

PRELIMINARY REPORT

The War Crimes of Transferring Populations in an Occupied Territory and Denationalization

THE ROYAL COMMISSION OF INQUIRY:

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

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PRELIMINARY REPORT:

The War Crimes of Transferring Populations in an Occupied Territory and Denationalization

This preliminary report of the Royal Commission of Inquiry is on the war crimes of transferring populations into an occupied territory and denationalization—*Americanization* committed against young Hawaiian subjects in the public and private schools, after the invasion by United States troops on 16 January 1893, and the beginning of the belligerent occupation the following day, after the conditional surrender by Queen Lili‘uokalani.

According to Article 49(6) of the 1949 Geneva Convention, IV, the “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupied.” If the violation of Article 49(6) was committed willfully, it is regarded as a “grave breach” by the 1977 Additional Protocol I to the Geneva Conventions. This grave breach is incorporated as a war crime into the Rome Statute of the International Criminal Court, where the words “directly and indirectly” have been added, to wit: “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies.”¹ The word “indirectly” is aimed at a situation where the occupying power does not actually organize the transfer of populations, but does not take effective measures to prevent it.²

The prohibition “is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.”³ Recent examples of population transfers that were widely condemned occurred in the Israeli occupation of Palestine and Turkey’s occupation of Northern Cyprus. Regarding Israel, the United Nations Security Council adopted a resolution in 1980, declaring that “Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.”⁴ As far as the case of Cyprus is concerned, in 2003 the Committee on Migration, Refugees and Demography of the Council of Europe noted that:

¹ Rome Statute, Art. 8(2)(b)(viii).

² William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 166 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

³ 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* 283 (1958).

⁴ UN Doc. S/RES/465, OP 5 (1980).

Since the *de facto* partition of Cyprus in 1974, the demographic structure of the island has been continuously modified as a result of the deliberate policies of the Turkish Cypriot administration. Despite the lack of consensus on the exact figures, all parties concerned admit that Turkish nationals have been systematically arriving in the northern part of the island. At the same time, continuous outflow of the indigenous Turkish Cypriot population from the northern part may be observed. In consequence, the settlers have outnumbered the indigenous Turkish Cypriot population. The policy of “naturalization” implemented by the Turkish Cypriot administration encourages new arrivals and favours the process of hidden colonisation which results in the modification of the demographic structure of the whole island, and constitutes a source of tension and dissatisfaction among the indigenous population.⁵

According to Professor Schabas:

Belligerent occupation is a temporary situation and not the prelude to annexation. For this reason, the Occupying Power must not change the demographic, social and political situation in the territory it has occupied to the social and economic detriment of the population living in the occupied territory. Discussing article 49(6) of the fourth Geneva Convention, the International Court of Justice stated that the provision “prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”⁶

The last census done in the Hawaiian Kingdom in 1890 listed the entire population at 89,990. Here follows the breakdown by nationality:

Hawaiian subjects.....	48,107
Aboriginals (pure/part).....	40,622
Hawaiian born foreigners.....	7,495
Portuguese.....	4,117
Chinese and Japanese.....	1,701
Other White foreigners.....	1,617
Other nationalities.....	60
Aliens.....	41,873
United States	1,928
China.....	15,301
France.....	70
Great Britain.....	1,344
Germany.....	1,034

⁵ Colonisation by Turkish settlers of the occupied part of Cyprus, Report, Doc. 9799, 2 May 2003 (online at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10153&lang=EN>).

⁶ Schabas, 167.

Japan.....	12,360
Portugal.....	8,602
Polynesian.....	588
Other nationalities.....	60

According to the U.S. Census of the population in the Hawaiian Kingdom from 1900 to 1950, migration from the continental U.S. and its territories in fifty years totaled 293,379.⁷ Here follows the breakdown by year.

1900.....	<u>4,290</u>
Other U.S. territories or possessions.....	6
Continental U.S.....	4,284
1910.....	<u>11,674</u>
Puerto Rico.....	3,510
Philippine Islands.....	2,372
Other U.S. territories or possessions.....	104
Continental U.S.....	5,688
1920.....	<u>32,322</u>
Puerto Rico.....	2,581
Philippine Islands.....	18,728
Other U.S. territories and possessions.....	56
Continental U.S.....	10,957
1930.....	<u>85,282</u>
Puerto Rico.....	2,181
Philippine Islands.....	52,672
Other U.S. territories and possessions.....	238
Continental U.S.....	30,191
1940.....	<u>92,211</u>
Puerto Rico.....	1,848
Philippine Islands.....	35,778
Other U.S. territories and possessions.....	361
Continental U.S.....	54,224
1950.....	<u>67,600</u>
Puerto Rico.....	1,178
American Samoa.....	463
Other U.S. territories and possessions.....	319

⁷ “Table 18. Country of Birth, for Hawaii, Urban and Rural, 1950, and for Hawaii, 1900 to 1940,” *U.S. Census of Population: 1950, Department of Commerce*, 52-18.

The unlawful imposition of American municipal laws began on 7 July 1898, with the passing of a *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*.⁸ During the debate on the floor of the Senate on 4 July 1898, Senator William Allen of Nebraska states:

The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the domain of another government and affect that government or persons or property therein.⁹

Senator Allen’s view was universal, and it was reflected by the Hawaiian Kingdom Supreme Court in *In re Francis de Flanchet*, regarding the limitation of French municipal laws. The Court declared:

The laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction.¹⁰

“The constitutionality of the annexation of Hawaii, by a simple legislative act,” according to Professor Willoughby, author of *The Constitutional Law of the United States*, “was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act.”¹¹ Willoughby further states, “[o]nly 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.”¹² Professor Marek declares that, “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”¹³ In 1988, the U.S. Department of Justice’s Office of Legal Counsel concluded, it is “unclear which constitutional power Congress exercised when it acquired Hawaii by a joint resolution.”¹⁴

⁸ 30 Stat. 750 (1898).

⁹ 31 Cong. Rec. 6635 (1898).

¹⁰ *In re Francis de Flanchet*, 2 Haw. 96, 108-109 (1858).

¹¹ Westel Woodbury Willoughby, *The Constitutional Law of the United States* §239, 427 (2nd ed., 1929).

¹² *Id.*

¹³ Krystyna Marek, *Identity and Continuity of States in Public International Law* 110 (2nd ed., 1968).

¹⁴ Douglas W. Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea,” 12 *Op. O.L.C.*, 238, 252 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).

Notwithstanding such a blatant violation of international law, the Congress enacted a statute to regulate U.S. citizenship in the Hawaiian Kingdom two years later under *An Act to Provide a Government for the Territory of Hawaii*.¹⁵ Section 4 of this Act stated:

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

The so-called Republic of Hawai‘i was never a government and, therefore, had no citizenship to be “declared to be citizens of the United States and citizens of the Territory of Hawaii.” They were insurgents that previously called themselves the Provisional Government. President Cleveland concluded that “the provisional government owe[d] its existence to an armed invasion by the United States.”¹⁶ Under American municipal laws, the putative U.S. national population exploded in the Hawaiian Kingdom from a meager 1,928 out of a population of 89,990, in 1890, to 423,174 out of a population 499,794 in 1950.¹⁷ In 1890, the aboriginal Hawaiian subjects constituted 86% of the Hawaiian national population, whereas in 1950, the aboriginal Hawaiian population, now being categorized as U.S. nationals, numbered 86,091¹⁸ out of 423,174, being a mere 20%. Despite the transfer of U.S. nationals began prior to the codification of international humanitarian law, the provisions of the 1949 Geneva Conventions and the 1907 Hague Regulations, as declared by the International Court of Justice, reproduce pre-existing rules of customary international law.¹⁹

The Royal Commission of Inquiry tracks the aboriginal Hawaiian population from the Hawaiian national population for purposes of tracking and not for the purpose of race-based analysis, because the aboriginal Hawaiian, both pure and part, can be tracked both prior and after the United States belligerent occupation through government census reports. Non-aboriginal Hawaiian subjects cannot be tracked post 1893. Given that Hawaiian nationality, during a belligerent occupation, is acquired by *jus sanguinis*, a census under Hawaiian law will be necessary to determine the current Hawaiian national population that includes both aboriginal and not aboriginal.

Once a State is occupied, international law preserves the status quo ante of the occupied State as it was before the occupation began. To preserve the nationality of the occupied

¹⁵ 31 Stat. 141.

¹⁶ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawaii: 1894-95*, 454 (895).

¹⁷ “Table 8, Race and Nativity, by sex, for Hawaii, Urban and Rural, 1950 and for Hawaii, 1900 to 1950,” *U.S. Census of Population: 1950, Department of Commerce*, 52-13.

¹⁸ *Id.*

¹⁹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 257-258, §79-§80.

State from being manipulated by the occupying State to its advantage, international law only allows individuals born within the territory of the occupied State to acquire the nationality of their parents—*jus sanguinis*. To preserve the status quo, Article 49 of the GC IV mandates that the “Occupying Power shall not...transfer parts of its own civilian population into the territory it occupied.”²⁰

International humanitarian law, as envisaged in the 1907 Hague Regulations, covers the war crime of denationalization, which is “the destruction of the national identity and national consciousness of the population.”²¹ In his “Note on the Criminality of ‘Attempts to Denationalize the Inhabitants of Occupied Territory,’” 10 September 1945, Schwelb, who was member of Committee III of the United Nations War Crimes Commission, stated:

It is the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the country (Art. 43 of the Hague Regulations). *Inter alia*, family honour and rights and individual life must be respected (Art. 46). The right of a child to be educated in his own native language falls certainly within the rights protected by Article 46 (“individual life”). Under Art. 56, the property of institutions dedicated to education is privileged. If the Hague Regulations afford particular protection to school buildings, it is certainly not too much to say that they thereby also imply protection for what is going to be done within those protected buildings. It would certainly be a mistaken interpretation of the Hague Regulations to suppose that while the use of Yugoslav school buildings for Yugoslav children is safe-guarded, it should be left to the unfettered discretion of the occupant to replace Yugoslav education by Italian education.

It is the rationale of Art. 56 to protect spiritual values. And in order to afford this protection to spiritual values the provision protects the property of institutions dedicated to public worship, charity, education, science and art as a means to a certain end: to make public worship, charity, education, science and art possible even under belligerent occupation. If the belligerent occupant must not confiscate, seize, destroy, or wilfully damage the property of educational institutions, he is the less entitled to interfere with the spiritual and intellectual life of the schools, the only possible legitimate exception being considerations of the safety of the occupying forces.²²

²⁰ David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 116 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

²¹ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 161 (2020).

²² E. Schwelb, Note on the Criminality of “Attempts to Denationalize the Inhabitants of Occupied Territory” (Appendix to Doc. C.I. No. XII) – Question Referred to Committee III by Committee I, United Nations War Crimes Commission, 6 (10 September 1945).

The adult population of Hawaiian subjects were fully aware of the illegality of the overthrow of the Hawaiian Kingdom government and the purported annexation without a treaty. Hawaiian subjects continued to oppose the insurgents now employed by the United States as officials of its so-called government called the Territory of Hawai'i. Hawaiian national consciousness is reflected in the following reporting by the editor of Maui News newspaper on 20 October 1900.

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 [sic] 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. Thomas, necessity knows no law, and it was absolutely necessary to annex the Islands at the time it was done. And further, Thomas, if it becomes necessary to annex Cuba, it will be done quicker than a wink. It is but fair to give you credit for being honest in your views, Thomas, but you don't quite understand the American people just yet, hence you are very misleading.²³

While patriotism was still present in the adult population of Hawaiian subjects, young Hawaiian school children would be subjected to denationalization through *Americanization* throughout the school system across the Islands.

In particular, in 1906, the Territory of Hawai'i intentionally sought to *Americanize* schoolchildren throughout the Hawaiian Islands. To accomplish this, they instituted a policy of denationalization. Under the policy titled "Programme for Patriotic Exercises in the Public Schools," the national language of Hawaiian was banned and replaced with the American language of English.²⁴ Young students who spoke the Hawaiian language in school were severely disciplined. One of the leading newspapers for the insurgents who were then officials in the territorial regime, printed a story on the plan of denationalization. The Hawaiian Gazette reported:

As a means of *inculcating patriotism* in the schools, the Board of Education [of the territorial government] has agreed upon a plan of patriotic observance to be followed in the celebration of notable days in American history, this plan being a composite drawn from the several submitted by teachers in the department for the consideration of the Board. It will be remembered that at the time of the celebration of the birthday of Benjamin Franklin, an agitation was begun looking to a better observance of these notable national days in the schools, as tending to inculcate patriotism in a school population that needed that kind of teaching, perhaps, more than the mainland children do [emphasis added].²⁵

²³ Maui News newspaper 2 (20 Oct. 1900) (online at: <https://chroniclingamerica.loc.gov/lccn/sn82014689/1900-10-20/ed-1/seq-2/>).

²⁴ *Programme for Patriotic Exercises in the Public Schools*, Territory of Hawai'i, adopted by the Department of Public Instruction (1906) (online at: http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf).

²⁵ Patriotic Program for School Observance, *Hawaiian Gazette* 5 (3 Apr. 1906) (online at: http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf).

When a reporter from the American news magazine, *Harper's Weekly*, visited the Ka'iulani Public School in 1907, he reported:

At the suggestion of Mr. Babbit, the principal, Mrs. Fraser, gave an order and within ten seconds all of the 614 pupils of the school began to march out upon the great green lawn which surrounds the building. . . . Out upon the lawn marched the children, two by two, just as precise and orderly as you find them at home. With the ease that comes of long practice the classes marched and counter-marched until all were drawn up in a compact array facing a large American flag that was dancing in the northeast trade-wind forty feet above their heads. . . . "Attention!" Mrs. Fraser commanded. The little regiment stood fast, arms at side, shoulders back, chests out, heads up, and every eye fixed upon the red, white and blue emblem that waived protectingly over them. "Salute!" was the principal's next command. Every right hand was raised, forefinger extended, and the six hundred and fourteen fresh, childish voices chanted as one voice: "We give our heads and our hearts to God and our Country! One Country! One Language! One Flag!"²⁶

The reporter visited Honolulu High School, which had 143 students all above the age of fifteen. He reported, "[t]he change in the color scheme from that of the schools below was astounding. Below were all the hues of the human spectrum, with brown and yellow predominating; here the tone was clearly white."²⁷ The change was possible due to a policy "that no pupil may attend a school of the higher grade unless he has a thorough working knowledge of the English language."²⁸

Within three generations, the national consciousness of the Hawaiian Kingdom resulted in the "destruction of the national identity and national consciousness of the population." Hawaiian national consciousness was effectively replaced with American national consciousness to include its history and language. What the Italians sought to accomplish in only a few years of their occupation of Yugoslavia during the Second World War, the United States were able to successfully achieve unfettered, through their policy of denationalization, which has lasted for over a century and continues to date.



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²⁶ William Inglis, "Hawai'i's Lesson to Headstrong California: How the Island Territory has solved the problem of dealing with its four thousand Japanese Public School children," *Harper's Weekly* 227 (16 Feb. 1907).

²⁷ *Id.*, 228.

²⁸ *Id.*