States to comply with their human rights obligations in this context."[129] The Human Rights Committee also has consistently applied the International Covenant on Civil and Political Rights to situations of belligerent occupations.[130] According to Professor Federico Lenzerini, violation of human rights "would first of all need to be treated as war crimes, which are primarily to be considered under the lens of international criminal law. However, they would also produce notable implications in terms of human rights protection. It is the case, for instance, of the crime of *usurpation of sovereignty* consequent to the occupation."[131]



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23 October 2021

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[127] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), at para. 25.
[128] Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004).
[129] Resolution 2005/63.
[130] See concluding observations regarding Cyprus, para. 3, UN. Doc. CCPR/C/79/Add.39 (21 Sep. 1994); Israel, para. 10, CCPR/C/79/Add.93 (18 Aug. 1998); Israel, para. 11, UN Doc. CCPR/CO/78/ISR (21 Aug. 2003).
[131] Lenzerini, 208.