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COUNTY COUNCIL
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July 12, 2019

David Lassner, President
University of Hawai'i System
2444 Dole Street, Bachman Hall
Honolulu, HI 96822

**SUBJECT: PROPOSED CONSTRUCTION OF THIRTY-METER
TELESCOPE ON THE SUMMIT OF MAUNA KEA**

Dear President Lassner:

This urgent plea is in response to Governor Ige's recent announcement informing of the July 15, 2019 construction start date of the Mauna Kea Thirty-Meter Telescope ("TMT") under the purview of the University of Hawaii at Hilo.

I have grave concerns for the safety of Maui County's residents and all individuals mobilizing to access and assemble atop Mauna Kea.

It is unsettling that "preparation for potential arrests if people illegally protest construction on Mauna Kea" is underway, as well as the tactics of allegedly engaging the use of Long-Range Acoustic Hailing Devices also known as "LRAD" on our people by law enforcement personnel.

Instead, if safety was truly a concern by both the Governor and yourself President Lassner, sensitivity and accommodations should be deployed for our citizenry who have every right to be on that summit for their religious and cultural practices and for protest purposes. Extreme weather is common place up at the Summit, maybe the presence of law enforcement can be replaced with first responders should our kupuna elders, keiki or anyone on that Mauna need the assistance.

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Replace the deployment of LRADs with the staging of portable personal care units (i.e. porta-potties) so our people don't have to worry about holding back on hydrating themselves while on the Mauna.

Recently, the Maui County Council's Planning and Sustainable Land Use Committee ("PSLU Committee"), which I serve as Chair, invited Dr. Keanu Sai to present an "Update on Land Use and Planning in Consideration of Hawai'i's Status Under International Law." As you may be aware, Dr. Sai is a product of our University of Hawai'i at Manoa political science department where he received his M.A. degree specializing in international relations in 2004 and his Ph.D. on the continuity of the Hawaiian Kingdom under international law in 2008.

On May 15, 2019, Dr. Sai provided a workshop for the committee members titled "Legal Status of the Hawaiian Kingdom under International Law," which was filmed and televised as a two-part series and uploaded online. Maui Time Weekly newspaper also did a feature story on Dr. Sai's presentation, which has a wide circulation throughout the island of Maui.

Dr. Sai's presentation on the continued existence of the Hawaiian Kingdom under international law was evidence-based and very compelling and undeniable. The evidence clearly demonstrated that Hawai'i has been under a prolonged and unlawful occupation by the United States since January 17, 1893.

We learned that as an occupying Power, the United States was, and still is obligated to administer Hawaiian Kingdom law and not the laws of the United States, which included the 1959 Statehood Act. This understanding prompted Council member Alice Lee, after providing a historical and legal narrative of the occupation, to ask Dr. Sai, "How do we operate in the meantime?"

Because Dr. Sai's presentation prompted questions by the Council members as to how the Council should deal with the impact of international law, he was asked to do a follow-up presentation on June 5, 2019. The title of his second workshop was "Stability versus Change: Compliance and the Rule of Law," which was also filmed and televised as a four-part series and uploaded online. In my capacity as the Chair of the PSLU Committee, and to uphold our

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duties as legislators for the County of Maui we are taking steps to address compliance with international humanitarian law.

In the meantime, it has recently been brought to my attention that residents from the County of Maui will be flying to the Island of Hawai'i this month to assemble on the summit of Mauna Kea to exercise traditional Native Hawaiian customs and practices, as well as to protest the proposed construction of the TMT.

It is because of the further clarity and awareness gained from Dr. Sai's trainings, and the understanding that the Hawaiian Kingdom has been under an illegal and prolonged occupation, that I requested from Dr. Sai, whom I recognize to be an expert on international and Hawaiian Kingdom law, insights on the matter of the legality of the TMT on so-called ceded lands, the ability of our people to safely assemble and protest, and exercise their cultural traditions and practices atop their Mauna that for centuries has been considered sacred and revered by Native Hawaiians.

In my July 5, 2019 letter of request to Dr. Sai, I specifically asked, "With regard to the aspects of the proposed construction of the thirty-meter telescope ("TMT"), please provide your insight as it relates to the topic of so-called ceded lands and the proposed construction of the TMT on the summit of Mauna Kea, as the ahupua'a of Ka'ohē is government so-called ceded lands." On July 9, 2019 I received Dr. Sai's response.

Dr. Sai's letter addressed three topics that underlie the proposed TMT construction. The first topic he covered was the invalidity of General Lease No. S-4191 between the State of Hawai'i Board of Land and Natural Resources, as the lessor, and the University of Hawai'i, as the lessee. The second topic covered was the war crime of destruction of property on the summit of Mauna Kea by the previous telescopes. And the third topic was native tenant rights within the ahupua'a of Ka'ohē. Dr. Sai's response was quite illuminating to say the least, and it deserves your serious attention given the profound ramifications under international law. I have enclosed Dr. Sai's letter with his enclosures.

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After Dr. Sai covers the serious subject of alleged war crimes, he specifically addresses the University of Hawai'i's general lease. On this he concludes:

Complicating matters would be the fact that the University of Hawai'i's general lease is invalid and therefore its sublease to TMT is void. As there is no evidence of consent from the Hawaiian Kingdom government to either the University of Hawai'i or for TMT, to include TMT's construction company Goodfellow Bros., to be on the summit of Mauna Kea, they would be the trespassers on government lands, and not those who would oppose the destruction of the property. Aboriginal Hawaiians who call themselves protectors of the mauna have more of a right to the summit under their "native tenant rights" than the University of Hawai'i or TMT who have no rights in the absence of a valid lease. They are, after all, protecting their rights against an unlawful encroachment by entities lacking permission of the true titled owner.

As my foremost concern is for the safety and protection of residents of Maui County who will be opposing TMT's construction, **I urgently request that you put a hold on the construction until you have reviewed Dr. Sai's letter,** which has been made a part of the record of the PSLU Committee.

I also recommend that you provide his letter with attachments to your legal counsel at the University of Hawai'i to also review and to determine whether or not Dr. Sai's assessment of the situation is misplaced given the severity of the consequences upon the University of Hawai'i System and those that are implicated in the proposed construction of TMT as noted by Dr. Sai. TMT's construction company Goodfellow Bros. is home based in the County of Maui.

Please do not disregard my urgent request to stand down there are severe consequences that may ensue as explained by Dr. Sai. This is not a political issue, but an issue of the rule of law, which is foundational and for our communities throughout the islands to have confidence that State of Hawai'i officials, to include the Counties, believe in and abide by.

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Thank you for your consideration of this very serious matter and your earnest attention would be greatly appreciated.

Should you have any questions regarding my urgent request, please contact me by email at Tamara.Paltin@mauicounty.us or by phone at (808) 270-5504.

Sincerely,



TAMARA PALTIN
Councilmember

Attachments

cc: The Honorable David Ige, Governor, State of Hawai'i
Clare Connors, Attorney General, State of Hawai'i
Suzanne Case, Chair, Board of Land and Natural Resources, State of Hawai'i
Henry Yang, Ph.D., Chair, TMT International Observatory (TIO) Board of Governors
Chad Goodfellow, Chief Executive Officer, Goodfellow Bros., Inc.
The Honorable Harry Kim, Mayor, County of Hawai'i
The Honorable Valerie T. Poindexter, Councilmember, Hawai'i County Council
The Honorable Aaron Chung, Chairman, Hawai'i County Council
The Honorable Karen Eoff, Vice-Chair, Hawai'i County Council

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cc cont'd:

The Honorable Susan L.K. Lee Loy, Councilmember, Hawai'i County Council

The Honorable Ashley Lehualani Kierkiewicz, Councilmember, Hawai'i County Council

The Honorable Matt Kaneali'i-Kleinfelder, Councilmember, Hawai'i County Council

The Honorable Maile Medeiros David, Councilmember, Hawai'i County Council

The Honorable Rebecca Villegas, Councilmember, Hawai'i County Council

The Honorable Herbert M. Richards III, DVM, Councilmember, Hawai'i County Council

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References Cited:

Public Meeting Notice, Council of the County of Maui—Planning and Sustainable Land Use Committee (9 May 2019), Pursuant to Rule 7(B) of the Rules of the Council, the Committee intends to receive a presentation from Dr. David Keanu Sai relating to an update on the land use and planning in consideration of Hawaii’s status under international law and other related matters,” available online at <https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/26015>. Minutes also available online at <https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/26151>.

Video of Dr. Keanu Sai’s Presentation to the Maui County Council’s Planning and Sustainable Land Use Committee (15 May 2019) available at <https://hawaiiankingdom.org/blog/video-of-dr-keanu-sais-presentation-to-the-maui-county-council-on-the-status-of-the-hawaiian-kingdom-under-international-law/>.

Maui Time newspaper, *Hawai’i: The Fake State—Dr. David Keanu Sai talks to the Maui County Council about the ongoing American occupation of the Hawaiian Kingdom* (24 May 2019), available at <https://mauitime.com/news/politics/hawaii-the-fake-state-dr-david-keanu-sai-talks-to-the-maui-county-council-about-the-ongoing-american-occupation-of-the-hawaiian-kingdom/>.

Public Meeting Notice, Council of the County of Maui—Planning and Sustainable Land Use Committee (30 May 2019), “The Committee received a presentation from Dr. David Keanu Sai at its meeting of May 15, 2019. The Committee may receive another presentation from Dr. David Keanu Sai and discuss related matters,” available online at <https://www.mauicounty.gov/ArchiveCenter/ViewFile/Item/26079>.

Video of Dr. Keanu Sai’s Second Presentation to the Maui County Council’s Planning and Sustainable Land Use Committee (5 June 2019), available online at <https://hawaiiankingdom.org/blog/video-of-dr-keanu-sais-second-presentation-to-the-maui-county-council-on-how-the-county-council-complies-with-international-law/>.

July 9, 2019

Hon. Madame Chair Tamara Paltin
Planning and Sustainable Land Use Committee
Maui County Council

Re: Letter of July 5, 2019 requesting insight on proposed TMT construction on Mauna Kea summit

Aloha Madame Chair:

This memorandum is in response to your letter dated July 5, 2019, requesting any insight I might have “as it relates to the topic of so-called ceded lands and the proposed construction of the TMT on the summit of Mauna Kea, as the ahupua‘a of Ka‘ohe is government so-called ceded lands.” Additionally, you stated that you “have grave concern for the safety of Maui County’s residents who may choose to assemble at Mauna Kea in support and solidarity for the protection of Mauna Kea and in opposition to the proposed development.”

Your letter acknowledges the two training sessions I did for the Maui County Council Planning and Sustainable Land Use Committee (“Land Use Committee”) on the subject of Hawai‘i’s status under international law and that the “information of historical facts and events spanning Hawai‘i’s past one-hundred-seventy-six years provides a foundational framework to be considered as part of our modern-day decision-making.” You further wrote, “Now we overlay the foundational framework with what is occurring on the ground in real time, and question what is happening vs. what should be happening considering this foundational framework we’ve all learned from the training.”

First, I would like to state that your concerns are well founded and that the proposed construction of TMT on the summit of Mauna Kea has serious implications under the international law of occupation, also called international humanitarian law, and human rights law.

In light of the Land Use Committee’s awareness of: the continued existence of the Hawaiian Kingdom that has been under a prolonged occupation by the United States since January 17, 1893 (Enclosure “1”); the restoration of the Hawaiian government as a Regency in 1996 that represented the Hawaiian Kingdom in international arbitral

proceedings at the Permanent Court of Arbitration, The Hague, Netherlands, in *Larsen v. Hawaiian Kingdom* from 1999-2001 (Enclosure “2”); the 2014 proclamation of the Council of Regency recognizing current United States laws that have been illegally imposed in Hawaiian territory as the provisional laws of the Hawaiian Kingdom so long as these laws do not run contrary to the letter, spirit and intent of Hawaiian Kingdom law (Enclosure “3”); the 2019 proclamation of the Council of Regency establishing the Royal Commission of Inquiry to investigate the consequences of the United States’ belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context (Enclosure “4”); and, the 2019 proclamation of the Council of Regency recognizing the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law (Enclosure “5”), I respectfully submit for your consideration the following insights on this very important topic.

This memorandum will first address what are three salient topics that underlie the proposed TMT construction. These topics include: first, the invalidity of General Lease No. S-4191 between the State of Hawai‘i Board of Land and Natural Resources, as the lessor, and the University of Hawai‘i as the lessee; second, the war crime of destruction of property on the summit of Mauna Kea; and, third, Native Tenant property rights within the ahupua‘a of Ka‘ohe, which includes the summit of Mauna Kea. I will finish with my concluding remarks.

General Lease No. S-4191 is Invalid

Under General Lease No. S-4191 dated June 21, 1968, the Board of Land and Natural Resources of the State of Hawai‘i, as lessor, issued a 65-year lease to the University of Hawai‘i with a commencement date of January 1, 1968 and a termination date of December 31, 2033. The lease is comprised of 11,215.554 acres, more or less, being a portion of Government lands of the ahupua‘a of Ka‘ohe situated at Hamakua, Island of Hawai‘i identified under Tax Map Key: 3rd/4.4.15:09.

The State of Hawai‘i claims to have acquired title under Section 5(b) of the 1959 *Hawai‘i Admissions Act*, Public Law 86-3 (73 Stat. 4), whereby “the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States’ title to all public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.” The United States derives its title from the 1898 *Joint Resolution of Annexation* (30 Stat. 750), which states “Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution...to cede and transfer to

the United States the absolute fee and ownership of all public, Government, or Crown lands.”

The Republic of Hawai‘i proclaimed itself on July 3, 1894, by a convention comprised of appointed members of the Provisional Government and eighteen “elected” delegates. The Provisional Government proclaimed itself on January 17, 1893 and claimed to be the successor of the Hawaiian Kingdom. The Hawaiian Kingdom’s title derives from the 1848 *Act Relating to the Lands of His Majesty The King and of the Government*, whereby the ahupua‘a of Ka‘ohe is “Made over to the Chiefs and People, by our Sovereign Lord the King, and we do hereby declare those lands to be set apart as the lands of the Hawaiian Government, subject always to the rights of tenants.”

According to President Grover Cleveland, in his message to the Congress after investigating the illegal overthrow of the Hawaiian Kingdom government that took place on January 17, 1893, the Provisional Government “was neither a government *de facto* nor *de jure*.”¹ He did not consider it a government. The President also concluded that “the provisional government owes its existence to an armed invasion by the United States.”² Being a creature, or creation, of the US, it could not claim to be the lawful successor of the Hawaiian Kingdom government with vested title to the ahupua‘a of Ka‘ohe. As the successor to the Provisional Government, the Republic of Hawai‘i, as it self-declared successor, could not take any better title than the Provisional Government and hence did not have title to Ka‘ohe. The U.S. Congress in the 1993 Apology Resolution noted that the Republic of Hawai‘i was “self-declared.”³

The United States claims to have acquired title to Ka‘ohe, by cession, from the Republic of Hawai‘i under the 1898 Joint Resolution of Annexation. International law recognizes that the “only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State.”⁴ The Joint Resolution of Annexation is not “an agreement embodied in a treaty.” It is a U.S. municipal law from the Congress merely asserting that cession took place. The situation is not unlike a neighbor holding a family meeting and claiming that they have agreed that your house is now their house.

In a debate on the Senate floor on July 4, 1898, Senator William Allen stated:

The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the

¹ President Cleveland’s Message to the Congress (Dec. 18, 1893), p. 453, available online at [https://hawaiiankingdom.org/pdf/Cleveland's_Message_\(12.18.1893\).pdf](https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).

² *Id.*, p. 454.

³ 107 Stat. 1510.

⁴ L. Oppenheim, *International Law*, vol. 1, second edition, 286 (1912).

government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein.⁵

The joint resolution is ipso facto null and void.⁶

In 1988, the U.S. Department of Justice, Office of Legal Counsel (“OLC”) issued a legal opinion on the lawfulness of the annexation of Hawai‘i by a joint resolution.⁷ In its opinion, it cited constitutional scholar Westel Willoughby:

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 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 it is enacted.⁸

The OLC concluded, “It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”⁹ The United States cannot produce any evidence of a conveyance of the ahupua‘a of Ka‘ohe from a grantor, vested with the title. All it can produce is a joint resolution of Congress. This is not a conveyance from a foreign State ceding territory.

Instead of providing evidence of a conveyance of territory, i.e. treaty of cession, the State of Hawai‘i Supreme Court in its October 30, 2018 majority decision *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, quoted from a book titled *Who Owns the Crown Lands of Hawai‘i* written by Professor Jon Van Dyke.

The U.S. Supreme Court gave tacit recognition to the legitimacy of the annexations of Texas and Hawai‘i by joint resolution, when it said in *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901), that “territory thus acquired [by conquest or treaty] is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii,

⁵ 31 Cong. Rec. 6635 (1898).

⁶ 33 Cong. Rec. 2391 (1900).

⁷ 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 (1988).

⁸ *Id.*, p. 252.

⁹ *Id.*

by an act of Congress.” See also *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), stating that Texas had been properly admitted as a state in the United States.¹⁰

It is unclear what Professor Van Dyke meant when he stated that the U.S. Supreme Court “gave tacit recognition to the legitimacy of the annexation of Texas and Hawai‘i by joint resolution,” because tacit, by definition, is to be “understood without being openly expressed or stated.”¹¹ Furthermore, this statement is twice irrelevant: first, the Court as a third party to any cession of foreign territory has no standing to make such a conclusion as to what occurred between the ceding and receiving States; and, second, its opinion is a fabrication or what American jurisprudence calls a legal fiction. Legal fictions treat “as true a factual assertion that plainly was false, generally as a means to avoid changing a legal rule that required a particular factual predicate for its application.”¹²

According to Professor Smith, a “judge deploys a new legal fiction when he relies in crafting a legal rule on a factual premise that is false or inaccurate.”¹³ These “new legal fictions often serve a legitimating function, and judges may preserve them—even in the face of evidence that they are false—if their abandonment would have delegitimizing consequences.”¹⁴

The proposition that Texas and Hawai‘i were both annexed by joint resolutions of Congress is clearly false. In the case of Texas, Congress consented to the admission of Texas as a State by joint resolution on March 1, 1845 with the following proviso, “Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments.” This condition was referring to Mexico because as Texas was comprised of insurgents who were fighting for their independence, Mexico still retained sovereignty and title to the land. In its follow up joint resolution on December 29, 1845 that admitted Texas as a State of the Union, it did state that the Congress consented “that the territory properly included within, and rightfully belonging to, the Republic of Texas.” These actions taken by the Congress is what sparked the Mexican-American War in 1846.

Congress’ statement of “rightfully belonging” is an opinion and the resolution mentions no boundaries. The transfer of title to the territory, which included the territory comprising Texas, came three years later on February 2, 1848 in a treaty of peace that ended the Mexican-American War.

¹⁰ *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, Opinion, State of Hawai‘i Supreme Court (Oct. 30, 2018), p. 46.

¹¹ Black’s Law, 6th ed. (1990), p. 1452.

¹² Peter J. Smith, “New Legal Fictions,” 95 *The Georgetown Law Journal* 1435, 1437 (2007).

¹³ *Id.*

¹⁴ *Id.*, p. 1440.

Under Article V of the treaty, the new boundary line between the United States and Mexico was to be drawn. “The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte.”¹⁵ Rio Brava del Norte is the southern tip of Texas. If Texas was indeed annexed in 1845 by a joint resolution with its territory intact, there was no reason for the treaty to specifically include the territory of Texas. If it were true that Texas territory was ceded in 1845, Article V of the treaty would have started the boundary line just west of the Texas city of El Paso, which is its western border, and not from the Gulf of Mexico at its southern border. The truth is that the territory of Texas was not annexed by Congress in 1845 but was ceded by Mexico in 1848. The Rio Grande river is the southern border for the State of Texas.



With regard to the so-called annexation of Hawai‘i in 1898 by Congress, there is no treaty ceding Hawaiian territory as in the case of Texas. Like the Texas resolution, Congress stated,

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description

¹⁵ Treaty of Guadalup Hidalgo, 9 Stat. 926 (1848).

belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining...

The reference to consent by its constitution is specifically referring to Article 32, which states, the “President, with the approval of the Cabinet, is hereby expressly authorized and empowered 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.”¹⁶ There is no treaty between the so-called Republic of Hawai‘i and the United States. Furthermore, a constitutional provision is not an instrument of conveyance as a treaty would be. So without a treaty from the Hawaiian Kingdom government as the ceding State vested with the sovereignty and title to government lands, which includes the ahupua‘a of Ka‘ohe, there was no change in the ownership of the government lands.

Furthermore, Hawaiians of the day knew there was no treaty as evidenced in the Maui News newspaper published October 20, 1900. The Editor wrote,

Thomas Clark, a candidate for Territorial senator from Maui holds that it was an unconstitutional proceeding on the part of the United States to annex the Islands without a treaty, and that as a matter of fact, the Island[s] are not annexed, and cannot be, and that if the democrats come into power they will show the thing up in its true light and demonstrate that that the Islands are de facto independent at the present time.

The legal fiction that Texas and Hawai‘i were annexed by a joint resolution of the Congress is just a patently false when measured “against the results of existing empirical research.”¹⁷ For the State of Hawai‘i Supreme Court to restate, and embrace, this falsifiable legal fiction is simply a trick that allows it to fabricate its own false and falsifiable fiction regarding the State of Hawai‘i. In its TMT decision the Court, in conflict with overwhelming evidence, stated, “[W]e reaffirm that ‘[w]hatever may be said regarding the lawfulness’ of its origins, ‘the State of Hawai‘i...is now a lawful government.’”¹⁸ For the State of Hawai‘i to be a “lawful government” it must be vested with lawful authority absent of which it is not lawful. The State of Hawai‘i Supreme Court, being a branch of the State of Hawai‘i itself, cannot declare it “is now a lawful government” without making reference to some intervening factor that vested the State of Hawai‘i with lawful authority.

When addressing the lawful authority and sovereignty of the United States of America, the United States Supreme Court specifically referred to a particular and significant intervening factor. It stated that as “a result of the separation from Great Britain by the

¹⁶ Constitution of the Republic of Hawai‘i, *Roster Legislatures of Hawaii*, 1841-1918 (1918) p. 198.

¹⁷ Smith, “New Legal Fictions,” p. 1439.

¹⁸ *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, Opinion, State of Hawai‘i Supreme Court (Oct. 30, 2018), p. 46.

Colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the Colonies severally, but to the Colonies in their collective and corporate capacity as the United States of America.” The Court was referring to “the Treaty of Paris of September 3, 1783, by which Great Britain recognized the independence of the United States.”¹⁹

It has been erroneously assumed that the US Congress vested the State of Hawai‘i with lawful authority in the 1959 Statehood Act²⁰ in an exercise of the constitutional authority of Congress to admit new States into the Federal union under Article IV, section 3, clause 1. There is no provision in the US constitution for the admission of a state to the union that is on territory not owned by the US. So before the US Congress can admit a new State to the US the US must “own” the territory. According to the United States Supreme Court:

Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens..., and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.²¹

Since the Hawaiian Islands were never annexed by the United States via treaty, Congressional acts, which are municipal laws, may only operate on the territory of the United States. The United States Supreme Court is relatively clear on this point and has stated that the “municipal laws of one nation do not extend in their operation beyond its own territory except as regards its own citizens.”²² In another decision, the United States Supreme Court reiterated, that “our Constitution, laws and policies have no extraterritorial operation unless in respect of our own citizens.”²³

Under international law, the United States is an occupying power in the Hawaiian Islands and as such the occupying Power is obligated, under Article 43 of the 1907 Hague Convention, IV, and Article 64 of the 1949 Geneva Convention, IV, to administer Hawaiian Kingdom laws. In his communication to the members of the Judiciary of the State of Hawai‘i of February 25, 2018, the United Nations Independent Expert, Dr. Alfred deZayas, reiterated this obligation under international law.

I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application

¹⁹ *United States v. Louisiana et al.*, 363 U.S. 1, 68 (1960).

²⁰ 73 Stat. 4.

²¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

²² *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824).

²³ *United States v. Belmont*, 301 U.S. 324, 332 (1936).

of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States) (Enclosure “6”).

The United States never acquired any kind of title to Ka‘ohe and, since one can only convey what one has, it could not convey what it did not have to the State of Hawai‘i under Section 5(b) of the 1959 Admissions Act. Thus the State of Hawai‘i was never lawfully vested with any title to the ahupua‘a of Ka‘ohe, and therefore its so-called general lease no. S-4191 to the University of Hawai‘i dated June 21, 1968 is defective. Under Hawaiian Kingdom law, the ahupua‘a of Ka‘ohe is government land under the management of the Ministry of the Interior and not the State of Hawai‘i Board of Land and Natural Resources. Consequently, all 10 subleases from the University of Hawai‘i that extend to December 31, 2033 are defective as well, which include:

- National Aeronautics and Space Administration dated November 29, 1974;
- Canada-France-Hawai‘i Telescope Corporation dated December 18, 1975;
- Science Research Council dated January 21, 1976;
- California Institute of Technology dated December 20, 1983;
- Science and Engineering Research Council dated February 10, 1984;
- California Institute of Technology dated December 30, 1985;
- Associated Universities, Inc., dated September 28, 1990;
- National Astronomical Observatory of Japan dated June 5, 1992;
- National Science Foundation dated September 26, 1994; and
- Smithsonian Institution dated September 28, 1995.

As such, the University of Hawai‘i’s sublease to TMT International Observatory, LLC, is also defective. Therefore, the University of Hawai‘i cannot sublease what it does not have to TMT International Observatory LLC.

The War Crime of Destruction of Property

According to Article 55 of the 1907 Hague Convention, IV, “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” As the title to Ka‘ohe remains vested in the Hawaiian government as public land there is a duty that anything done on public property must be in accordance with the rules of usufruct, which, by definition, is the “right of using and enjoying and receiving the profits of property that belongs to another.”²⁴

Article 147 of the Geneva Convention, IV, lists as a grave breach the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully

²⁴ Black’s Law, p. 1544.

and wantonly.” This grave breach is expanded under Article 53, any “destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State [Hawaiian Kingdom], or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” The Commentary to the Geneva Convention, IV, states:

In the very wide sense in which the Article must be understood, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of cooperative organizations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.²⁵

Section 402 of the United States Army Field Manual 27-10 provides:

Real property of the [occupied] State which is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations ... The occupant does not have the right of sale or unqualified use of such property. As administrator, usufructuary, he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value.

In international criminal law, the *actus reus* present on Mauna Kea are the acts of destruction of property belonging to the Hawaiian Kingdom as the Occupied State. The *mens rea* requires that the perpetrator act with intent to destroy the property and with knowledge that the owner of the property is the Hawaiian Kingdom government. The *actus reus* and *mens rea* are met as evidenced in the State of Hawai‘i Supreme Court decisions *In the Matter of Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka‘ohe Mauka, Hamakua, Hawai‘i, TMK (3) 404015:009*.

On October 30, 2018, the Hawai‘i Supreme Court affirmed a decision of the Board of Land and Natural Resources which issued a conservation district use permit for TMT near the

²⁵ Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 301.

summit of Mauna Kea.²⁶ In its decision, the majority of the court did not, because it could not, refute the claim that “the ahupua‘a of Ka‘ohe in the District of Hamakua are lands still held by the Hawaiian Kingdom.”²⁷ Somewhat amazing was its open acknowledgement that eleven observatories built since 1970²⁸ on the summit of Mauna Kea did destroy the property.

The majority stated:

Construction of these observatories and roads has had significant cumulative adverse impacts on cultural, archaeological, and historic resources in the MKSR [Mauna Kea Science Reserve]. The observatories have also had significant cumulative adverse impacts on geology, soils, and slope stability in the MKSR because they significantly modified the preexisting terrain, the tops of certain pu‘u were flattened to accommodate observatory foundations, and some materials removed from the pu‘u were pushed over their sides, creating steeper slopes more susceptible to disturbance.²⁹

Associate Justice Michael Wilson dissented from the majority of the court and filed his dissent on November 9, 2018. At the heart of Justice Wilson’s dissent was the destruction of the summit of Mauna Kea. He acknowledged that

the party responsible for the substantial adverse impact to this protected resource is the State of Hawai‘i (State). It is uncontested that the State authorized previous construction within the Astronomy Precinct of the MKSR that created a substantial adverse impact. Thus, the party that caused the substantial adverse impact is empowered by the degradation principle to increase the damage. Now the most extensive construction project yet proposed for the Astronomy Precinct—a 180-foot building 600 feet below the summit ridge of Mauna Kea—is deemed to have no substantial adverse impact due to extensive degradation from prior development of telescopes in the summit area.³⁰

²⁶ *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, Opinion, State of Hawai‘i Supreme Court (Oct. 30, 2018), available at: <http://www.courts.state.hi.us/wp-content/uploads/2018/10/SCOT-17-0000777.pdf>.

²⁷ *Id.*, p. 45.

²⁸ The University 2.2-meter Telescope (1970), the United Kingdom Infrared Telescope (“UKIRT”)(1979)(now owned by the University), the NASA Infrared Telescope Facility (operated by the University)(1979), the Canada-France-Hawai‘i Telescope (1979); (5) the California Institute of Technology (“Caltech”) Submillimeter Observatory (“CSO”)(1986), the James Clerk Maxwell Telescope (“JCMT”)(1986)(now owned by the University), the Very Long Baseline Array (1992), the W. M. Keck Observatory, first phase (1992) and second phase (1996), the Subaru Observatory (“Subaru”)(1999), the Gemini North Observatory (1999), and the Submillimeter Array (2002).

²⁹ *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, Opinion, State of Hawai‘i Supreme Court (Oct. 30, 2018), p. 5-6.

³⁰ *In Re Conservation District Use Application for TMT*, SCOT-17-0000777, Dissenting Opinion, Wilson, J. (Nov. 9, 2018), p. 5, available at: <http://www.courts.state.hi.us/.../11/SCOT-17-0000777dis.pdf>.

He concluded that the “substantial adverse impacts to cultural resources presently existing in the Astronomy Precinct of Mauna Kea combined with the impacts from TMT—a proposed land use that eclipses all other telescopes in magnitude—would constitute an impact on existing cultural resources that is substantial and adverse.”³¹

Native Tenant Rights

All lands throughout the Hawaiian Islands, including the ahupua‘a of Ka‘ohe, are subject to the vested rights of native tenants. In *Kekiekie v. Dennis*, the Hawaiian Kingdom Supreme Court acknowledged that the “people’s lands were secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself.” The acknowledgment of native tenant rights in the lands can be found in the:

act of 1839, declaring protection for tenants as well as for landlords. That act particularly recognizes but three classes of persons as having rights in the sale, viz: the King or government, the landlords and the tenants ... It being therefore fully established, that there are but three classes of persons having vested rights in the lands,—1st, the government, 2nd, the landlord, and 3^d, the tenant.³²

The division began in 1848 of these vested undivided rights between the Hawaiian Government and 253 Konohiki (landlord), which included Kamehameha III as the highest of all Konohiki.³³ Once divided, the lands were subject to the rights of native tenants who comprised the commoner class. As the right is vested in the class of commoners the recipients of this right are infinite as opposed to the Government and 253 Konohiki which is finite. For the ahupua‘a of Ka‘ohe, native tenant rights remain in the land under the management of the Ministry of the Interior. These rights include the right to purchase and the right to access. Hawaiian Kingdom legislation provides:

That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.³⁴

³¹ *Id.*, p. 36.

³² *Principles Adopted by the Board of Commissioners to Quiet Land Titles, in Their Adjudication of Claims Presented to Them*, adopted by Resolution of the Legislative Council (Oct. 26, 1846).

³³ *Minutes of the Privy Council* (Dec. 11, 1847), p. 87, “The King now claims to be Konohiki of a great portion of the lands. He therefore makes known to the other Konohiki’s, that they are only Holders of Lands under him, but he will only take a part and leave them a part.”

³⁴ Section 4, *An Act Confirming Certain Resolutions of the King and Privy Council, passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges* (Aug. 6, 1850)

When the landlords [including the government] have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, but they shall not have a right to take articles to sell for profit. The people shall also have a right to drinking water, and running water, and roads shall be free to all, on all lands granted in fee-simple. Provided that this shall not be applicable to wells and water courses which individuals have made for their own use.³⁵

Religious rights are secured to all people under Hawaiian constitutional law. Article 2 of the 1864 Constitution provides “All men are free to worship God according to the dictates of their own consciences.” The constitutional provision of worshipping God is not confined to a particular religion but rather the conscience of the person who does the worship so long it does not “justify acts of licentiousness, or practices inconsistent with the peace or safety of the Kingdom.”³⁶ International humanitarian law and human rights law also provide for the protection of religious rights of people within the territory of the occupied State.

The 1907 Hague Convention, IV, provides:

Article 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Article 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

The 1949 Geneva Convention, IV, provides:

Article 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.

As a matter of human rights, the International Covenant on Civil and Political Rights provides that that all persons “shall have the right to freedom of thought, conscience and religion.”³⁷ And that freedom “to manifest one’s religion and beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”³⁸

³⁵ *An Act to Amend an Act Granting to the Common People, Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges* (June 11, 1851).

³⁶ Article 2, 1864 Constitution.

³⁷ International Covenant on Civil and Political Rights, Article 18(1).

³⁸ *Id.*, Article 18(3).

Concluding Remarks

The implications of the proposed construction of TMT are profound in that it not only draws attention to the war crimes of destruction of property done by the prior construction telescopes on the Mauna Kea summit, but that TMT's construction pales in comparison in that the summit will be destroyed by excavating to a depth of 600 feet. A pit as deep as a 43-story building. Since the construction of TMT has not commenced there is, as yet, no destruction of property and, as yet, no war crimes.

The proposed construction, however, could lead to other war crimes that would include unlawful arrest and confinement of persons³⁹ who would be preventing the evil of the added destruction of the summit. These people could include aboriginal Hawaiians, which Hawaiian law recognizes as native tenants that have vested rights in the ahupua'a of Ka'ohē as aforementioned.

Complicating matters would be the fact that the University of Hawai'i's general lease is invalid and therefore its sublease to TMT is void. As there is no evidence of consent from the Hawaiian Kingdom government to either the University of Hawai'i or for TMT, to include TMT's construction company Goodfellow Bros., to be on the summit of Mauna Kea, they would be the trespassers on government lands, and not those who would oppose the destruction of the property. Aboriginal Hawaiians who call themselves protectors of the mauna have more of a right to the summit under their "native tenant rights" than the University of Hawai'i or TMT who have no rights in the absence of a valid lease. They are, after all, protecting their rights against an unlawful encroachment by entities lacking permission of the true titled owner.

Should these people be charged with a crime, they would face an unfair trial, which is, itself, a war crime,⁴⁰ i.e., a criminal complaint of trespass would be invalid if the complainant has no title to the property, and, therefore, should be quashed. The 2019 proclamation by the Council of Regency recognizing the State of Hawai'i and its Counties as the occupying power transformed the State of Hawai'i Courts into regularly constituted courts. "A court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country."⁴¹ These properly constituted courts, however, could still commit a war crime if the court denies judicial guarantees recognized under international law, including those of the 1949 Geneva Convention, IV, and the International Covenant on Civil and Political Rights.

³⁹ Article 147, 1949 Geneva Convention, IV, "unlawful confinement of a protected person."

⁴⁰ *Id.*, "willfully depriving a protected person of the rights of a fair and regular trial."

⁴¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law, Vol. I: Rules* (2005), p. 355.

As your Committee is already aware of the formation of the Royal Commission of Inquiry, these war crimes and human rights violations could well come under the purview of the Commission's investigation.

Should you require further information or elaborations on the information provided, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "David Keanu Sai". The signature is fluid and cursive, with the first name "David" being the most prominent.

David Keanu Sai, Ph.D.

Enclosures

Enclosure “1”

Continuity of the Hawaiian Kingdom

by Dr. Matthew Craven

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Being a portion of a Legal Brief provided for the acting Council of Regency

July 12, 2002

THE CONTINUITY OF THE HAWAIIAN KINGDOM

General Considerations

The issue of State continuity usually arises in cases in which some element of the State has undergone some significant transformation (such as changes in its territorial compass or in its form of government). A claim as to state continuity is essentially a claim as to the continued independent existence of a State for purposes of international law in spite of such changes. It is essentially predicated, in that regard, upon an insistence that the State's legal identity has remained intact. If the State concerned retains its identity it can be considered to 'continue' and *vice versa*. Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another 'successor' state (to the extent provided by rules of succession). At its heart, therefore, the issue of State continuity is concerned with the parameters of a state's existence and demise (or extinction) in international law.

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

- a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.
- b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.
- c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibus* or impossibility of performance.
- d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian kingdom incurred prior to its occupation.

Bearing in mind the consequences elucidated in c) and d) above, it might be said that a claim of state continuity on the part of Hawai'i has to be opposed as against a claim by the US as to its succession. It is apparent, however, that this opposition is not a strict one. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one state to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a

great deal in terms of their effect. Whilst State continuity certainly denies the applicability of principles of succession and holds otherwise that rights and obligations remain intact save insofar as they may be affected by the principles *rebus sic stantibus* or impossibility of performance, there is room in theory at least for a principle of universal succession to operate such as to produce exactly the same result (under the theory of universal succession).¹ The continuity of legal rights and obligations, in other words, does not necessarily suppose the continuity of the State as a distinct person in international law, as it is equally consistent with discontinuity followed by universal succession. Even if such a thesis remains largely theoretical, it is apparent that a distinction has to be maintained between continuity of personality on the one hand, and continuity of specific legal rights and obligations on the other. The maintenance in force of a treaty, for example, in relation to a particular territory may be evidence of State continuity, but it is far from determinative in itself.

Even if it is relatively clear as to when States may be said to come into being for purposes of international law (in many cases predicated upon recognition or admission into the United Nations),² the converse is far from being the case.³ Beyond the theoretical circumstance in which a body politic has dissolved (for example by submergence of the territory or the dispersal of the population), it is apparent that all cases of putative extinction will arise in cases where certain changes of a material nature have occurred—such as a change in government and change in the territorial configuration of the State. The difficulty, however, is in determining when such changes are merely incidental, leaving intact the identity of the state, and when they are to be regarded as fundamental going to the heart of that identity.⁴ The problem, in part, is the lack of any institution by which such an event may be marked: governments do not generally withdraw recognition even if circumstances might so warrant,⁵ and there is no mechanism by which membership in international organisations may be terminated by reason of extinction. It is evident, moreover, that states are complex political communities possessing various attributes of an abstract nature which vary in space as well as time, and, as such, determining the point at which changes in those attributes are such as to affect the State's identity will inevitably call for very fine distinctions.

It is generally held, nevertheless, that there exist several uncontroversial principles that have some bearing upon the issue of continuity. These are essentially threefold, all of which assume an essentially negative form.⁶ First that the continuity of the State is not affected by changes in

¹ Cf. article 34 Vienna Convention on State Succession in Respect of Treaties (1978).

² See on this point Crawford J., *The Creation of States in International Law* (1979); Dugard J., *Recognition and the United Nations* (1987).

³ *Ibid.*, p.417.

⁴ See generally, Marek K., *The Identity and Continuity of States in Public International Law* (2nd ed. 1968). For early recognition of this principle see Phillimore P., *Commentaries upon International Law* (1879) p. 202.

⁵ See, Guggenheim P., *Traité de droit international public* (1953) p. 194. Lauterpacht notes that '[W]ithdrawal of recognition from a State is often obscured by the fact that, having regard to the circumstances, it does not take place through an express declaration announcing the withdrawal but through the act of recognition, express or implied, of the new authority.' Lauterpacht H., *Recognition in International Law*, (1947) pp. 350-351.

⁶ Further principles have also been suggested, such as: i) the state does not cease to exist by reason of its entry into a personal union, Pradier-Fodéré, *Traité de droit international public Européen et Américain* (1885) s.148, p.253; ii) that the state does not expire by reason of becoming economically or politically weak, *ibid.*, s. 148, p.254; iii) that the state does not cease to exist by reason of changes in its population, *ibid.* p. 252; iv) that the state is not affected by changes in the social or economic system, Verzijl, *International Law in Historical Perspective*, p. 118; v) that the State is not affected by being reduced to a State of semi-sovereignty, Phillimore, *supra*, n. 4, p. 202. According to

government even if of a revolutionary nature.⁷ Secondly, that continuity is not affected by territorial acquisition or loss,⁸ and finally that it is not affected by belligerent occupation (understood in its technical sense).⁹ Each of these principles reflects upon one of the key incidents of statehood—territory, government and independence—making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity.¹⁰ As Hall was to express the point, a State retains its identity

‘so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.’¹¹

Vattel, the key to sovereignty was ‘internal independence and sovereign authority’ (Vattel E., *The Law of Nations or the Principles of Natural Law* (1758, trans Fenwick C., 1916) Bk.1, s.8)- if a state maintained these, it would not lose its sovereignty by the conclusion of unequal treaties or tributary agreements or the payment of homage. Sovereign states could be subject to the same prince and yet remain sovereign e.g Prussia and Neufchatel (*ibid*, Bk.1, s.9). The formation of confederative republic of states did not destroy sovereignty because ‘the obligation to fulfill agreements one has voluntarily made does not detract from one’s liberty and independence’ (*ibid*, bk.1, s.10) e.g. the United Provinces of Holland and the members of the Swiss Confederation.

⁷ For early versions of this principle see, Grotius, *De Jure Belli ac Pacis* Bk. II, c. xvi, p. 418. See also, Pufendorf S., *De Jure Naturae et Gentium Libri Octo* (1688, trans Oldfather C. and Oldfather W., 1934) B. VIII, c. xii, s.1, p. 1360; Rivier, *Principes du Droit des Gens*, (1896) I, p. 62; De Martens F., *Traité de Droit International* (1883) 362; Westlake J., *International Law* (1904) I, 58; Wright Q., ‘The Status of Germany and the Peace Proclamation’, 46 A.J.I.L. (1952) 299, p. 307; McNair A., ‘Aspects of State Sovereignty’ B.Y.I.L. (1949) p. 8. Jennings and Watts (Oppenheim’s *International Law* (9th ed. 1996), p. 146) declare that:

‘Mere territorial changes, whether by increase or by diminution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties. Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired’.

See also, *US v. Curtiss Wright Export Corp. et al* 299 US (1936) 304, p. 316 (J. Sutherland): ‘Rulers come and go; governments end and forms of government change; but sovereignty survives.’

⁸ Westlake, *supra*, n. 7, p. 59; Pradier-Fodéré, *supra*, n. 6, s. 148, p. 252; Hall W., *A Treatise on International Law* (4th ed. 1895) p. 23; Phillimore, *supra*, n. 4, I, pp. 202-3; Rivier, *supra*, n. 7, I, pp. 63-4; Marek, *supra*, n. 4, pp. 15-24 Article 26 Harvard Research Draft Convention on the Law of Treaties 1935, 29 AJIL (1935) Supp. 655. See also, *Katz and Klump v. Yugoslavia* [1925-1926] A. D. 3 (No. 24); *Ottoman Debt Arbitration* [1925-26] A. D. 3; *Roselius and Co. v. Dr Karsten and the Turkish Republic intervening*, [1925-6] A. D. (No. 26); *In re Ungarische kriegsprodukien Aktiengesellschaft*, [1919-22] A.D. (No. 45); *Lazard Brothers and Co v. Midland Bank*, [1931-32] A.D. (No. 69). For State practice see e.g. Great Britain remained the same despite the loss of the American Colonies; France, after the loss of territory in 1814-15 and 1871; Austria after the cession of Lombardy in 1859 and Venice in 1866; Prussia after the Franco-Prussian Peace Treaty at Tilsit, 1807. See generally, Moore, J., *A Digest of International Law*, (1906), p. 248.

⁹ See below, paras. .

¹⁰ Crawford points out that ‘the presumption—in practice a strong one—is in favour of the continuance, and against the extinction, of an established state’, Crawford, *supra*, n. 2, p. 417.

¹¹ Hall, *supra*, n. 8, p. 22.

The only exception to this general principle, perhaps, is to be found in case of multiple changes of a less than total nature, such as where a revolutionary change in government is accompanied by a broad change in the territorial delimitation of the State.¹²

If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other States. It is commonly recognised that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entirety of the territory of the State, as they do in case of Hawai'i, and when they are accompanied by effective occupation to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands.

In light of such considerations any claim to State continuity will be dependent upon the establishment of two legal facts: first that the State in question existed as a recognised entity for purposes of international law at some relevant point in history; and secondly that intervening events have not been such as to deprive it of that status. It should be made very clear, however, that the issue is not simply one of 'observable' or 'tangible facts', but more specifically of 'legally relevant facts'. It is not a case, in other words, simply of observing how power or control has been exercised in relation to persons or territory, but of determining the scope of 'authority' (understood as 'a legal entitlement to exercise power and control'). Authority differs from mere control by not only being essentially rule governed, but also in virtue of the fact that it is not always entirely dependent upon the exercise of that control. As Arbitrator Huber noted in the *Island of Palmas Case*:

'Manifestations of sovereignty assume... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.'¹³

Thus, whilst 'the continuous and peaceful display of territorial sovereignty' remains an important measure for determining entitlements in cases where title is disputed (or where 'no conventional line of sufficient topographical precision exists'), it is not always an indispensable prerequisite for legal title. This has become all the more apparent since the prohibition on the annexation of territory became firmly implanted in international law, and with it the acceptance that certain factual situations will not be accorded legal recognition: *ex inuria ius non oritur*.

¹² See e.g. Marek, *supra*, n. 4.

¹³ *Island of Palmas Case (Netherlands v. United States)* 2 R.I.A.A. 829.

The Status of the Hawaiian Kingdom as a Subject of International Law

Whilst the Montevideo criteria¹⁴ (or versions of) are now regarded as the definitive determinants of statehood, the criteria governing the ‘creation’ of states in international law in the 19th Century were somewhat less clear.¹⁵ The rise of positivism and its rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many to posit international law less in terms of a ‘universal’ law of nations and more in terms of an international public law of European (and North American) States.¹⁶ According to this view, international law was gradually extended to other portions of the globe primarily in virtue of imperialist ambition and colonial practice - much of the remainder was regarded as simply beyond the purview of international law and frequently as a result of the application of a highly suspect ‘standard of civilisation’. It was not the case, therefore, that all territories governed in a stable and effective manner would necessarily be regarded as subjects of international law and much would apparently depend upon the formal act of recognition, which signaled their ‘admittance into the family of nations’.¹⁷ Thus, on the one hand commentators frequently provided impressively detailed ‘definitions’ of the State. Phillimore, for example, noted that ‘for all purposes of international law, a state... may be defined to be a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe’.¹⁸ These definitions, however, were not always intended to be prescriptive. Hall maintained, for example, that whilst States were subjected to international law ‘from the moment... at which they acquire the marks of a state’¹⁹ he later added the qualification that States ‘outside European civilisation... must formally enter into the circle of law-governed countries’.²⁰ In such circumstances recognition was apparently critical. Given the trend to which this gave rise, Oppenheim was later to conclude in 1905, that ‘a State is and becomes an international person through recognition only and exclusively’.²¹

Whatever the general position, there is little doubt that the Hawaiian Kingdom fulfilled all requisite criteria. The Kingdom was established as an identifiable, and independent, political community at some point in the early 19th Century (the precise date at which this occurred is perhaps of little importance). During the next half-Century it was formally recognised by a number of Western

¹⁴ Montevideo Convention on the Rights and Duties of States, Dec. 26th 1933, article 1: ‘The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.’

¹⁵ Doctrine towards the end of the 19th Century began to articulate those criteria. Rivier, for example, described the ‘essential elements of the state’ as being evidenced by ‘an independent community, organised in a permanent manner on a certain territory’ (Rivier, *supra*, n. 7). Hall similarly speaks about the ‘marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.’ *Supra*, n. 8, p. 18.

¹⁶ See e.g., Lawrence T., *Principles of International Law* (4th ed. 1913) p. 83; Pradier-Fodéré, *Traité de droit international public Européen et Américain* (1885).

¹⁷ Hall comments, for example, that ‘although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired. Hall, *supra*, n. 8, p. 87.

¹⁸ Phillimore, *supra*, n. 4, I, p. 81.

¹⁹ Hall, *supra*, n. 8, p. 21.

²⁰ *Ibid*, pp. 43-44.

²¹ *International Law: A Treatise* (1905) I, p. 109.

powers including Belgium, Great Britain,²² France,²³ and the United States,²⁴ and received and dispatched diplomatic agents to more than 15 States (including Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden and Norway and the United States). Secretary of State Webster declared, for example, in a letter to Hawaiian agents in 1842 that:

‘the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the Islands as a conquest or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.’²⁵

This point was reiterated subsequently by President Tyler in a message to Congress.²⁶ In similar vein, Britain and France declared in a joint declaration in 1843 that they considered ‘the Sandwich Islands as an independent State’ and vowed ‘never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed’.²⁷ When later in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions ‘incompatible with any just regard for the Hawaiian Government as an independent State’ and calling upon France to ‘desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands’.²⁸

In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd 1826, Dec. 20th 1849, May 4th 1870, Jan. 30th 1875, Sept. 11th 1883, and Dec. 6th 1884), Britain (Nov. 16th 1836 and July 10th 1851), the Free Cities of Bremen (Aug. 7th 1851) and Hamburg (Jan. 8th 1848), France (July 17th 1839), Austria-Hungary (June 18th 1875), Belgium (Oct. 4th 1862), Denmark (Oct. 19th 1846), Germany (March 25th 1879), France (Oct. 29th 1857), Japan (Aug. 19th 1871), Portugal (May 5th 1882), Italy (July 22nd 1863), the Netherlands (Oct. 16th 1862), Russia (June 19th 1869), Samoa (March 20th 1887), Switzerland (July 20th 1864), Spain (Oct. 29th 1863), and Sweden and Norway (July 1st 1852). The Hawaiian Kingdom, furthermore, became a full member of the Universal Postal Union on January 1st 1882.

There is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893, the moment of the first occupation of the Island(s)

²² Declaration of Great Britain and France relative to the Independence of the Sandwich Islands, London, Nov. 28th, 1843.

²³ Ibid.

²⁴ Message from the President of the United States respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government, Dec. 19th 1842. The Apology Resolution of 1993, however, maintains that the US ‘recognised the independence of the Hawaiian Kingdom, extended full and complete diplomatic recognition to the Hawaiian Government ‘from 1826 until 1893’.

²⁵ Letter of Dec. 19th 1842, Moore’s Digest, *supra*, n. 8, I, p. 476.

²⁶ Message of President Tyler, Dec. 30th 1842, Moore’s Digest, *supra*, n. 8, I, pp. 476-7.

²⁷ For. Rel. 1894, App. II, p. 64.

²⁸ Letter of June 19th 1851, For. Rel. 1894, App. II, p. 97.

by American troops.²⁹ Indeed, this point was explicitly accepted in the *Larsen v. Hawaiian Kingdom* Arbitral Award.³⁰

The consequences of Statehood at that time were several. States were deemed to be sovereign not only in a descriptive sense, but were also regarded as being ‘entitled’ to sovereignty. This entailed, amongst other things, the rights to free choice of government, territorial inviolability, self-preservation, free development of natural resources, of acquisition and of absolute jurisdiction over all persons and things within the territory of the State.³¹ It was, however, admitted that intervention by another state was permissible in certain prescribed circumstances such as for purposes of self-preservation, for purposes of fulfilling legal engagements or of opposing wrong-doing. Although intervention was not absolutely prohibited in this regard, it was generally confined as regards the specified justifications. As Hall remarked,

‘The legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it.’³²

A desire for simple aggrandisement of territory did not fall within these terms, and intervention for purposes of supporting one party in a civil war was often regarded as unlawful.³³ In any case, the right of independence was regarded as so fundamental that any action against it ‘must be looked upon with disfavour’.³⁴

Recognized Modes of Extinction

In light of the evident existence of Hawai’i as a sovereign State for some period of time prior to 1898, it would seem that the issue of continuity turns upon the question whether Hawai’i can be said to have subsequently ceased to exist according to the terms of international law. Current international law recognises that a state may cease to exist in one of two scenarios: by means of that State’s integration with another in some form of union (such as the GDR’s accession to the FRG), or by its dismemberment (such as in case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia).³⁵ As will be seen, events in Hawai’i in 1898 are capable of being construed in several ways, but it is evident that the most obvious characterisation was one of annexation (whether by cession or conquest).

The general view today is that, whilst annexation was historically a permissible mode of acquiring title to territory (as was ‘discovery’), it is now regarded as illegitimate and primarily as a consequence of the general prohibition on the use of force as expressed in article 2(4) of the UN Charter. This point has since been underscored in various forms since 1945. General Assembly Resolution 2625 on Friendly Relations, for example, provides that:

²⁹ For confirmation of this fact see e.g. Rivier, *supra*, n. 7, I, p. 54.

³⁰ *Larsen v. Hawaiian Kingdom*, P.C.A. Arbitral Award, Feb. 5th 2001, para. 7.4.

³¹ Phillimore, *supra*, n. 4, I, p. 216.

³² Hall, *supra*, n. 8, p. 298.

³³ See e.g. Lawrence, *supra*, n. 14, p. 134.

³⁴ Hall, *supra*, n. 8, p. 298.

³⁵ Jennings and Watts add one further category: when a State breaks up into parts all of which become part of other states (such as Poland in 1795), *supra*, n. 8, p. 204.

‘The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.’³⁶

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness³⁷ (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.³⁸ It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.³⁹

Even if the annexation of the Hawaiian Islands would be regarded as unlawful according to accepted standards today, it does not necessarily follow that US claims to sovereignty are unfounded. It is generally maintained that the legality of any act should be determined in accordance with the law of the time when it was done, and not by reference to law as it might have become at a later date. This principle finds its expression in case of territorial title, as Arbitrator Huber pointed out in the *Island of Palmas* case,⁴⁰ in the doctrine of inter-temporal law. As far as Huber was concerned, there were two elements to this doctrine – the first of which is relatively uncontroversial, the second of which has attracted a certain amount of criticism. The first, uncontroversial, element is simply that ‘a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled’.⁴¹ In the present context, therefore, the extension of US sovereignty over Hawai’i should be analysed in terms of the terms of international law, as they existed at the relevant point(s) in time. This much cannot be disputed. The second element outlined by Huber, however, is that, notwithstanding the legitimate origins of an act creating title, the continued existence of that title – its continued manifestation – ‘shall follow the conditions required by the evolution of law’. The issue in consideration, here, is whether title based upon historical discovery, or conquest, could itself survive irrespective of the fact that neither is regarded as a legitimate mode of acquisition today. Whilst some have regarded this element as a dangerous extension of the basic principle,⁴² its practical effects are likely to be limited to those cases in which the State originally claiming sovereignty has failed to reinforce that title by means of effective occupation (acquisitive prescription). This was evident in case of the Island of Palmas, but is unlikely to be so in other cases – particularly in light of Huber’s comment that sovereignty will inevitably have its

³⁶ Declaration of Principles of International Law, GA Resn. 2625. See Whiteman, *Digest of International Law* (1965), V, pp. 874-965.

³⁷ See, Crawford, *supra*, n. 2, p. 418.

³⁸ Such a principle has been recognised in e.g., *Free Zones of Upper Savoy and the District of Gex* (2nd Phase), 1930, PCIJ, Series A, No. 24; *South-Eastern Territory of Greenland*, 1932, PCIJ, Series A/B, No. 48, p. 285; *Jurisdiction of the Courts of Danzig*, 1933, PCIJ, Series B, No. 15, p. 26; *Legal Status of Eastern Greenland*, 1933, PCIJ, Series A/B, No. 53, pp. 75, 95.

³⁹ Article 52 Vienna Convention on the Law of Treaties 1969.

⁴⁰ *Island of Palmas (Netherlands v. United States)* 2 R.I.A.A. (1928) 829

⁴¹ *Ibid.*

⁴² Jessup, 22 A.J.I.L. (1928) 735.

discontinuities. In any case, it is apparent that, as Huber stressed, any defect in original title is capable of being remedied by means of a continuous and peaceful exercise of territorial sovereignty and that original title, whether defective or perfect, does not itself provide a definitive conclusion to the question.

Turning then to the law as it existed at the critical date of 1898, it was generally held that a State might cease to exist in one of three scenarios:

- a) By the destruction of its territory or by the extinction, dispersal or emigration of its population (a theoretical disposition).
- b) By the dissolution of the corpus of the State (cases include the dissolution of the German Empire in 1805-6; the partition of the Pays-Bas in 1831 or of the Canton of Bale in 1833).
- c) By the State's incorporation, union, or submission to another (cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886).⁴³

Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently distinguished between two processes – one of which involved a voluntary act (i.e. union or incorporation), the other of which came about by non- consensual means (i.e. conquest and submission followed by annexation).⁴⁴ It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory⁴⁵ and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

Although annexation was regarded as a legitimate means of acquiring territory, it was recognised as taking a variety of forms.⁴⁶ It was apparent, to begin with, that a distinction was typically drawn between those cases in which the annexation was implemented by Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part of the annexing power. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.⁴⁷ Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,⁴⁸ title acquired in virtue of a peace treaty was considered to be essentially derivative (i.e. being transferred from one state to another).⁴⁹ There was little, in other words, to distinguish title acquired

⁴³ See e.g. Pradier-Fodere, *supra*, n. 7, I, p. 251; Phillimore, *supra*, n. 4, I, p. 201; de Martens *Traite de Droit International* (1883) I, pp. 367-370.

⁴⁴ See e.g., Westlake J., 'The Nature and Extent of the Title by Conquest', 17 L.Q.R. (1901) 392.

⁴⁵ Oppenheim (*supra*, n. 31, I, p. 288) remarks that '[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory'.

⁴⁶ Halleck H., *International Law* (1861) p. 811; Wheaton H., *Elements of International Law* (1866, 8th ed.) II, c. iv, s. 165.

⁴⁷ See e.g. Lawrence, *supra*, n. 14, p. 165-6 ('Title by conquest arises only when no formal international document transfers the territory to its new possessor'.)

⁴⁸ Cf. now article 52 Vienna Convention on the Law of Treaties 1969.

⁴⁹ See e.g. Rivier, *supra*, n. 7, p. 176.

by means of a treaty of peace backed by force, and a voluntary purchase of territory: in each case the extent of rights enjoyed by the successor were determined by the agreement itself. In case of conquest absent an agreed settlement, by contrast, title was thought to derive simply from the fact of military subjugation and was complete ‘from the time [the conqueror] proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act... his intention to retain it as part of his own territory’.⁵⁰ What was required, in other words, was that the conflict be complete (acquisition of sovereignty *durante bello* being clearly excluded) and that the conqueror declare an intention to annex.⁵¹

What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession (a point of particular importance for possessions held in foreign territory).⁵² Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the state in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.⁵³ Title, in other words, was original, and rights of the occupants were limited to those which they possessed (perhaps under the doctrine *uti possidetis de facto*). Others, by contrast, seemed to assume some form of ‘transfer of title’ as taking place (i.e. that conquest gave rise to a derivative title⁵⁴), and concluded in consequence that the conqueror ‘becomes, as it were, the heir or universal successor of the defunct or extinguished State’.⁵⁵ Much depended, in such circumstances, as to how the successor came to acquire title.

It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization⁵⁶ and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that ‘the principle of conquest shall not... be recognised as admissible under American public law’. It had, furthermore, later taken the lead in adopting a policy of non-recognition of ‘any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928’ (the ‘Stimson Doctrine’) which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

US Acquisition of the Islands

⁵⁰ Baker S., *Halleck's International Law* (3rd ed. 1893) p. 468.

⁵¹ This point was of considerable importance following the Allied occupation of Germany in 1945.

⁵² For an early version of this idea see de Vattel E., *supra*, n. 7, bk III, ss. 193-201; Bynkershoek C., *Quaestionum Juris Publici Libri Duo* (1737, trans Frank T., 1930) Bk. I, pp. 32-46.

⁵³ Rivier, *supra*, n. 7, p. 182.

⁵⁴ Phillimore, *supra*, n. 4, I, p. 328.

⁵⁵ Baker, *supra*, n. 50, p. 495.

⁵⁶ ‘The American continents, by the free and independent conditions which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.’

As pointed out above, the continuity of the Kingdom of Hawaii as an independent state for purposes of international law is theoretically independent of the legitimacy of claims to sovereignty over its territory on the part of other states. By the same token, the fact that the entirety of the Hawaiian Islands have been occupied, administered, and claimed as US territory for a considerable period of time, means that attention must be given to the legitimacy of the US claims as part of the process of determining Hawaiian continuity. US claims to sovereignty over the Islands would appear to be premised upon one of three grounds: a) by the original acquisition of the Islands in 1898 (by means of ‘annexation’ or perhaps ‘cession’); b) by the confirmation of the exercise of that sovereignty by plebiscite in 1959; and c) by the continuous and effective display of sovereignty since 1898 to the present day (acquisitive prescription in the form of adverse possession). Each of these claims will be considered in turn.

Acquisition of the Islands in 1898

The facts giving rise to the subsequent occupation and control of the Hawaiian Kingdom by the US government are, no doubt, susceptible to various interpretations. It is relatively clear, however, that US intervention in the Islands first took place in 1893 under the guise of the protection of the US legation and consulate and ‘to secure the safety of American life and property’.⁵⁷ US troops landed on the Island of O’ahu on 16th January and a Provisional Government was established by a group of insurgents under their protection. On the following day, and once Queen Lili’uokalani had abdicated her authority in favour of the United States, US minister Stevens formally recognised *de facto* the Provisional Government of Hawai’i. The Provisional Government then proceeded to draft and sign a ‘treaty of annexation’ on February 14th 1893 and dispatch it to Washington D.C. for ratification by the US Senate.

According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy ‘was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili’uokalani which put in serious peril not only the large and preponderating interests of the United States in the Islands, but all foreign interests’.⁵⁸ It was further emphasised in a report of Mr Foster to the President that the US marines had taken ‘no part whatever toward influencing the course of events’⁵⁹ and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of government. This version of events was to be contradicted in several important respects shortly after.

Following receipt of a letter of protest sent by Queen Lili’uokalani, newly incumbent President Cleveland withdrew the Treaty of Annexation from the Senate and dispatched US Special Commissioner James Blount to Hawai’i to investigate. The investigations of Mr Blount revealed that the presence of American troops, who had landed without permission of the existing government, were ‘used for the purpose of inducing the surrender of the Queen, who abdicated

⁵⁷ Order of Jan. 16th 1893.

⁵⁸ For. Rel. 1894, App. II, 198.

⁵⁹ Report of Mr. Foster, Sec. of State, For. Rel. 1894, App. II, 198-205.

under protest [to the United States and not the provisional government] with the understanding that her case would be submitted to the President of the United States.⁶⁰ It was apparent, furthermore, that the Provisional Government had been recognised when it had little other than a paper existence, and ‘when the legitimate government was in full possession and control of the palace, the barracks, and the police station’.⁶¹ On December 18th 1893, President Cleveland addressed Congress on the findings of Commissioner Blount. He emphasised that the Provisional Government did not have ‘the sanction of either popular revolution or suffrage’ and that it had been recognised by the US minister pursuant to prior agreement at a time when it was ‘neither a government *de facto* nor *de jure*’.⁶² He concluded as follows:

‘Hawai’i was taken possession of by United States forces without the consent or wish of the Government of the Islands, or of anybody else so far as shown, except the United States Minister. Therefore, the military occupation of Honolulu by the United States... was wholly without justification, either of an occupation by consent or as an occupation necessitated by dangers threatening American life or property’.

Given the ‘substantial wrong’ that had been committed, he concluded that ‘the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods’.

It is fairly clear then, that the position of the US government in December 1893 was that its intervention in Hawai’i was an aberration which could not be justified either by reference to US law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands ‘as being neither a government *de facto* nor *de iure*’. At this stage there was an implicit acknowledgement of the fact that the US intervention not only conflicted with specific US commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that ‘[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors’) but also with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.⁶³

This latter interpretation of events has since been confirmed by the US government. In its Apology Resolution of 23rd November 1993 the US Congress and Senate admitted that the US Minister (John Stevens) had ‘conspired with a small group of non-Hawaiian residents of the Hawaiian Kingdom, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawai’i’, and that in pursuance of that conspiracy had ‘caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16th 1893’. Furthermore, it is admitted that recognition was accorded to the Provisional government without the consent of the Hawaiian people, and ‘in violation of treaties between the two nations and of international law’, and that the insurrection would not have succeeded without US diplomatic and military intervention.

⁶⁰ Moore’s Digest, *supra*, n. 8, I, p. 499.

⁶¹ *Ibid*, pp. 498-99.

⁶² Moore’s Digest, *supra*, n. 8, p. 501.

⁶³ Brownlie, *International Law and the Use of Force by States* (1963) pp. 46-7.

Despite admitting the unlawful nature of its original intervention, the US, however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili'uokalani to the throne even though she had acceded to the US proposals in that regard. Rather it left control of Hawai'i in the hands of the insurgents it had effectively put in place and who clearly did not enjoy the popular support of the Hawaiian people.⁶⁴ Following a proclamation establishing the Republic of Hawai'i by the insurgents in 1894 – the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United States⁶⁵ - *de facto* recognition of the Republic was affirmed by the US⁶⁶ and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili'uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai'i.⁶⁷ A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai'i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

'by that resolution the Republic of Hawai'i as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions vested in the United States...'.⁶⁸

Although the Japanese minister in Washington had raised certain concerns in 1897 as regards the position of Japanese labourers emigrating to the Islands under the Hawaiian-Japanese Convention of 1888, and had insisted that 'the maintenance of the status quo' was essential to the 'good understanding of the powers having interests in the Pacific', it subsequently withdrew its opposition to annexation subject to assurances as regards the treatment of Japanese subjects.⁶⁹ No other state objected to the fact of annexation.

It is evident that there is a certain element of confusion as to how the US came to acquire the Islands of Hawai'i during this period of time. Effectively, two forms of justification seem to offer themselves: a) that the Islands were ceded by the legitimate government of Hawai'i to the United States in virtue of the treaty of annexation; or b) that the Islands were forcibly annexed by the United States in absence of agreement.

The Cession of Hawai'i to the United States

The joint resolution itself speaks of the government of the Republic of Hawai'i having signified its consent 'to cede absolutely and without reserve to the United States of American all rights of

⁶⁴ See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992).

⁶⁵ Article 32 Constitution of the Republic of Hawai'i.

⁶⁶ For. Rel. 1894, pp. 358-360.

⁶⁷ XC B.F.S.P. 1897-8 (1901) 1248.

⁶⁸ President McKinley, Third Annual Message, Dec. 5th 1899, Moore's Digest, *supra*, n. 8, I, p. 511.

⁶⁹ See, Moore's Digest, *supra*, n. 8, I, pp. 504-9.

sovereignty of whatsoever kind’, suggesting, as some commentators have later accepted, that the process was one of voluntary merger.⁷⁰ Hawai’i brought about, according to this thesis, its own demise by means of voluntary submission to the sovereignty of the United States.⁷¹ This interpretation was bolstered by the fact that the government of the Republic had exercised *de facto* control over the Islands since 1893 – as President McKinley was to put it: ‘four years having abundantly sufficed to establish the right and the ability of the Republic of Hawai’i to enter, as a sovereign contractant, upon a conventional union with the United States’.⁷² Furthermore, even if it had not been formally recognised as the *de jure* government of Hawai’i by other nations,⁷³ it was effectively the only government in place (the government of Queen Lili’uokalani being forced into internal exile).

Such a thesis overlooks two facts. First of all, whilst the Republic of Hawai’i had certainly sponsored the adoption of a treaty of cession, the failure by the US to ratify that instrument meant that no legally binding commitments in that regard were ever created. This is not to say that the US actions in this regard were therefore to be regarded as unlawful for purposes of international law. Even if doubts exist as to the constitutional competence of US Congress to extend the jurisdiction of the United States in the manner prescribed by the Resolution,⁷⁴ this in itself does not prevent the acts in question from being effective for purposes of international law.⁷⁵ Indeed, as suggested above it was widely recognised that, for purposes of international law, annexation need not be accomplished by means of a treaty of peace and could equally take the form of a unilateral declaration of annexation. The significance of the failure to ratify, however, does suggest that the acquisition was achieved, if at all, by unilateral act on the part of the United States rather than being governed by the terms of the bilateral agreement.

Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sahib v. Chief Commissioner Pondicherry*⁷⁶ in which it was held that Pondicherry was not to be considered as part of India, despite India’s administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.⁷⁷

Doubts as to the validity of the voluntary merger/ cession thesis are also evident when consideration is given to the role played by US troops in installing and maintaining in power the

⁷⁰ See e.g. Verzijl, *supra*, n. 6.

⁷¹ *Ibid*, I, p. 129.

⁷² Message of President McKinley to the Senate, June 16th 1897, Moore’s Digest, *supra*, n. 8, I, p. 503.

⁷³ Some type of recognition was provided by Great Britain in 1894, however.

⁷⁴ See, Willoughby W., *The Constitutional Law of the United States* (2nd ed. 1929) I, p. 427.

⁷⁵ Article 7 of the ILC Articles on State Responsibility (2001) provides, for example, that ‘[t]he conduct of an organ of a State... shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.’

⁷⁶ I.L.R. (1969) 49.

⁷⁷ *Iloilo Claims Arbitration* (1925) 6 R.I.A.A. 158. To similar effect see *Forest of Central Rhodope Arbitration* (Merits, 1933) 3 R.I.A.A. 1405; *British Claims in Spanish Morocco* (1924) 2 R.I.A.A. 627.

Republican government in face of continued opposition on the part of the ousted monarchy. If, as was admitted by the US in 1893, intervention was unjustified and therefore undoubtedly in violation of its international obligations owed in respect of Hawai'i, it seems barely credible to suggest that it should be able to rely upon the result of that intervention (namely the installation of what was to become the Republican government) by way of justifying its claim that annexation was essentially consensual.

Central to the US thesis, in this respect, is the view that the government of the self-proclaimed Republic enjoyed the necessary competence to determine the future of Hawai'i. Notwithstanding the fact that the Republic was itself maintained in power by means of US military presence, and notwithstanding its recognition of the legitimate claims on the part of the Kingdom, the US recognised the former as a *de facto* government with which it could deal. This, despite the fact that US recognition policy during this period was 'based predominantly on the principle of effectiveness evidenced by an adequate expression of popular consent'.⁷⁸ As Secretary Seward was to indicate in 1868, revolutions 'ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanence.'⁷⁹ The US refusal, therefore, to recognise the Rivas Government in Nicaragua in 1855 on the basis that '[i]t appears to be no more than a violent usurpation of power, brought about by an irregular self-organised military force, as yet unsanctioned by the will or acquiescence of the people',⁸⁰ stands in marked contrast to its willingness to offer such recognition to the government of the Republic of Hawai'i in remarkably similar circumstances. Given the precipitous recognition of the government of the Republic – itself an act of unlawful intervention - it seems unlikely that the US could legitimately rely upon the fact of its own recognition as a basis for claiming that its acquisition of sovereignty over Hawai'i issued from a valid expression of consent.

The Annexation of Hawai'i by the United States

If there is some doubt as to the validity of the voluntary merger thesis, an alternative interpretation of events might be to suggest that the US came to acquire the Islands by way of what was effectively conquest and subjugation. It could plausibly be maintained that annexation of the Islands came about following the installation of a puppet government intent upon committing the future of the Islands to the US and which was visibly supported by US armed forces. According to this interpretation of events, the initial act of intervention in 1893 would simply be the beginning of an extended process of *de facto* annexation which culminated in the extension of US laws to Hawai'i in 1898. Whether or not the Republican government was the legitimate government of Hawai'i mattered little, and the apparent lack of consent of the former Hawaiian government largely irrelevant. According to this thesis the unlawful nature of the initial intervention would ultimately be wiped out by the subsequent annexation of the territory and the extinction of the Hawaiian Kingdom as an independent State (just as Britain's precipitous annexation of the Boer Republics in 1901 was subsequently rendered moot by its perfection of title under the Peace Treaty of 1902). Support for this interpretation of events comes from the fact that the Queen initially abdicated in favour of the United States, and not the Provisional Government of 1893 (although she did eventually give an oath of allegiance to the Republic in 1895) and from the persistent

⁷⁸ Lauterpacht, *Recognition in International Law* (1947) p. 124.

⁷⁹ US Diplomatic Correspondence, 1866, II, p. 630.

⁸⁰ Mr. Buchanan to Mr. Rush. Moore's Digest, *supra*, n. 8, I, p. 124.

presence of US forces which, no doubt, reinforced the authority of the Provisional Government and subsequently the Government of the Republic.

The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.⁸¹ Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai'i.⁸² It could not easily be construed, in other words, merely as an instrument of US government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

‘unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal. It makes no difference that the territory involved may already be under the firm control of the State declaring the annexation.’⁸³

The reason for this, no doubt, was the tendency to view international law as being comprised of two independent sets of rules applicable respectively in peacetime and in war (a differentiation which is no longer as sharp as it once was). A State of war had several effects at the time including not merely the activation of the laws and customs of war, but also the invalidation or suspension of existing treaty obligations.⁸⁴ This meant, in particular, that in absence of armed conflict, in other words, the US would be unable to avoid its commitments under the 1849 Treaty with Hawai'i, and would therefore be effectively prohibited from annexing the Islands by unilateral act. This, no doubt, informed President Cleveland's unwillingness to support the treaty of annexation in 1893, and meant that the only legitimate basis for pursuing annexation in the circumstances would have been by treaty of cession.

Ultimately, one might conclude that there are certain doubts, albeit not necessarily overwhelming, as to the legitimacy of the US acquisition of Hawai'i in 1898 under the terms of international law as it existed at that time. It neither possessed the hallmarks of a genuine 'cession' of territory, nor that of forcible annexation (conquest). If, however, the US neither came to acquire the Islands by way of treaty of cession, nor by way of conquest, the question then remains as to whether the sovereignty of the Hawaiian Kingdom was maintained intact. The closest parallel, in this regard, is to be found in the law governing belligerent occupation.

Belligerent Occupation and Occupation Pacifica

⁸¹ See, Hackworth G., *Digest of International Law*, (1940) I, pp. 333-338.

⁸² Moore's Digest, *supra*, n. 8, I, p. 500.

⁸³ Bindschedler R., 'Annexation', in *Encyclopedia of Public International Law*, III, 19, p. 20.

⁸⁴ Brownlie, *supra*, n. , pp. 26-40.

From the time of Vattel onwards it was frequently held that the mere occupation of foreign territory did not lead to the acquisition of title of any kind until the termination of hostilities.⁸⁵ During the course of the 19th Century, however, this became not merely a doctrinal assertion, but a firmly maintained axiom of international law.⁸⁶ Up until the point at which hostilities were at an end, the control exercised over territory was regarded as a ‘belligerent occupation’ subject to the terms of the laws of war. The hallmark of belligerent occupation being that the occupant enjoyed *de facto* authority over the territory in question, but that sovereignty (and territorial title) remained in the hands of the displaced government. As President Polk noted in his annual message of 1846 ‘by the law of nations a conquered territory is subject to be governed by the conqueror during his military possession and until there is either a treaty of peace, or he shall voluntarily withdraw from it.’⁸⁷ In such a case ‘[t]he sovereignty of the enemy is in such case “suspended”, and his laws can “no longer be rightfully enforced” over the occupied territory and that “[b]y the surrender, the inhabitants pass under a temporary allegiance to the conqueror.”⁸⁸ The suspensory, and provisional, character of belligerent occupation was further confirmed in US case law of the time,⁸⁹ in academic doctrine⁹⁰ and in various Manuals on the Laws of War.⁹¹ The general idea was subsequently recognised in Conventional form in article 43 of the 1907 Hague Regulations,⁹² and in the US Military Manual of 1914.⁹³

In essence, the doctrine of belligerent occupation placed certain limits on the capacity of the occupying power to acquire or dispose of territory *durante bello*. By inference, sovereignty remained in the hands of the occupied power and, as a consequence it was generally assumed that until hostilities were terminated, title to territory would not pass and the extinction of the state would not be complete. This doctrine was subsequently elaborated during the course of the First and Second World Wars to the effect that States would not be regarded as having been lawfully annexed even when the entirety of the territory was occupied and the government forced into exile, so long as the condition of war persisted, albeit on the part of allied States. The general prohibition on the threat or use of armed force in the Charter era since 1945 has further reinforced this regime to the point at which it might be said that ‘effective control by foreign military force can never bring about by itself a valid transfer of sovereignty’.⁹⁴

⁸⁵ See e.g. de Vattel *supra*, n. 6, III, s. 196.

⁸⁶ Graber believes this was the case following the Franco-Prussian war. Graber D., *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (1968) 40-41.

⁸⁷ President Polk’s Second Annual Message, 1846, Moore’s Digest, *supra*, n. 8, I, p. 46.

⁸⁸ President Polk’s Special Message, July 24th, 1848. Moore’s Digest, *supra*, n. 8, I, pp. 46-7.

⁸⁹ *US v. Rice*, US Supreme Court, 1819, 4 Wheat. 246 (1819).

⁹⁰ Heffter, *Das europäische Völkerrecht de Gengenwart* (1844) pp. 287-9; Bluntschli, *Das Moderne Völkerrecht* (3rd ed. 1878) pp. 303-7.

⁹¹ The Oxford Manual on the Laws of War on Land, 1880 provided (article 6): ‘No invaded territory is regarded as conquered until the end of war; until that time the occupant exercises, in such territory, only a *de facto* power, essentially provisional in character.’ See also, article 2 Brussels Code of 1874.

⁹² Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907. The Brussels Declaration of 1874 provided similarly (article 2) that ‘The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety’.

⁹³ Rules of Land Warfare, 1914, pp. 105-6: ‘Military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty of the occupant, but simply the authority or power to exercise some of the rights of sovereignty’.

⁹⁴ Benvenisti E., *The International Law of Occupation* (1993) p. 5.

Until the adoption of common article 2 of the 1949 Geneva Conventions,⁹⁵ however, the doctrine of belligerent occupation applied primarily to time of war or armed conflict where military intervention met armed resistance. Indeed, the absence of resistance would not infrequently be construed either as an implicit acceptance of the fact of occupation, or as a signal that the original sovereign had been effectively extinguished in virtue of *debellatio*. It is evident, however, that by the turn of the century a notion of peacetime occupation (*occupatio pacifica*) was coming to be recognised.⁹⁶ This concept encompassed not merely occupation following the conclusion of an agreement between the parties, but also non-consensual occupation occurring outside armed conflict (but normally following the threatened use of force).⁹⁷ Practice in the early 20th Century suggests that even though the Hague Regulations were themselves limited to occupations *pendente bello*, their provisions should apply to peacetime occupations such as the British occupation of Egypt in 1914-18,⁹⁸ the Franco- Belgian occupation of the Ruhr in 1923-5⁹⁹ and the occupation of Bohemia and Moravia by Germany in 1939.¹⁰⁰ Indeed, the Arbitral Tribunal in the *Coenca Brothers v. Germany Arbitration Case*¹⁰¹ took the view that the Allied occupation of Greece in 1915 was governed by the terms of the law of belligerent occupation notwithstanding the fact that Greece was not a belligerent at that time, but had merely invited occupation of Salonika in order to protect the Serbian State. Similarly, in the *Chevreau Case* the Arbitrator intimated that the laws of belligerent occupation would apply to the British forces occupying Persia under agreement with the latter in 1914.¹⁰²

If the general terms of the Hague Regulations are to apply to peacetime occupations, it would seem to follow that the same limitations apply as regards the authority of the occupying State. In fact it

⁹⁵ Common Article 2 of the 1949 Geneva Conventions 75 U.N.T.S. 31 reads:

‘In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.’

It would seem that the purpose of this ‘extension’ of the regime of military occupation was to take account of the peculiar facts surrounding the German occupation of Czechoslovakia in 1939 and Denmark in 1940.

⁹⁶ See, Robin, *Des Occupations militaires en dehors des occupations de guerre* (1913).

⁹⁷ Llewellyn Jones F., ‘Military Occupation of Alien Territory in Time of Peace’, 9 *Transactions of Grotius Soc.* (1924) 150; Roberts A., ‘What is a Military Occupation?’, 55 *B.Y.I.L.* (1984) 249, p. 273; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) 116.

⁹⁸ *Leban and Others v. Alexandria Water Co. Ltd. and Others Egypt*, Mixed Court of Appeal, 25 March 1929, A.D. 1929/30, Case No. 286.

⁹⁹ See *In re Thyssen and Others* and *In re Krupp and Others*, 2 A.D. (1923-4) Case No. 191, pp. 327-8.

¹⁰⁰ See Judgment of Nuremberg Tribunal, p. 125; *Anglo-Czechoslovak and Prague Credit Bank v. Janssen* 12 A.D. (1943-5) Case No. 11, p. 47.

¹⁰¹ 7 M.A.T., 1929, p. 683.

¹⁰² *Chevreau Case* (France v. Great Britain) 27 A.J.I.L. (1931) 159, pp. 159-60.

is arguable that the rights of the pacific occupant are somewhat less extensive than those of the belligerent occupant. As Llewellyn Jones notes:

‘[i]n the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation...’.¹⁰³

Whether or not this has significance in the present context, it is apparent that the US could not, as an occupying power, take steps to acquire sovereignty over the Hawaiian Islands. Nor could it be justified in attempting to avoid the strictures of the occupation regime by way of installing a sympathetic government bent on ceding Hawaiian sovereignty to it. This point has now been made perfectly clear in article 47 of the 1949 Geneva Convention IV which states that protected persons shall not be deprived of the benefits of the Convention ‘by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory’.

It may certainly be maintained that there are serious doubts as to the United States’ claim to have acquired sovereignty over the Hawaiian Islands in 1898 and that the emerging law at the time would suggest that, as an occupant, such a possibility was largely excluded. To the extent, furthermore, that US claims to sovereignty were essentially defective, one might conclude that the sovereignty of the Hawaiian Kingdom as an independent state was maintained intact. The importance of such a conclusion is of course dependent upon the validity and strength of subsequent bases for the claim to sovereignty on the part of the US.

Acquisition of the Islands in virtue of the Plebiscite of 1959

An alternative basis for the acquisition of title on the part of the US government (and hence the conclusion that the Hawaiian Kingdom has ceased to exist as a State) is the Plebiscite of 1959 exercised in pursuit of article 73 of Chapter XI of the United Nations Charter. In 1945 Hawai’i was listed as a Non-Self-Governing Territory administered by the United States together with its other overseas territories including Puerto Rico, Guam, the Philippines, American Samoa and Alaska. Article 73 of the Charter provides that:

‘Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a) to ensure, with due respect for culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free

¹⁰³ Supra, n. , p. 159.

- political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement...
- d) to transmit regularly to the Secretary-General for information purposes... statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.'

Central to this provision is the 'advancement of the peoples concerned' and the development of their 'self-government'. Unlike the United Nations Trusteeship System elaborated in Chapters XII and XIII of the UN Charter, however, Chapter XI does not stipulate clearly the criteria by which it may be determined whether a people has achieved the status of self-government or whether the competence to determine that issue lies with the organs of the United Nations or with the administering State. The United Nations General Assembly, however, declared in Resolution 334(IV) that the task of determining the scope of application of Chapter XI falls 'within the responsibility of the General Assembly'.

The General Assembly was to develop its policy in this respect during the subsequent decades through the adoption of the UN List of Factors in 1953 (Res. 742 (VIII)), the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 (Res. 1514 (XV)), supplemented by Resolutions 1541 (XV) (1960) and 2625 (XXV) in 1970. Central to this policy development was its elaboration of the meaning of self-determination in accordance with article 1(2) UN Charter (which provided that the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' was one of the Purposes and Principles of the United Nations). According to the General Assembly, colonial peoples must be able to 'freely determine their political status and freely pursue their economic, social and cultural development' (Resn. 1514 (XV), and Resn. 2625 (XXV)), and primarily by way of choosing between one of three alternatives: emergence as a sovereign independent State; free association with an independent State; and integration with an independent State (Resn. 1514 (XV) and Resn. 1541 (XV) principles II, VI). The most common mode of self-determination was recognised to be full independence involving the transfer of all powers to the people of the territories 'without any conditions or reservations' (Resn. 1514 (XV) principles VII, VIII and IX). In case of integration with another state, it was maintained that the people of the territory should act 'with full knowledge of the change in their status... expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage' (Resn. 1541 (XV), principle IX).

A higher level of scrutiny was generally exercised in case of integration than in respect of other forms of self-determination. Until the time in which self-determination is exercised, furthermore, 'the territory of a... Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State' (Resn. 2625 (XXV) para. VI).¹⁰⁴ As the ICJ subsequently noted in its Advisory Opinion in the *Namibia case*, the 'development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them'.¹⁰⁵ It emphasised, furthermore, in the

¹⁰⁴ This follows by implication from the terms of article 74 UN Charter.

¹⁰⁵ ICJ Rep. (1971), 31, para. 51.

Western Sahara case that ‘the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned’.¹⁰⁶

An initial point in question here is whether Hawai’i should have been listed as a Non-Self-Governing Territory at all for such purposes. Article 73 of the Charter refers to peoples ‘who have not yet attained a full measure of self-government’ – a point which is curiously inapplicable in case of Hawai’i. That being said, the regime imposed was designed, primarily, to foster decolonisation after 1945 and it was only with some reluctance that the United States agreed to include Hawai’i on the list at all. The alternative would have been for Hawai’i to remain under the control of the United States and deprived of any obvious means by which it might re-obtain its independence. The UN Charter may be seen, in that respect, as having created a general but exclusive system of entitlements whereby only those non-State entities regarded as either Non-Self-Governing or Trust Territories would be entitled to independence by way of self-determination absent the consent of the occupying power.¹⁰⁷ It may be emphasised, furthermore, that to regard Hawai’i as being a territory entitled to self-determination was not entirely inconsistent with its claims to be the continuing State. The substance of self-determination in its external form as a right to political independence may be precisely that which may be claimed by a State under occupation. Indeed, the General Assembly Declaration on Friendly Relations (Resn. 2625) makes clear that the right is applicable not simply in case of colonialism, but also in relation to the ‘subjection of peoples to alien subjugation, domination and exploitation’. Crawford points out, furthermore, that self-determination applies with equal force to existing states taking ‘the well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government’.¹⁰⁸ The international community’s subsequent recognition of the applicability of self-determination in case of the Baltic States, Kuwait and Afghanistan, for example, would appear merely to emphasise this point.¹⁰⁹ One may tolerate, in other words, the placing of Hawai’i on the list of non-self-governing territories governed by article 73 only to the extent that the entitlement to self-determination under that article was entirely consonant with the general entitlements to ‘equal rights and self-determination’ in articles 1(2) and 55 of the Charter.

Notwithstanding doubts as to the legality of US occupation/ annexation of Hawai’i, it would seem evident that any outstanding problems would be effectively disposed of by way of a valid exercise of self-determination. In general, the principle of self-determination may be said to have three effects upon legal title. First of all it envisages a temporary legal regime that may, in effect, lead to the extinction of legal title on the part of the Metropolitan State.¹¹⁰ Secondly, it may nullify claims to title in cases where such claims are inconsistent with the principle. Finally, and most importantly in present circumstances, it may give rise to a valid basis for title including cases where it has resulted in free integration with another State. In this third scenario, if following a valid exercise of self-determination on the part of the Hawaiian people it was decided that Hawai’i

¹⁰⁶ ICJ Rep (1975) 12, p. 32.

¹⁰⁷ For a review of the practice in this regard see Crawford J., ‘State Practice and International Law in Relation to Secession’, 69 B.Y.I.L (1998) 85.

¹⁰⁸ Crawford, *supra*, n. 2, p. 100.

¹⁰⁹ See Cassese A., *Self-Determination of Peoples: A Legal Reappraisal* (1995) pp. 94-5.

¹¹⁰ Crawford, *supra*, n. 2, pp. 363-4; Shaw, *Title to Territory in Africa*, pp. 149 ff.

should seek integration into the United States, this would effectively bring to a close any claims that might remain as to the continuity of the Hawaiian Kingdom.

Turning then to the question whether the Hawaiian people can be said to have exercised self-determination following the holding of a plebiscite on June 27th 1959. The facts themselves are not in dispute. On March 18th 1959 the United States Congress established an *Act to Provide for the admission of the State of Hawai'i into the Union* setting down, in section 7(b) the terms by which this should take place. This specified that:

‘At an election designated by proclamation of the Governor of Hawai'i ... there shall be submitted to the electors, qualified to vote in said election, for adoption or rejection, the following propositions:

1. Shall Hawai'i immediately be admitted into the Union as a State?...

An election was held on June 27th 1959 in accordance with this Act and a majority of residents voted in favour of admission into the United States. Hawai'i was formally admitted into the Union by Presidential Proclamation on August 21st 1959. A communication was then sent to the Secretary-General of the United Nations informing him that Hawai'i had, in virtue of the plebiscite and proclamation, achieved self-governance. The General Assembly then decided in Resolution 1469(XIV) that the US would no longer be required to report under the terms of article 73 UN Charter as to the situation of Hawai'i.

Two particular concerns may be raised in this context. First, the plebiscite did not attempt to distinguish between ‘native’ Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident ‘colonial’ population who vastly outnumbered them. This was certainly an extraordinary situation when compared with other cases with which the UN was dealing at the time, and has parallels with one other notoriously difficult case, namely the Falkland Islands/ Malvinas (in which the entire population is of settler origin). There is certainly nothing in the concept of self-determination as it is known today to require an administering power to differentiate between two categories of residents in this respect, and indeed in many cases it might be treated as illegitimate.¹¹¹ By the same token, in some cases a failure to do so may well disqualify a vote where there is evidence that the administering state had encouraged settlement as a way of manipulating the subsequent result.¹¹² This latter point seems to be even more clear in a case such as Hawai'i in which the holders of the entitlement to self-determination had presumptively been established in advance by the fact of its (prior or continued) existence as an independent State. In that case, one might suggest that it was only those who were entitled to regard themselves as nationals of the Kingdom of Hawaii (in accordance with Hawaiian law prior to 1898), who were entitled to vote in exercise of the right to self-determination.

A second, worrying feature of the plebiscite concerns the nature of the choice being presented to the Hawaiian people. As GA Resn. 1514 makes clear, a decision in case of integration should be made ‘with full knowledge of the change in their status... expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage’. It is far from

¹¹¹ See, Hannum H., ‘Rethinking Self-Determination’, 34 Va.J.I.L. (1993) 1, p. 37.

¹¹² Cf. the case of Israeli settlements in the Occupied Territories, Cassese, *supra*, n. 97, p. 242.

clear that much, if any, information was provided as regards the ‘change in status’ that would occur with integration, and there is no evidence that the alternative of full independence was presented as an option. Judged in terms of the later resolutions of the General Assembly on the issue, then, it would seem that the plebiscite falls considerably short of that which would be required for purposes of a valid exercise of self-determination.¹¹³

An important point, here, as is evident from the discussion above, is that most of the salient resolutions by which the General Assembly ‘developed’ the law relating to decolonisation post-dated the plebiscite in Hawai’i, and the organisation’s practice in that respect changed quite radically following the establishment of the Committee of Twenty-Four in 1961 (Resn. 1700 (XVI)). Up until that point, many took the view that Non-Self-Governing Territories were merely entitled to ‘self-government’ rather than full political independence, and that self-determination was little more than a political principle being, at best, *de lege farenada*.¹¹⁴ There was, in other words, no clear obligation as far as UN practice at the time was concerned, for the decision made in 1959 to conform to the requirements later spelled out in relation to other territories – practice was merely crystallising at that date. The US made clear, in fact, that it did not regard UN supervision as necessary for purposes of dealing with its Non-Self-Governing Territories such as Puerto Rico, Alaska or Hawai’i.¹¹⁵ Whilst such a view was, perhaps, defensible at the time given the paucity of UN practice, it does not itself dispose of the self-determination issue. It might be said, to begin with, that in light of the subsequent development of the principle, it is not possible to maintain that the people of Hawai’i had in reality exercised their right of self-determination (as opposed to having merely been granted a measure of self-government within the Union). Such a conclusion, however, is debatable given the doctrine of inter-temporal law. More significant, however, is the fact that pre-1960 practice did not appear to be consistent with the type of claim to self-determination that would attach to independent, but occupied, States (in which one would suppose that the choice of full political independence would be the operative presumption, rebuttable only by an affirmative choice otherwise). As a consequence, there are strong arguments to suggest that the US cannot rely upon the fact of the plebiscite alone for purposes of perfecting its title to the territory of Hawai’i.

Acquisition of Title by Reason of Effective Occupation / Acquisitive Prescription

As pointed out above, it cannot definitively be supposed that the US did acquire valid title to the Hawaiian Islands in 1898, and even if it did so, the basis for that title may now be regarded as suspect given the current prohibition on the annexation of territory by use of force. In case of the latter, the second element of the doctrine of inter-temporal law as expounded by Arbitrator Huber in the *Island of Palmas case* may well be relevant. Huber distinguishes in that case between the acquisition of rights on the one hand (which must be founded in the law applicable at the relevant date) and their existence or continuance at a later point in time which must ‘follow the conditions required by the evolution of the law’. One interpretation of this would be to suggest that title may be lost if a later rule of international law were to arise by reference to which the original title would no longer be lawful. Thus, it might be said that since annexation is no longer a legitimate means by which title may be established, US annexation of Hawai’i (if it took place at all) would no

¹¹³ Similar points have been made as regards the disputed integration of West Irian into Indonesia.

¹¹⁴ See, Jennings R., *The Acquisition of Territory in International Law* (1963) pp. 69-87.

¹¹⁵ US Department of State Bulletin, (1952) p. 270.

longer be regarded as well founded. Apart from the obvious question as to who may be entitled to claim sovereignty in absence of the United States, it is apparent that Huber's *dictum* primarily requires that 'a State must continue to maintain a title, validly won, in an effective manner – no more no less.'¹¹⁶ The US, in other words, would be entitled to maintain its claim over the Hawaiian Islands so long as it could show some basis for asserting that claim other than merely its original annexation. The strongest type of claim in this respect is the 'continuous and peaceful display of territorial sovereignty'.

The emphasis given to the 'continuous and peaceful display of territorial sovereignty' in international law derives in its origin from the doctrine of occupation which allowed states to acquire title to territory which was effectively *terra nullius*. It is apparent, however, and in line with the approach of the ICJ in the *Western Sahara Case*,¹¹⁷ that the Islands of Hawai'i cannot be regarded as *terra nullius* for purpose of acquiring title by mere occupation. According to some, nevertheless, effective occupation may give rise to title by way of what is known as 'acquisitive prescription'.¹¹⁸ As Hall maintained, '[t]itle by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.'¹¹⁹ Johnson explains in more detail:

'Acquisitive Prescription is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor...) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or international tribunal or – exceptionally in cases where no such action was possible – have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.'¹²⁰

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,¹²¹ and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case¹²² found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,¹²³ the *Anglo-*

¹¹⁶ Higgins R., 'Time and the Law: International Perspectives on an Old Problem', 46 I.C.L.Q. (1997) 501, p. 516.

¹¹⁷ *Supra* n. 94.

¹¹⁸ For a discussion of the various approaches to this issue see Jennings and Watts, *supra*, n. 8, pp. 705-6.

¹¹⁹ Hall W., *A Treatise on International Law* (Pearce Higgins, 8th ed 1924) p. 143.

¹²⁰ Johnson, 27 B.Y.I.L. (1950) 332, pp. 353-4.

¹²¹ Prescription may be said to have been recognized in the *Chamizal Arbitration*, 5 A.J.I.L. (1911) 785; the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*, *supra* n. 13.

¹²² ICJ Rep. 1960, p. 6.

¹²³ ICJ Rep. 1953 47

*Norwegian Fisheries Case (United Kingdom v. Norway)*¹²⁴ and in the *Island of Palmas Arbitration*.¹²⁵

If a claim as to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indicia* have to be considered including, for example, the length of time of effective and peaceful occupation, the extent of opposition to or acquiescence in, that occupation and, perhaps, the degree of recognition provided by third states. As Jennings and Watts confirm, however, ‘no general rule [can] be laid down as regards the length of time and other circumstances which are necessary to create such a title by prescription. Everything [depends] upon the merits of the individual case’.¹²⁶ As regards the temporal element, the US could claim to have peacefully and continuously exercised governmental authority in relation to Hawai’i for over a century. This is somewhat more than was required for purposes of prescription in the *British Guiana-Venezuela Boundary Arbitration*, for example,¹²⁷ but it is clear that time alone is certainly not determinative. Similarly, in terms of the attitude of third states, it is evident that apart from the initial protest of the Japanese Government in 1897, none has opposed the extension of US jurisdiction to the Hawaiian Islands. Indeed the majority of States may be said to have acquiesced in its claim to sovereignty in virtue of acceding to its exercise of sovereign prerogatives in respect of the Islands (for example, in relation to the policing of territorial waters or airspace, the levying of customs duties, or the extension of treaty rights and obligations to that territory). It is important, however, not to attach too much emphasis to third party recognition. As Jennings points out, in case of adverse possession ‘[r]ecognition or acquiescence on the part of third States... must strictly be irrelevant’.¹²⁸

More difficult, in this regard, is the issue of acquiescence/ protest. In the *Chamizal Arbitration*¹²⁹ it was held that the US could not maintain a claim to the Chamizal tract by way of prescription in part because of the protests of the Mexican government. The Mexican government, in the view of the Commission, had done ‘all that could be reasonably required of it by way of protest against the illegal encroachment’. Although it had not attempted to retrieve the land by force the Commission pointed out that:

‘however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.’¹³⁰

It would seem, in other words, that protesting in any way that might be ‘reasonably required’ should effectively defeat a claim of prescription.

¹²⁴ ICJ Rep. 1951 116.

¹²⁵ *Supra*, n. 13.

¹²⁶ *Supra*, n. , p. 706.

¹²⁷ The arbitrators were instructed by their treaty terms of reference to allow title if based upon ‘adverse holding or prescription during a period of 50 years’. 92 BFSP (1899-1900) 160.

¹²⁸ Jennings, *supra*, n. 114, p. 39.

¹²⁹ *US v. Mexico* (1911), 5 A.J.I.L. (1911) 782.

¹³⁰ *Ibid.*

The difficulty of applying such considerations in the current circumstances is evident. Although the Hawaiian Kingdom (the Queen) protested vociferously at the time, and on several separate occasions, and although this protest resulted in the refusal of the US Senate to ratify the treaty of cession, from 1898 onwards no further action was taken in this regard. The reason, of course, is not hard to find. The government of the Kingdom had been effectively removed from power and the US had *de facto*, if not *de jure*, annexed the Islands. The Queen herself survived only until 1917 and did so before a successor could be confirmed in accordance with article 22 of the 1864 Constitution. This was not a case, moreover, of the occupation of merely part of the territory of Hawai'i in which case one might have expected protests to be maintained on a continuous basis by the remaining State. In the circumstances, therefore, it is entirely understandable that the Queen or her government failed to pursue the matter further when it appeared exceedingly unlikely that any movement in the position of the US government would be achieved. This is not to say, of course, that the government of the Kingdom subsequently acquiesced in the US occupation of the Islands, which of course raises the question whether a claim of acquisitive prescription may be sustained. In the view of Jennings, in cases of acquisitive prescription, 'an acquiescence on the part of the State prescribed against is of the essence of the process'.¹³¹ If, as he suggests, some positive indication of acquiescence is to be found, there is remarkably little evidence for it. Indeed, of significance in this respect is the admission of the United States in the 'Apology Resolution' of 1993 in which it noted that 'the indigenous Hawaiian people never directly relinquished their claims to the inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum'. By the same token, the weight of evidence in favour of prescription should not be underplayed. As Jennings and Watts point out:

'When, to give an example, a state which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another state, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among states that the present condition of things is in conformity with international order.'¹³²

The significant issue, however, is whether such considerations apply with equal ease in cases where the occupation concerned comprises the entirety of the State concerned, and where the possibilities of protest are hampered by the fact of occupation itself. It is certainly arguable that if a presumption of continuity exists, different considerations must come into play.

¹³¹ *Supra*, n. 114, p. 39.

¹³² *Supra*, n. 7, p. 707.

Enclosure “2”



Larsen v. Hawaiian Kingdom

Case name	Larsen v. Hawaiian Kingdom
Case description	<p>Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency (“Hawaiian Kingdom”) on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom.</p> <p>In determining whether to accept or decline to exercise jurisdiction, the Tribunal considered the questions of whether there was a legal dispute between the parties to the proceeding, and whether the tribunal could make a decision regarding that dispute, if the very subject matter of the decision would be the rights or obligations of a State not party to the proceedings.</p> <p>The Tribunal underlined the many points of agreement between the parties, particularly with respect to the propositions that Hawaii was never lawfully incorporated into the United States, and that it continued to exist as a matter of international law. The Tribunal noted that if there existed a dispute, it concerned whether the respondent has fulfilled what both parties maintain is its duty to protect the Claimant, not in the abstract but against the acts of the United States of America as the occupant of the Hawaiian islands. Moreover, the United States’ actions would not give rise to a duty of protection in international law unless they were themselves unlawful in international law. The Tribunal concluded that it could not determine whether the Respondent has failed to discharge its obligations towards the Claimant without ruling on the legality of the acts of the United States of America – something the Tribunal was precluded from doing as the United States was not party to the case.</p>
Name(s) of claimant(s)	Lance Paul Larsen (Private entity)
Name(s) of respondent(s)	The Hawaiian Kingdom (State)
Names of parties	
Case number	1999-01
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Other proceedings
Subject matter or economic sector	Treaty interpretation
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Other The 1849 Treaty of Friendship, Commerce and Navigation with the United States of America
Language of proceeding	English
Seat of arbitration (by country)	Netherlands
Arbitrator(s)	Dr. Gavan Griffith QC Professor Christopher J. Greenwood QC Professor James Crawford SC (President of the Tribunal)
Representatives of the claimant(s)	Ms. Ninia Parks, Counsel and Agent
Representatives of the respondent(s)	Mr. David Keanu Sai, Agent

Mr. Peter Umialiloa Sai, First deputy agent
Mr. Gary Victor Dubin, Second deputy agent and counsel

Representatives of the parties

Number of arbitrators in case 3

Date of commencement of proceeding [dd-mm-yyyy] 08-11-1999

Date of issue of final award [dd-mm-yyyy] 05-02-2001

Length of proceedings 1-2 years

Additional notes

Attachments **Award or other decision**

> [Arbitral Award](#) 15-05-2014 English

Other

> [Annex 1 - President Cleveland's Message to the Senate and the House of Representatives](#) 18-12-1893 English

> [Joint Resolution - To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.](#) 23-11-1993 English



Enclosure “3”

Proclamation

Whereas, the armed forces of the United States of America have invaded and occupied the shores of the Hawaiian Islands on two separate occasions, the first being from January 16, 1893 to April 1, 1893, and the second since August 12, 1898 to the present, whereby the latter being an illegal and prolonged occupation; and

Whereas, the armed forces of the United States of America on January 17, 1893 aided and abetted a small group of insurgents in seizing the Executive office of the Hawaiian Kingdom government and thereafter participated in the coercion of all government employees and officials in the executive and judicial branches of the government of the Hawaiian Kingdom to sign oaths of allegiance to the insurgency calling themselves the so-called provisional government; and

Whereas, United States President Grover Cleveland concluded, through a presidential investigation, that the overthrow of the Hawaiian Kingdom government was unlawful, and that the United States bears the sole responsibility for the overthrow of the government of a friendly State, and provide restitution; and

Whereas, executive mediation took place between United States Minister Plenipotentiary Albert Willis and Her Majesty Queen Lili'uokalani beginning on November 13, 1893, at the United States Legation in the city of Honolulu, and on December 18, 1893 an agreement was reached through *exchange of notes* committing the United States to reinstate the government, and thereafter the Hawaiian Kingdom to grant amnesty to the insurgents; and

Whereas, United States President Cleveland and his successors in office failed to faithfully execute the agreement and allowed the insurgency to gain power through the hiring of American mercenaries in order to seek annexation to the United States of America; and

Whereas, during the Spanish-American War, the armed forces of the United States of America unlawfully occupied the Hawaiian Islands on August 12, 1898, being a neutral State, to wage war against the Spanish colonies of the Philippines and Guam in the Pacific Ocean; and

Whereas, since the second occupation, the armed forces of the United States of America have not complied with international law, the international laws of occupation, both customary and by conventions, and international humanitarian law; and

Whereas, the armed forces of the United States of America under the guise of civilian authority seized control of the government of the Hawaiian Kingdom calling itself the so-called Republic of Hawai'i, being the successor to the provisional government, and renamed the same as the government of the Territory of Hawai'i on April 30, 1900, and then subsequently renamed as the government of the State of Hawai'i on March 18, 1959; and

Whereas, the so-called provisional government, the Republic of Hawai'i, the Territory of Hawai'i, and the State of Hawai'i have no legal basis under Hawaiian Kingdom law or the international laws of occupation; and

Whereas, the occupant State has unlawfully levied pecuniary contributions of various kinds that included taxes and the imposition of fines in violation of international law; and

Whereas, the occupant State has unlawfully seized public and private property for the construction of its government agencies and military installations from the occupied State and its inhabitants, and that restoration and compensation shall be made under *jus post liminii*; and

Whereas, the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom as

it stood prior to the insurrection of July 6, 1887 has placed the Hawaiian Kingdom into a state of emergency that could lead to economic ruination and calamity; and

Whereas, war crimes have and continue to be committed as a result of the failure of the armed forces of the United States of America to administer the laws of the Hawaiian Kingdom in accordance with the 1907 Hague Regulations and the 1949 Geneva Convention IV; and

Whereas, customary international law recognizes that the rules on belligerent occupation will also apply where a belligerent State, in the course of war, occupies neutral territory, being the territory of the Hawaiian Kingdom; and

Whereas, customary international law recognizes that when neutral territory is militarily occupied by a belligerent, the occupant State does not possess a wide range of rights with regard to the occupied State and its inhabitants as it would in occupied enemy territory; and

Whereas, customary international law recognizes that legislative power remains with the government of the occupied State during military occupation of the occupied State's territory; and

Whereas, Her late Majesty Queen Lili'uokalani died on November 11, 1917, without an heir apparent proclaimed in accordance with Hawaiian law; and

Whereas, it is provided by Article 33 of the Constitution, that should a Monarch die without confirming an heir apparent in accordance with Hawaiian law, the Cabinet Council shall serve as an *acting* Council of Regency who shall administer the Government in the name of the Monarch, and exercise all the Powers which are constitutionally vested in the Monarch, until the Legislative Assembly may be assembled to elect by ballot a *de jure* Regent or Council of Regency; and

Whereas, according to Article 42 of the Constitution, the Cabinet Council consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance and the Attorney General of the Kingdom; and

Whereas, an *acting* Regency, by virtue of the offices made vacant in the Cabinet Council, was established under the doctrine of necessity by proclamation on February 28, 1997, pursuant to Article 33 of the Constitution, and possesses the constitutional authority to temporarily exercise the Royal Power of the Hawaiian Kingdom; and

Whereas, the Legislative Assembly is unable to be assembled in accordance Title 3—Of the Legislative Department, Civil Code of the Hawaiian Islands (Compiled Laws, 1884), in order to elect by ballot a *de jure* Regent or Council of Regency as a direct result of the prolonged occupation of the Hawaiian Kingdom by the armed forces of the United States of America and the Rules of Land Warfare of the United States; and

Whereas, the public safety requires:

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

under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

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

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

And, We do hereby call upon the said Commander of the United States Pacific Command, and those subordinate military personnel to whom he may delegate such authority to seize control of our government, calling itself the State of Hawai'i, by proclaiming the establishment of a military government, during the present prolonged military occupation

and until the military occupation has ended, to exercise those powers allowable under the international laws of occupation and international humanitarian law;

And, We do require all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the military government may issue during the present military occupation of the Hawaiian Kingdom so long as these proclamations, rules, regulations and orders are in compliance with the laws and provisional laws of the Hawaiian Kingdom, the international laws of occupation and international humanitarian law;

And, We do further require that all courts of the Hawaiian Kingdom, whether judicial or administrative, shall administer the provisional laws hereinbefore proclaimed forthwith;

And, We do further require that Consular agents of foreign States within the territory of the Hawaiian Kingdom shall comply with Article X, Chapter VIII, Title 2—Of the Administration of Government, Civil Code of the Hawaiian Islands (Compiled Laws, 1884) and the Law of Nations;

And, We do further require every person now holding any office of profit or emolument under the State of Hawai'i and its Counties, being the Hawaiian government, take and subscribe the oath of allegiance in accordance with *An Act to Provide for the Taking of the Oath of Allegiance by Persons in the employ of the Hawaiian Government* (1874).



In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 10th day of October A.D. 2014.

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

Peter Umialiloa Sai,
Acting Minister of Foreign Affairs

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

Dexter Ke'eaumoku Ka'iama, *Esq.*,
Acting Attorney General

Enclosure “4”

Proclamation

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

Article 1

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

1. His Excellency David Keanu Sai, Ph.D., *Acting* Minister of the Interior and Chairman of the Council of Regency, because of his recognized expertise in international relations and public law, is hereby appointed head of the Royal Commission of Inquiry, hereinafter "Royal Commission," on the consequences of the belligerent occupation of the Hawaiian Kingdom by the United States of America since January 17, 1893.
2. The purpose of the Royal Commission shall be to investigate the consequences of the United States' belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical

scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission.

3. The results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report.
4. The head of the Royal Commission shall be responsible for the implementation of the inquiry. He shall determine, with complete independence, the procedures and working methods of the inquiry, and the content of the report referred to in paragraph 3.
5. The head of the Royal Commission shall take the following oath:

“The undersigned, a Hawaiian subject, being duly sworn, upon his oath, declares that as head of the Royal Commission of Inquiry duly constituted on

April 17, 2019, I will act correctly, truly and faithfully, and without favor to or prejudice against anyone.”

Article 2

Financing

1. All costs incurred by the Royal Commission shall be borne by the Hawaiian Government, by its Council of Regency, and that the latter has granted on this day \$15,000.00 (USD) for initial expenditures of the Royal Commission.
2. The management of the expenditures of the Royal Commission shall be subject to contracts between the head of the Royal Commission and the *Acting* Minister of Finance.
3. The head of the Royal Commission shall be accountable to the *Acting* Minister of Finance for all expenditures.

Article 3

Composition of the Royal Commission of Inquiry

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

Article 4

Entry into effect and expiration

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



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

A handwritten signature in blue ink that reads "David Keanu Sai".

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

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs

A handwritten signature in black ink that reads "Kau'i P. Sai-Dudoit".

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

A handwritten signature in black ink that reads "Dexter Ke'eaumoku Ka'iama".

Dexter Ke'eaumoku Ka'iama, *Esq.*,
Acting Attorney General

Enclosure “5”

Proclamation

Whereas, the insurgency, with the support and protection of United States troops, unlawfully seized control of the Hawaiian Kingdom governmental infrastructure on January 17, 1893, and called themselves the so-called provisional government; and

Whereas, the insurgency maintained the Hawaiian Kingdom's governmental institutions with the exception of the Executive Monarch and Cabinet, to include the head of the police force; and

Whereas, all Hawaiian government officials were coerced to sign oaths of allegiance to the unlawful regime; and

Whereas, the State of Hawai'i, and its Counties, is a successor of the Territory of Hawai'i, the Republic of Hawai'i, and the so-called provisional government, all of which have no legal basis under Hawaiian Kingdom law or the international laws of occupation; and

Whereas, the United States, including through its proxy, the State of Hawai'i and its Counties, as an administrative body, is

in effective control of the territory of the Hawaiian Kingdom without lawful authority; and

Whereas, according to Article 42 of the 1907 Hague Convention, IV, a State's territory is considered occupied when it is placed under the authority of the Occupying State; and

Whereas, Article 42 has three requisite elements: (1) the presence of a foreign State's forces; (2) the exercise of authority over the occupied territories by the foreign State or its proxy; and (3) the non-consent by the occupied State; and

Whereas, United States President Grover Cleveland's manifesto to the Congress on December 18, 1893, and the continued United States presence today without a treaty of peace firmly meets all three elements of Article 42; and

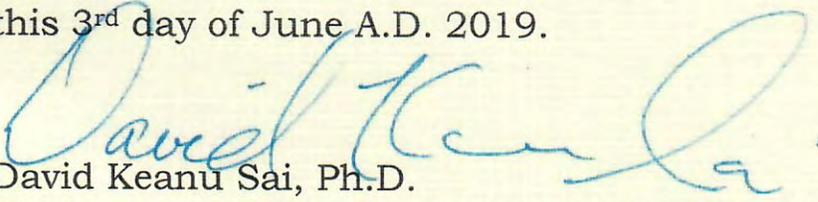
Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai'i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

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize the State of Hawai'i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;

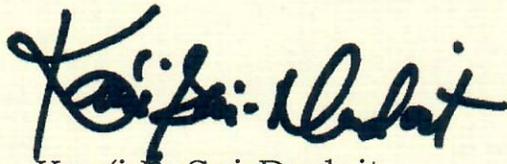
And, We do hereby further proclaim that the State of Hawai'i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights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



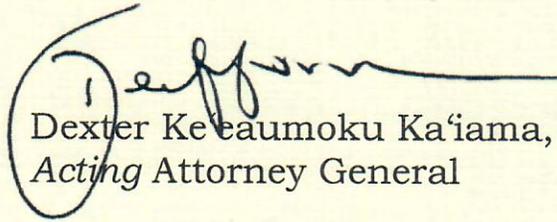
In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 3rd day of June A.D. 2019.


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

Peter Umialiloa Sai, deceased
Acting Minister of Foreign Affairs



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



Dexter Ke'eumoku Ka'iama, *Esq.*,
Acting Attorney General

Enclosure “6”



Office of the High Commissioner for Human Rights
Palais des Nations, CH-1211 Geneva 10, Switzerland

MEMORANDUM

Date: 25 February 2018

From: Dr. Alfred M. deZayas
United Nations Independent Expert
Office of the High Commissioner for Human Rights

To: Honorable Gary W. B. Chang, and
Honorable Jeannette H. Castagnetti, and
Members of the Judiciary for the State of Hawaii

Re: The case of Mme Routh Bolomet

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

Based on that understanding, in paragraph 69(n) of my 2013 report (A/68/284) to the United Nations General Assembly I recommended that the people of the Hawaiian Islands — and other peoples and nations in similar situations — be provided access to UN procedures and mechanisms in order to exercise their rights protected under international law. The adjudication of land transactions in the Hawaiian Islands would likewise be a matter of Hawaiian Kingdom law and international law, not domestic U.S. law.

I have reviewed the complaint submitted in 2017 by Mme Routh Bolomet to the United Nations Office of the High Commissioner for Human Rights, pointing out historical and ongoing plundering of the Hawaiians' lands, particularly of those heirs and descendants with land titles that originate from the distributions of lands under the authority of the Hawaiian Kingdom. Pursuant to the U.S. Supreme Court judgment in the *Paquete Habana Case* (1900),

U.S. courts have to take international law and customary international law into account in property disputes. The state of Hawaii courts should not lend themselves to a flagrant violation of the rights of the land title holders and in consequence of pertinent international norms. Therefore, the courts of the State of Hawaii must not enable or collude in the wrongful taking of private lands, bearing in mind that the right to property is recognized not only in U.S. law but also in Article 17 of the Universal Declaration of Human Rights, adopted under the leadership of Eleanor Roosevelt.

Respectfully,



Dr. Alfred M. deZayas
United Nations Independent Expert on the promotion of a
democratic and equitable international order
Office of the High Commissioner for Human Rights
Palais des Nations, CH-1211 Geneva 10, Switzerland