



DATE DOWNLOADED: Tue Nov 1 15:52:03 2022

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Bluebook 21st ed.

David Keanu Sai, Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001), 4 HAW. J.L. & POL. 133 (2022).

ALWD 7th ed.

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

APA 7th ed.

Sai, D. (2022). Backstory Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001). Hawaiian Journal of Law and Politics, 4, 133-161.

Chicago 17th ed.

David Keanu Sai, "Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)," Hawaiian Journal of Law and Politics 4 (2022): 133-161

McGill Guide 9th ed.

David Keanu Sai, "Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)" (2022) 4 Haw JL & Pol 133.

AGLC 4th ed.

David Keanu Sai, 'Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)' (2022) 4 Hawaiian Journal of Law and Politics 133

MLA 9th ed.

Sai, David Keanu. "Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)." Hawaiian Journal of Law and Politics, 4, 2022, pp. 133-161. HeinOnline.

OSCOLA 4th ed.

David Keanu Sai, 'Backstory - Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)' (2022) 4 Haw JL & Pol 133

Provided by:

William S. Richardson School of Law

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

**BACKSTORY—*LARSEN V. HAWAIIAN KINGDOM* AT THE PERMANENT
COURT OF ARBITRATION (1999-2001)**

David Keanu Sai, Ph.D.*

- I. INTRODUCTION
- II. HAWAIIAN INDEPENDENCE AND NEUTRALITY
- III. UNITED STATES INVASION OF THE HAWAIIAN KINGDOM AND
TWO FAILED ATTEMPTS TO ACQUIRE HAWAIIAN TERRITORY
- IV. The SPANISH-AMERICAN WAR AS A PRETENCE TO
UNILATERALLY SEIZE THE HAWAIIAN ISLANDS
- V. RESTORING THE GOVERNMENT OF THE HAWAIIAN KINGDOM
- VI. ARBITRATION PROCEEDINGS UNDER THE AUSPICES OF THE
PERMANENT COURT OF ARBITRATION
- VII. CONCLUSION

I. INTRODUCTION

To the layperson, the word Hawai‘i would be the common understanding for the Hawaiian Islands, and the term Hawaiian Kingdom would be novel. It is in fact the opposite. The Hawaiian Kingdom gained prominence in the nineteenth century as a recognized independent State. Prior to becoming the first non-European State admitted into the *Family of Nations*, the Hawaiian Kingdom was a British protectorate from 1794 to 1843. The term Hawai‘i replaced the Hawaiian Kingdom in the early twentieth century while under American control.

If one were to do a google search “Hawai‘i,” at the top of the list would be the official website for the State of Hawai‘i government. But if you google “Hawaiian Kingdom,” what is first on the list would be the official website of the Hawaiian Kingdom government. Both governments claim territorial jurisdiction of the Hawaiian Islands. Can there be two lawful governments within one and the same territory? The answer is both yes and no. International humanitarian law provides for two governments, that of the occupying State and that of the occupied State. Under a State’s domestic

* The author is a Lecturer in political science and Hawaiian Studies at the University of Hawai‘i Windward Community College, and Affiliate Graduate Faculty member in the Education Ph.D. graduate program at the University of Hawai‘i at Mānoa. He served as lead agent for the Hawaiian Kingdom in arbitration proceedings before the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

law, however, there can only be one government. The Hawaiian Kingdom is an occupied State.

In its 2001 arbitral award in *Larsen v. Hawaiian Kingdom*, the Tribunal at the Permanent Court of Arbitration (“PCA”) concluded, “in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”¹ This article will provide a history of the Hawaiian Kingdom since the nineteenth century and the backstory as to why the PCA acknowledged, by a *juridical act*, the continuity of the Hawaiian Kingdom—a *juridical fact*, and the Council of Regency as its government.

Unlike other non-European States, the Hawaiian Kingdom, as a recognized neutral State, enjoyed equal treaties with European powers, including the United States, and full independence of its laws over its territory. In his speech at the opening of the 1855 Hawaiian Legislature, King Kamehameha IV, reported, “It is gratifying to me, on commencing my reign, to be able to inform you, that my relations with all the great Powers, between whom and myself exist treaties of amity, are of the most satisfactory nature. I have received from all of them, assurances that leave no room to doubt that my rights and sovereignty will be respected.”²

The Hawaiian Kingdom entered into treaties of amity with Austria-Hungary on June 18, 1875;³ Belgium on October 4, 1862;⁴ Bremen on August 7, 1851;⁵ Denmark on October 19, 1846;⁶ France on October 29, 1857;⁷ Germany on March 25, 1879;⁸ Hamburg on January 8, 1848;⁹ Italy

¹ *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).

² Robert C. Lydecker, *Roster Legislatures of Hawaii* (Honolulu: The Hawaiian Gazette Co., Ltd., 1918), 57.

³ “Treaty with Austria-Hungary,” in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 237-240, [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

⁴ *Id.*, “Treaty with Belgium,” 241-246.

⁵ *Id.*, “Treaty with Bremen,” 247-248.

⁶ *Id.*, “Treaty with Denmark,” 255-256.

⁷ *Id.*, “Treaty with France,” 257-264.

⁸ *Id.*, “Treaty with Germany,” 265-272.

⁹ *Id.*, “Treaty with Hamburg,” 273-274.

on July 22, 1863;¹⁰ Japan on August 19, 1871;¹¹ the Netherlands-Luxembourg on October 16, 1862;¹² Portugal on May 5, 1882;¹³ Russia on June 19, 1869;¹⁴ Spain on October 29, 1863;¹⁵ Sweden-Norway on July 1, 1852;¹⁶ Switzerland on July 20, 1864;¹⁷ Great Britain on July 10, 1851;¹⁸ and the United States of America on December 20, 1849.¹⁹ Hawai‘i also became a full member of the Universal Postal Union on January 1, 1882.

By 1893, the Hawaiian Kingdom maintained diplomatic representatives and consulates accredited to foreign States. Hawaiian Legations were established in Washington, D.C., London, Paris, Lima, Valparaiso, and Tokyo, while diplomatic representatives and consulates accredited to the Hawaiian Kingdom were from the United States, Portugal, Great Britain, France, and Japan. There were two Hawaiian consulates in Mexico; one in Guatemala; two in Peru; one in Chile; one in Uruguay; thirty-three in Great Britain and her colonies; five in France and her colonies; five in Germany; one in Austria; ten in Spain and her colonies; five in Portugal and her colonies; three in Italy; two in the Netherlands; four in Belgium; four in Sweden and Norway; one in Denmark; and one in Japan.²⁰ Foreign Consulates in the Hawaiian Kingdom were from the United States, Italy, Chile, Germany, Sweden and Norway, Denmark, Peru, Belgium, the Netherlands, Spain, Austria and Hungary, Russia, Great Britain, Mexico, Japan, and China.²¹

The recognition of the Hawaiian Kingdom as a State was also the recognition of its government—a constitutional monarchy, as its agent. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King

¹⁰ *Id.*, “Treaty with Italy,” 275-280.

¹¹ *Id.*, “Treaty with Japan,” 281-282.

¹² *Id.*, “Treaty with the Netherlands & Luxembourg,” 283-284.

¹³ *Id.*, “Treaty with Portugal,” 285-286.

¹⁴ *Id.*, “Treaty with Russia,” 287.

¹⁵ *Id.*, “Treaty with Spain,” 290-295.

¹⁶ *Id.*, “Treaty with Sweden and Norway,” 296-300.

¹⁷ *Id.*, “Treaty with Switzerland,” 301-304.

¹⁸ *Id.*, “Treaty with Britain,” 249-254.

¹⁹ *Id.*, “Treaty with the United States of America,” 305-310.

²⁰ “Hawaiian Register and Directory for 1893,” in *Hawaiian Almanac and Annual for 1893*, ed. Thomas Thrum (Honolulu: Thos. G. Thrum, 1892), 14-141.

²¹ *Id.*

Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, and Queen Lili‘uokalani in 1891. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.²² Successors to King Kamehameha III were not established through “extra-legal changes,” but rather under the constitution and laws of the Hawaiian Kingdom. According to Professor Peterson,

A government succeeding to power according to the constitution, basic law, or established domestic custom is assumed to succeed as well to its predecessor’s status as international agent of the state. Only if there is legal discontinuity at the domestic level because a new government comes to power in some other way, as by coup d’état or revolution, is its status as an international agent of the state open to question.²³

The Hawaiian Kingdom was no doubt firmly established as a subject and co-equal sovereign under international law, but it still had to navigate through the political waters of power and expansionism in the Pacific displayed by the United States in the latter part of the nineteenth century. The untold political and legal history of the Hawaiian Kingdom presents a fascinating story of agency on the part of Hawaiians as they were forced to engage the United States’ new vision of world prominence and naval supremacy. In the end, Hawaiians were able to prevent American expansionists from acquiring the sovereignty and independence of the island kingdom under international law, but they could not hold back the unbridled power of the United States in seizing and occupying the islands for military purposes since the Spanish-American War, in similar fashion, to Germany’s occupation of Luxembourg during the First World War.

Since the occupation began on January 17, 1893, the world has been led to believe that the United States acquired the independence and sovereignty of the Hawaiian Kingdom. In a 1901 United States government publication titled *History of the Department of State of the United States*, William Henry Michael, Chief Clerk of the Department of State, wrote, that under the McKinley administration, “a treaty was ratified by both parties, and annexation was consummated...which effected the absorption of the Sandwich [Hawaiian] Islands into the domain of the United States.”²⁴ There is no treaty. Instead, there is only a congressional statute called a joint resolution purporting to have annexed a foreign State—the Hawaiian Kingdom.

²² M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* (London: MacMillan, 1997), 26.

²³ *Id.*, 185.

²⁴ Wm. H. Michael, *History of the Department of State on the United States* (Washington: Government Printing Office, 1901), 38.

It would be ninety years later when Acting Assistant United States Attorney General, Douglas W. Kmiec, would stumble over this American dilemma in a memorandum opinion written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three mile limit to twelve.²⁵ Kmiec concluded that only the President and not the Congress possesses “the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”²⁶ He further stated, “we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”²⁷ Therefore, he stated it is “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”²⁸

Kmiec cited United States constitutional scholar Professor Willoughby, who wrote in 1929, “The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. ... Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it.”²⁹ In 1910, Willoughby wrote, “The incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is...essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts.”³⁰

II. HAWAIIAN INDEPENDENCE AND NEUTRALITY

On June 7, 1839, Kamehameha III proclaimed an expanded uniform code of laws preceded by a *Declaration of Rights* that formally acknowledged and vowed to protect the *natural rights* of life, limb, and liberty for both

²⁵ Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” *Opinions of the Office of Legal Counsel* 12 (1988): 238.

²⁶ *Id.*, 242.

²⁷ *Id.*

²⁸ *Id.*, 262.

²⁹ *Id.*, 252.

³⁰ Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1 (New York: Baker, Voorhis & Company, 1910), 345.

chiefs and people. The code provided that “no chief has any authority over any man, any farther than it is given him by specific enactment, and no tax can be levied, other than that which is specified in the printed law, and no chief can act as a judge in a case where he is personally interested, and no man can be dispossessed of land which he has put under cultivation except for crimes specified in the law.”³¹ On October 8, 1840, Kamehameha III approved the first constitution incorporating the *Declaration of Rights* as its preamble. Marquardt acknowledges that Hawai‘i’s transformation into a constitutional monarchy even precedes that of Prussia.³²

After French troops temporarily occupied the Hawaiian Kingdom in 1839, under the command of Captain Laplace, Lord Ingestre, a member of the British House of Commons, called upon the Secretary of State for Foreign Affairs, Viscount Palmerston, to provide an official response. Lord Ingestre also “desired to be informed whether those islands which, in the year 1794, and subsequently in 1824, ... had been declared to be under the protection of the British Government, were still considered... to remain in the same position.”³³ Viscount Palmerston reported he knew very little of the situation with the French, and with regard to the protectorate status of the Islands “he was non-committal and seemed to indicate that he knew very little about the subject.”³⁴

In the eyes of the Hawaiian government, Viscount Palmerston’s report quelled the notion of British dependency and acknowledged Hawaiian autonomy.³⁵ Two years later, a clearer British policy toward the Hawaiian Islands, by Viscount Palmerston’s successor, Lord Aberdeen, reinforced the position taken by the Hawaiian government. In a letter to the British Admiralty on October 4, 1842, Viscount Canning, on behalf of Lord Aberdeen, wrote, “Lord Aberdeen does not think it advantageous or politic, to seek to establish a paramount influence for Great Britain in those Islands, at the expense of that enjoyed by other Powers. All that appears to his Lordship to be required, is, that no other Power should exercise a greater degree of influence than that possessed by Great Britain.”³⁶

³¹ “William Richards’ Report to the Sandwich Islands Mission on His First Year in Government Service, 1838-1839,” in *Fifty-First Annual Report of the Hawaiian Historical Society for the Year 1942* (Honolulu: Hawaiian Printing Company, Ltd., 1943), 68.

³² Lit Bernd Marquardt, *Universalgeschichte des Staates: von der vorstaatlichen Gesellschaft zum Staat der Industriegesellschaft* (Zurich: Lit Verlag, 2009), 478.

³³ Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, vol. 1 (Honolulu: University of Hawai‘i Press, 1938), 185.

³⁴ *Id.*

³⁵ *Report of the Minister of Foreign Affairs, May 21, 1845* (Honolulu: Polynesian Press 1845), 7.

³⁶ *Report of the Historical Commission of the Territory of Hawai‘i for the two years ending December 31, 1924*, (Honolulu: Star-Bulletin, Ltd., 1925), 36.

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent State under international law. He sought the formal recognition of Hawaiian independence from the three naval powers of the world at that time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys, Timoteo Ha'alilio, William Richards, who was still an American citizen, and Sir George Simpson, a British subject. Of all three powers, Great Britain had legal claim over the Hawaiian Islands through cession by King Kamehameha I in 1794, but for political reasons, the British could not openly exert its claim over the other two naval powers. Due to the islands prime economic and strategic location in the middle of the north Pacific, the political interest of all three powers was to ensure that none would have a greater interest than the other. This caused Kamehameha III "considerable embarrassment in managing his foreign relations, and...awakened the very strong desire that his Kingdom shall be formally acknowledged by the civilized nations of the world as a sovereign and independent State."³⁷

The envoys succeeded in obtaining formal international recognition of the Hawaiian Islands "as a sovereign and independent State." Great Britain and France formally recognized Hawaiian sovereignty on November 28, 1843, by joint proclamation at the Court of London,³⁸ and the United States followed on July 6, 1844, by a letter of Secretary of State John C. Calhoun.³⁹ The Hawaiian Islands became the first Polynesian and non-European nation to be recognized as a sovereign and independent State.

As a recognized State, Hawaiian Attorney General John Ricord established a diplomatic code for Kamehameha III and the Royal Court, which was based on the principles of the 1815 Vienna Conference. According Mykkanen, "Besides prescribing rank orders, the mode of applying for royal audience, and the appropriate dress code, the new court etiquette set the Hawaiian standard for practically everything that constituted the royal symbolism."⁴⁰

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

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

³⁷ United States House of Representatives, 53d Cong., *Executive Documents on Affairs in Hawaii: 1894-95* (Washington, D.C.: Government Printing Office, 1895), 42.

³⁸ *Id.*, 120.

³⁹ Report of the Minister of Foreign Affairs, 4.

⁴⁰ Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom* (Honolulu: University of Hawai'i Press, 2003), 161.

Hawaii, containing about, 4,000 square miles; Maui, 600 square miles; Oahu, 520 square miles; Kauai, 520 square miles; Molokai, 170 square miles; Lanai, 100 square miles; Niihau, 80 square miles; Kahoolawe, 60 square miles; Nihoa, known as Bird Island, Molokini, Lehua, Kaula, Islets, little more than barren rocks; and all Reefs, Banks and Rocks contiguous to either of the above, or within the compass of the whole.⁴¹

In its search for guano, the Hawaiian Kingdom annexed four uninhabited islands northwest of the main islands. Laysan Island was annexed by discovery of Captain John Paty on May 1, 1857.⁴² Lisiansky Island also was annexed by discovery of Captain Paty on May 10, 1857.⁴³ Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on April 15, 1862, and proclaimed as Hawaiian Territory.⁴⁴ Ocean Island, also called Kure atoll, was acquired September 20, 1886, by proclamation of Colonel J.H. Boyd.⁴⁵

King Kamehameha III sought international recognition of Hawaiian neutrality. Unlike States that were neutralized by agreement of third States, *e.g.*, Switzerland, Belgium and Luxembourg, the Hawaiian Kingdom took a proactive approach to secure its neutrality through diplomacy and treaty provisions. It made full use of its global location and became a beneficial asylum for all States who found themselves at war in the Pacific. Hawaiian Minister of Foreign Affairs, Robert C. Wyllie, was responsible for carrying out this policy of neutrality. He secured equal and most favored nation treaties for the Hawaiian Kingdom, and wherever possible, included in the treaties, the recognition of Hawaiian neutrality. The first treaty provision securing the recognition of Hawaiian neutrality was with the unified kingdoms of Sweden and Norway in 1852. Similar provisions were also provided under Article XXVI of the 1863 treaty with Spain, and Article VIII of the 1879 treaty with Germany.

As an independent State, the Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with the rapidly changing political, social, and economic conditions. In 1841, the Hawaiian Kingdom became the fifth country in the world to provide compulsory education through a Department of Public Instruction. The other four countries were Prussia in 1763, Denmark in 1814, Greece in 1834, and Spain in 1838.

⁴¹ A.P. Taylor, *Islands of the Hawaiian Domain* (Honolulu: Librarian Archives of Hawaii, January 10, 1931), 5.

⁴² *Id.*, 7.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*, 8.

There were three levels of schools in the country that were both public and private schools. Common Schools were for children between the ages of four and fourteen where the attendance was mandatory. The curriculum of study was “confined chiefly to Reading, Mental and Written Arithmetic, Geography, and Penmanship.”⁴⁶ Secondary Schools or High Schools were for students of fifteen and older, where attendance was not mandatory. And High Education Institutions that were also not mandatory, which were Lahainaluna Seminary and O‘ahu College. The aboriginal Hawaiian students attended the former, while those students of foreign parentage attended the latter.⁴⁷ Curriculum studies at Lahainaluna Seminary, a public school, included a good knowledge of English and “instruction in all the Higher Mathematics, in subjects of Natural and Moral Science, History, and Political Economy, and also instruction in the principles and practice of teaching.”⁴⁸ The Secondary Schools and the High Education Institutions were English immersion, while the Common Schools were taught solely in the Hawaiian language until 1851 when legislation established Independent Common Schools to provide instruction in the English language.

In 1859, universal healthcare was provided at no charge for aboriginal Hawaiians through hospitals regulated and funded by the Hawaiian government. Tourists were also provided health coverage after paying a hospital tax. As part of Hawai‘i’s mixed economy, the Hawaiian government appropriated funding for the maintenance of its quasi-public hospital, the Queen’s Hospital, where the monarch served as the head of the Board of Trustees comprised of ten appointed government officials and ten persons elected by the corporation’s shareholders. According to Witney, “Native Hawaiians are admitted free of charge, while foreigners pay from seventy-five cents to two dollars a day, according to accommodations and attendance.”⁴⁹

Under the Hawaiian Constitution of 1864, the office of Prime Minister was repealed, which established an Executive Monarch. The separation of powers doctrine was also fully adopted, and according to Article 13, “The King conducts His Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among his subjects.” The Hawaiian Kingdom’s political economy was not based on Adam Smith’s *Wealth of Nations*, but rather Francis Wayland’s

⁴⁶ Biennial Report of the President of the Board of Education to the Legislative Assembly of 1880 (1880), 5.

⁴⁷ *Id.*, 27.

⁴⁸ *Id.*, 17.

⁴⁹ Henry Witney, *The Tourists’ Guide through the Hawaiian Islands Descriptive of Their Scenes and Scenery* (Honolulu: Hawaiian Gazette Company’s Press, 1895), 21.

Elements of Political Economy.⁵⁰ 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.”⁵¹

III. UNITED STATES INVASION OF THE HAWAIIAN KINGDOM AND TWO FAILED ATTEMPTS TO ACQUIRE HAWAIIAN TERRITORY

On January 16, 1893, the United States intervened in the internal affairs of the kingdom when its diplomat—Minister John Stevens, ordered the landing of U.S. troops who actively participated with a minority of insurgents to take over the Hawaiian government. The following day, U.S. troops forcibly removed the executive Monarch—Queen Lili‘uokalani, her Cabinet of four ministers and the Marshal of the Hawaiian Kingdom. They were replaced with insurgents led by Hawai‘i Supreme Court Judge Sanford Dole. The insurgents’ proclamation of January 17, 1893, stated:

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.⁵²

Once the regime change was complete, all remaining government officers and employees were forced to sign oaths of allegiance or face termination or arrest. This was done under the oversight of U.S. troops after Minister Stevens declared Hawai‘i to be an American protectorate on February 1, 1893. The purpose of the regime change was for the provisional government to cede, by treaty, the Hawaiian Kingdom’s sovereignty and territory to the United States.

U.S. Naval Captain Alfred Mahan’s vision of deploying ships abroad relied on securing naval ports, and only three years after his book was published, he set his eyes on the Hawaiian Islands. On January 31, 1893, Captain Mahan wrote a letter to the Editor of the *New York Times* where he advocated seizing the Hawaiian Islands. In his letter, he recognized the

⁵⁰ David Keanu Sai, “Hawaiian Constitutional Governance,” in *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 60.

⁵¹ Mykkanen, *Inventing Politics*, 154.

⁵² Lydecker, *Roster Legislatures*, 188.

Hawaiian Islands, “with their geographical and military importance, [to be] unrivalled by that of any other position in the North Pacific.”⁵³ Captain Mahan used the Hawaiian situation to bolster his argument of building a large naval fleet. He warned that a maritime power could well seize the Hawaiian Islands, and that the United States should take that first step. He wrote, “To hold [the Hawaiian Islands], whether in the supposed case or in war with a European state, implies a great extension of our naval power. Are we ready to undertake this?”⁵⁴ Mahan conveniently omits, in his doomsday scenarios, his own country’s established neutrality, and the implication of customary international law and treaties prohibiting the infringement upon another country’s neutrality—the Hawaiian Kingdom.

On February 14, 1893, one month after the treaty of annexation was signed in Washington, D.C., under President Benjamin Harrison and submitted to the Senate for ratification, President Grover Cleveland, Harrison’s successor, withdrew the treaty and initiated an investigation into the overthrow of the Hawaiian Government. President Cleveland concluded that the provisional government was neither *de facto* nor *de jure*, but self-declared,⁵⁵ and “that the provisional government owes its existence to an armed invasion by the United States.”⁵⁶ He also determined that the “military demonstration upon the soil of Honolulu was itself an act of war.”⁵⁷

President Cleveland then notified Congress that he had begun executive mediation with Queen Lili‘uokalani to reinstate her and her Cabinet of Ministers, on condition she would grant amnesty to the insurgents.⁵⁸ The first of several meetings were held at the U.S. Legation in Honolulu on November 13, 1893.⁵⁹ An agreement was reached on December 18, 1893,⁶⁰ but President Cleveland was unable to get Congressional authorization for the use of force to redeploy U.S. troops to the islands. Although the agreement was not carried out, this agreement is recognized

⁵³ Captain A.T. Mahan, *The Interest of America in Sea Power, Present and Future* (Boston: Little, Brown, and Company, 1897), 31.

⁵⁴ *Id.*, 32.

⁵⁵ United States, *Executive Documents*, 453.

⁵⁶ *Id.*, 454.

⁵⁷ *Id.*, 451.

⁵⁸ *Id.*, 458.

⁵⁹ *Id.*, 1241-43.

⁶⁰ *Id.*, 1269-73.

under international law and American public law as a treaty that did not require ratification by the U.S. Senate.⁶¹

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. As Professor Wright asserts “international law distinguishes between a government and the state it governs.”⁶² Professor Cohen also posits that the “state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law.”⁶³ And according to Professor Crawford “Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”⁶⁴

On July 4, 1894, the insurgents declared the Provisional Government to be the Republic of Hawai‘i, and they continued to have government officers and employees sign oaths of allegiance. These signings were coerced under threat from American mercenaries employed by the insurgents. The proclamation of the insurgents stated, “it is hereby declared, enacted and proclaimed by the Executive and Advisory Councils of the Provisional Government and by the elected Delegates, constituting said Constitutional Convention, that on and after the Fourth day of July, A.D. 1894, the said Constitution shall be the Constitution of the Republic of Hawaii and the Supreme Law of the Hawaiian Islands.”⁶⁵

The Republic of Hawai‘i and its predecessor, the Provisional Government, never intended to be an independent government, but rather were established with the sole purpose of ceding the sovereignty of the Hawaiian Islands to the United States. In its proclamation on January 17, 1893, the insurgents proclaimed a “Provisional Government...is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.”⁶⁶ Branded self-declared by U.S. President Cleveland, the puppet renamed themselves the Republic of

⁶¹ See *Dames & Moore v. Regan*, 453 U. S. 654, 679, 682-683 (1981); *United States v. Pink*, 315 U. S. 203, 223, 230 (1942); *United States v. Belmont*, 301 U. S. 324, 330-331 (1937).

⁶² Quincy Wright, “The Status of Germany and the Peace Proclamation,” *American Journal of International Law* 46, no. 2 (1952): 299-308, 307.

⁶³ Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* (Boulder, Taylor & Francis Ltd., 1989), 17.

⁶⁴ James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006), 34.

⁶⁵ Lydecker, *Roster Legislatures*, 225.

⁶⁶ *Id.*, 187.

Hawai‘i,⁶⁷ and empowered its so-called President, under Article 32 of its constitution, “to make a Treaty of Political or Commercial Union between the Republic of Hawaii, and the United States of America, subject to the ratification of the Senate.” Clearly this self-declared armed force remained a puppet, despite President Cleveland’s severing of the puppeteer’s strings, as these insurgents sought to reconnect with another Presidential administration.

The subsequent McKinley administration was already drawing up plans to seize the Hawaiian Islands for naval interests. As Assistant Secretary of the Navy, Theodore Roosevelt sent a private and confidential letter, on May 3, 1897, to Captain Mahan. Roosevelt wrote, “I need not tell you that as regards Hawaii I take your views absolutely, as indeed I do on foreign policy generally. If I had my way we would annex those islands tomorrow.”⁶⁸ Moreover, Roosevelt told Mahan that Cleveland’s handling of the Hawaiian situation was “a colossal crime, and we should be guilty of aiding him after the fact if we do not reverse what he did.”⁶⁹ Roosevelt also assured Mahan “that Secretary [of the Navy] Long shares our views. He believes we should take the islands, and I have just been preparing some memoranda for him to use at the Cabinet meeting tomorrow.”⁷⁰

In a follow up letter to Mahan, on June 9, 1897, Roosevelt wrote that he “urged immediate action by the President as regards Hawaii. Entirely between ourselves, I believe he will act very shortly. If we take Hawaii now, we shall avoid trouble with Japan.”⁷¹ Eight days later, on June 16, the McKinley administration signed a treaty of annexation with the American puppet in Washington, D.C. On the following day, June 17, Queen Lili‘uokalani submits a formal protest to the U.S. State Department. She stated:

I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the

⁶⁷ In a 1993 joint resolution apologizing for the illegal overthrow of the government of the Hawaiian Kingdom, the U.S. Congress acknowledged that the Republic of Hawai‘i was self-declared. 107 U.S. Stat. 1510, 1512 (1993).

⁶⁸ H.W. Brands, *The Selected Letters of Theodore Roosevelt* (Lanham: Rowman & Littlefield Publishers, 2006), 132.

⁶⁹ *Id.*

⁷⁰ *Id.*, 133.

⁷¹ *Id.*, 141.

constitutional government was overthrown, and, finally, an act of gross injustice to me.⁷²

President McKinley ignored the protest and submitted the treaty for Senate ratification, which required a minimum of 60 votes. The Senate, however, was not convening until December 6, 1897. These facts prompted two Hawaiian political organizations to mobilize signature petitions protesting annexation. According to Professor Silva, the “strategy was to challenge the U.S. government to behave in accordance with its stated principles of justice and of government of the people, by the people, and for the people.”⁷³ The Hawaiian Political Association (Hui Kalai‘āina) gathered over 17,000 signatures, and the Hawaiian Patriotic League (Hui Aloha ‘Āina) gathered 21,269 signatures.⁷⁴ The last official census, done in 1890, listed the entire Hawaiian Kingdom population at 89,990, with 48,107 as Hawaiian subjects and 41,873 as resident aliens.⁷⁵ The petition of the Hawaiian Patriotic League was separated into men and women in order to be sure that not only the voters were against annexation, but also the women and children.⁷⁶

On its way to Washington, D.C., a Hawaiian commission of four men, representing the Hawaiian Patriotic League and the Hawaiian Political association, arrived in San Francisco. On November 28, 1897, they celebrated Hawaiian Independence Day, known as Lā Kū‘oko‘a, a national holiday celebrating Hawaiian Independence. On that same day, an article was published, in the *San Francisco Call* newspaper, interviewing the commission members. One of the commissioners, and President of the Hawaiian Patriotic League, James Kaulia, stated, “Nearly twenty-one thousand Hawaiians have signed the memorial we are taking to Washington. The men, the natives, who have refused to sign, tell us that it would hurt their business or jeopardize their positions if their names were added to our petition. But they are with us in feeling, and...if it comes to a vote, they will forget every other consideration, and remember only that their country is being taken from them.”⁷⁷ He added, the “United States

⁷² Liliuokalani, *Hawaii's Story by Hawaii's Queen* (Boston: Lothrop, Lee & Shepard Co., 1898), 354; Petition (June 17, 1897), <http://libweb.hawaii.edu/digicoll/annexation/protest/pdfs/liliu5.pdf>.

⁷³ Noenoe K. Silva, *Aloha Betrayed* (Durham & London: Duke University Press, 2004), 146.

⁷⁴ *Id.*, 151.

⁷⁵ David Keanu Sai, “American Occupation of the Hawaiian State: A Century Unchecked,” *Hawaiian Journal of Law and Politics* 1 (2004), 46-81, 63.

⁷⁶ Hawaiian Patriotic League petition, <http://libweb.hawaii.edu/digicoll/annexation/petition.html>.

⁷⁷ “Hawaii’s Last Struggle for Freedom,” *San Francisco Call Newspaper*, Nov. 28, 1897, 1.

cannot...if it has any regard for justice, annex our country, after our protest.”⁷⁸

The Hawaiian commission arrived in Washington, D.C., on December 6, 1897, the same day the Senate opened its session, and were told there were 58 votes for annexation, just 2 shy of the 60 votes needed for ratification.⁷⁹ The next day, they met with Queen Lili‘uokalani and chose her as chair of the Washington Committee. In that meeting, “they decided to present only the petitions of Hui Aloha ‘Āina because the substance of the two sets of petitions were different. Hui Aloha ‘Āina’s petition protested annexation, but the Hui Kālai‘āina’s petitions called for the monarchy to be restored. They agreed that they did not want to appear divided or as if they had different goals.”⁸⁰

Senators Richard Pettigrew and George Hoar met with the delegates of the Committee and said they would lead the opposition in the Senate. Senator Hoar promised the Committee that he would introduce opposition into the Senate and the Senate Foreign Relations Committee. “On December 9, with the delegates present, Senator Hoar read the text of the petitions to the Senate and had them formally accepted.”⁸¹ In the days that followed, the Committee would meet with many Senators urging them not to ratify the treaty. Two of the leading Senators for annexation were Senators Henry Cabot Lodge and John Morgan, who were both strong believers in Captain Mahan’s views on Hawai‘i.

Unbeknownst to the Queen and the Hawai‘i delegates, Senators began to inquire into the military importance of annexing the Hawaiian Islands. On this matter, Senator Kyle made a request, by letter, to Captain Mahan, on February 3, 1898, where he wrote, “Recent discussions in the Senate brought prominently to the front the question of the strategic features of the Hawaiian Islands, and in this connection many quotations have been made from your valuable and highly interesting contribution to literature in regard to these islands.”⁸²

This was war rhetoric to justify the preemptive seizure of a neutral State for military interests. It was precisely what Germany did in 1914 to justify its invasion and occupation of Luxembourg. Germany invaded Luxembourg before formally declaring war against France. German military commander, Herr von Jagow then stated, “to our great regret, the

⁷⁸ *Id.*

⁷⁹ Silva, *Aloha Betrayed*, 158.

⁸⁰ *Id.*

⁸¹ *Id.*, 159.

⁸² House Committee on Foreign Affairs Report to accompany H. Res. 259, May 17, 1898, Appendix 3 (House Report no. 1355, 55th Congress, 2d session), 98.

military measures which have been taken have become indispensable by the fact that we have received sure information that the French military were marching against Luxemburg. We were forced to take measures for the protection of our army and the security of our railway lines.”⁸³ Herr von Jagow then issued a proclamation stating “all the efforts of our Emperor and King to maintain peace have failed. The enemy has forced Germany to draw the sword. France has violated the neutrality of Luxemburg and has commenced hostilities on the soil of Luxemburg against German troops, as has been established without a doubt.”⁸⁴ The French protested against this German invasion and confirmed there were no French troops in Luxembourg. Thus, according to Garner, “The alleged intentions of France were merely a pretext, and the violation of Luxemburg was committed by Germany solely in her military interest and in no sense on the ground of military necessity.”⁸⁵

It appears the Senators were not swayed by Mahan’s position because by the time the Hawaiian Committee left Washington, D.C., on February 27, 1897, they had successfully chiseled the 58 Senators in support of annexation down to 46.⁸⁶ Unable to garner the necessary 60 votes, the treaty was dead by March, yet war with Spain was looming over the horizon, and the Hawaiian Kingdom would have to face the belligerency of the United States again. American military interests would be the driving forces behind the occupation of the islands, and Captain Mahan’s philosophy, the guiding principles.

IV. The SPANISH-AMERICAN WAR AS A PRETENCE TO UNILATERALLY SEIZE THE HAWAIIAN ISLANDS

On April 25, 1897, one month after the treaty was killed, Congress declared war on Spain. President McKinley proclaimed, “that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice.”⁸⁷ The U.S. Supreme Court later explained that, “the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.”⁸⁸ The U.S. administration was clearly giving the impression that this war would be

⁸³ James Wilford, *International Law and the World War*, vol. II (New York, Bombay, Calcutta, and Madras: Longmans, Green and Co., 1920), 233.

⁸⁴ *Id.*, 234.

⁸⁵ *Id.*, 235.

⁸⁶ Silva, *Aloha Betrayed*, 159.

⁸⁷ 30 U.S. Stat. 1770.

⁸⁸ *The Paquete Habana*, 175 U.S. 712 (1900).

conducted in compliance with international law, yet they were already making plans to violate Hawaiian neutrality and seize the island kingdom. The Spanish-American War was not waged in Spain, but rather in the Spanish colonies of Puerto Rico and Cuba in the Caribbean, and in the colonies of the Philippines and Guam in the Pacific. On May 1, 1898, Commodore George Dewey defeated the Spanish fleet at Manila Bay in the Philippines. Then on May 4, 1898, Representative Francis Newlands (S-Nevada) submitted a joint resolution for the annexation of the Hawaiian Islands to the U.S. House Committee on Foreign Affairs.

On May 1, 1898, the U.S.S. *Charleston*, a protected cruiser, was commissioned. Then on May 5, it was ordered to lead a convoy of 2,500 troops to reinforce Dewey in the Philippines and Guam. In a move to deliberately violate Hawaiian neutrality, the convoy set a course to re-coal and arrived in Honolulu harbor on June 1. This convoy took on 1,943 tons of coal before it left on June 4. A second convoy of troops arrived in Honolulu harbor on June 23 and took on 1,667 tons of coal. On June 8, H. Renjes, the Spanish Vice-Counsel in Honolulu, lodged a formal protest. Renjes declared, "In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America."⁸⁹

The U.S. gave formal notice to the other powers of the existence of war so that these powers could proclaim neutrality, yet the United States was also violating the neutrality of the Hawaiian Kingdom at that time. From Professor Bailey's view, the position taken by the United States "was all the more reprehensible in that she was compelling a weak nation to violate the international law that had to a large degree been formulated by her own stand on the Alabama claims. Furthermore, in line with the precedent established by the Geneva award, Hawaii would be liable for every cent of damage caused by her dereliction as a neutral, and for the United States to force her into this position was cowardly and ungrateful."⁹⁰ Bailey also wrote, "At the end of the war, Spain or a cooperating power would doubtless occupy Hawaii, indefinitely if not permanently, to insure payment of damages with the consequent jeopardizing of the defenses of the Pacific Coast."⁹¹

On May 17, the joint resolution was reported out of the Committee without amendment and headed to the floor of the House of Representatives. The joint resolution's accompanying Report justified the congressional action to seize the Hawaiian Islands as a matter of military interest, which was

⁸⁹ U.S. Minister of Hawai'i Harold Sewall to U.S. Secretary of State William R. Day, No. 167 (June 4, 1898), Hawai'i Archives.

⁹⁰ T.A. Bailey, "The United States and Hawaii During the Spanish-American War," *American Historical Review* 36, no. 3 (1931): 552-560, 557.

⁹¹ *Id.*

advocated by Captain Mahan. The Congressional record clearly showed that when the joint resolution of annexation reached the floor of the House of Representatives, the Congressmen there knew the limitations of congressional laws.

On June 15, 1898, Representative Thomas H. Ball (D-Texas) emphatically stated, “The annexation of Hawaii by joint resolution is unconstitutional, unnecessary, and unwise. ... Why, sir, the very presence of this measure here is the result of a deliberate attempt to do unlawfully that which can not be done lawfully.”⁹² When the resolution reached the Senate, Senator Augustus Bacon (D-Georgia) sarcastically remarked that the “friends of annexation, seeing that it was not possible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.”⁹³ Senator William Allen (P-Nebraska) added, “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.”⁹⁴ He later reiterated, “I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution.”⁹⁵ Despite these objections, the Congress passed the joint resolution and President McKinley signed it into law on July 7, 1898.

Since the United States failed to carry out its obligation to reinstate the Executive Monarch and her Cabinet, under the executive agreement concluded with the Cleveland administration, the McKinley administration took complete advantage of its puppet called the Republic of Hawai‘i, and deliberately violated Hawaiian neutrality. This served as leverage to force the hand of Congress to pass this joint resolution purporting to annex a foreign State. Still more diabolical, while the Senate was in secret session, Senator Lodge argued that the “Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity.”⁹⁶

“Puppet governments,” according to Marek, “are organs of the occupant and, as such form part of his legal order. The agreements concluded by

⁹² 31 Cong. Rec. 5975 (1898).

⁹³ *Id.*, 6150.

⁹⁴ *Id.*, 6635.

⁹⁵ 33 Cong. Rec. 2391.

⁹⁶ “Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898,” *Hawaiian Journal of Law and Politics* 1 (2004): 230-284, 280.

them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself.”⁹⁷ Choreographed like a carefully rehearsed play, the annexation ceremony on August 12, 1898, between the American puppet—the Republic of Hawai‘i, and the United States, was scripted to appear in conformity with international law when the ratifications of a treaty were being exchanged. In the hands of U.S. Minister Harold Sewell was the joint resolution, and in the hands of Republic President Sanford Dole was their ratification. They were exchanging an apple for an orange.

Many government officials and constitutional scholars could not explain how a joint resolution could have the extra-territorial force and effect in annexing a foreign State. During the nineteenth century, Professor Born states, “American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction.”⁹⁸ In 1824, the United Supreme Court illustrated this view by asserting that, “the legislation of every country is territorial,” and that the “laws of no nation can justly extend beyond its own territory,”⁹⁹ for it would be “at variance with the independence and sovereignty of foreign nations.”¹⁰⁰ The *Apollon* Court also explained that, “however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction.”¹⁰¹

The war with Spain came to an end on April 11, 1899, after ratifications of the Treaty of Paris were exchanged. This was a *bona fide* exchange, unlike the Hawaiian situation. As an occupying State, customary international law mandated the United States to establish a military government to provisionally administer the laws of the occupied State, the Hawaiian Kingdom. These were the laws that stood in force prior to January 17, 1893.

In violation of international law and the treaties with the Hawaiian Kingdom, the United States maintained the insurgents’ control until the Congress could reorganize its puppet. By statute, the Congress changed the name of the Republic of Hawai‘i to the Territory of Hawai‘i on April

⁹⁷ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed. (Geneva: Librairie Droz S.A., 1968), 114.

⁹⁸ Gary Born, *International Civil Litigation in United States Courts*, 3d ed. (Boston: Wolters Kluwer Law & Business, 1996), 493.

⁹⁹ *Rose v. Himely*, 8 U.S. 241, 279 (1808).

¹⁰⁰ *The Apollon*, 22 U.S. 362, 370 (1824).

¹⁰¹ *Id.*

30, 1900.¹⁰² Later, on March 18, 1959, the Congress, again by statute, changed the name of the Territory of Hawai‘i to the State of Hawai‘i.¹⁰³ According to the U.S. Supreme Court, however, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory,” which renders these congressional acts *ultra vires*.¹⁰⁴

When the United States assumed control of its installed puppet under the new title of 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.”¹⁰⁵ The purpose of this extraterritorial prescription was to conceal the occupation of the Hawaiian Kingdom and bypass their duty to administer the laws of the occupied State in accordance with customary international law at the time, which was later codified under Article 43 of the 1907 Hague Regulations,¹⁰⁶ and Article 64 of the 1949 Fourth Geneva Convention.¹⁰⁷ The United States’ deliberate omission to do what was obligatory under the laws and customs of war would chart a course for the commission of war crimes on such a colossal scale unrivaled in the history of international relations. According to Professor Schabas, these crimes include usurpation of sovereignty, compulsory enlistment, denationalization, pillage, destruction of property, unfair trial, deporting civilians, and transferring populations into an occupied State.¹⁰⁸ According to Benvenisti, “The occupations of Hawaii, The Philippines, and Puerto Rico reflected the same unique US view on the unlimited authority of the occupant.”¹⁰⁹

In 1906, the intentional policy and methodical plan of *Americanization* began. This plan intended to conceal the unlawful overthrow of the Hawaiian Kingdom government and the international law of occupation. It sought to obliterate the national consciousness of the Hawaiian Kingdom in the minds of the children attending the public and private

¹⁰² 31 U.S. Stat. 141.

¹⁰³ 73 U.S. Stat. 4.

¹⁰⁴ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

¹⁰⁵ Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University of Press, 1993), 19.

¹⁰⁶ 36 U.S. Stat. 2277.

¹⁰⁷ 6.3 U.S.T. 3516.

¹⁰⁸ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai (Honolulu: Ministry of the Interior, 2020), 167-169.

¹⁰⁹ Eyal Benvenisti, *The International Law of Occupation*, 2d ed. (Oxford: Clarendon Press, 2012), 37.

schools throughout the islands. This program was developed by the Territory of Hawai‘i’s Department of Public Instruction and called “Programme for Patriotic Exercises in the Public Schools.” The purpose of this program was to inculcate American patriotism in the minds of the children and forced them to speak English and not Hawaiian. According to the Programme, “The teacher will call one of the pupils to come forward and stand at one side of the desk while the teacher stands at the other. The pupil shall hold an American flag in military style. At second signal all children shall rise, stand erect and salute the flag, concluding with the salutation, ‘We give our heads and our hearts to God and our Country! One Country! One Language! One flag!’”¹¹⁰

Since this policy began, *Americanization* has become so pervasive and institutionalized throughout the islands, that the national consciousness of the Hawaiian Kingdom was obliterated. According to Kauai, “From one of the most progressive independent states in the world to one of the most forgotten. If not for the US, where would Hawai‘i rank among the countries of the world today in regard to health care, political rights, civil rights, economy, and the environment? In the 19th century Hawai‘i was a global leader in many ways, even despite its size.”¹¹¹

It took diligent historical research to uncover the true status of the Hawaiian Kingdom as an independent State under an illegal and prolonged occupation. These revelations are reconnecting the Hawaiian Kingdom to the international community and to its treaty partners and highlighting the violations of human rights and war crimes committed against Hawaiian subjects and the citizens, and subjects of foreign States, who have visited, resided, or have done business in the Hawaiian Islands.

V. RESTORING THE GOVERNMENT OF THE HAWAIIAN KINGDOM

International humanitarian law reverses the principle of effective control of territory. According to Professor Marek, “in the first place: of these two legal orders, that of the occupied State is regular and ‘normal,’ while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is...strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness.”¹¹² Therefore, belligerent

¹¹⁰ Territory of Hawai‘i, *Programme for Patriotic Exercises* (1906), 4, http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf.

¹¹¹ Willy Daniel Kaipo Kauai, “The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai‘i” (PhD diss., University of Hawai‘i at Mānoa, 2014), 298.

¹¹² Marek, *Identity and Continuity of States*, 102.

occupation “is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.”¹¹³

In 1996, remedial steps were taken, under the *doctrine of necessity*, to reinstate the Hawaiian Kingdom government as it was under its legal order prior to the U.S. invasion in 1893.¹¹⁴ An *acting* Council of Regency was established in accordance with the Hawaiian Constitution and the doctrine of necessity to serve in the absence of the executive monarch. By virtue of this process, an *acting* Government, comprised of officers *de facto*, was established as the successor to Queen Lili‘uokalani who passed away on November 11, 1917.

The Council was established in similar fashion to the Belgian Council of Regency after King Leopold was captured by the Germans during Second World War. As the Belgian Council of Regency was established under Article 82 of its 1821 Constitution, as amended, *in exile*, the Hawaiian Council was established under Article 33 of its 1864 Constitution, as amended, not *in exile* but *in situ*. 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 their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.¹¹⁵

Article 33 provides that the Cabinet Council “shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King.” Like the Belgian Council, the Hawaiian Council was bound to call into session the Legislative Assembly to provide for a regency but because of the prolonged belligerent occupation and the effects of denationalization it was impossible for the Legislative Assembly to function. Until the Legislative Assembly can be called into session, Article 33 provides that

¹¹³ *Id.*

¹¹⁴ David Keanu Sai, “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 (Honolulu: Ministry of the Interior, 2020), 18-23.

¹¹⁵ F.E. Oppenheimer, “Governments and Authorities in Exile,” *American Journal of International Law* 36 (1942): 568-595, 569.

the Cabinet Council, comprised of the Ministers of the Interior, Foreign Affairs, Finance and the Attorney General, “shall be a Council of Regency, until the Legislative Assembly” can be called into session.

The Hawaiian Council is a government restored in accordance with the constitutional laws of the Hawaiian Kingdom as they existed prior to the unlawful overthrow of the previous administration of Queen Lili‘uokalani. It was not established through “extra-legal changes,” and, therefore, did not require diplomatic recognition to give itself validity as a government. It was a successor in office to Queen Lili‘uokalani as the Executive Monarch.

According to Professor Lenzerini, based on the *doctrine of necessity*, “the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom.”¹¹⁶ He also concluded that the Regency “has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.”¹¹⁷

In 1998, a dispute arose between the Council of Regency and Lance Larsen, a Hawaiian subject. Larsen was subjected to an unfair trial by a State of Hawai‘i court and incarcerated for thirty days, seven of which were served in solitary confinement. Larsen’s defense was that the State of Hawai‘i court was unlawful because there is no treaty of cession whereby the Hawaiian Kingdom ceded its sovereignty to the United States. He was, therefore, subject to Hawaiian Kingdom laws and not the laws of the United States to include the laws of the State of Hawai‘i. After being incarcerated, he alleged the Council of Regency was liable for allowing the unlawful imposition of American municipal laws over him.

In a lawsuit filed in the United States District Court for the District of Hawai‘i, *Larsen v. United Nations, et al.*, on August 4, 1999, Larsen alleged that the Hawaiian Kingdom is “in continual violation of the... 1849 Treaty of Friendship, Commerce and Navigation between the [Hawaiian Kingdom and the United States], and in violation of the principles of international law laid in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful imposition of American municipal laws over Plaintiff’s person within the territorial jurisdiction of the Hawaiian Kingdom.”

On October 13, 1999, a notice of voluntary dismissal without prejudice was filed as to the United States and nominal defendants, United Nations, France, Denmark, Sweden, Norway, United Kingdom, Belgium,

¹¹⁶ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” *Hawaiian Journal of Law and Politics* 3 (2020): 317-333, 324.

¹¹⁷ *Id.*, 325.

Netherlands, Italy, Spain, Switzerland, Russia, Japan, Germany, Portugal and Samoa by the plaintiff. On October 29, 1999, the remaining parties, Larsen and the Hawaiian Kingdom, by its Council of Regency, entered into a stipulated settlement agreement dismissing the entire case without prejudice as to all parties and all issues and submitting their dispute to binding arbitration. An agreement between Larsen and the Hawaiian Kingdom to submit their dispute to final and binding arbitration at the PCA at The Hague, the Netherlands, was entered into on October 30, 1999.¹¹⁸ On November 8, 1999, a notice of arbitration was filed with the International Bureau of the PCA—*Lance Paul Larsen v. Hawaiian Kingdom*.¹¹⁹

VI. ARBITRATION PROCEEDINGS UNDER THE AUSPICES OF THE PERMANENT COURT OF ARBITRATION

The first allegation of the war crime of usurpation of sovereignty,¹²⁰ was made the subject of an arbitral dispute in *Larsen v. Hawaiian Kingdom* at the PCA, whereby the claimant alleged that the Plaintiff was legally liable “for allowing the unlawful imposition of American municipal laws” over him within Hawaiian territory.¹²¹ According to Schabas, the war crime of usurpation of sovereignty consists of the “imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation.”¹²²

To ensure that the dispute is international, the PCA needed to possess institutional jurisdiction first,¹²³ before it could form the *ad hoc* arbitral tribunal to resolve the dispute. 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, involving States, include disputes between two or more States, a State and an international

¹¹⁸ Agreement between plaintiff Lance Paul Larsen and defendant Hawaiian Kingdom to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at The Hague, the Netherlands (October 30, 1999), https://www.alohaquest.com/arbitration/pdf/Arbitration_Agreement.pdf.

¹¹⁹ Notice of Arbitration (November 8, 1999), https://www.alohaquest.com/arbitration/pdf/Notice_of_Arbitration.pdf.

¹²⁰ Memorial of Lance Paul Larsen (May 22, 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, para. 62-64, https://www.alohaquest.com/arbitration/pdf/Memorial_Larsen.pdf.

¹²¹ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, <https://pca-cpa.org/en/cases/35/>.

¹²² Schabas, “War Crimes,” 157.

¹²³ United Nations, *United Nations Conference on Trade and Development: Dispute Settlement* (New York and Geneva: United Nations, 2003), 15.

organization, or a State and a private party.¹²⁴ Contracting States to the 1907 Hague Convention for the Pacific Settlement of International Disputes (“1907 Convention”) have direct access to the PCA.¹²⁵ Whereas, non-Contracting States have access to the PCA by virtue of Article 47 of the 1907 Convention, which states, “The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to...non-Contracting [States].”¹²⁶ Private parties do not have access to the PCA unless sponsored by their home State.¹²⁷ In this case, the Hawaiian Kingdom did not sponsor Larsen in its suit, but rather waived its sovereign immunity by consenting to submit their dispute to the PCA for resolution by virtue of Article 47.

The PCA accepted the case as a dispute between a “State” and a “private party” and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done “Pursuant to article 47 of the 1907 Convention.”¹²⁸

From an evidential standpoint, Hawaiian laws are silent in explaining the actions taken by the PCA in acknowledging the Hawaiian Kingdom’s status as a non-Contracting State. When Hawaiian “laws are silent on the subject of evidence,” the Hawaiian Kingdom Supreme Court stated that it would “be guided by the general principles which are recognized in civilized countries, and providing that we may adopt, in any case, the reasonings and analogies of the common law, or of the civil law, so far as they are deemed to founded in justice, and not in conflict with the laws and usages of this Kingdom.”¹²⁹

The common law is English in origin and is derived from judicial decisions, which cannot explain the action taken by the PCA. The civil law, on the other hand, “is the freest of all because it is purely theoretical. It is also the most prolific because it is developed leisurely. In its examination it does not confine itself to an isolated case. It gives to its

¹²⁴ *Id.*

¹²⁵ 36 U.S. Stat. 2199.

¹²⁶ *Id.*, 2224.

¹²⁷ See *Ilya Levitis (United States) v. The Kyrgyz Republic*, PCA Case no. 2021-21, <https://pca-cpa.org/en/cases/97/>; *U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic*, PCA Case no. 2013-06, <https://pca-cpa.org/en/cases/2/>; *Windstream Energy LLC (United States) v. The Government of Canada*, PCA Case no. 2013-22; and *Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic*, PCA Case no. 2014-01, <https://pca-cpa.org/en/cases/24/>.

¹²⁸ Permanent Court of Arbitration, Annual Reports, <https://pca-cpa.org/en/about/annual-reports/>.

¹²⁹ *Bullions v. Loring Brothers & Co.*, 1 Haw. 372, 377 (1856).

concepts and its deductions the broadness of view, the logic and the force of synthesis.”¹³⁰ According to Professor Picker, “There is a wide degree of support for the proposition that civil law has served as the most significant influence on international law.”¹³¹ He goes on to state that “some would even argue that international law is essentially a civil law system.”¹³² And Professor Nagle explains, “[i]t is the civil-law traditions that have most widely influenced international law [and] international organizations.”¹³³ Furthermore, as stated by Professors Merryman and Clark, “[t]he civil law was the legal tradition familiar to the Western European scholar-politicians who were the fathers of international law. The basic charters and the continuing legal development and operation of the European Communities are the work of people trained in the civil law tradition.”¹³⁴

Of the forty-four Contracting States to the 1907 Convention that established the PCA at the Hague Conference in 1907, the United States and Great Britain, as common law States, were the only States that were not from a civil law tradition. The other forty-two States were represented by men who were “trained in the civil law tradition.” This includes the Netherlands where the PCA is situated in its city The Hague. The current number of Contracting States to the 1907 Convention is 122, the majority of which are based on the civil law tradition.

Therefore, the International Bureau of the PCA in acknowledging the continuity of the Hawaiian Kingdom as a State for purposes of its institutional jurisdiction should be viewed through the reasonings of the civil law tradition. According to civilian law, a fact is juridical or legal when it produces a legal effect, by virtue of a legal rule. In *Schexnider v. McDermott Int’l Inc.*, the federal court in Louisiana stated *juridical facts* are defined as “events having prescribed legal effects.”¹³⁵ According to the German tradition of the civil law, a *juridical act*, which is triggered by a *juridical fact*, “sets the law in motion and produces legal consequences.”¹³⁶

The Hawaiian Kingdom, as an independent State in continuity, is a *juridical fact* according to the civilian law. Both rights and powers held by

¹³⁰ I Planiol, *Civil Law Treatise* (translation by the Louisiana State Law Institute) (St. Paul, Minnesota: West Publishing Company, 1959), §21.

¹³¹ Colin B. Picker, “International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction,” *Vanderbilt Journal of Transnational Law* 41 (2008): 1083-1140, 1106.

¹³² *Id.*

¹³³ Estella Nagle, “Maximizing Legal Education: The International Component,” *Stetson Law Review* 29 (2000): 1091-1117, 1092.

¹³⁴ John Henry Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: The Bobbs-Merrill, 1978), 77.

¹³⁵ *Schexnider v. McDermott Int’l Inc.*, 688 F. Supp. 234, 238 (W.D. La. 1988).

¹³⁶ Nikolaos A. Davrados, “A Louisiana Theory of Juridical Acts,” *Louisiana Law Review* 80, no. 4 (2020): 1119-1284, 1129.

a subject of international law, which includes the PCA as an intergovernmental institution, may arise from a *juridical fact*. Access to the institutional jurisdiction of the PCA would only be triggered by the *juridical fact* of the Hawaiian Kingdom being a non-Contracting “State,” and not by Larsen as a “private party.” This *juridical fact* set in motion and produced legal consequences, which was the convening of the *ad hoc* arbitral tribunal on June 9, 2000. Professor Shaw recently drew attention to the institutional jurisdiction of the International Criminal Court regarding Palestinian Statehood and its territory for purposes of investigating international crimes.¹³⁷ Shaw does not see Palestine as a *juridical fact* that would have otherwise triggered the Court’s institutional jurisdiction to investigate international crimes under Article 12(2)(a) of the Rome Statute.

The *juridical fact* of the Hawaiian State produced a legal effect for the International Bureau of the PCA to do a *juridical act* of accepting the dispute under the auspices of the PCA by virtue of Article 47, being a legal rule. The international dispute between Larsen and the Hawaiian Kingdom was not created by the *juridical fact*, but rather the *juridical fact* determined the legal conditions for the PCA’s acceptance of the dispute, which is the *juridical act* by which the dispute is established to gain access to the jurisdiction of the PCA. This *juridical act* “may be compared—*mutatis mutandis*—to a juridical act of a domestic judge recognizing a juridical fact (*e.g. filiation*) which is productive of certain legal effects arising from it according to law.”¹³⁸ The significance of the *juridical act* is that the United States, as a member of the PCA Administrative Council, was fully aware of the *Larsen* case and did not object. In fact, the United States entered into an agreement with the Council of Regency to access all records and pleadings of the case.¹³⁹

State continuity of the Hawaiian Kingdom is determined by the rules of customary international law. And while State members of the Administrative Council furnishes all Contracting States “with an annual Report” in accordance with Article 49,¹⁴⁰ it does represent “State practice [that] covers an act or statement by...State[s] from which views can be inferred about international law,” and it “can also include omissions and

¹³⁷ Professor Malcom N. Shaw, *Amicus Curiae on the Situation in the State of Palestine*, ICC-01-18 (March 16, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_01017.PDF.

¹³⁸ Federico Lenzerini, “Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration,” (Dec. 5, 2021), 3, [https://hawaiiankingdom.org/pdf/Memo_Re_Juridical_Fact_and%20Act_of_PCA_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/Memo_Re_Juridical_Fact_and%20Act_of_PCA_(Lenzerini).pdf).

¹³⁹ Sai, “Royal Commission of Inquiry,” 25-26.

¹⁴⁰ 36 U.S. Stat. 2199, 2225.

silence on the part of States.”¹⁴¹ The fact that the United States, to include all member States of the PCA Administrative Council did not object to the International Bureau’s *juridical act* of acknowledging the Hawaiian Kingdom’s existence as a non-Contracting State, is a reflection of the practice of States—*opinio juris*. Furthermore, the Administrative Council is a treaty-based component of an intergovernmental organization comprised of representatives of States, and “their practice is best regarded as the practice of States.”¹⁴² According to Professor Lenzerini, “it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau.”¹⁴³

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but their denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.¹⁴⁴ The Tribunal explained it “could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.”¹⁴⁵ Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

VII. CONCLUSION

The *Larsen v. Hawaiian Kingdom* case was a major public event in international relations and international law, but its significance, for reasons unknown, only recently garnered the attention of legal scholars and historians. Given the international reach of the Hawaiian Kingdom through its treaties and diplomatic posts, scholars in the fields of history, law and political science should have been engaging the legal and political history of the Hawaiian Kingdom and its continued existence as a State under a prolonged and belligerent occupation since 1893. Notwithstanding, the discourse regarding the history of the Hawaiian

¹⁴¹ Michael Akehurst, “Custom as a Source of International Law,” *British Yearbook of International Law* 47, no. 1 (1975): 1-53, 10.

¹⁴² *Id.*, 11.

¹⁴³ Lenzerini, *Civil Law*, 4.

¹⁴⁴ Sai, “Royal Commission of Inquiry,” 25-26.

¹⁴⁵ *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

Islands since the *Larsen* case has managed to shift from an American colonial context of race and indigeneity to State theory and international humanitarian law.¹⁴⁶ Professor Young advocates for “a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity.”¹⁴⁷

¹⁴⁶ David Keanu Sai, “Setting the Record Straight on Hawaiian Indigeneity,” *Hawaiian Journal of Law and Politics* 3 (2021): 6-72, [http://www2.hawaii.edu/~anu/pdf/Indigeneity_Sai_\(HJLP\)_Vol_3.pdf](http://www2.hawaii.edu/~anu/pdf/Indigeneity_Sai_(HJLP)_Vol_3.pdf).

¹⁴⁷ Kanalu Young, “Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001,” *Hawaiian Journal of Law and Politics* 2 (2006): 1-33, 1.