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November 18, 2024

Lieutenant Colonel Lloyd C. Phelps
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Via electronic mail

Re: Your duty as Staff Judge Advocate to advise Lieutenant Colonel Rosner of his duty to establish a military government

Lieutenant Colonel Phelps:

In my last communication to you, by letter dated June 22, 2024, I recommended you advise senior military leadership not to take my communications with them lightly. These communications concerned the interference of State of Hawai'i Attorney General Anne Lopez with Major General Hara's military duty to establish a military government in accordance with U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation. It appears senior military leadership did not take my communications with them seriously. This misguided attitude led them to commit the war crime by omission under the Army doctrine of command responsibility for war crimes.

Senior military leadership's war crimes by omission include Major General Kenneth Hara—War Criminal Report no. 24-0001,[1] Brigadier General Stephen Logan—War Criminal Report no. 24-0002,[2] Colonel Wesley Kawakami—War Criminal Report no. 24-0003,[3] Lieutenant Colonel

[1] Royal Commission of Inquiry, War Criminal Report no. 24-0001 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).
[2] *Id*., War Criminal Report no. 24-0002 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0002.pdf).
[3] *Id*., War Criminal Report no. 24-0003 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0003.pdf).

Fredrick Werner—War Criminal Report no. 24-0004,[4] Lieutenant Colonel Bingham Tuisamatatele, Jr.—War Criminal Report no. 24-0005,[5] Lieutenant Colonel Joshua Jacobs—War Criminal Report no. 24-0006,[6] and Lieutenant Colonel Dale Balsis—War Criminal Report no. 24-0007.[7]

As a result, Lieutenant Colonel Michael Rosner, Executive Officer of the 29th Infantry Brigade, became the most senior officer in the Hawai'i Army National Guard. In my letter dated November 11, 2024, the Royal Commission of Inquiry notified LTC Rosner that he has until November 28, 2024, to transform the State of Hawai'i into a Military Government. Failure to do so will render him a war criminal by omission under the Army doctrine of command responsibility for war crimes.

Customary international law is the determining factor that the Hawaiian Kingdom continues to exist as a sovereign and independent State. As a source of international law, academic scholars explain the applicable rules of customary international law on a particular subject. Therefore, the continuity of Hawaiian Statehood under customary international law was explained in two legal opinions, one by Professor Matthew Craven[8] and the other by Professor Federico Lenzerini.[9] In addition, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law. This fact is explained by the legal opinion of Professor William Schabas.[10] The continuity of Hawaiian Statehood and the commission of war crimes throughout the Hawaiian Islands is uncontested by the United States and the State of Hawai'i.

As the most senior legal advisor in the Army National Guard, unless you discover a rule of customary international law that concludes the Hawaiian Kingdom was extinguished as a State under international law by the United States, you are duty bound to advise commanders of their duties and responsibilities under U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation. As such, I am enclosing an article written by JAG officer Major Michael Winn titled "Command Responsibility for Subordinates' War Crimes: A Twenty-First Century Primer" published in *Army Lawyer*.

Moreover, in my latest letter to LTC Rosner I recommended that he immediately request of you an answer to the following two questions.

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[4] *Id*., War Criminal Report no. 24-0004 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0004.pdf).
[5] *Id*., War Criminal Report no. 24-0005 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0005.pdf).
[6] *Id*., War Criminal Report no. 24-0006 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0006.pdf).
[7] *Id*., War Criminal Report no. 24-0007 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0007.pdf).
[8] Matthew Craven, "Continuity of the Hawaiian Kingdom," 1 *Hawaiian Journal of Law and Politics* 508 (2004) (online at https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf).
[9] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).
[10] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Hawaiian Journal of Law and Politics* 334 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).

> First question: Do I have a duty to assume command of the Hawai‘i Army National Guard under Army Regulation 600-20, paragraph 2-11? If yes, then go to the second question. If no, give me a legal reason why I do not have this duty.
>
> Second question: Do I have a duty to establish a military government Under DOD Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation? If yes, then begin the mission of transforming the State of Hawai‘i into a military government by November 28, 2024. If no, give me a legal reason why I do not have this duty.

If LTC Rosner has not requested of you answers to these questions, then I am recommending you provide answers to him, as a matter of command responsibility, since the November 28, 2024, deadline is fast approaching. Should you fail to do so and LTC Rosner neglects to establish a military government, thereby, committing the war crime by omission, then the Royal Commission of Inquiry will view your conduct as an accessory by aiding in the commission of this war crime.

Since 2015, you were made aware of the continuity of Hawaiian Statehood and the commission of war crimes when you were the Deputy Prosecuting Attorney for the County of Maui in *State of Hawai‘i v. English et al.*, criminal no. 14-1-0819. This case was brought before Judge Joseph P. Cardoza of the Second Circuit Court and I served as an expert witness, for the defense, at an evidentiary hearing on March 5, 2015. The purpose for the evidentiary hearing was to meet the burden of proof, established by the Intermediate Court of Appeals in *State of Hawai‘i v. Lorenzo* for defendants who are contesting the subject matter jurisdiction of the court because of the unlawful overthrow of the government of the Hawaiian Kingdom, must provide a "factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature."[11] My expert testimony served to meet the defendants' burden by answering this in the affirmative.

In my testimony, I provided the factual circumstances of the United States military occupation of the Hawaiian Kingdom and the unlawful imposition of American municipal laws as to the reason why the Court did not have subject matter jurisdiction. The court's authority extends from the 1959 Statehood Act passed by the Congress, which has no extra-territorial effect. I stated that for the Court to proceed it would violate "Article 147 [1949 Fourth Geneva Convention], unfair trial [as] a grave breach, which is considered a war crime." When asked by Judge Cordoza, "Any cross-examination?" You responded, "Your Honor, the State has no questions of Dr. Sai. Thank you for his testimony. One Army officer to another, I appreciate your testimony." I am enclosing the transcript of my testimony so that LTC Rosner is aware of the severity of this situation.

As you know, I have ten years of service in the Hawai‘i Army National Guard as a field artillery officer so I am well aware of Army regulations and the role of a JAG. The State of Hawai‘i is at a critical juncture as it comes face to face with customary international law and its only recourse to transform itself into a military government. Your role as a legal advisor to LTC Rosner is critical. I am hopeful that you and LTC Rosner perform your affirmative duties and responsibilities to carry out the Army mission of military government without further delay.

[11] *State of Hawai‘i v. Lorenzo*, 77 Haw. 219, 221; 883 P.2d 641, 643 (1994).

In closing, I am also enclosing my recent law article "The Sweeping Effect of Hawaiian Sovereignty and the Necessity of Military Government to Curb the Chaos" that was published by the *Hawaiian Journal of Law & Politics*.

David Keanu Sai, Ph.D.
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Enclosures

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Enclosure “1”

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No. 1

Command Responsibility for Subordinates' War Crimes

A Twenty-First Century Primer

By Major Michael D. Winn

[T]*he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.*[1]

Legal advisor, take heed—when an enlisted member or officer of your unit commits a war crime in an armed conflict, your commander may be held responsible.[2] Recent updates to the *Department of Defense Law of War Manual, The Commander's Handbook on the Law of Land Warfare*, and *Army Command Policy* confirm President Roosevelt's declaration that commanders are ultimately responsible to keep their subordinates' actions in check.[3]

Following World War II, German and Japanese commanders were tried for war crimes in international tribunals at Nuremberg and Tokyo.[4] Some of these commanders were tried for war crimes they ordered their troops to commit, but other commanders were tried for war crimes they merely failed to prevent.[5] In the seventy-five years following those prosecutions, commanders have been aware that they may be held liable for not doing enough to prevent, halt, or punish war crimes committed by their subordinates.[6]

The Vietnam War and the Global War on Terror have provided various examples of commanders running afoul of the requirements of the law of war. From the My Lai massacre to the abuses at Abu Ghraib prison to the murder of detainees during Operation Iron Triangle in Iraq, U.S. military forces have not always lived their righteous values—and leaders have been called to account.[7] Now, as the U.S. military shifts its focus toward large-scale combat operations (LSCO) against peer and near-peer competitors, we must be ready to apply the law of war to a higher-speed, higher-intensity operating environment.[8] Commanders—and by extension, their legal advisors—must prepare now for the legal and leadership challenges that LSCO will entail.[9]

This article first considers the breadth of command responsibility for war crimes and summarizes the current standards in customary international law (CIL). It then explains how the international standard, first articulated by the United States in the tribunals following World War II, has made its way back into U.S. regulation and policy. Finally, the article considers commanders' affirmative duties under the 2020 update to *Army Command Policy*, highlighting both good and bad examples from recent U.S. history and offering practice tips for command legal advisors.

Definition of War Crimes

In July 2020, the Army updated Army Regulation (AR) 600-20, *Army Command Policy*.[10] The new version of the regulation added

paragraph 4-24, "Command responsibility under the law of war."[11] The paragraph provides:

> Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control. These measures include requirements to train their Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated.[12]

This new provision on command responsibility for war crimes does not define the term "war crimes."[13] What then, are war crimes? Synthesizing the relevant sources, a war crime is an act or omission that is 1) a violation of the law of armed conflict (LOAC), 2) serious, 3) committed intentionally, 4) and pursuant to an armed conflict, as considered below.[14]

First, all war crimes are violations of the LOAC, also referred to as the law of war.[15] In determining whether a LOAC violation exists for any act or omission, consider whether there has been a violation of the Geneva Conventions, the Hague Convention of 1907, or another treaty that is ratified by the United States or that reflects CIL.[16] In the absence of any specific rule, look to the five LOAC principles derived from CIL: military necessity, distinction, proportionality, humanity, and honor.[17] A failure to comply with these principles may indicate a LOAC violation.[18]

Second, not all LOAC violations are war crimes.[19] A LOAC violation must be *serious* to be a war crime.[20] An example of a non-serious LOAC violation is that of a combatant who steals bread from a civilian's home in occupied territory to feed himself, in violation of the Hague Convention.[21] In contrast, serious violations of the LOAC may be considered war crimes.[22] For example, the U.S. War Crimes Act of 1996 criminalizes "grave breaches" of the Geneva Conventions and portions of other key international treaties.[23]

Third, the actor must have acted intentionally or at least with culpable negligence—there is no such thing as a purely "accidental" war crime.[24] A contemporary example is the attack by a U.S. AC-130U gunship on a hospital in Kunduz, Afghanistan, in 2015.[25] Although at least thirty occupants of the hospital were killed, the incident was not a war crime, since the U.S. Service members involved did not know they were firing on a medical facility.[26]

Fourth, a war crime can occur only incident to an armed conflict.[27] A war crime may arise during an international armed conflict,[28] or it may occur during a non-international armed conflict, as shown at the International Criminal Tribunal for Rwanda.[29] With "war crimes" defined, the next section considers what it means to have command responsibility for them.

The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.[40]

Historical Development

Command responsibility goes beyond those in a command billet and implicates all military leaders, including platoon leaders and noncommissioned officers (NCOs), tasked with leading troops.[30] Any commander or other leader who ordered or encouraged a subordinate to commit a war crime would be criminally liable as a principal for the act or omission of that subordinate.[31] For example, during Operation Iron Triangle near Samarra, Iraq, in 2006, Staff Sergeant Ray Girouard of the 101st Airborne Division encouraged, or perhaps ordered, his squad members to kill three Iraqi detainees.[32] At his court-martial, Girouard was tried as a principal for premeditated murder.[33]

Command responsibility applies not only to those leaders who order or encourage their subordinates' war crimes, but also to those leaders who fail to take appropriate action to counter such abuses.[34] The cases explored below demonstrate the genesis of that duty.

Genesis of the "Knew or Should Have Known" Standard

From the 1474 trial of Peter von Hagenbach by the Archduke of Austria to U.S. courts-martial during the Philippine insurgency at the turn of the twentieth century, commanders have been held criminally liable for acts committed by their subordinates.[35] Nonetheless, it was not until three U.S. prosecutions following World War II that the international standard for command responsibility crystallized.[36]

In the first trial, General Tomoyuki Yamashita, commander of Japanese forces in the Philippines, was convicted by a U.S. military commission for "permitting" widespread atrocities by those forces.[37] Although the prosecution introduced little direct evidence that Yamashita actually knew of his troops' actions, the panel found him liable for "crimes . . . so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[38] In other words, Yamashita was convicted because he "must have known" of the crimes yet failed to stop them.[39] The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.[40]

The *Yamashita* standard for command responsibility was soon refined by two cases from Nuremberg.[41] In the *Hostage Case*, a panel of U.S. judges convicted Field Marshal Wilhelm List and other German generals under a theory of command responsibility for their subordinates' murders of civilian hostages in occupied territory.[42] Later, in the *High Command Case*, Field Marshal Wilhelm von Leeb and other German officers were tried under a similar theory of command responsibility for subordinates' war crimes on the Eastern Front.[43] In both cases, the judges considered whether the accused knew or *should have* known that their subordinates were engaging in war crimes and that they failed to prevent or stop the crimes.[44]

The "Knew or Should Have Known" Standard and Customary International Law

The "knew or should have known" standard for command responsibility for war crimes took root in international jurisprudence.[45] In 1977, the standard was incorporated into Additional Protocol I to the Geneva Conventions in its provision for holding commanders liable for war crimes committed by subordinates.[46] Later, in the 1990s, the "knew or should have known" standard was employed by the International Criminal Tribunal for Yugoslavia (ICTY).[47] That same decade, the United States and over 150 countries negotiated the Rome Statute, which established the International Criminal Court (ICC)[48] and incorporated the concept of "knew or . . . should have known" as the standard for command responsibility for war crimes.[49] The ICC prosecutor applied it recently against a commander whose men had murdered, raped, and pillaged during an operation in Central Africa.[50]

Although the United States has not ratified AP I or the Rome Statute, it accepts the command-responsibility provision in AP I as reflective of CIL.[51] Customary international law is consistent practice that states follow out of "a sense of legal obligation."[52] According to CIL, then, commanders may be responsible for failing to prevent war crimes which they knew or had reason to know their subordinates would commit.[53]

A panel of American judges convicted Field Marshal Wilhelm List for war crimes on a theory of command responsibility. (Credit: German Federal Archive)

Current U.S. Policy on Command Responsibility for War Crimes

The Uniform Code of Military Justice (UCMJ) does not expressly incorporate the international standard of "knew or should have known."[54] Nevertheless, a U.S. commander should still be mindful of it, for the standard is both germane to multinational operations and fully incorporated into U.S. military policy, as explained below.

To start, the standard constitutes CIL[55] and is the rule by which many of our allies and partners judge their commanders' actions.[56] A U.S. commander in a coalition operation will want to keep in mind that partner-nation commanders may be judged

"The Americans are back in Courtroom 600." Waltraut Bayerlein, the Vice President of the Higher Regional Court of Nuremberg, noted the historic nature of the return of American Service members to the courtroom that hosted the Nuremberg Trials. Lieutenant Colonel Jeremy Steward, Staff Judge Advocate for 7th Army Training Command, presides as judge for the mock-court martial held in the storied room as part of an outreach to the local German community. (Credit: Staff Sergeant Ashley Low)

based on what they "should have known."[57] Furthermore, although not common, a foreign nation may attempt to exert criminal jurisdiction over a U.S. commander.[58] For example, during the 2003 invasion of Baghdad, Iraq, a U.S. armored tank crew, believing it was under attack from enemy inside a hotel, opened fire and damaged the building.[59] A Spanish journalist at the hotel was killed.[60] Although a U.S. military investigation determined that the tank crew's actions were justified, Spanish authorities charged two U.S. officers and an NCO with murder and issued arrest warrants.[61] Spain did not drop the charges until 2008.[62] The international "knew or should have known" standard would likely come into play in any foreign prosecution against a U.S. commander.[63]

More importantly for American commanders, however, U.S. regulation and policy have fully embraced the "knew or should have known" standard for command responsibility for subordinates' war crimes.[64] In its section on command responsibility for subordinates' war crimes, the 2015 *Department of Defense Law of War Manual* cites to the statute defining the liability of principals under military commissions.[65] That statute includes as a principal a commander who "knew, had reason to know, or should have known" of subordinates' punishable acts.[66] Likewise, paragraph 4-24 of the 2020 version of AR 600-20 provides, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish."[67] The "knew or should have known" standard is also found in Field Manual (FM) 6-27, *The Commander's Handbook on the Law of Land Warfare*, published in 2019.[68]

While all three of these recently released policies require a commander to take steps to prevent war crimes by subordinates, they differ in how they word the commander's duty.[69] The *DoD Law of War Manual* imposes on commanders a duty to "take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[70] The term, "necessary and reasonable measures," was adapted from language in the 1956 Army publication, FM 27-10, *Law of Land Warfare*, and was carried over to its 2019 successor, FM 6-27.[71] Army Regulation 600-20 employs a seemingly stricter standard for Army commanders, requiring them to take "all feasible measures within their power to prevent and suppress" LOAC violations on the part of their troops.[72] Regardless, there is little practical difference between "all feasible measures," from AR 600-20, and "necessary and reasonable measures," from FM 6-27.[73]

These policies instruct that commanders may be held accountable for not taking adequate measures to "prevent or repress" violations of the law of war.[74] Command-

ers are expected to act on what they *should have* known as they take these measures.[75] Commanders who fail to comply with their obligations with regard to the LOAC are at risk of an administrative reprimand or elimination.[76] Worse, failure to comply could serve as the basis for a court-martial for dereliction of duty.[77]

The Commander's Affirmative Duties and the Legal Advisor's Role

Given that commanders may be held accountable for their omissions, a responsible commander must lead proactively.[78] In regard to subordinates' war crimes, AR 600-20 reminds commanders of their three *affirmative* obligations: prevent, stop, and punish.[79] These cornerstone duties are described in turn.

Prevent

As noted earlier, AR 600-20 requires commanders "to take all feasible measures within their power to prevent or repress breaches of the law of war . . . ."[80] The regulation states that preventive measures "include requirements to train . . . Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated."[81] The components of prevention, i.e., to train, report, investigate, and take corrective action, are explored below.

Train

The DoD Law of War Program demands that all military units be trained periodically on the law of war.[82] The Army has reinforced this directive in AR 350-1, *Army Training & Leader Development*, by imposing annual training requirements on units organized under a military table of organization and equipment (MTOE)—in other words, deployable, combat-ready units.[83] In addition to annual training, MTOE units must also be trained in the law of war prior to deployment.[84] The commander is responsible to ensure troops receive the training, but the instruction itself may be conducted only by a judge advocate (JA) or a paralegal NCO certified by a JA.[85] Additionally, the training must be specific to the unit's designated missions or contingency plans and should be woven into field exercises.[86]

Time to train is always in short supply, especially leading up to a deployment.[87] The command legal advisor must work diligently with the staff to ensure LOAC training be nested within the unit's annual or pre-deployment training plan.[88] The command legal advisor or NCO should deliver the training personally,[89] but the commander must continually reinforce LOAC precepts by emphasizing respect for noncombatants.[90]

A cautionary example of a commander who failed to train his subordinates adequately is Colonel (COL) Thomas Pappas, who in 2003–04 commanded the 205th Military Intelligence Brigade, with responsibility over the Soldiers who engaged in atrocities at Abu Ghraib prison in Iraq.[91] Soldiers in the brigade abused Iraqi prisoners, in violation of common Article 3 of the Geneva Conventions.[92] Colonel Pappas received general-officer non-judicial punishment, in part because of his failure to train subordinates adequately in how to interrogate prisoners the correct way.[93] Commanders must learn from COL Pappas's example—it is easy to deprioritize LOAC training requirements when the operational tempo is high, but the consequences may be dire for failing to train.[94]

Report and Investigate

Of course, when U.S. commanders learn of a suspected war crime, they have the duty to report up the chain of command or to an appropriate investigative body, such as the U.S. Army Criminal Investigation Division (CID).[95] What may surprise some commanders, however, is that they have a duty to report *any* alleged violation of the LOAC, not just allegations of serious violations, up the chain of command to the appropriate Combatant Commander (CCDR).[96] The duty to report does not depend on the status of the alleged violators; they could be American, coalition, enemy, or neutral.[97] Furthermore, the standard for determining whether an incident must be reported is *credible information*—although a commander must report the allegation even should it fail to clear that low bar.[98]

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.[109]

A legal advisor may want to advise the commander to err on the side of overreporting. Failure to report an alleged LOAC violation for fear of the boss's disapproval could lead to far worse results.[99] For example, immediately after the My Lai massacre during the Vietnam War, the division commander and his assistant received information that a couple dozen noncombatants had been killed under suspicious circumstances.[100] Nonetheless, the officers chose not to investigate the killings thoroughly, and they violated theater policy by failing to relay the information to higher headquarters.[101] Their failure to properly investigate and report the My Lai killings, which claimed far more than a couple dozen victims, has contributed to an enduring stain on the Army's reputation.[102]

When commanders learn of a reportable incident, they must direct an investigation into the incident, unless already begun by higher headquarters or an investigative agency such as CID.[103] As with the duty to report, the duty to investigate should be complied with strictly.[104] Commanders should err on the side of investigating too much rather than too little.[105]

Take Corrective Action

Commanders who learn that their troops have become undisciplined—e.g., dehumanizing the enemy or disregarding LOAC training—have a duty to correct that issue.[106] Commanders in this situation must reinforce subordinates' understanding of

the law of war, reeducate them on how to apply it, and employ sufficient checks on the troops' conduct.[107] The focus in corrective action is on preventing future LOAC violations.[108]

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.[109] When subordinates have a history of violence, substance abuse, or other misconduct, it should put a commander on guard about their propensity for LOAC violations, giving rise to a legal duty to take corrective action.[110]

The war in Afghanistan provides an example of when a commander *should have known* conditions were ripe for war crimes.[111] A squad leader in the 2d Infantry Division, serving in Kandahar, told his men that all Afghans were "savages."[112] Soldiers in the platoon began to fantasize openly about ways to kill Afghan children and other civilians, and they reveled in "trophy" photos with their kills.[113] The Soldiers' behavior remained uncorrected by platoon and company leadership, even when the Soldiers shot an unarmed Afghan teenager in an open field.[114] The platoon conducted at least four unjustified shootings of Afghans before it was reined in.[115] An engaged commander, immediately correcting lower-level misconduct, might have prevented most or all of these war crimes.[116] Instead, the Soldiers' actions, left unchecked, caused inestimable damage to the war effort in the minds of U.S. allies.[117]

In contrast, engaged commanders promote a climate of respect for the law of war.[118] General Barry McCaffrey, who commanded the 24th Infantry Division in Operation Desert Storm, refused to allow Soldiers to speak of Iraqis disrespectfully, such as by disparaging their ethnicity or religion.[119] He knew that talking of the enemy as subhuman would lead to treating the enemy as subhuman.[120] General McCaffrey ordered that any Soldier suspected of a war crime immediately be placed in handcuffs and sent to the rear.[121] General McCaffrey's respect for Iraqi soldiers contributed to their willingness to surrender rather than fight.[122]

Correcting loose talk and wrongheaded attitudes requires engaged, involved leadership by commanders.[123] Commanders must promote open dialogue with Soldiers, allowing them a safe place to discuss their emotions, to keep unchecked fear from leading to indiscriminate killing as was experienced at My Lai.[124] Furthermore, commanders must cultivate a culture in which subordinates are open to asking for clarification on orders and are not afraid to give the boss bad news.[125] Commanders must constantly keep their finger on the pulse of the unit and mentor their subordinate officers and NCOs to do the same.[126]

Stop

The classic example of a U.S. Service member who stopped a war crime, at least in part, is Warrant Officer (WO1) Hugh Thompson, the Army aviator who intervened to save at least ten unarmed Vietnamese civilians during the My Lai massacre.[127] Although he was not a commander, Thompson displayed the behavior prescribed by *The Commander's Handbook on the Law of Land Warfare*—he investigated when he suspected a war crime was being committed, he questioned superiors as necessary, and he acted to protect the innocent.[128] Flying low over the hamlet in a light observation helicopter, Thompson, his door gunner, and crew chief saw up to one hundred bodies stacked in a ditch. Some were still alive.[129] Thompson landed and asked a platoon leader if he was going to aid the wounded, but a tense exchange followed in which the platoon leader told Thompson to mind his own business.[130] Thompson lifted off but soon saw ten civilians in a makeshift bunker, with U.S. troops closing in.[131] Thompson landed again, placing his helicopter between the Soldiers and the civilians.[132] With his gunner training his weapon toward the Soldiers, Thompson coaxed the villagers from the shelter and escorted them onto two larger helicopters which had landed nearby.[133] He stopped again at the ditch and rescued a living child from the stack of bodies.[134]

Commanders are expected to have the courage to stop LOAC violations as soon as they learn they may be occurring.[135] Even if it means placing oneself in harm's way, as WO1 Thompson did at My Lai, a commander's duty is to protect both noncombatants and the overarching strategic mission by leading from the front and intervening to stop war crimes.[136]

Punish

A commander's responsibility with regard to subordinates' war crimes does not terminate once prevention of a war crime is no longer possible.[137] Commanders have a duty to punish war crimes once they learn of them, with the goal of deterring future war crimes.[138]

The duty to punish means taking appropriate steps to bring a perpetrator to justice, such as by preferring or forwarding court-martial charges as appropriate.[139] The inclusion of the duty to punish in AR 600-20 should not be interpreted to mean that commanders no longer have independent discretion to dispose of misconduct in their ranks, for that would constitute unlawful command influence.[140] Similarly, commanders will not violate AR 600-20 should the prosecution of an accused fail for matters beyond their control or should they deem non-judicial punishment or administrative action more appropriate.[141]

Conclusion

Meeting our Nation's obligations under the law of war does not come automatically—it requires leadership.[142] In this era of increased focus on command responsibility for war crimes, legal advisors have an important role to play in helping their commanders prevent, stop, and punish such offenses.[143] Accordingly, legal advisors keep their commanders on the high road of command responsibility, where they can focus on their mission—to prepare Soldiers for combat and lead them in defense of our Nation.[144] **TAL**

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Notes

1. *See* Major William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 9 (1973) (quoting U.S. President Theodore Roosevelt).

2. *See* Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual § 18.23.3 (12

June 2015) (C2, 13 Dec. 2016) [hereinafter DoD LoW Manual].

3. *Id.*; U.S. Dep't of Army, Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare paras. 8-29 to -31 (7 Aug. 2019) (C1, 20 Sept. 2019) [hereinafter FM 6-27]; U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-24 (24 July 2020) [hereinafter AR 600-20].

4. John Alan Appleman, Military Tribunals and International Crimes 139–264 (1954).

5. *See, e.g., id.* at 259 (discussing the Far East Military Tribunal); Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al. (Feb. 1948), *reprinted in* The Law of War 1303–43 (Leon Friedman, ed., 1972).

6. *See* Parks, *supra* note 1, at 20.

7. Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility Under International Humanitarian Law*, 18 Chi. J. Int'l L. 553, 574–75, 587–88 (2018); Raffi Khatchadourian, *The Kill Company*, New Yorker (June 29, 2009), https://www.newyorker.com/magazine/2009/07/06/the-kill-company.

8. *See* Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, Army Law., Sept.–Oct. 2018, at 23, 27; Christopher M. Rein, *Weaving the Tangled Web: Military Deception in Large-Scale Combat Operations*, Mil. L. Rev., Sept.–Oct. 2018, at 10, 14.

9. *See* Allan A. Ryan, Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability 334–41 (2012) (discussing recent historical changes to the practice of the law of war).

10. *See* U.S. Dep't of Army, Reg. 600-20, Army Command Policy (24 July 2020).

11. *See id.* para. 4-24.

12. *Id.*

13. *See id.* Working for the Union Army, Francis Lieber coined the term "war crime" in 1865 while examining the archives of the Confederacy in search of material implicating rebel leaders in such a crime. He did not find evidence to support a prosecution. Jessica Laird & John Fabian Witt, *Inventing the War Crime: An Internal Theory*, 60 Va. J. Int'l L. 53, 89–90 (2019).

14. *See* War Crimes Act, 18 U.S.C. § 2441; DoD LoW Manual, *supra* note 2, § 18.9.5; Gary D. Solis, The Law of Armed Conflict 329, 335–37 (2d ed. 2016). U.S. Army Field Manual 27-10, published in 1956 and now inactive, considered *any* violation of the law of war to be a war crime. U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare para. 499 (July 1956) [hereinafter FM 27-10]. In defining "war crime," the *Department of Defense Law of War Manual* gives three options: the all-encompassing definition from Field Manual 27-10, the definition of "war crime" as a *serious* violation of the law of armed conflict (LOAC), and a third definition of "war crime" as a serious violation of domestic law applicable during armed conflict. This article uses the second definition of "war crime" as a serious LOAC violation, as it is the interpretation favored by the directive framing the DoD Law of War Program and is the generally accepted approach in the twenty-first century. *See* U.S. Dep't of Def., Dir. 2311.01, DoD Law of War Program para. G.2 (2 July 2020) [hereinafter DoDD 2311.01]; Oona A. Hathaway et al., *What is a War Crime?* 44 Yale J. Int'l L. 53, 55 (2019). The *Department of Defense Law of War Manual* recognizes the third definition as antiquated, yet states it may be helpful to categorize acts such as espionage and treason, which do not fit neatly into other formalizations of war crimes. DoD LoW Manual, *supra* note 2, § 18.9.5.

15. *See* DoD LoW Manual, *supra* note 2, § 18.9.5. This article uses the terms "law of war" and "LOAC" interchangeably.

16. *See* 18 U.S.C. § 2441(c); Hathaway et al., *supra* note 14, at 68. The War Crimes Act specifically includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as a source of war-crimes law. 18 U.S.C. § 2441(c)(4).

17. Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual § 2.1 (12 June 2015) (C2, 13 Dec. 2016).

18. *Id.* § 2.1.2. *See, e.g.,* the conviction at the Tokyo International Military Tribunal of Japanese service members for cannibalism, which international law had never prohibited explicitly. Solis, *supra* note 14, at 332.

19. *See id.* § 18.9.5.2.

20. *Id.* For example, the London Charter, which established the Nuremberg International Military Tribunal, defined war crimes as "violations of the law or customs of war. Such violations shall include, but not be limited to, murder . . . deportation to slave labour . . . killing of hostages, plunder of public or private property, wanton destruction of cities . . . or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1547, 82 U.N.T.S. 280.

21. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Hathaway et al., *supra* note 14, at 88. Another example is a medic wearing a red-cross armband on the right arm rather than the left. DoD LoW Manual, *supra* note 2, § 18.9.5.2.

22. Solis, *supra* note 14, at 329–30.

23. War Crimes Act, 18 U.S.C. § 2441.

24. *See id.* § 2441(d)(1), (3) (establishing liability for intentional acts yet not for causing collateral or incidental damage). "Individual acts may constitute war crimes, and intent is not indispensable to prosecution. . . . Reckless, as well as intent, is a sufficient prosecutorial basis." Solis, *supra* note 14, at 330.

25. U.S. Cent. Command, Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015: Investigation and Follow-on Actions 3 (n.d), https://www3.centcom.mil/FOIALibrary/cases/16-0061/00.%20CENTCOM%20Summary%20Memo.pdf.

26. *Id.* "The label 'war crimes' is typically reserved for *intentional* acts—*intentionally* targeting civilians or *intentionally* targeting protected objects." *See also* McCarthy, *supra* note 7, at 579.

27. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Solis, *supra* note 14, at 329, 335–37. The Pictet factors and *Tadić* factors provide a guide to determine when violence rises to the level of armed conflict. *See* 1 Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 49–50 (Jean S. Pictet ed., 1952), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf; *Tadić*, Case No. IT-94-1-T, ¶¶ 561–62. Not every crime committed during an armed conflict is a war crime; however, it must have a nexus to the battlefield. "If, for instance, a civilian merely takes advantage of the general atmosphere of lawlessness created by the armed conflict to kill a hated neighbor or to steal his property without his acts being otherwise closely connected to the armed conflict, such conduct would not generally constitute a war crime." Guénaël Mettraux, International Crimes and the Ad Hoc Tribunals 42 (2005).

28. *See, e.g.,* Appleman, *supra* note 4, at 139–264 (describing the tribunals following World War II).

29. *See* S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing a UN-sanctioned international tribunal to prosecute "genocide and other serious violations of international humanitarian law" in Rwanda).

30. *See* Claude Pilloud et al., Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 para. 3553 (Yves Sandoz eds., 1987) [hereinafter ICRC Commentary].

31. DoD LoW Manual, *supra* note 2, § 18.23.1–.2. *See* 10 U.S.C. § 877.

32. Raffi Khatchadourian, *The Kill Company*, New Yorker (June 29, 2009), https://www.newyorker.com/magazine/2009/07/06/the-kill-company.

33. *Id.*; United States v. Girouard, 70 M.J. 5, 8 (C.A.A.F. 2011). The panel was instructed on negligent homicide as a lesser included offense of premeditated murder, and Girouard was convicted of three specifications of negligent homicide. *Girouard*, 70 M.J. at 6, 8. On appeal, the conviction was reversed for negligent homicide not being a lesser included offense of premeditated murder under the elements test. *Id.* at 9–12.

34. DoD LoW Manual, *supra* note 2, § 18.23.3. Moreover, as the 2020 update to AR 600-20 states, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish." AR 600-20, *supra* note 3, para. 4-24.

35. Captain Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 112–17 (1972).

36. *See* Solis, *supra* note 14, at 423; Ryan, *supra* note 9, at 340; Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law 203–04 (2002).

37. *In re* Yamashita, 327 U.S. 1, 5, 13–14 (1946).

38. Decision of the United States Military Commission at Manila (Dec. 7, 1945), *reprinted in* The Law of War, *supra* note 5, at 1596–98. Yamashita's conviction was upheld by the U.S. Supreme Court, which confirmed that a commander is responsible under the law of war to control his subordinates. *Yamashita*, 327 U.S. at 15.

39. Solis, *supra* note 14, at 423.

40. Parks, *supra* note 1, at 22, 37–38.

41. Solis, *supra* note 14, at 423.

42. Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al. (Feb. 1948), *reprinted in* The Law of War, *supra* note 5, at 1303–43; 8 United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals 88–89 (1949); Ryan, *supra* note 9, at 304–07.

43. Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs.

Wilhelm von Leeb et al. (Oct. 1948), *reprinted in* The Law of War, *supra* note 5, at 1421–1470; 12 United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals 111–12 (1949); Ryan, *supra* note 9, at 308.

44. The "knew or should have known" standard is widely known as the *Yamashita* standard in international jurisprudence. *See, e.g.*, Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 200 (2000). However, the standard took form at the subsequent Nuremberg trials. Ryan, *supra* note 9, at 302–08; Parks, *supra* note 1, at 87–89. One expert refers to the "knew or should have known" standard as the von Leeb–List standard. *See* Solis, *supra* note 14, at 425.

45. Parks, *supra* note 1, at 88; Solis, *supra* note 14, at 423.

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

47. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

48. *The US-ICC Relationship*, Int'l Crim. Ct. Project, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Dec. 14, 2021). Although the United States has signed the Rome Statute, the U.S. Senate has not ratified it.

49. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

50. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, ¶¶ 29–30, 51–57 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF. Jean-Pierre Bemba Gombo, the leader of the Movement for the Liberation of the Congo and its military branch, was convicted of murder, rape, and pillaging committed by his subordinates from 2002 to 2003 in the Central African Republic. *Id.* ¶¶ 1–2, 752. The International Criminal Court Appeals Chamber held that the Trial Chamber had incorrectly determined that Bemba had failed to take "necessary and reasonable measures" while acting as a remote commander with a non-linear command structure. Prosecutor v. Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute," ¶¶ 171, 173, 191–92 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. The Appeals Chamber overturned the conviction. *Id.*, Judgment.

51. Michael Matheson, Deputy Legal Advisor to U.S. Department of State, 6th Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, reported in 2 Am. Univ. Int'l L. Rev. 419, 428 (1987), reprinted in Nat'l Sec. L. Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Law of Armed Conflict Documentary Supplement 249–50 (2020).

52. Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 3 (1989).

53. "The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War II." John W. Vessey Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 app. at 85 (May 3, 1985), *noted in* Brian Finucane, *U.S. Recognition of a Commander's Duty to Punish War Crimes*, 97 Int'l L. Stud. 995, 1006 (2021). *See also* Smidt, *supra* note 44, at 200, 213–15.

54. *See* Smidt, *supra* note 44, at 215-19; Major Trenton W. Powell, *Command Responsibility: How the International Criminal Court's Jean-Pierre Bemba Gombo Conviction Exposes the Uniform Code of Military Justice,* 225 Mil. L. Rev. 837, 871–79 (2017); *Instructions from the Military Judge to the Court Members in* United States vs. Captain Ernest Medina, *reprinted in* The Law of War, *supra* note 5, at 1732.

55. Matheson, *supra* note 51.

56. *See* AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a). Most North Atlantic Treaty Organization members, for example, have ratified AP I and the Rome Statute. Int'l Comm. of the Red Cross, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=47 (last visited Jan. 13, 2022); *The States Parties to the Rome Statute*, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 13, 2022).

57. *See* AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a).

58. *Spain Drops US Army Murder Case*, BBC News (May 13, 2008, 5:05 PM), http://news.bbc.co.uk/2/hi/europe/7398973.stm.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. Smidt, *supra* note 44, at 215. The American Servicemembers' Protection Act prohibits transferring or extraditing U.S. persons for prosecution by the International Criminal Court, but it does not and cannot foreclose prosecution by a court of a foreign nation. *See* 22 U.S.C. § 7423. *See also* Solis, *supra* note 14, at 330 (discussing a 2008 Italian criminal case against a U.S. Soldier stemming from a fatal shooting of an Italian officer at a checkpoint in Iraq).

64. *See* DoD LoW Manual, *supra* note 2, § 18.23.3.2 n.340; AR 600-20, *supra* note 3, para. 4-24.

65. DoD LoW Manual, *supra* note 2, § 18.23.3.2 n.340 (citing Military Commissions Act § 8, 10 U.S.C. § 950q (2009)).

66. 10 U.S.C. § 950q.

67. AR 600-20, *supra* note 3, para. 4-24.

68. FM 6-27, *supra* note 3, para. 8-31.

69. *See* DoD LoW Manual, *supra* note 2, § 18.23.3; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31.

70. DoD LoW Manual, *supra* note 2, § 18.23.3. For liability to attach, there must be "personal neglect amounting to a wanton, immoral disregard of the action of [the commander's] subordinates amounting to acquiescence in the crimes." *Id.* § 18.23.3.2.

71. *See* FM 27-10, *supra* note 14, para. 501 (requiring "necessary and reasonable steps"); FM 6-27, *supra* note 3, para 8-31. The term is also reflected in the Rome Statute for the International Criminal Court. Rome Statute, *supra* note 49, art. 28(a)(ii).

72. AR 600-20, *supra* note 3, para. 4-24.

73. *See* sources cited *supra* note 69. The *Department of Defense Law of War Manual* uses "feasible" and "reasonable" without distinction. DoD LoW Manual, *supra* note 2, § 5.2.3.1. *But see* James E. Baker, The Centaur's Dilemma 245 (2021) (holding "all feasible measures within their power," from AP I, to be a higher standard than "reasonable measures," as found in the Rome Statute).

74. Sources cited *supra* note 69. The standards expressed by these sources may be higher than those found in the UCMJ. *See* DoD LoW Manual, *supra* note 2, § 18.7.

75. DoD LoW Manual, *supra* note 2, § 18.23.3.2; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31. The duty to "prevent or repress" violations under the "knew or should have known" standard carries with it a duty to investigate. *See* DoD LoW Manual, *supra* note 2, § 18.4.3.

76. *See* AR 600-20, *supra* note 3, para. 4-6a; U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-2 (8 February 2020). For example, Colonel (COL) Michael Steele, commander of 3d Brigade, 101st Airborne Division (Air Assault), received an administrative reprimand for his response to the war crimes in Operation Iron Triangle. Paul von Zielbauer, *Army Says Improper Orders by Colonel Led to 4 Deaths*, N.Y. Times (Jan. 21, 2007), https://www.nytimes.com/2007/01/21/world/middleeast/21abuse.html. Colonel Steele reportedly received the reprimand for failure to report Iraqi deaths and "other details of the raid."

77. DoD LoW Manual, *supra* note 2, § 18.23.3.1. "A duty may be imposed by treaty, statute, regulation, lawful order . . . ." Manual for Courts-Martial, United States pt. IV, ¶ 18c(3)(a) (2019) [hereinafter MCM]. *See* Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 Gonz. L. Rev. 335, 401–13 (2006–2007) (advocating for a new article to the Uniform Code of Military Justice to address command responsibility for war crimes).

78. *See* Smidt, *supra* note 44, at 197. "Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control." FM 6-27, *supra* note 3, para. 8-29.

79. AR 600-20, *supra* note 3, para. 4-24 (codifying the three-part duty to prevent, stop, and punish war crimes helps the United States comply with its obligations under customary international law). *See* AP I, *supra* note 46, art. 87; Matheson, *supra* note 51.

80. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-24 (24 July 2020).

81. *Id.*

82. DoDD 2311.01, *supra* note 14, para. 2.7.b. All training must be consistent with the *Department of Defense Law of War Manual. Id.* para. 2.7.b.(2).

83. U.S. Dep't of Army, Reg. 350-1, Army Training and Leader Development tbl.F-2 (10 Dec. 2017) [hereinafter AR 350-1]. *See History of Tables of Distribution and Allowances (TDA) Units*, U.S. Army Ctr. of Mil. Hist. (May 30, 1995), https://history.army.mil/html/forcestruc/tda-ip.html.

84. U.S. Dep't of Army, Reg. 350-1, Army Training and Leader Development tbl.F-2 (10 Dec. 2017) (Law of War/Detainee Operations Training).

85. *Id.*

86. *Id.*

87. *See* U.S. Dep't of Def., Instr. 1322.32, Pre-Deployment Training and Theater-Entry Requirements para. 4.1.a (10 June 2020) (C1, 25 Aug. 2021).

88. *See* U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations paras. 3-24, 4-42, 4-47 (8 June 2020) [hereinafter FM 1-04].

89. *Id.*; AR 350-1, *supra* note 83, tbl.F-2 (Law of War/Detainee Operations Training).

90. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, Mil. L. Rev., May–June 2009, at 17, 19.

91. *Abu Ghraib US Colonel Reprimanded*, BBC News (May 12, 2005, 4:59 AM), http://news.bbc.co.uk/2/hi/americas/4539033.stm.

92. *Id. See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

93. *Abu Ghraib US Colonel Reprimanded*, BBC News (May 12, 2005, 4:59 AM), http://news.bbc.co.uk/2/hi/americas/4539033.stm.

94. *See id.*; Rielly, *supra* note 90, at 19.

95. U.S. Dep't of Def., Dir. 2311.01, DoD Law of War Program para. 4.2 (2 July 2020).

96. *Id.* paras. 4.2, G.2. (defining "reportable incident").

97. *Id.* para. 4.2.b.

98. *Id.* para. 4.2.c.

99. *See* Seymour M. Hersh, Cover-Up 256, 265–68 (1972) (discussing the consequences faced by the division and brigade commanders for covering up the My Lai massacre).

100. 1 Lieutenant General William R. Peers, U.S. Army, Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident 10-5, 10-12 to 10-16, 10-40 to 10-41, 11-12 (1974) [hereinafter peers inquiry].

101. *Id.*; Hersh, *supra* note 99, at 206–11.

102. *See* W.R. Peers, The My Lai Inquiry, at xi–xii (1979); Michael Bilton & Kevin Sim, Four Hours in My Lai 23, 185 (1992). The death toll comprised at least 347 noncombatants—mostly women, children, and old men. *Id.* at 92–93.

103. DoDD 2311.01, *supra* note 14, para. 4.2.a.

104. *See* DoD LoW Manual, *supra* note 2, § 18.4.3. Thorough investigation allows a commander to fulfill duties imposed by the "knew or should have known" standard of command responsibility. *See* Parks, *supra* note 1, at 90.

105. *See* MCM, *supra* note 77, R.C.M. 303 ("[T]he immediate commander shall make . . . a preliminary inquiry . . . .").

106. AR 600-20, *supra* note 3, para. 4-24; Rielly, *supra* note 90, at 19–20.

107. *See* DoD LoW Manual, *supra* note 2, § 18.4.2, 18.4.4.

108. Rielly, *supra* note 90, at 23.

109. *See* McCarthy, *supra* note 7, at 556. "An Army leader operates with clear expectations regarding conduct so that indiscipline does not jeopardize mission success." U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 1-94 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

110. *See* McCarthy, *supra* note 7, at 564, 586–87 (citing Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

111. *See* Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, Rolling Stone (Mar. 28, 2011, 2:00 AM), https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* McCarthy, *supra* note 7, at 556; ADP 6-22, *supra* note 109, para 1-94.

117. *See* Jim Frederick, *Anatomy of a War Crime: Behind the Enabling of the "Kill Team,"* Time (Mar. 29, 2011), https://world.time.com/2011/03/29/anatomy-of-a-war-crime-behind-the-enabling-of-the-kill-team/ (discussing "outrage" in Europe over the "Kill Team" story despite a lack of interest in it in the United States).

118. Barry R. McCaffrey, *Human Rights and the Commander*, Joint Forces Q., Autumn 1995, at 10, 10–11.

119. *See id.* at 12. "[I]f we train a unit to hate insurgents and kill them in combat, and the unit finds it increasingly difficult to distinguish the insurgents from the population, in the minds of the Soldiers, the population may soon become the hated enemy and thus victims of unlawful conduct." Rielly, *supra* note 90, at 20.

120. Barry R. McCaffrey, *Human Rights and the Commander*, Joint Forces Q., Autumn 1995, at 10, 12.

121. *Id.*

122. *Id.*

123. *Id.* at 12–13. Leaders at all levels must also police their own speech. Even offhand remarks in jest, such as, "The only good prisoner is a dead one," may be overheard and misinterpreted by Soldiers, leading to a climate of disregard for the Law of Armed Conflict. *See* Parks, *supra* note 1, at 78–80.

124. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, Mil. L. Rev., May–June 2009, at 17, 21.

125. *Id.* at 22. These problems contributed to the My Lai massacre and the failure of investigation afterward.

126. *Id.* at 22–23. "[A] moral, ethical command climate . . . is the single most important factor in preventing civilian casualties . . . . No substitute exists for ethical leadership manifested by the provision of training in garrison and throughout deployments." Def. Legal Pol'y Bd., U.S. Dep't of Def., Report of the Subcommittee on Military Justice in Combat Zones 60 (2013).

127. Bilton & Sim, *supra* note 102, at 138–40.

128. *See* FM 6-27, *supra* note 3, paras. 8-2, -4, -7.

129. Peers Inquiry, *supra* note 100, at 10-9 to -10.

130. Michael Bilton & Kevin Sim, Four Hours in My Lai 23, 138 (1992).

131. *Id.*

132. *Id.* at 138–39.

133. *Id.* at 139.

134. *Id.* at 139–40.

135. Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 Mil. L. Rev. 1, 14 (1982); *see* ADP 6-22, *supra* note 109, para. 8-4 (Leaders and Courage).

136. *See* Peers Inquiry, *supra* note 100, at 10-8 to -11; DoD LoW Manual, *supra* note 2, § 18.2 (discussing the practical reasons for enforcing compliance with the Law of Armed Conflict).

137. *See* AR 600-20, *supra* note 3, para. 4-24 (listing the duty to "prevent" as just one of a commander's duties with regard to war crimes).

138. Deterrence is a key goal of punishment. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 16, 2001).

139. MCM, *supra* note 77, R.C.M. 306 (initial disposition); Parks, *supra* note 1, at 80–81.

140. *See* MCM, *supra* note 77, R.C.M. 306(a); 10 U.S.C. § 37(a) (command influence). International law imposes no duty to punish certain offenses a particular way. FM 6-27, *supra* note 3, para. 8-5.

141. *See* MCM, *supra* note 77, R.C.M. 306. If a commander took unreasonably light action against an alleged war criminal, that could constitute a violation of the commander's duty to punish. Parks, *supra* note 1, at 80–81.

142. U.S. Dep't of Army, Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare paras. 8-1 (7 Aug. 2019) (C1, 20 Sept. 2019).

143. *Id.* para. 8-7. *See* AR 600-20, *supra* note 3, para. 4-24 (added to AR 600-20 in 2020).

144. *See* Chief of Staff, U.S. Army, & Sec'y of Army, The Army Vision (n.d.), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf. Enforcing compliance with the law of war enables mission accomplishment by enhancing troop discipline, setting an example for reciprocal compliance by opposing forces, and establishing a framework for perceived legitimacy by host-nation, allied, and U.S. populations. DoD LoW Manual, *supra* note 2, § 18.2.

(Credit: Andy Dean – stock.adobe.com)

Enclosure “2”

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, vs. KAIULA KALAWE ENGLISH Defendant.	Crim. No. 14-1-0819 TRANSCRIPT OF PROCEEDINGS
STATE OF HAWAII vs. ROBIN WAINUHEA DUDOIT Defendant.	Crim. No. 14-1-0820

TRANSCRIPT OF PROCEEDINGS

before the Honorable JOSEPH P. CARDOZA, Circuit Court Judge presiding on Thursday, March 5, 2015. Defendant English's Motion to Dismiss Criminal Complaints Pursuant To HRPP 12(1)(b); Defendant Robin Wainuhea Dudoit's Joinder In Defendant English's Motion to Dismiss Criminal Complaint Pursuant To HRPP 12(1)(b).

TRANSCRIBED BY:
Beth Kelly, RPR, CSR #235
Court Reporter

APPEARANCES:

LLOYD PHELPS, Esq. Attorney for the State
Deputy Prosecuting Attorney
County of Maui
Wailuku, Hawaii

DEXTER KAIAMA, Esq. Attorney for the Defendants
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THURSDAY, MARCH 5, 2015

THE CLERK: Calling Criminal Numbers 14-1-0819, State of Hawaii versus Kaiula Kalawe English; and Criminal Number 14-1-0820, State of Hawaii versus Robin, Wainuhea Dudoit; for, one, defendant English's motion to dismiss criminal complaints pursuant to HRPP 12(1)(b); and two, defendant Robin Wainuhea Dudoit's joinder in defendant English's motion to dismiss criminal complaint pursuant to HRPP 12(1)(b).

MR. PHELPS: Good morning, your Honor, Lloyd Phelps appearing on behalf of the State for all matters.

MR. KAIAMA: Good morning, your Honor, Dexter Kaiama on behalf of Kaiula English and Robin Dudoit. Mr. English and Mr. Dudoit are present.

THE COURT: All right. Good morning, Counsel. Good morning, Mr. English. Good morning, Mr. Dudoit.

All right. This is the defendant's motion and joinder. And so, Mr. Kaiama, is there anything you wanted to present?

MR. KAIAMA: Yes, just first order of business, your Honor. I just wanted to make sure, because I filed Mr. Dudoit's joinder in the case --

THE COURT: You did?

MR. KAIAMA: -- to execute the same paper

and time for the Court. It's essentially the same motion.

But I just wanted it understood, and I believe it is that Mr. Dudoit is bringing the exact same argument and motion to dismiss as Mr. English is bringing by his motion. Yes? Okay. Thank you.

Your Honor --

MR. PHELPS: State's understanding, your Honor.

MR. KAIAMA: Okay. Yes.

Your Honor, actually as part of -- before we make oral argument on the motion, your Honor, as I understand, if this was scheduled for an evidentiary hearing, I did retain and I do have an expert witness to testify. And I would like to present his expert testimony before we proceed with our oral argument.

THE COURT: All right. If you have a witness to testify.

MR. KAIAMA: I would be calling Dr. Keanu Sai.

THE CLERK: I'm sorry, sir. Can you please stand and raise your right hand?

DR. DAVID KEANU SAI

was called as a witness by and on behalf of the Defendants and after having been first duly sworn was examined and testified as follows:

THE CLERK: So sworn. Please be seated.

THE COURT: You may proceed with your examination of the witness.

MR. KAIAMA: Thank you, your Honor. Sorry, I think I turned on my phone. Excuse me. Excuse me, your Honor.

DIRECT EXAMINATION

BY MR. KAIAMA:

Q. Good morning, Dr. Sai. Would you please state your name and your present occupation for the record?

A. David Keanu Sai. I'm a lecturer at the University of Hawaii, Windward Community College.

Q. Okay. Dr. Sai, before I ask you about your testimony in this case, I'm going to ask you a few questions about your qualifications. Is that okay with you?

A. That's fine.

Q. Dr. Sai, can you please provide us a background, your educational background from high school to the present date?

A. I can. Well, got a high school diploma from Kamehameha, 1982. An Associates Degree from New Mexico Military Institute, a military college. A Bachelor's in sociology from the University of Hawaii. That was 1987.

A Master's Degree in political science, specializing in international relations, 2004. And a Ph.D. in political science focusing on international relations and public law, which includes international law, United States law, and Hawaiian Kingdom law of the 19th century. And that was 2008.

Q. Okay. Tell us a little bit about obtaining your Ph.D., Dr. Sai. How did you go about doing that? What's the requirements and what did you need to do? What was the process of your getting that Ph.D.?

A. Well, you first need a Master's Degree. In my case it was in political science specializing in international relations.

A Ph.D. is the highest degree you can get within the academy. And a Ph.D. is based upon something original to contribute to the political science field and law field, because my area's public law.

What takes place is you begin with a proposal. You have to give a defense. And you have a committee that -- I had a committee of six professors.

And you basically present what your research is going to be. What they do is to ensure that this research has not been done already by another Ph.D.. So it's called a lit review or literature review.

My area that I proposed was researching

Hawaii's legal and political status since the 18th century to the present and incorporating international relations, international law, and Hawaiian Kingdom law and United States law.

That proposal was passed. Then you have to go into what is called the comprehensive exams.

So comprehensive exams is where each of your professors, in this case, six of them, would provide two questions to test my comprehension of the topic of the research -- of the proposed research.

And they would pose two questions each. I would have to answer one of the two. Each question average about 30 pages. Okay.

You're given one week to complete from Monday -- from Monday to Monday. It's a pass or fail. It's not graded.

During that process I successfully completed the comprehensive exams. And then you move to what is called all-but-dissertation. That's when you begin the writing of your dissertation through the research.

The title of my doctorate dissertation was the continuity of the Hawaiian Kingdom, beginning the transition from occupied to restored state or country.

Successfully defended that before my committee. And it was submitted in time for me to

graduate in 2008.

Q. Okay. Would you be able to tell us, and just for the record, who was on your committee, Dr. Sai?

A. My chairman was Neal Milner. He's a pretty famous political pundit on Channel 4 news. His area is -- background is law and judicial behavior.

Katharina Heyer, political scientist, public law.

John Wilson, sovereignty, goes back to the Greek Polis states through Hobbes, Rousseau, political science and law regarding sovereignty.

Then I had a Professor Avi Soifer, the Dean of the Law School. His background is U.S. Constitutional law.

I also had as an outside member, Professor Matthew Craven from the University of London, who teleconferenced in for my defense. His background is state sovereignty and international law.

And then I also had as the final professor, Professor Kanalu Young from Hawaiian Studies, whose background was Hawaiian Chiefs. But he regrettably passed away before my defense. So Professor Jon Osorio stepped in from the Hawaiian Studies Department.

They made up my committee.

Q. And again, it's obvious, Dr. Sai, you did

pass your dissertation defense?

A. And that's what I want to -- ensure a clear understanding. When you defend your dissertation, you're not arguing your dissertation. You have to defend it against the committee members who try to break it. And if they're not able to break it, then you're awarded the Ph.D. and that becomes your specialty.

Q. Okay. And it's clear in this case and it's of particular interest to me that the Dean of the law school was on this committee; correct?

A. Yes.

Q. Okay. And he had an opportunity to so-called challenge or break your dissertation defense as well?

A. That's part of the academic process.

Q. Okay. And did he come to any conclusion concerning your dissertation?

A. They couldn't deny what I proposed and what I argued. Because if they could deny it, I wouldn't have my Ph.D.. They would find a hole in the argument or the research.

Q. Okay. Thank you, Dr. Sai.

Since the obtaining your dissertation defense, have you had any publications that's been -- any articles that have been published in, I guess, relevant journals or journals of higher education?

A. Law review articles. One was published in the University of San Francisco School of Law, Journal of Law and Social Challenges. Another one at the University of Hawaii, Hawaiian Jounal of Law and Politics, which is published on HeinOnline, which is a legal publication, Hawaiian.

Q. I also understand and, Dr. Sai, just so you know, we did provide as Exhibit 1 in the motion, your curriculum vitae. And so it does provide much of the information that you're testifying about, but I wanted to ask you about, besides publication, I know you also have -- or tell me, you've also written education material?

A. Yes.

Q. Can you explain that?

A. Actually I have a history text that is used in the high school and college levels. It's actually a watered down version of my doctorate dissertation. Much more user friendly for teaching the legal and political history of Hawaii that begins with Kamehameha I and brings it up-to-date.

So it is used to teach. It's part of the curriculum. And it is actually required reading at the University of Hawaii Maui College, the community colleges, the University of Hawaii at Manoa. And I did find that

it's actually required reading and used in NYU, New York University, and University of Massachusetts at Boston.

Q. Okay. And what is the name of that education material, Dr. Sai?

A. Ua mau kea ea Sovereignty Endures.

Q. Thank you. In addition to publications, Dr. Sai, I understand that you've made a number of presentations. In fact, most recently presentations at facilities or educations -- higher educational facilities. Can you give me a little bit of background or other kinds of presentations that you've made and what the topics of those presentations were?

A. I've been invited quite often to present to conferences, to the universities. This past April I was giving guest lectures at the University of NYU, New York University; Harvard; University of Massachusetts at Boston and Southern Connecticut State University.

Other universities that I've given presentations to as well span across here in Hawaii, the colleges, the high schools.

Just recently I was invited as a guest presenter in a conference at Cambridge University History Department in London. And the conference is focusing on non-European states in the age of imperialism.

Q. Very good. And, Dr. Sai, again, all of this,

both your publications, your educational materials, as well as your presentations, is in your area of expertise; correct?

A. Yes.

Q. And just for the record again, can you tell us what that area of expertise is?

A. The continuity of the Hawaiian state under international law.

Q. Okay. Very good. And, Dr. Sai, you have -- have you been qualified as an expert or to testify as an expert in any other proceedings?

A. Yes. There was a case in Hilo, Judge Freitas. Tamanaha -- it was a lender versus Tamanaha, I believe. I can't recall the exact case.

Q. And you were qualified as an expert and you were allowed to provide your expert opinion in that case concerning your area of expertise?

A. Yes.

MR. KAIAMA: Your Honor, at this time we would ask that Dr. Sai be qualified as an expert witness to testify about matters concerning our motion to dismiss.

MR. PHELPS: The State has no objection, your Honor.

THE COURT: All right. There being no objection, the Court will so receive the witness as an

expert as offered.

MR. KAIAMA: Thank you, your Honor.

BY MR. KAIAMA:

Q. Dr. Sai, based on all of your research, based on your background and your education and this specialty, you understand that on behalf of my clients I am bringing a motion to dismiss for lack of subject matter jurisdiction?

A. Yes.

Q. Based on all of your research and your expertise in this area, Dr. Sai, have you reached any conclusions about this, and can you tell us what your conclusions are?

A. That the Court would not have subject matter jurisdiction as a result of international law.

Q. And if you can explain or perhaps expand on that explanation and tell us why the Court does not have subject matter jurisdiction in this case?

A. Sure. Well, it goes back to what the status of Hawaii was first, not necessarily what we are looking at today.

So when you look at Hawaii and its political and legal status on November 28th, 1843 Great Britain and France jointly recognized Hawaii as an independent state.

July 6th, 1844 Secretary of State, John C.

Calhoun, also recognized formally the independence of the Hawaiian Kingdom.

Now, to determine dependence under international law applies to the political independence, not physically independent.

From that point Hawaii was admitted into the Family of Nations.

By 1893 it had gone through government reform whereby it transformed itself into a constitutional monarchy that fully adopted a separation of powers since 1864.

By 1893 the Hawaiian Kingdom as a country had over 90 embassies and consulates throughout the world. The United States had an embassy in Honolulu. And the Hawaiian Kingdom had an embassy in Washington D.C.. And Hawaiian consulates throughout the United States, as well as U.S. consulates throughout Hawaii.

So in 1893 clearly Hawaii was an independent state.

Now, under international law there is a need to discern between a government and a state. The state is what was recognized as a subject of international law, not its government. The government was merely the means by which that recognition took place in 1843 and 1844.

Now, a government is the political organ of a

state. What that means is it exercises the authority of that state. Every government is unique in its geopolitical, but every state is identical under international law. It has a defined boundary. It has independence. It has a centralized government. And it has territory -- people within its territory and the ability to enter into international relations.

What happened in 1893 on January 17th, as concluded by the United States investigation, presidential investigation, is that the Hawaiian government was overthrown, not the Hawaiian state. Okay.

Now, this is no different than overthrowing the Iraqi government in 2003. By the United States overthrowing the Iraqi government that did not equate to the overthrow of Iraq as a state.

That situation is what we call an international law occupation. Okay. Occupation is where the sovereignty is still intact, but international law mandates the occupier to conform as a proxy, a temporary proxy of a government to temporarily administer those laws of that particular country.

Now, prior to 1899, which is we're talking about 1893, the illegal overthrow of the government, customary international law would regulate the actions taken by governments that occupy the territory of another

country.

Those customary laws are the law of occupation is to maintain the status quo of the occupied state. The occupier must administer the laws of the occupied state and can not impose its own laws within the territory of an occupied state, because sovereignty and independence is still intact.

So by 1899, we have what is called the Hague Conventions. Later 1949, the Geneva Conventions. The Hague Conventions merely codified customary international law, fully recognized. And 1949 again codified customary international law and the gaps that may have been in the Hague Conventions.

So when we look at 1893, it is clear the government was overthrown, but it is also clear that the State wasn't, because the United States did not have sovereignty over Hawaii. The only way that you can acquire sovereignty of another state under international law is you need a treaty. Okay, whether by conquest or by voluntary transfer.

An example of a voluntary transfer that United States acquired sovereignty would be the 1803 Louisanna Purchase. An example of a treaty of conquest where the United States acquired territory through a war, 1848, Treaty of Guadalupe Hidalgo, Mexican America War

making the Rio Grande the dividing point.

You didn't have that in 1893. In fact, you had an attempt to do a treaty, but President Cleveland withdrew that treaty in 1893 in March and investigated the situation. Never resubmitted that treaty. In other words, in the alternative he entered into another treaty with the Queen to reinstate the Hawaiian government. And that's called a sole executive agreement. That took place on December 18th, 1893. All part of the record in the State Department.

So what we have there from 1893 is a situation of a governmental matter, not a state or a sovereignty.

As we move forward into 1898 there still is no treaty, but the Spanish American War breaks out and that's in April of 1898. The United States is waging war against the Spanish, not just in Puerto Rico and Cuba in the Caribbean, but also in Guam and the Phillipines.

And Captain Alfred Mahan from the U.S. Naval War College and General Schoffield gave testimony to the House Committee on Foreign Affairs in May 1898, that they should pass a law, called a joint resolution, to annex the Hawaiian Islands because of necessity called war. They need to seize Hawaii, as stated by those given testimony, in order to protect the west coast of the United States

and to reinforce troops in Guam and the Phillipines.

The problem we run into is a joint resolution of Congress has no effect beyond the borders of the United States. It's a municipal legislation. It's not international law.

That was then taken up for a vote in the house. Congressmen were making points on the record that this is illegal. You can not pass laws that can effect the sovereignty of another country. But the argument was it's necessity. We're at war.

On July 7th, after the House and Senate made the record, but was not able to get -- what they did was they passed by majority, July 6th, 1898, joint resolution of annexation and then it was President McKinley on June -- July 7th, 1898 that signed it into law.

It was that U.S. law that was used to seize another country in the occupation. And the occupation of Hawaii began formally on August 12th, 1898. Formal ceremonies at Iolani Palace where the Hawaiian flag was lowered and the American flag risen before a full regalia of U.S. military in formation.

What has happened since then is that now research is showing that there was a deliberate move to basically denationalize the inhabitants in the public schools that actually began formally in 1906 where they

began to teach within the schools American history. You can not speak Hawaiian. And if you do speak Hawaiian and not English, you get disciplined. We hear those stories from our kupuna.

And that began what we call in international law, attempts to denationalize the inhabitants of occupied territories. Which since World War I and World War II has been categorized as a war crime.

So what we have today is we have in 1900, after 1898, in 1900 the United States Congress passed another law called the Organic Act creating a government for the Territory of Hawaii.

In that Organic Act it specifically says that the Republic of Hawaii, which was called the provisional government which President Cleveland called self-declared, is now going to be called the Territory of Hawaii.

And then in 1959 the Statehood Act basically stated that what was formerly the Territory of Hawaii is the State of Hawaii.

Now, looking at the limitation of U.S. law it has no effect in a foreign state. You still need a treaty.

But what's interesting is in 1993 the United States Congress passed a law apologizing for the illegal overthrow of the Hawaiian Kingdom government. What was

important in there is that in one of the whereases it stated specifically, that whereas the self-declared Republic of Hawaii ceded sovereignty to the United States.

We have a problem there because self-declared means you're not a government. Which is precisely what President Cleveland, in his investigation, called its predecessor the provisional government.

So in that genealogy, if the provisional government was self-declared, then the Republic of Hawaii is self-declared, then the Territory of Hawaii was self-declared, then the State of Hawaii self-declared.

Now, I fully understand the ramifications of this information and history and the applicable law. I'm a retired captain from the Army, you know. So this is not a political statement. But it's part of my research that clearly shows that I can not find how the State of Hawaii, a court, could have subject matter jurisdiction on two points.

First, U.S. law is the Statehood Act is limited to U.S. territory. Second, the State of Hawaii is a successor of the Republic of Hawaii, which was admitted to be self-declared in 1993 by the U.S. Congress.

So that's -- that's why I've come to the conclusion where there is what is called a presumption of continuity of the Hawaiian Kingdom as a state, not as a

government, but as a state under international law.

Q. Can you expand on that, the presumption of continuity just a little bit, so that the Court understands that or I can understand better what continuity means in the context of international law?

A. Well, the word presumption is a conclusion based upon facts. Assumption is a conclusion based upon no facts.

But what is more important about the presumption is that it shifts the burden. So no different than there is a presumption of innocence because of the fact the person has rights. You have, under international law, a presumption of continuity, because the state itself has rights under international law.

So the presumption of continuity is a very well recognized principle of international law. That's what preserves the State's continuity despite the fact that its government was overthrown.

Now, there are two legal facts that need to be established on the presumption of continuity of an independent state. The first legal fact has to be that the entity in question existed at some point in time in history as an independent state. That's the first thing.

Now, clearly Hawaii's history shows that it was an independent state, but what's more important there

was dictum in an arbitration award out of the permanent Court of Arbitration in 2001 published in international law reports out of Cambridge. Which basically says paragraph 7.4, that in the 19th century the Hawaiian Kingdom existed as an independent state, recognized as such by the United States of America, Great Britain and various other states. That right there, that dictum verified and accomplished that first rule. Hawaii was an independent state.

The second legal fact that would have to apply, now that the United States which has the burden to prove is that there are intervening events that have deprived that state of its independence under international law.

What we have as far as the historical record from the United States of America is that all it has, as a claim to Hawaii, it's not a treaty, but a joint resolution of annexation, which is a U.S. law limited to U.S. territory not recognized by international law. And that the Statehood Act of 1959 is still a U.S. law not recognized by international law.

So there are no intervening facts that would deprive or rebut the presumption of continuity.

In fact, in 1988 the Office of Legal Counsel, Department of Justice, in a legal opinion looked into that

very issue and it stated regarding the joint resolution, it is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Therefore, this is not a proper precedent for the United States president to follow.

And they made reference to the Congressional records of Congressmen and Senators who was saying U.S. laws have no effect beyond our borders. We can not annex a foreign country by passing a joint resolution.

So in 1988 the Office of Legal Counsel, Department of Justice, stumbled over that. Therefore, there are no clear evidence that can rebut the presumption of continuity. And that's why my research and my expertise is in that area that the Hawaiian state continues to exist under international law.

Q. Thank you, Dr. Sai.

MR. KAIAMA: I just wanted to let you know, and for the record, the executive agreements that you refer to between Queen Liliuokalani and President Grover Cleveland has been attached to my client's motion to dismiss as Exhibit 7 and 8, your Honor. So those are the diplomatic records and negotiations, communications between President Grover Cleveland when he comes to that conclusion based on his investigation.

BY MR. KAIAMA:

Q. Dr. Sai, I also wanted you to confirm, I know you spoke earlier and you testified that the joint resolution, the Territorial Act, as well as the Statehood Act was of Congressional Legislation, which has no force and effect beyond its own territory or borders.

And you're referring to U.S. law. And I can speak to that. But it's also true that that same rule of law applies in the international realm as well; right? So no country can occupy other countries by way of joint resolution. That's a -- that's a common -- well, a well established understanding under international as well; is that correct?

A. International law is able to distinguish what is international law and what is national law. So national law's applied to states as an exercise of their sovereignty.

International law is a law between states. And between states is based upon agreements. And those agreements are evidenced by treaties.

Q. Based on your conclusion that the continuity of the Hawaiian Kingdom still exists, Dr. Sai, what are the consequences of that -- of your opinion, your expert opinion about that? Especially particularly with respect to, respectfully, the Court's exercise of jurisdiction in this case?

A. When we're looking at this issue within the framework of international law what resonates is, number one, sovereignty is still intact and it remains with the state under occupation. Okay.

Now, that because sovereignty is still intact and it's not a part of the United States, then international law regulates that phenomenon or that situation. And that is what we call the law of occupation. And that's called the Hague Conventions of 1899, which was amended in 1907. And then we also have the Geneva Conventions of 1949.

Now, specific issues regarding occupations are pretty much the substance of Hague Conventions Number Four of 1907, as well as Geneva Conventions Number Four that deals with the civilian population during occupations.

After World War I -- well, toward the end of World War I is when war crimes began to be brought up as a possible issue to be addressed with the Germans and the access powers.

And they came up with a list of war crimes. And one of those war crimes in 1919 was put out by the United Nations Commission. Now, United Nations, back then, I'm not talking about 1945 United Nations, but they called like the United Front.

Attempts to denationalize inhabitants of an occupied state, failure to provide a fair trial, those issues, although they were not successful in prosecution of individuals for war crimes after World War I because there was still that issue of state immunity that people were acting on behalf of the state, so they're not personally liable or criminally liable. The State still carried that.

Once World War II took place, it became a foregone conclusion that individuals will be prosecuted for war crimes.

There is a similar history that Hawaii has with regard to war crimes in a country called Luxembourg. In 1914 the Germans occupied Luxembourg, which was a neutral country, in order to fight the French. The seizure of Luxembourg under international law was not a justified war, but it was called a war of aggression. That led to war crimes being committed. So from 1914 to 1918 Germany occupied Luxembourg even when Luxembourg did not resist the occupation.

They also did that same occupation in 1940 to 1945. Now 1940 to 1945 they began to attempt to denationalize Luxembourgers into teaching the children that they're German. They began to address the schools, the curriculum.

What was also happening, not just in Luxembourg, as a war crime was unfair trials. Germany began to impose their laws and their courts within occupied territories. And that became the subject of war crime prosecutions by the allied states, but a prominant tribunal that did prosecute war crimes for unfair trial and denationalization was the Nuremberg trials.

And that set the stage, after the Nuremberg trials, to address those loopholes in the conventional -- the Hague Conventions of 1907 which prompted the Geneva Conventions in 1949.

And the Geneva Conventions specifically stated as the experience -- as they acquired the experience from World War II, Article 147, unfair trial is a grave breach, which is considered a war crime.

So that's where the issue of not providing a fair trial is a war crime according to the Geneva Conventions and customary international law.

Q. Is it true, Dr. Sai, that the United States is a party to that Geneva Conventions?

A. Yes.

Q. So it is obligated under the terms of Geneva Conventions?

A. The United States acknowledges customary international law and the law of occupation during the

Spanish American War, as evidenced by their written manuals to the military. In administration of justice within occupied territories came to be known as General Order Number 101. Okay. Direction of the president on how to administer the laws of former Spanish territory until a peace treaty is signed where they can acquire the territory themselves.

And they're also a party to the 1899 Hague Conventions, the 1907 Hague Conventions, and the 1949 Geneva conventions.

Q. As part of their obligation as a contracting party to those conventions, including 1949 Geneva Conventions, did the United States create domestic legislation that covered the commission of war crimes, including deprivation of a fair and regular trial?

A. That would be in 1996 called the War Crimes Act, which is Title 18, Section 2441, United States Code.

Q. Okay. You know, Dr. Sai, you answered all my questions. Thank you. I appreciate it.

Is there -- I'll be honest, I think I covered everything I need to cover, but I'm not sure. I'm not the expert. Is there any other area that you would like to provide us some insight that we don't have about the status of Hawaii or about perhaps subject matter jurisdiction?

A. I think there's a particular important case here regarding subject matter jurisdiction. That dealt with Guantanamo Bay, Gitmo. And this is a case that went before the United States Supreme Court, Hamdan versus Rumsfeld. Okay.

And basically the argument that was presented by a JAG as a Public Defender was that the military tribunals were not properly constituted which was a direct violation of the Geneva Conventions. Therefore, his client could not get a fair trial.

Now, these military tribunals were determined by the United States Supreme Court to be illegal because the United States president can not establish -- can not establish military tribunals within U.S. territory because that would undermine the authority of Congress which has plenary power.

Guantanamo Bay was not foreign territory where the president could create military tribunals. It was actually part of the United States.

Now, the United States President does have the authority under Article 2 to create military tribunals in occupied territories. He did that in Japan after World War II. In Germany after World War II, as well as after World War I.

And these military tribunals administer the

laws of the occupied state. What was brought up in this case with Hamdan versus Rumsfeld, the president could not create a military tribunal within U.S. territory and it was not justified by necessity.

So the Court ruled that the Court's are illegal and then turned over to Congress to pass a law, because it's within U.S. territory, to keep it up.

Now, what's important is there was a Justice Robertson, I believe, of the Supreme Court. He was addressing the secondary argument that people were not getting a fair trial within these military tribunals. And Justice Robertson, if I'm not mistaken his name, he stated it is irrelevant whether or not they were given a fair trial, because if they're not properly constituted, they can't give a fair trial.

Q. Okay. And so is it fair to say, is it your -- I think I understood this, but I just want to be clear. The Hamdan case also stands for the president does not have authority in U.S. territory, then he is the one that has authority in foreign territory?

A. And these courts called military tribunals are also referred to as Article 2 courts.

Q. Okay. And is that your opinion with respect to Hawaii, those are the courts that should be administering the laws of the Hawaiian Kingdom?

A. Yes.

Q. Okay. Thank you. And just to give you a quick correction. It was actually Justice Kennedy who said that.

A. Kennedy. My apologies.

Q. No. Thank you, Dr. Sai. Is there anything else that you'd like to add?

I'd actually like to ask you about how we resolve the situation, but I think that would be something for --

A. I can quickly state to that because this information is quite perplexing. All right.

My committee members on my doctorate committee could not refute the evidence. All they asked is how do you fix the problem? So Chapter Five of my dissertation is how do you begin the transition in this process.

And actually the transition is quite simple. I think this issue is not hard to understand. It's just hard to believe. I mean to understanding, and once you understand, things can take place.

So what we have to ensure for myself as a professional, I am not an anarchist. I'm a person to maintain civility. I still am inherently a retired captain.

There is a way to fix this problem, yeah. And that is clear, but the rule of law has to apply. But there is a doctrine called necessity under international law that can resolve over a hundred years of noncompliance to the law. And that's what I cover in Chapter Five. But that's another issue.

Q. And perhaps one of the first places we can start is with the proper courts administering the proper law; is that correct?

A. It's really just the court administering the proper law so that people have a fair trial.

MR. KAIAMA: Thank you, Dr. Sai. I have no further questions.

THE COURT: Any cross-examination?

MR. PHELPS: Your Honor, the State has no questions of Dr. Sai. Thank you for his testimony. One Army officer to another, I appreciate your testimony.

THE WITNESS: 13 echo.

THE COURT: Thank you. You are excused.

Mr. Kaiama.

MR. KAIAMA: Thank you, your Honor. And I will try to be brief.

As you can see, your Honor, we did file the motion to dismiss for lack of subject matter jurisdiction and I also did file a supplemental memorandum.

In the motion in the supplemental memorandums I did provide exhibits. And the exhibits include Dr. Sai's curriculum vitae, and expert opinion briefs that he's written concerning much of what he's testified today.

Essentially our argument is this, your Honor. That with the exhibits that's been presented and the testimony of Dr. Sai, we now have met the requirements set forth under State of Hawaii versus Lorenzo.

We have provided the courts now with a factual and legal basis to conclude that the Hawaiian Kingdom continues to exist. Because we've met that burden under Lorenzo, we respectfully submit that the State has failed to meet its burden that this Court has jurisdiction under Nishitani versus Baker.

And given that we've met our burden and the State, respectfully, has not met theirs, our position simply, your Honor, is that the Court has no other alternative but to dismiss the case for lack of subject matter jurisdiction.

In the motion itself we did provide the Court with additional arguments. We did present the Court with the legal arguments as to the limits of Congressional enactments, and we've provided both Supreme Court cases. Curtiss-Wright versus United States Export (sic). I may have said that wrong. But talking about the limits, and

basically confirming that the joint resolution which attempted to annex the United States is not lawful and has no force and effect on Hawaiian territory.

And because of that, neither the Organic Act which formed the territory, or the Statehood Act which are both Congressional legislations, also have no force and effect on Hawaiian territory.

That being the case, your Honor, the United States never lawfully acquired a sovereignty over the Hawaiian territory.

In addition with Dr. Sai's testimony, his expert testimony, we've proven or clearly established that the Hawaiian Kingdom, in fact, was recognized as an independent nation as of 1843 and concluded a number of treaties. I believe over 90 treaties -- 46 treaties, a little over 90 countries, to further affirm its position as an independent nation.

With Dr. Sai's testimony, again once independence is established, it is the burden in this case of the United States or the State of Hawaii to prove that that continuity has been extinguished.

There is no evidence, and in all honesty, your Honor, in the four years that I've been arguing this motion there has not been any evidence to rebut the presumption of that continuity.

Finally, your Honor, I think it is important, and I do say this in all respect, that because of the evidence provided in this situation that the Court not only should be -- the Court should be dismissing the case for lack of subject matter jurisdiction, but also the argument is that, respectfully, the Court is not lawfully constituted under Hamsden -- Hamden versus Rumsfeld, because it is not administering the laws of the Hawaiian Kingdom.

Because we continue to be under a state of occupation, the rule of law which applies is the law of occupation. And the United States, in this case, presently as the occupier, should be administering Hawaiian Kingdom law.

By virtue of the fact that the prosecutor's office and the State has brought this case and sought to confer jurisdiction on the Court by Hawaii Revised Statutes, that the Court's retention of jurisdiction, with all respect, in light of the evidence that's been provided would, in fact, deprive my clients of a fair and regular trial, and would be a violation of the Geneva, the Hague, and other conventions that has been testified to by Dr. Sai.

Again, with all respect, your Honor, we think we've met our burden. We do not believe, in fact we are

certain, that the State has not met its burden to prove that this Court has jurisdiction.

And we would respectfully request -- I would respectfully request on behalf of my clients, Kaiula English and Mr. Robin Dudoit, that the Court dismiss their cases for lack of subject matter jurisdiction. Thank you, your Honor.

THE COURT: Mr. Phelps.

MR. PHELPS: Your Honor, the State will be brief.

We're going to ask that obviously you deny the defense motion to dismiss for lack of subject matter jurisdiction. We're going to submit on the memorandum that we submitted in opposition to it.

But the State will simply point out, we appreciate Dr. Sai's testimony. It was one of more impressive dissertations I've heard in awhile. And I do respect some of the points he's made.

But the case law is fairly clear on this, your Honor. This isn't a new argument. This isn't a novel argument. Courts have ruled that basically regardless of the legality of the overthrow of the Hawaiian Kingdom, Hawaii, as it is now, is a lawful, lawful state with a lawful court system and a lawful set of laws.

That anybody who avails themselves of this jurisdiction, they fall under the law, whether they want to claim to be a member of a sovereign kingdom or not, the law applies, your Honor. And for those reasons, we feel that you have no other choice but to deny this motion, your Honor.

I believe that the case law on this is fairly clear as laid out in our memorandum. All due respect to Mr. Kaiama and everybody who's here, we believe the courts have spoken, and we're simply going to ask that you take judicial recognition of the U.S. Constitution, the Hawaii Constitution, the Hawaii Revised Statutes, every law that basically this Court is mandated to follow, and deny his motion -- motions, actually.

THE COURT: Thank you.

MR. PHELPS: Thank you, your Honor.

MR. KAIAMA: Yes, your Honor. Briefly in response.

I know that the cases that the prosecutor relies on, your Honor, as a point of order, all of those cases in those decisions deal with personal immunity and personal jurisdiction.

So the question of subject matter jurisdiction has not been raised before this Court or before the appellate courts or nor has it been addressed.

I can tell you, your Honor, that I believe in 2012 I did take two cases up on appeal, bringing the same question before the Court and presenting the same legal analysis.

The ICA did not address the legal analysis in this case, and I don't know why. I might say they refused to address it, and, in fact, in both cases issued just a two page summary disposition order, really relying on the Kauwila case -- Kaulia case, excuse me. And the entirety of the Court's analysis or the holding in that is essentially what the prosecutor said. Is that despite or regardless of lawfulness of its orgins, this is the proper State of Hawaii.

Your Honor, I'm asking that this Court transcend that, and actually look into the analysis, and based on the analysis realize that what we're asking is the predicate question. Did the United States ever establish lawful acquisition of sovereignty here? And if they did not, then none of this legislative enactments can have any bearing on this Court.

And, essentially, Dr. Sai and the evidence that we provided has proved that. There is no dispute that the claim for statehood here of Hawaii is by way of a joint resolution. That's not undisputed. That's part of Congressional records.

It's also clear, based on the law, both the Supreme Court, by testimony by representatives and Congressmen in Congress at the time of 1898, and the testimony of the Attorney General in 1998 as well, I believe it was Douglas Kmiec, all call into question -- in fact, they don't call into question, basically affirm the fact that the Congress has no legislative powers beyond its own borders.

So what I'm asking the Court, your Honor, at this time, is that under its own law, Lorenzo is still the prevailing case.

So it still requires us to present that evidence for the Court to conclude relevant factual and legal evidence for the Court to conclude that the Hawaiian Kingdom continues to exist.

We've done that now. So we're presenting the Court with that analysis it hasn't had before, and we're asking the Court to transcend the lack of -- and I don't know how to say it, but I wish to say, respectfully, the lack of courage on the part of the Intermediate Courts of Appeals to actually address it and to address the legal analysis.

We're asking this Court to take a look at that and, again, once the Court is required or takes a look at that analysis, we assert and we firmly believe

that there is no other course but that my clients should prevail. Thank you, your Honor.

THE COURT: All right. Well, before the Court today is defendant English's motion to dismiss a criminal complaint pursuant to Hawaii Rules of Penal Procedure 12(1)(b) and the joinder that was filed by Mr. Dudoit joining in Mr. English's motion.

And as has been outlined by Mr. Kaiama, essentially the argument here, is that this Court lacks subject matter jurisdiction. As has also been pointed out by Mr. Kaiama in his remarks to the Court, he has brought this issue to our appellate courts in the past and has not achieved the result that he has sought through those arguments.

And, of course, as I'm sure everyone would acknowledge, this Court is a trial court and is subject to the rulings of our appellate courts. And what our appellate court has said, as has been acknowledged in Mr. Kaiama's arguments, has in (inaudible) stated that individuals claiming to be citizens of the Kingdom of Hawaii and not the State of Hawaii are not exempt from application of the laws of the State of Hawaii.

And Mr. Kaiama has argued on behalf of Mr. English and Mr. Dudoit that he's not of the view that the Court has -- the appellate courts have addressed the issue

that they wish to have addressed.

But, at any rate, these identical issues having been presented in the past, and the Court having ruled, and the appellate courts having ruled in a certain fashion, in the Court's view, at least for purposes of a trial court, resolves the question presented by the motion and joinder.

And, respectfully, the Court is of the view that based on everything that's been presented, that the Court does have subject matter jurisdiction and will -- will ask the question though. And that is that in your pleadings, although it was not discussed today, you asked the Court to take judicial notice of various documents, but you never said anything about it today.

MR. KAIAMA: Actually, your Honor, I would ask -- and thank you -- I would ask, because we did make the request and it's provided for in the motion itself, as well as the authorities, that the Court take judicial notice of the matters that were presented in the motion itself.

And that being, and a number of those are actually treaties between the Hawaiian Kingdom and United States, and they are part of the Congressional records to begin with.

And I think it's fairly clear from the law

that these kinds of treaties, there is a -- an obligation to take judicial notice of those treaties. That essentially was most of the request.

Now, we did also ask that the Court take -- request judicial notice of the Hague Conventions of 1907, the Geneva Conventions of 1949. Again, those are treaties that the United States is a contracting party to and it is part of U.S. law and part of Congressional records there. And --

THE COURT: Well, it -- I'm sorry, I thought you were finished.

MR. KAIAMA: Yeah. And, finally, the other parts that we did ask was that the Court take notice of the agreement -- assignment agreement with Liliuokalani and Grover Cleveland, as well as the restoration agreement between the the United States President and the Queen. Again, those are part of the Congressional records.

And, finally, we did ask the Court to take judicial notice of particular court rulings, that being Larsen versus the Hawaiian Kingdom, and that is part of the international law reports, and that's stated there. As well as the U.S. Supreme Court decisions in U.S. versus Belmont, U.S. versus Curtiss-Wright Export Corp, and State of Hawaii, which is -- State of Hawaii versus Lorenzo, which is the prevailing law in Hawaii.

Finally, I did ask the Court to take judicial notice of Dr. Sai's expert memorandum, which was attached as an exhibit. I still make that request, although I am aware that the courts have not necessarily granted the request, but I would still make the request on behalf of Mr. English and Mr. Dudoit.

THE COURT: The matters that you've requested by way of your written presentation to the Court are set forth in page 12 of the memorandum; correct?

MR. KAIAMA: Let me just double -- yes, I believe that is correct. That is on pages -- yes, page 12. Yes, page 12 of the memorandum.

THE COURT: Yeah, okay. What's the prosecution's position?

MR. PHELPS: No objection, your Honor.

THE COURT: All right. The Court will take -- there being no objection, the Court will take judicial notice as requested in writing on the documents and the matters requested on the last paragraph of page 12 of the memorandum in support of motion filed on February 6th, 2015.

And having considered all of that, the Court at this time is going to deny the motion and joinder to dismiss the criminal complaint in these cases.

And I'll ask Mr. Phelps to prepare the

appropriate order.

And thank all of you, your report and presentation today.

MR. KAIAMA: Thank you, your Honor.

MR. PHELPS: Thank you, your Honor.

THE CLERK: All rise, court stands in recess.

THE COURT: You know, actually we were -- yesterday during a pretrial, we were talking about the trial date.

MR. KAIAMA: Yes.

THE COURT: And --

MR. KAIAMA: My clients did sign the waiver.

THE COURT: You've done that already?

MR. KAIAMA: Yes.

THE COURT: Okay. Thank you.

(At which time the above-entitled proceedings were concluded.)

C E R T I F I C A T E

I, BETH KELLY, a Court Reporter do hereby certify that the foregoing pages 1 through 46 inclusive comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 20th day of March, 2015.

_____
BETH KELLY, RPR, CSR #235
Court Reporter

Enclosure “3”

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THE SWEEPING EFFECT OF HAWAIIAN SOVEREIGNTY AND THE NECESSITY OF MILITARY GOVERNMENT TO CURB THE CHAOS

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I. INTRODUCTION

We are now at 131 years of an American occupation of the Hawaiian Kingdom. There are two periods since the occupation began on 17 January 1893. The first period was when the national consciousness of the Hawaiian Kingdom was effectively obliterated in the minds of the population. The second period was when the government was restored as a Regency in 1997 up until the present where the national consciousness had begun to be restored. Underlying the first and second periods, however, was the non-compliance with the law of occupation under international humanitarian law, which the military calls the law of armed conflict. So, while the national consciousness in the minds of the population has begun to change, the United States and its proxy, the State of Hawai'i, has not changed in its unlawful authority.

If the American military in Hawai'i complied with the international law of occupation when Queen Lili'uokalani conditionally surrendered to the United States in 1893, the occupation would not have lasted 131 years. Consequently, everything since 1893 that derives from American authority, that would otherwise be valid within the territory of the United States, is invalid and void in Hawaiian territory because the United States has not been vested with Hawaiian sovereignty by a treaty. The only way to bring order to this calamity is by establishing a military government of Hawai'i where the American military governor has centralized command and control allowable under the law of occupation.

This article will explain the role and function of a military government that presides over occupied territory of a State under international law. And that it is only by a military government that remedial steps can be taken, considering 131 years of illegality, that has consequently placed the entire population of the occupied State in a dire situation where their possessions and rights have evaporated because of the United States unlawful conduct and actions under the law of occupation. Despite the deliberate failure to establish a military government, international law and American military law still obliges the occupant to do so that will eventually bring the American occupation to an end by a treaty of peace between the Hawaiian Kingdom and the United States.

II. THE SWEEPING EFFECT OF STATE SOVEREIGNTY DURING A PROLONGED OCCUPATION

The bedrock of international law is the sovereignty of an independent State. Sovereignty is defined as the "supreme, absolute, and uncontrollable power by which any independent state is governed."[1] For the purposes of international law, Wheaton explains:

> Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people or any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law [...], but which may be more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law [...], but may more properly be termed international law.[2]

In the *Island of Palmas* arbitration, which was a dispute between the United States and the Netherlands, the arbitrator explained that "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[3] And in the *S.S. Lotus* case, which was a dispute between France and Turkey, the Permanent Court of International Justice stated:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [treaty].[4]

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[1] Henry Campbell Black, *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), 1396.

[2] Henry Wheaton, *Elements of International Law*, 8th ed., (London: Sampson Low, Son, and Company, 1866), §20.

[3] *Island of Palmas* Case (Netherlands v. United States) 2 R.I.A.A. 838 (1928).

[4] *The Case of the S.S. "Lotus," judgment, Publications of the Permanent Court of International Justice, Collection of Judgments*, Series A, No. 70, 18 (7 Sep. 1927). Generally, on this issue see Arthur Lenhoff, "International Law and Rules on International Jurisdiction", *Cornell Law Quarterly* 50 (1964): 5.

The permissive rule under international law that allows one State to exercise authority over the territory of another State is Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention, that mandates the occupant to establish a military government to provisionally administer the laws of the occupied State until there is a treaty of peace. For the past 131 years, there has been no permissive rule of international law that allows the United States to exercise any authority in the Hawaiian Kingdom, which makes the prolonged occupation illegal under international law.

As the arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, noted in its award, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[5] The scope of Hawaiian sovereignty can be gleaned from the Civil Code. §6 states:

> The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.

Property within the territorial jurisdiction of the Hawaiian Kingdom includes both real and personal. Hawaiian sovereignty over the population, whether Hawaiian subjects or citizens or subjects of any foreign State, is expressed in the Penal Code. Under Chapter VI—Treason, the statute, which is in line with international law, states:

> 1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King's government, or the adhering to the enemies thereof, giving them aid and comfort, the same being done by a person owing allegiance to this kingdom.
>
> 2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
>
> 3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.
>
> 4. Ambassadors and other ministers of foreign states, and their alien secretaries, servants and members of their families, do not owe allegiance to this kingdom, though resident therein, and are not capable of committing treason against this kingdom.

[5] Larsen v. Hawaiian Kingdom, 119 *International Law Reports* 119 (2001): 581.

When the Hawaiian Kingdom Government conditionally surrendered to the United States forces on January 17, 1893, the action taken did not transfer Hawaiian sovereignty but merely relinquished control of Hawaiian sovereignty because of the American invasion and occupation. According to Benvenisti:

> The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation. [...] Because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee (emphasis added).[6]

The occupant's 'managerial powers' is exercised by a military government over the territory of the occupied State that the occupant is in effective control. The military government would need to be in effective control of the territory to effectively enforce the laws of the occupied State. Without effective control there can be no enforcement of the laws. The Hawaiian government's surrender on January 17, 1893, that transferred effective control over the territory of the Hawaiian Kingdom to the American military did not transfer Hawaiian sovereignty. U.S. Army regulations on this subject state, being "an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty (emphasis added)."[7]

When the Queen surrendered, it transferred temporary authority to the American military, the government apparatus also came under the control of the American military where the office of the Monarch would be replaced by the theater commander of U.S. forces who would be referred to as the military governor. All members of the executive and judicial branches of government would remain in place except for the legislative branch because the military governor "has supreme legislative, executive,

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[6] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed. (United Kingdom: Oxford University Press 2012), 6.

[7] U.S. Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956), para. 358.

and judicial authority, limited only by the laws and customs of war and by directives from higher authority."[8]

III. UNITED STATES PRACTICE DURING MILITARY OCCUPATION OF FOREIGN STATES

In a decisive naval battle off the coast of the Cuban city of Santiago de Cuba on July 3, 1898, the United States North Atlantic Squadron under the command of Rear Admiral William Sampson and Commodore Winfield Schley, defeated the Spanish Caribbean Squadron under the command of Admiral Pascual Cervera y Topete. After the surrender, the United States placed the city of Santiago de Cuba under military occupation and began to administer Spanish laws. The practice of the United States military occupying foreign territory prior to a treaty of peace can be gleaned from General Orders no. 101 issued by President William McKinley to the War Department on July 13, 1898. General Orders no. 101 stated:

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. … Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[9]

The Battle of Santiago de Cuba facilitated negotiations for a treaty of peace, called the Treaty of Paris, that was signed on August 12, 1898.[10] The Treaty of Paris came into effect on April 11, 1899, which ended the military occupation of the city of Santiago de Cuba, and Spanish law was replaced by American law.

When Japanese forces surrendered to the United States on September 2, 1945, Army General Douglas MacArthur transformed the Japanese civilian government into a military government with General MacArthur serving as the military governor. General MacArthur was ensuring the terms of the surrender were being met and he continued to administer Japanese law over the population. When the treaty of peace, called the

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[8] U.S. Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947), para. 3.

[9] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

[10] 30 U.S. Stat. 1742 (1898)

Treaty of San Francisco, came into effect on April 28, 1952, the military occupation came to an end.

After the defeat of the Nazi regime, Germany was divided into four zones of military occupation by the United States, the Soviet Union, France and Great Britain in July of 1945. In the American sector, Army General Dwight D. Eisenhower took over the German civilian government, as its military governor, by proclaiming the establishment of the Office of Military Government United States ("OMGUS"). The United States, French, and British zones of occupation were joined together under one authority in 1949 and the OMGUS was succeeded by the Allied High Commission ("AHC"). The AHC lasted until 1955 after the Federal Republic of Germany joined the North Atlantic Treaty Organization. The American zone of occupation of West Berlin, however, lasted until October 2, 1990, after the Treaty on the Final Settlement with Respect to Germany was signed on September 12, 1990. The treaty was signed by both East and West Germany, the United States, France, Great Britain and the Soviet Union.

In all three military occupations, the sovereignty of Spain, Japan, and Germany was not affected. However, Spanish sovereignty over Cuba ended by the Treaty of Paris, but Japanese sovereignty was uninterrupted by the Treaty of San Francisco, and German sovereignty was uninterrupted by the Treaty on the Final Settlement with Respect to Germany.

IV. THE DUTY TO ESTABLISH A MILITARY GOVERNMENT IN OCCUPIED TERRITORY

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by the law of armed conflict while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, from "a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction."[11]

The 1907 Hague Regulations assumed that after the occupant gains effective control it would establish its authority by establishing a system of direct administration. Since the Second World War, United States practice of a system of direct administration is for the Army to establish a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. This was acknowledged by letter from U.S.

[11] William E. Birkhimer, *Military Government and Martial Law*, 3rd ed. (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1914), 21.

President Roosevelt to Secretary of War Henry Stimson dated November 10, 1943, where the President stated, although "other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden."[12] Military governors that preside over a military government are general officers of the Army. Solidifying the role of the Army, U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority."

Under Article 43, the authority to establish a military government is not with the Occupying State, but rather with the occupant that is physically on the ground—colloquially referred to in the Army as "boots on the ground." Professor Benvenisti explains, this "is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the 'occupying State' as the authority in power, but the delegates preferred to change the reference to 'the occupant.' This insistence on the distinct character of the occupation administration should also be kept in practice."[13] This authority is triggered by Article 42 that states, territory "is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Only an "occupant," which is the "army," and not the Occupying State, can establish a military government.

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals—FM 27-10, *The Law of Land Warfare*, and FM 27-5, *Civil Affairs Military Government*. Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states, military "occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."

According to the U.S. Manual for Court-Martial United States, it states that the duty to establish a military government may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.[14] A military government is the civilian government of the Occupied State. It is not a government comprised of the military. The

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[12] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany* 1944-1946 (Washington D.C.: Center of Military History United States Army, 1975), 22.

[13] Benvenisti, 5.

[14] U.S. Department of Defense, *Manual for Courts-Martial United States*, 2024 ed., IV-28.

practice of the United States is to establish a military government after the surrender by the government of the Occupied State. Since the Second World War, it is the sole function of the Army to establish a military government to administer the laws of the occupied State until there is a treaty of peace that will bring the military occupation to an end. Here follows the treaties and regulations to establish a military government in occupied territory:

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority."

- U.S. Department of Defense Directive 2000.13 states that "Civil affairs operations include…[e]stablish and conduct military government until civilian authority or government can be restored."

- Para. 11.4, Department of Defense Law of War Manual states that "Military occupation of enemy territory involves a complicated, trilateral set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of occupied territory. The fact of occupation gives the Occupying Power the right to govern enemy territory temporarily, but does not transfer sovereignty over occupied territory to the Occupying Power."

- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions obliges the occupant to administer the laws of the occupied State, after securing effective control of the territory according to Article 42 of the 1907 Hague Regulations.

- Para. 2-37, Army Field Manual 41-10, states that all "commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949."

- Para. 3, Army Field Manual 27-5, stating the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."

- Para. 62, Army Field Manual 27-10, states that "[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory."

- Para. 2-18, Army Field Manual 3-57, states that "DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations]."

Under the Uniform Code of Military Justice, the failure to establish a military government would invoke two offenses under Article 92. Under Article 92(1) for failure to obey order or regulation, and Article 92(3) for dereliction in the performance of duties. The maximum punishment for an Article 92(1) offense is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years. The maximum punishment for an Article 92(3) offense is bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. These two offenses also constitute the war crime by omission under international law.

V. FROM A BRITISH PROTECTORATE TO A SOVEREIGN AND INDEPENDENT STATE

In an agreement between King Kamehameha I and Captain George Vancouver on February 25, 1794, the Kingdom of Hawai'i[15] joined the international community of States as a British Protectorate.[16] By 1810, the Kingdoms of Maui and Kaua'i were consolidated under Kamehameha I whose kingdom was thereafter called the Kingdom of the Sandwich Islands. In 1829, Sandwich Islands was replaced with Hawaiian Islands. According to Captain Finch of the U.S.S. Vincennes who was attending a meeting of King Kamehameha III and the Council of Chiefs, the "Government and Natives generally have dropped or do not admit the designation of Sandwich Islands as applied to their possessions; but adopt and use that of Hawaiian; in allusion to the fact of the whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was the Chief of the principal Island of Owhyhee, or more modernly Hawaii."[17] The Kingdom of the Hawaiian Islands eventually became known as the Hawaiian Kingdom.

Government reform from an absolute to a constitutional monarchy began on October 8, 1840, when the first constitution was proclaimed by King Kamehameha III. Government reform continued, which led Great Britain and France to jointly recognize the Hawaiian Kingdom as an "independent State" on November 28, 1843.[18] By this proclamation, Great Britain

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[15] The term Kingdom of Hawai'i, is used to distinguish it from the Kingdom of Maui and the Kingdom of Kaua'i that co-existed at the time.

[16] George Vancouver, *A Voyage of Discovery to the North Pacific Ocean and Round the World*, vol. 3, (London: G. G. and J. Robinson, and J. Edwards, 1798), 56. "Mr. Puget, accompanied by some of the officers, immediately went on shore; there displayed the British colours, and took possession of the island in His Majesty's name, in conformity to the inclinations and desire of *Tamaahmaah* [Kamehameha] and his subjects."

[17] "Capt. Finch's Cruise in the U.S.S. Vincennes," U.S. Navy Department Archives.

[18] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* (Washington: Government Printing Office, 1895), 120, ("Executive Documents"). "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich [Hawaiian] Islands as an Independent State, and never to take

terminated its possession of external sovereignty over the Hawaiian Islands as a British Protectorate and recognized the internal sovereignty of the Hawaiian Kingdom. Both external and internal sovereignty was vested in the Hawaiian Kingdom. The United States followed and recognized the "independence" of the Hawaiian Kingdom on July 6, 1844.

While all three States recognized Hawaiian independence, it was Great Britain, being vested with the external sovereignty by cession from King Kamehameha I in 1794, that mattered. This transfer of external sovereignty by the proclamation made the Hawaiian Kingdom a successor State to Great Britain. The recognitions by France and the United States were merely political and not legally necessary for the Hawaiian Kingdom to be admitted into the Family of Nations. Thus, the legal act necessary for the United States to obtain its external sovereignty from Great Britain was the 1783 Treaty of Paris that ended the American revolution. Article 1 states:

> His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof.

VI. HAWAIIAN SOVEREIGNTY UNAFFECTED BY MILITARY OCCUPATION

By orders of the U.S. resident Minister John Stevens, on January 16, 1893, a "detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu. The men upwards of 160, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[19] President Grover Cleveland determined, after a Presidential investigation, that this "military demonstration upon the soil of Honolulu was of itself an act of war."[20] He also concluded that the overthrow of the Hawaiian Government the following day on January 17th was also an "act of war."[21] President Cleveland concluded:

> Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the

possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed."

[19] Executive Documents, 451.

[20] *Id.*

[21] *Id.*, 456.

> 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 on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.[22]

Because international law provides for the presumption of State continuity in the absence of its government, the burden of proof shifts as to what must be proven and by whom. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations…despite a period in which there is no, or no effective, government,"[23] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[24] Addressing the presumption of the German State's continued existence, despite the military overthrow of the German Reich, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence. The very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty. A similar case, recognized by the customary law for a very long time, is that of the belligerent occupation of enemy territory in time of war. The important features of "sovereignty" in such cases are the continued legal existence of a legal personality and the attribution of territory to that legal person and not to holders for the time being.[25]

"If one were to speak about a presumption of continuity," explains Professor Craven, "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, absent of which the

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[22] *Id.*, 452.

[23] James Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford: Clarendon Press, 2007), 34.

[24] *Id.*

[25] Brownlie, 109.

presumption remains."[26] Evidence of 'a valid demonstration of legal title, or sovereignty, on the part of the United States' would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[27] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[28] There is no treaty of peace between the Hawaiian Kingdom and the United States, and, therefore, sovereignty remains vested in the Hawaiian Kingdom even as an Occupied State.

Since 1893, the United States has been exercising its authority over Hawaiian territory without any 'permissive rule derived from international custom or from a convention (treaty).' The actions taken by the provisional government and the Republic of Hawai'i are unlawful because they were puppet governments established by the United States. President Cleveland sealed this fact when he informed the Congress on December 18, 1893, that the "provisional government owes its existence to an armed invasion by the United States."[29] This status did not change when the insurgents changed their name to the Republic of Hawai'i on July 4, 1894. According to Professor Marek:

> From the status of the puppet governments as organs of the occupying power the conclusion has been drawn that their acts should be subject to the limitation of the Hague Regulations. The suggestion, supported by writers as well as by decisions of municipal courts, seems at first both logical and convincing. For it is true that puppet governments are organs of the occupying power, and it is equally true that the occupying power is subject to the limitations of the Hague Regulations. But the direct actions of the occupant himself are included in the inherent legality of belligerent occupation, whilst the very creation of a puppet government or State is itself an illegal act, creating an illegal situation. Were the occupant to remain within the strict limits laid down by international law, he would never have recourse to the formation of puppet governments or States. It is therefore not to be assumed that puppet governments will conform to the Hague Regulations; this the occupant can do himself; for this he does not need a puppet. The very aim of the

[26] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 128, accessed October 17, 2024, https://hawaiiankingdom.org/royal-commission.shtml.

[27] 9 Stat. 922 (1848).

[28] 30 Stat. 1754 (1898).

[29] Executive Documents, 454.

> latter, as has already been seen, is to enable the occupant to act in *fraudem legis*, to commit violations of the international regime of occupation in a disguised and indirect form, in other words, to disregard the firmly established principle of the identity and continuity of the occupied State. Herein lies the original illegality of puppet creations.[30]

From January 17, 1893, to July 7, 1898, the United States has been unlawfully exercising its power, indirectly, over the territory of the Hawaiian State, through its puppet governments. From the purported annexation of the Hawaiian Islands by a congressional joint resolution on July 7, 1898, to the present, the United States has been directly exercising unlawful authority over the territory of the Hawaiian State. How does international law and the law of occupation see this unlawful exercise of authority? If the United States, to include the State of Hawai'i, has no lawful authority to exercise its power in Hawaiian territory, then everything that derives from its unlawful authority is invalid in the eyes of international law. This comes from the rule of international law *ex injuria jus non oritur*, which is Latin for "law (or right) does not arise from injustice." This international rule's "coming of age" is traced to the latter part of the nineteenth century,[31] and was acknowledged by President Cleveland in his message to the Congress on December 18, 1893, where he stated:

> As I apprehend the situation, we are brought face to face with the following conditions:
>
> The lawful Government of Hawaii was overthrown without a drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.
>
> But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.
>
> But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.
>
> But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have

[30] Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie Droz, 1968), 115.

[31] Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Irvington-on-Hudson New York: Transnational Publishers, Inc., 1993), 43-45.

> proclaimed the provisional government from the steps of the Government building.
>
> And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.
>
> Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.[32]

From this international rule—*ex injuria jus non oritur*, when applied to an Occupied State, springs forth another rule of international law called *postliminium*, where all unlawful acts that an Occupying State may have been done in an occupied territory, are invalid and cannot be enforced when the occupation comes to an end. According to Professor Oppenheim, if "the occupant has performed acts which are not legitimate acts [allowable under the law of occupation], postliminium makes their invalidity apparent."[33] Professor Marek explains:

> Thus, the territory of the occupied State remains exactly the same and no territorial changes, undertaken by the occupant, can have any validity. In other words, frontiers remain exactly as they were before the occupation. The same applies to the personal sphere of validity of the occupied State; in other words, occupation does not affect the nationality of the population, who continues to owe allegiance to the occupied State. There can hardly be a more serious breach of international law than forcing the occupant's nationality on citizens of the occupied State.[34]

This rule of international law renders everything stemming from American laws and administrative measures null and void, *e.g.* land titles, business registrations, court decisions, incarcerations, and taxation. Regarding land titles, there were no lawful notaries after January 17, 1893, to notarize

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[32] Executive Documents, 455-456.

[33] L. Oppenheim, *International Law—A Treatise*, vol. II, War and Neutrality, 2nd ed. (London: Paternoster Row, 1912), §283.

[34] Marek, 83.

transfers of title throughout the Hawaiian Islands. This renders all titles that were acquired after January 17, 1893, void, and not voidable.[35]

VII. THE LAW OF ARMED CONFLICT PROHIBITS ANNEXATION OF THE OCCUPIED STATE

The United States purportedly annexed the Hawaiian Islands in 1898 by unilaterally enacting a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[36] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to Professor Roberts, even where a "whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right of annexation."[37] Therefore, because the Hawaiian Kingdom retained the sovereignty of the State despite being occupied, only the Hawaiian Kingdom could cede its sovereignty and territory to the United States by way of a treaty of peace. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[38] International law does not permit annexation of territory of another state.[39]

Furthermore, in 1988, the U.S. Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[40] The OLC concluded that only the President,

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[35] See David Keanu Sai, "Setting the Record Straight on Hawaiian Indigeneity," *Hawaiian Journal of Law and Politics* 3 (2021): 14-16.

[36] 30 Stat. 750 (1898).

[37] Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights," *American Journal of International Law* 100(3) (2006): 580, 583.

[38] There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

[39] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), Section 525, 242.

[40] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," *Opinions of the Office of Legal Counsel* 12 (1988): 238.

and not the Congress, possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[41] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[42] and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[43] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[44]

That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC investigated whether it could be accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional 9 miles by statute because its authority was limited up to the 3-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[45]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[46] Professor Willoughby also stated that the "incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is…essentially a matter falling

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[41] *Id.*, 242.

[42] *Id.*.

[43] *Id.*

[44] *Id.*, 262.

[45] *The Apollon*, 22 U.S. 362, 370 (1824).

[46] Kmiec, 252.

within the domain of international relations, and, therefore, beyond the reach of legislative acts."[47] According to Professor Lenzerini:

> [I]ntertemporal-law-based perspective confirms the illegality—under international law—of the annexation of the Hawaiian Islands by the US. In fact, as regards in particular the topic of military occupation, the affirmation of the *ex injuria jus non oritur* rule predated the Stimson doctrine, because it was already consolidated as a principle of general international law since the XVIII Century. In fact, "[i]n the course of the nineteenth century, the concept of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied territory, the fate of which could be determined only by a peace treaty"; in other words, "the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory."[48]

Therefore, despite the prolonged nature of the American occupation, the Hawaiian Kingdom legal status under international law remained undisturbed. Under customary international law, the Hawaiian Kingdom continues to exist as a State despite its government being unlawfully overthrown by the United States on January 17, 1893.

VIII. RESTORATION OF THE HAWAIIAN GOVERNMENT AND THE RECOGNITION OF THE CONTINUITY OF THE HAWAIIAN STATE BY THE PERMANENT COURT OF ARBITRATION

According to Professor Rim, the State continues "to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain."[49] In 1997, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in similar fashion to governments established in exile during the Second World War.[50] By virtue of this

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[47] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1 (New York: Baker, Vooris and Company, 1910), 345.

[48] Federico Lenzerini, "Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying wit the Supreme Imperative of Suppressing 'Acts of Aggression or other Breaches of the Peace' à la carte?," *International Review of Contemporary Law* 6(2) (June 2024): 64.

[49] Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," *European Journal of International Law* 20(20) (2021): 4.

[50] David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 18-23; see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," *Hawaiian Journal of Law and Politics* 3 (2021): 317-333.

process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[51]

Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. While the last Executive Monarch was Queen Lili'uokalani who died on November 11, 1917, the office of the Monarch remained vacant under Hawaiian constitutional law. The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and third, prepare for an effective transition to a *de jure* government when the occupation ends.

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on July 6, 1844,[52] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[53] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, where "a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[54]

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[51] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum* (1893): 390.

[52] U.S. Secretary of State Calhoun to Hawaiian Commissioners (July 6, 1844), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/US_Recognition.pdf.

[53] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* (New York: St. Martin's Press, 1997), 26.

[54] *Restatement of the Law Third, The Foreign Relations Law of the United States* (Philadelphia, Pennsylvania: American Law Institute, 1987), §203, comment c.

On November 8, 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration. Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes. This brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of customary international law that apply to established States must be considered, and not the rules of that would apply to new States such as the case with Palestine. The issue before the PCA was not the recognition of Hawaiian Statehood, but rather recognition of the "continuity" of Hawaiian Statehood since the nineteenth century. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of…States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[55]

After the PCA verified the continued existence of the Hawaiian State, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity" in its case repository.[56] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

> 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 (emphasis added).[57]

[55] Lenzerini, *Legal Opinion*, 322.

[56] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, accessed October 17, 2024, https://pca-cpa.org/en/cases/35/.

[57] *Id.*

It should also be noted that the United States, by its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.[58] This agreement also constitutes explicit recognition by the United States of the continued existence of the Hawaiian Kingdom and the Council of Regency as its government.

IX. AS AN AMERICAN PUPPET REGIME, THE ROLE OF THE ADJUTANT GENERAL

The military force of the provisional government was not an organized unit or militia but rather armed insurgents under the command of John Harris Soper. Soper attended a meeting of the leadership of the insurgents, calling themselves the Committee of Safety, in the evening of January 16, 1893, where he was asked to command the armed wing of the insurgency. Although Soper served as Marshal of the Hawaiian Kingdom under King Kalākaua, he admitted in an interview with U.S. Special Commissioner James Blount on June 17, 1893, who was investigating the overthrow of the Hawaiian Kingdom government by direction of U.S. President Grover Cleveland, that he "was not a trained military man, and was rather adverse to accepting the position [he] was not especially trained for, under the circumstances, and that [he] would give them an answer on the following day; that is, in the morning."[59] Soper told Special Commissioner Blount he accepted the offer after learning that "Judge Sanford Dole [agreed] to accept the position as the head of the [provisional] Government."[60] The insurgency renamed the Hawaiian Kingdom's Royal Guard to the National Guard by *An Act to Authorize the Formation of a National Guard* on January 27, 1893.[61] Soper was thereafter commissioned by the insurgents as Colonel to command the National Guard and was called the Adjutant General.

Under international law, the provisional government was an armed force of the United States in effective control of Hawaiian territory since April 1, 1893, after the departure of U.S. troops. As an armed proxy of the United States, they were obliged to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty was negotiated and agreed upon between the United States and the Hawaiian Kingdom. As a matter of fact, and law, it would have been Soper's duty to head the military government as its military governor after President Cleveland completed

[58] Sai, *The Royal Commission of Inquiry*, 25-26.

[59] Executive Documents, 972.

[60] *Id.*

[61] *An Act to Authorize the Formation of a National Guard,* Laws of the Provisional Government of the Hawaiian Islands (1893), 8.

his investigation of the overthrow of the Hawaiian Kingdom government and notified the Congress on December 18, 1893. A military government was not established under international law but rather the insurgency maintained the facade that they were a *de jure* government.

The insurgency changed its name to the Republic of Hawai'i on July 4, 1894. Under *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard* of August 13, 1895, the National Guard was reorganized and commanded by the Adjutant General that headed a regiment of battalions with companies who were comprised of American citizens.[62]

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on April 30, 1900,[63] the Act of 1895 continued in force. According to section 6 of the Act of 1900, "the laws not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." Soper continued to command the National Guard as Adjutant General until April 2, 1907, when he retired. The Hawai'i National Guard continued in force under *An Act To provide for the admission of the State of Hawaii into the Union* enacted by the U.S. Congress on March 18, 1959.[64] The State of Hawai'i governmental infrastructure is the civilian government of the Hawaiian Kingdom.

Article V of the State of Hawai'i Constitution provides that the Governor is the Chief Executive of the State of Hawai'i. He is also the Commander-in-Chief of the Army and Air National Guard and appoints the Adjutant General who "shall be the executive head of the department of defense and commanding general of the militia of the State."[65] Accordingly, the "adjutant general shall perform such duties as are prescribed by law and such other military duties consistent with the regulations and customs of the armed forces of the United States [...]."[66] In other words, the Adjutant General operates under two regimes of law, that of the State of Hawai'i and that of the United States Department of Defense.

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[62] *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard*, Laws of the Republic of Hawaii (1895), 29.

[63] An Act To provide a government for the Territory of Hawaii, 31 Stat. 141 (1900).

[64] An Act To provide for the admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).

[65] Hawai'i Revised Statutes, §121-7.

[66] *Id.*, §121-9.

The State of Hawai'i Constitution is an American municipal law that was approved by the Territorial Legislature of Hawai'i on May 20, 1949 under *An Act to provide for a constitutional convention, the adoption of a State constitution, and appropriating money therefor*. The Congress established the Territory of Hawai'i under *An Act To provide a government for the Territory of Hawaii*, on April 30, 1900.[67] The constitution was adopted by a vote of American citizens, that included those Hawaiian subjects that were led to believe they were American citizens as a result of the war crime of denationalization, in the election throughout the Hawaiian Islands held on November 7, 1950. The State of Hawai'i Constitution came into effect by *An Act To provide for the admission of the State of Hawaii into the Union* passed by the Congress on March 18, 1959.[68]

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, "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."[69] The Court also concluded that the "laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[70] Therefore, the State of Hawai'i cannot claim to be a *de jure*—lawful government because its only claim to authority derives from American legislation that has no extraterritorial effect. And under international law, the United States "may not exercise its power in any form in the territory of another State."[71] To do so, according to Professor Schabas, is the war crime of usurpation of sovereignty during occupation.[72]

"The occupant," according to Professor Sassòli, "may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation." Professor Sassòli further explains that the "expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in

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[67] 31 Stat. 141 (1900).

[68] 73 Stat. 4 (1959).

[69] United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).

[70] *The Apollon*, 22 U.S. 362, 370 (1824).

[71] *Lotus* case, 18.

[72] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," *Hawaiian Journal of Law and Politics* 3 (2021): 340, accessed October 17, 2024, https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf.

territories of common law tradition), as well as administrative regulations and executive orders."[73]

All authority of the State of Hawai'i is by virtue of American laws, which constitutes war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of Hawai'i is invalid because it never legally existed in the first place. What remains valid, however, is the authority of the State of Hawai'i Department of Defense, which is its Army and Air National Guard. The authority of both branches of the military continues as members of the United States Armed Forces that are situated in occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the U.S. Army.

As the occupant in effective control of most of the territory of the Hawaiian Kingdom at 10,931 square miles, while the U.S. Indo-Pacific Combatant Command is in effective control of less than 500 square miles, the Army National Guard is vested with the authority to transform the State of Hawai'i into a Military Government of Hawai'i forthwith. Enforcement of the laws of an occupied State requires the occupant to be in effective control of territory so that the laws can be enforced. The current Adjutant General is an Army general officer and not an Air Force general officer.

X. PREPARING FOR THE TRANSFORMATION OF THE STATE OF HAWAI'I INTO A MILITARY GOVERNMENT OF HAWAI'I

According to Professor Paulsen, the constitution of necessity "properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results."[74] U.S. President Abraham Lincoln was the first to invoke the principle of constitutional necessity, or in his words "indispensable necessity." President Lincoln determined his duty to preserve, "by every indispensable means, that government—that nation—of which the constitution was the organic law."[75] In his letter to U.S. Senator Hodges, President Lincoln explained the theory of constitutional necessity.

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[73] Marco Sassòli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century," *International Humanitarian Law Research Initiative* (2004), 6, accessed October 17, 2024, https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf.

[74] Michael Stokes Paulsen, "The Constitution of Necessity," *Notre Dame L. Rev.* 79(4) (2004): 1268.

[75] Letter from Abraham Lincoln, U.S. President, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *Abraham Lincoln: Speeches and Writings 1859-65*, Don E. Fehrenbacher (ed.) (New York, Library of America, 1989), 585-86.

> By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.[76]

Like the United States, the Hawaiian Kingdom is a constitutional form of governance whereby the 1864 Constitution, as amended, limits governmental powers. The American republic's constitution is similar yet incompatible to the Hawaiian monarchical constitution. The primary distinction is that the former establishes the functions of a republican form of government, while the latter establishes the function of a constitutional monarchy. Both adhere to the separation of powers doctrine of the executive, legislative and judicial branches. Where they differ as regards this doctrine, however, is in the aspect that the American constitution provides separate but equal branches of government, while the Hawaiian constitution provides for separate but coordinate branches of government, whereby the Executive Monarch retains a constitutional prerogative to be exercised in extraordinary situations within the confines of the constitution.

Under the American construction of separate but equal, the Congress, as the legislative branch, can paralyze government if it does not pass a budget for government operations, and the President, as head of the executive branch, can do nothing to prevent the shutdown. On the contrary, the Hawaiian Kingdom's executive is capable of intervention by constitutional prerogative should the occasion arise, as it did occur in 1855.

In that year's legislative session, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget. King Kamehameha IV explained that "the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about $200,000, which Bill we could not sanction."[77] After the House of Nobles "repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed it Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people

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[76] *Id.*

[77] Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* (Honolulu, Hawaiian Gazette, 1918), 62.

in the Kingdom."[78] A new election for Representatives occurred and the Legislative Assembly was reconvened in special session and a budget passed.

Under Article 24 of the 1864 Constitution, the Executive Monarch took the following oath: "I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith." The Ministers, however, took another form of oath: "I solemnly swear in the presence of Almighty God, that I will faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties of [Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General]."

Lincoln viewed the source of constitutional necessity as arising from the oath taken by the executive chief, whereby the duty for making "constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—[is] in the President of the United States, whose special sworn duty the Constitution makes it to 'preserve, protect and defend the Constitution of the United States.'"[79] The operative word for the Executive Monarch's oath of office is "to maintain the Constitution of the Kingdom whole and inviolate." Inviolate meaning free or safe from injury or violation. The Hawaiian constitution is the organic law for the country.

XI. EXERCISING THE CONSTITUTIONAL PREROGATIVE WITHOUT A MONARCH

In 1855, the Monarch exercised his constitutional prerogative to keep the government operating under a workable budget, but the king also kept the country safe from injury by an unwarranted increase in taxes. The duty for making constitutional decisions in extraordinary situations, in this case as to what constitutes the provisional laws of the country during a prolonged and illegal belligerent occupation, stems from the oath of the Executive Monarch. The Council of Regency serves in the absence of the Monarch; it is not the Monarch and, therefore, cannot take the oath.

The Cabinet Ministers that comprise the Council of Regency have taken their individual oaths to "faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties" of their offices, but there is no prerogative in their oaths to "maintain the Constitution of the Kingdom whole and inviolate." Therefore, this prerogative must be construed to be inherent in Article 33 when the Cabinet Council serves as the Council of Regency, "who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King." The Monarch's

[78] *Id.*

[79] Paulsen, 1258.

constitutional prerogative is in its "Powers" that the Council of Regency temporarily exercises in the absence of the Monarch. Therefore, the Council of Regency has the power "to maintain the Constitution of the Kingdom whole and inviolate," and, therefore, provisionally legislate, through proclamations, for the protection of Hawaiian subjects during the American military occupation.

XII. LEGAL STATUS OF AMERICAN MUNICIPAL LAWS IN THE HAWAIIAN KINGDOM

Under public international law, American municipal laws being imposed in the Hawaiian Kingdom are not laws but rather situations of facts. Within the Hawaiian constitutional order, this distinction between situations of facts and Hawaiian law is fundamental so as not to rupture the Hawaiian legal system in this extraordinary and extralegal situation of a prolonged military occupation.

As Professor Dicey once stated, "English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country."[80] Any right acquired under American municipal laws that have been unlawfully imposed within the territory of the Hawaiian Kingdom, being a situation of fact and not law, must be recognized by Hawaiian law. Without it being acquired under Hawaiian law, there is no right to be recognized. Before any right can be claimed, American municipal laws must first be transformed from situations of facts into provisional laws of the Hawaiian Kingdom.

Because the State of Hawai'i Constitution and its Revised Statutes are situations of facts and not laws, they have no legal effect within Hawaiian territory. Furthermore, the State of Hawai'i Constitution is precluded from being recognized as a provisional law of the Hawaiian Kingdom, pursuant to the 2014 Proclamation by the Council of Regency recognizing certain American municipal laws as the provisional laws of the Kingdom, because the 1864 Hawaiian Constitution, as amended, remains the organic law of the country and the State of Hawai'i Constitution is republican in form.[81] As such, all officials that have taken the oath of office under the State of Hawai'i Constitution, to include the Governor and his staff, cannot claim lawful authority without committing the war crime of *usurpation of sovereignty during military occupation* with the exception of the Adjutant General who also operates under U.S. Army doctrine and regulations.

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[80] A.V. Dicey, *The Conflict of Laws*, 6th ed., (London: Stevens and Sons, Ltd., 1949), 12.

[81] Council of Regency, *Proclamation of Provisional Laws* (10 Oct. 2014), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf; see also David Keanu Sai, *Memorandum on the Formula to Determine Provisional Laws* (22 March 2023), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Memo_Provisional_Laws_Formula.pdf.

Since the Council of Regency recognized, by proclamation on June 3, 2019, "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,"[82] the State of Hawai'i and its Counties, however, did not take the necessary steps to comply with international humanitarian law by transforming itself into a military government. This omission consequently led to war criminal reports, subject to prosecution, by the Royal Commission of Inquiry finding the senior leadership of the United States, State of Hawai'i, and County governments guilty of committing the war crimes of *usurpation of sovereignty during military occupation*, *deprivation of a fair and regular trial* and *pillage*.[83]

In determining which American municipal laws, being situation of facts, would constitute a provisional law of the kingdom, the following questions need to be answered. If any question is answered in the affirmative, except for the last question, then it will not be considered a provisional law.

> 1. The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?
>
> 2. Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.
>
> 3. If the American municipal law has no comparison to Hawaiian Kingdom law, would it run contrary to the Hawaiian Kingdom's police power?
>
> 4. If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?
>
> 5. Does the American municipal law infringe vested rights secured under Hawaiian law?
>
> 6. And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

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[82] Council of Regency, *Proclamation Recognizing the State of Hawai'i and its Counties* (June 3, 2019), accessed October 17, 2024, https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf.

[83] Website of the Royal Commission of Inquiry, accessed October 17, 2024, https://hawaiiankingdom.org/royal-commission.shtml.

XIII. CUSTOMARY INTERNATIONAL LAW CONCLUDES THE HAWAIIAN KINGDOM CONTINUES TO EXIST

The continuity of Hawaiian Statehood is a matter of customary international law, and is evidenced by two legal opinions, one by Professor Craven[84] and the other by Professor Lenzerini.[85] Furthermore, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law as evidenced by the legal opinion of Professor Schabas.[86] These writings are considered from "the most highly qualified publicists," and as such, a source of customary international law. Thus, under customary international law, the Hawaiian Kingdom continues to exist and that war crimes are being committed throughout its territory.

Article 38 of the Statute of the International Court of Justice identifies five sources of international law: (a) treaties between States; (b) customary international law derived from the practice of States; (c) general principles of law recognized by civilized nations; and, as subsidiary means for the determination of rules of international law; (d) judicial decisions; and (e) the writings of "the most highly qualified publicists." These writings by Professors Craven, Lenzerini, and Schabas are from "the most highly qualified publicists," and are, therefore, a source of customary international law.

According to Professor Shaw, "Because of the lack of supreme authorities and institutions in the international legal order, the responsibility is all the greater upon publicists of the various nations to inject an element of coherence and order into the subject as well as to question the direction and purposes of the rules."[87] Therefore, "academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules."[88] As the U.S. Supreme Court explained in the *Paquette Habana* case:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,

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[84] Matthew Craven, "Continuity of the Hawaiian Kingdom," *Hawaiian Journal of Law and Politics* 1 (2004): 508, accessed October 17, 2024, https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf.

[85] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," *Hawaiian Journal of Law and Politics* 3 (2021): 317, accessed October 17, 2024, https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf.

[86] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," *Hawaiian Journal of Law and Politics* 3 (2021): 334.

[87] Malcolm N. Shaw QC, *International Law*, 6th ed., (New York: Cambridge University Press, 2008), 113.

[88] *Id.*, 71.

> as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is* (emphasis added).[89]

As a source of international law, the legal opinions establish a legal foundation, under customary international law, that the Hawaiian Kingdom continues to exist as a State, and that the State of Hawai'i Adjutant General is obligated to transform the State of Hawai'i into a military government despite 131 of non-compliance with the law of occupation and U.S. Army regulations.

XIV. CONCLUSION

The legal foundation is set for the State of Hawai'i to be transformed into the Military Government of Hawai'i. The path to compliance with international law began with the Permanent Court of Arbitration in 1999 recognizing, under customary international law, the continued existence of Hawaiian Kingdom Statehood and the Council of Regency as its provisional government. The Regency's three-phase strategic plan set in motion the path to compliance.[90]

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

According to Professor Lenzerini, in his legal opinion, based on the doctrine of necessity, "the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[91] He also concluded that the Regency "has the authority to represent the Hawaiian Kingdom as a State, which has been under a

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[89] *The Paquete Habana*, 175. U.S., 677, 700 (1900).

[90] Council of Regency, *Strategic Plan* (September 26, 1999), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf.

[91] Lenzerini, *Legal Opinion*, 324.

belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level."[92]

After all four offices of the Cabinet Council were filled on September 26, 1999, a strategic plan was adopted based on its policy: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and, third, prepare for an effective transition to a completely functioning government when the occupation comes to end. The Council of Regency's strategic plan has three phases to carry out its policy.

> Phase I: Verification of the Hawaiian Kingdom as an independent State and subject of International Law
>
> Phase II: Exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.
>
> Phase III: Restoration of the Hawaiian Kingdom as an independent State and a subject of International Law, which is when the occupation comes to an end.

This grand strategy of the Council of Regency is long term, not short term, and can be compared to China's grand strategy, which is also long term. According to Professors Leverett and Bingbing:

> What is grand strategy, and what does it mean for China? In broad terms, grand strategy is the culturally shaped intellectual architecture that structures a nation's foreign policy over time. It is, in Barry Posen's aphoristic rendering, "a state's theory of how it can best 'cause' security for itself." Put more functionally, grand strategy is a given political order's template for marshalling all elements of national power to achieve its self-defined long-term goals. Diplomacy—a state's capacity to increase the number of states ready to cooperate with it and to decrease its actual and potential adversaries—is as essential to grand strategy as raw military might. So too is economic power. For any state, the most basic goal of grand strategy is to protect that state's territorial and political integrity. Beyond this, the grand strategies of important states typically aim to improve their relative positions by enhancing their ability to shape strategic outcomes, maximize their influence, and bolster their long-term economic prospect.[93]

Phase I was completed when the PCA acknowledged the continued existence of the Hawaiian Kingdom as a State for the purposes of its

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[92] *Id.*, 325.

[93] Flynt Leverett and Wu Bingbing, "The New Silk Road and China's Evolving Grand Strategy," *The China Journal* 77 (2017): 112.

institutional jurisdiction prior to forming the arbitration tribunal on June 9, 2000. The notice of arbitration was filed with the PCA by Larsen on November 8, 1999. The Hawaiian Kingdom's invitation to the United States, on March 3, 2000, to join in the arbitration proceedings occurred "after" the PCA already acknowledged the continued existence of Hawaiian Kingdom Statehood and the Council of Regency as its government.[94]

The State of Hawai'i Adjutant General will be guided in the establishment of a military government by the Royal Commission of Inquiry's memorandum on bringing the American occupation of Hawai'i to an end by establishing an American military government (June 22, 2024),[95] and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).[96]

[94] David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 25.

[95] Royal Commission of Inquiry, *Memorandum on bringing the American occupation of Hawai'i to an end by establishing an American Military Government* (June 22, 2024), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/RCI_Memo_re_Military_Government_(6.22.24).pdf.

[96] Council of Regency, *Operational Plan for Transitioning the State of Hawai'i into a Military Government* (August 14, 2023), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf.