Hawai‘i and International Humanitarian Law: Obligations and Duties of States

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International law recognizes States and international organizations, *e.g.* the International Committee of the Red Cross (ICRC), as the primary subjects of international law.[1] International humanitarian law recognizes protected persons as having rights during an international armed conflict, which includes prisoners of war and civilians who are non-combatants.[2] International humanitarian law that applies during occupations draws from the following treaties: 1907 Hague Regulations respecting the Laws and Customs of War on Land, IV; 1949 Geneva Convention, III, relative to the Treatment of Prisoners of War; 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War; and the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I). The United States is a State Party to these treaties except for the Additional Protocol I, which it has signed but not ratified. Despite the United States not being a party to the Additional Protocol I, "the customary law of international armed conflict is fully applicable from the outset."[3]

In order for international humanitarian law to be triggered, there must be an international armed conflict. Article 2 common to the Geneva Conventions states, "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[4] The American occupation of the Hawaiian Kingdom began on August 12, 1898, during the Spanish-American War, which did not meet armed resistance. There was, however, political resistance in the form of diplomatic protests and protests of the Hawaiian citizenry.[5]

International humanitarian law is the formulation of objective rules of conduct for States and armed forces, which includes non-State actors, and their application lies with States, who are parties to the armed conflict, and also to States who are not parties to the conflict but are parties to the treaties of international humanitarian law. It was recognized that the 1899 Hague Convention, II, with Respect to the Laws and Customs of War on Land was merely codification of existing customary international law, and, therefore, these rules of

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[1] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 58-70 (4th ed. 1990).
[2] Geneva Conventions, III & IV (1949), and Additional Protocol I (1977).
[3] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1084 (1987).
[4] The Hawaiian Kingdom became a High Contracting Party after Ambassador Benno Bättig, General Secretariat of the Swiss Federal Department of Foreign Affairs, received at his office in Berne, Switzerland, the Hawaiian Kingdom's Instrument of Accession to the 1949 Fourth Geneva Convention for the Protection of Civilian Persons in Time of War, available at http://hawaiiankingdom.org/blog/swiss-general-secretary-receives-the-hawaiian-kingdoms-accession-to-the-fourth-geneva-convention/.
[5] David Keanu Sai, *A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai‘i today*, 10 J. L. & SOC. CHALLENGES 69, 76-79 (Fall 2008).

occupation would apply to Hawai‘i whose occupation occurred one year prior. The 1899 Hague Regulations were superseded by the 1907 Hague Regulations, together with the 1949 Geneva Convention, IV, and the 1977 Additional Protocol I, which forms the basis of international humanitarian law today.

State responsibility derives from the principle of *pacta sunt servanda*, whereby treaties "in force is binding upon the parties to it and must be performed by them in good faith."[6] There are, however, obligations that still bind States beyond treaties. The International Law Commission's draft articles on State responsibility restates the general principle of international law that a breach of a State's international obligation, whether by action or omission, constitutes an international wrongful act, and "Every internationally wrongful act of a State entails the international responsibility of that State."[7]

Article 1 common to all four Geneva Conventions states, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." In the ICRC's commentaries, "When a State contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders."[8] Therefore, "in the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the [Geneva] Convention. The proper working of the system of protection provided by the [Geneva] Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the [Geneva] Conventions are applied universally."[9]

A more direct approach to ensure respect for the Conventions is the appointment of a Protecting Power. Article 9 of Geneva Convention, IV, states, "The present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict." A State Party to the conflict, called the Power of Origin, must first enter into an agreement with a Protecting Power who accepts the offer. This can be done by executive agreement through *exchange of notes*. Secondly, the Protecting Power must have an agreement with the Occupying Power whereby the former acknowledges the role of the latter in the occupied territory. Article 5 of Protocol I states, "From the beginning of a situation referred to in Article 1 [*i.e.* occupation without resistance], each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party." This is called the "Geneva mandate" as distinguished from the

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[6] Vienna Convention on the Law of Treaties (1969), art. 26.
[7] Responsibility of States for Internationally Wrongful Acts (2001), art. 1 & 2.
[8] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 16 (1958).
[9] *Id*.

"Vienna mandate" that represents the Power of Origin in diplomatic matters in the territory of another State where the Power of Origin has no diplomatic representation.

The aim of Protecting Powers under international humanitarian law is "to ensure the supervision and implementation of the Conventions and the Protocol."[10] In light of the duty to appoint a Protecting Power, there exists a corresponding duty by the Occupying Power to accept the Protecting Power unless it can point out that the Protecting Power is not neutral or is a party to the conflict itself. To allow the Occupying Power to have discretion when accepting a Protecting Power would directly undermine Article 1 of the Geneva Conventions that State Parties must respect and ensure respect for the Conventions in all circumstances as recognized under international law. Thus, the "law governing the validity, binding force, interpretation, application and termination of treaties between States cannot be the municipal law of any of them; it is well settled by the doctrine, practice, and jurisprudence that this law is international law."[11] Furthermore, a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[12]

Prior to the Geneva Conventions, the Protecting Power normally exercised its duties through its diplomatic staff of its embassy resident within the territory of the belligerent State. Article 9 of the Fourth Convention now included consular staff as representing the Protecting Power in not only the territory of the belligerent State, but also in occupied territories. According to the ICRC's commentary, "All members of the diplomatic and consular staff of the Protecting Power are *ipso facto* entitled, in virtue of their capacity as official representatives of their Government, to engage in the activities arising out of the Convention."[13]

As a result of the prolonged occupation of Hawai'i coupled with the war crime of denationalization, the primary aim of the *acting* Government of the Hawaiian Kingdom (*acting* Council of Regency), established under and by virtue of the doctrine of *necessity*, is to ensure compliance with international humanitarian law and Hawaiian domestic law, which includes Hawaiian statutes and common law. To accomplish this, a strategic plan of three phases was drafted to guide the actions of the *acting* Council of Regency.

- *Phase I*—Verification of the Hawaiian Kingdom as an independent State and a subject of international law;
- *Phase II*—Exposure of Hawaiian Kingdom Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels; and
- *Phase III*—Restoration of the Hawaiian Kingdom as an independent State and a subject of international law.

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[10] See *Commentary—Additional Protocol*, at 79.
[11] Harvard Research in International Law, "Draft Convention on the Law of Treaties," 29 AM. J. INT'L L. 693 (Supplement 1935).
[12] Vienna Convention on the Law of Treaties (1969), art. 27.
[13] See *Commentary—Geneva Convention, IV,* at 89.

The strategic plan "guides the *acting* Council of Regency in the implementation of its *Vision* in a responsible and coherent manner. It is a fundamental and methodical approach toward a situation gone unchecked by the international community for over a century has been allowed to permeate upon a false premise that the Hawaiian Islands were *legally* made a part of the United States of America."[14] After the Permanent Court of Arbitration, in *Larsen v. Hawaiian Kingdom*, verified, "in the nineteenth century the Hawaiian Kingdom existed as an independent State,"[15] Phase I had been completed. In Phase II, the *acting* Government would "concentrate its efforts on research and education in the areas of political and economic impact resulting from prolonged occupation. Through this process, a remedial plan of compliance to international humanitarian law was established that takes into consideration the political, economical, and social wellbeing of the Hawaiian State. The remedial plan is attached as a *Supplement* to this Strategic Plan."[16]

[14] *Strategic Plan of the acting Council of Regency*, 9, available at http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf.
[15] *Larsen v. Hawaiian Kingdom*, 119 INT'L L. REP. 566, 581 (2001), *reprinted in* 1 Haw. J.L. & Pol. 299 (Summer 2004).
[16] See *Strategic Plan*, at 12