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### MEMORANDUM REGARDING THE HAWAIIAN KINGDOM'S CONTINUITY AS A STATE AND SUBJECT OF INTERNATIONAL LAW

There have been two legal opinions on the subject of the continuity of the Hawaiian Kingdom as a State despite the unlawful overthrow of its government by an act of war committed by United States troops on 17 January 1893. The first legal opinion was by Matthew Craven, professor of international law at the University of London, SOAS, School of Law.<sup>1</sup> The second legal opinion was by Federico Lenzerini, professor of international law at the University of Siena, Department of Political and International Sciences.<sup>2</sup> Here follows an overview of Hawaiian State continuity since the nineteenth century.

#### *Hawaiian Independence*

On 28 November 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. The United States followed on 6 July 1844. According to Professor Oppenheim, once recognition of a State is granted, it “is incapable of withdrawal”<sup>3</sup> by the recognizing State, and that “recognition estops the State which has recognized the title from contesting its validity at any future time.”<sup>4</sup> And the “duty to treat

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<sup>1</sup> 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* 128 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian\\_Royal\\_Commission\\_of\\_Inquiry\\_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

<sup>2</sup> Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* (24 May 2020) (online at [https://hawaiiankingdom.org/pdf/Legal\\_Opinion\\_Re\\_Authority\\_of\\_Regency\\_Lenzerini.pdf](https://hawaiiankingdom.org/pdf/Legal_Opinion_Re_Authority_of_Regency_Lenzerini.pdf)).

<sup>3</sup> Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).

<sup>4</sup> Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” 51(2) *American Journal of International Law* 308, 316 (1957).

a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be ‘derecognized.’”<sup>5</sup>

As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.<sup>6</sup> The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.<sup>7</sup> By 1893, the Hawaiian Kingdom maintained over 90 Legations and Consulates throughout the world. This fact of Hawaiian Statehood was acknowledged in 2001 by the arbitral tribunal, in *Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration, which stated, “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.”<sup>8</sup>

To preserve its political independence, should war break out in the Pacific Ocean, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. As a result, provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway, Spain, and Germany. “A nation that wishes to secure her own peace,” says Vattel, “cannot more successfully attain that object than by concluding treaties of neutrality.”<sup>9</sup>

The Hawaiian Kingdom also became a full member State of the Universal Postal Union (“UPU”) on 1 January 1882, which is currently a specialized agency of the United Nations and the postal sector’s primary forum for international cooperation. While being a member State of the UPU, the Hawaiian Kingdom has been inactive since 17 January 1893 because it was incapacitated as a result of the illegal overthrow of its government by the United States as it is explained below.

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<sup>5</sup> Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.

<sup>6</sup> David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian\\_Royal\\_Commission\\_of\\_Inquiry\\_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

<sup>7</sup> “Treaties with Foreign States,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020).

<sup>8</sup> *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).

<sup>9</sup> Emerich De Vattel, *The Law of Nations* 333 (6th ed., 1844).

*United States' Invasion and Overthrow of the Hawaiian Kingdom Government*

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops “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.”<sup>10</sup> This invasion coerced Queen Lili‘uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior power of the United States military, whereby she stated:

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.<sup>11</sup>

President Cleveland initiated a presidential investigation on 11 March 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on 29 March after which he “directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels.”<sup>12</sup> Blount’s last report was dated 17 July 1893, and on 18 October 1893, Secretary of State Gresham notified the President:

The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act.

[...]

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<sup>10</sup> United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawaii: 1894-95*, 451 (1895) (hereafter “Executive Documents”).

<sup>11</sup> *Id.*, 586.

<sup>12</sup> *Id.*, 568.

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign [...].

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.<sup>13</sup>

On 18 December 1893, President Cleveland delivered a manifesto<sup>14</sup> to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government. The President concluded that the “military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.”<sup>15</sup> He also determined “that the provisional government owes its existence to an armed invasion by the United States.”<sup>16</sup> Finally, the President admitted that by “an act of war [...] the Government of a feeble but friendly and confiding people has been overthrown.”<sup>17</sup>

Through executive mediation between the Queen and the new U.S. Minister to the Hawaiian Islands, Albert Willis, that lasted from 13 November through 18 December, an agreement of peace was reached. According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents. Political wrangling in the Congress, however, blocked President Cleveland from carrying out his obligation of restoration of the Queen. Without the pardon, the insurgents remained fugitives of Hawaiian law.

#### *International Principle of Presumption of State Continuity*

Driven by the desire to attain naval superiority in the Pacific, U.S. troops, without cause, invaded the Hawaiian Kingdom on 16 January 1893, and unlawfully overthrew the Hawaiian government and replaced it with their puppet the following day with the prospect of militarizing the islands.

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<sup>13</sup> *Id.*, 462-463.

<sup>14</sup> *Manifesto* is defined as a “formal written declaration, promulgated by...the executive authority of a state or nation, proclaiming its reasons and motives for...important international action.” Black’s Law Dictionary 963 (6th ed., 1990).

<sup>15</sup> Executive Documents, 452.

<sup>16</sup> *Id.*, 454.

<sup>17</sup> *Id.*

The State of Hawai‘i today is the successor to this puppet government. However, despite the unlawful overthrow of its government, the Hawaiian Kingdom as a State would continue to exist as a subject of international law and come under the regime of international humanitarian law and the law of occupation.

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. 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,”<sup>18</sup> and belligerent occupation “does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”<sup>19</sup> Addressing the presumption of the German State’s continued existence despite the military overthrow of the Nazi government during the Second World War, 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 [its independence and sovereignty] 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.<sup>20</sup>

“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 presumption remains.”<sup>21</sup> 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*<sup>22</sup> and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.<sup>23</sup>

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<sup>18</sup> James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

<sup>19</sup> *Id.*

<sup>20</sup> Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

<sup>21</sup> 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* 128 (2020).

<sup>22</sup> 9 Stat. 922 (1848).

<sup>23</sup> 30 Stat. 1754 (1898).

## *United States' Unlawful Annexation of the Hawaiian Islands*

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.<sup>24</sup> 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 *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*.<sup>25</sup> International law does not permit annexation of territory of another state.<sup>26</sup>

Furthermore, in 1988, the United States 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.<sup>27</sup> The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."<sup>28</sup> As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"<sup>29</sup> 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."<sup>30</sup> 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

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<sup>24</sup> 30 Stat. 750 (1898).

<sup>25</sup> 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.

<sup>26</sup> Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

<sup>27</sup> Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).

<sup>28</sup> *Id.*, 242.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

precedent for a congressional assertion of sovereignty over an extended territorial sea.”<sup>31</sup> 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 looked into it being accomplished by the President’s proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-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.”<sup>32</sup>

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.”<sup>33</sup> Professor Willoughby also stated, the “incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is...essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts.”<sup>34</sup>

#### *Prolonged Occupation and Effective Control by the Occupant*

The principle of effectiveness is at the core of international law because it is a decisive element when determining territorial sovereignty claims by a State. The principle asserts that “whenever an authority exercises effective control over territory it may be recognized as the government of that territory.”<sup>35</sup> As the arbitral tribunal at the Permanent Court of Arbitration in the *Eritrea—Yemen* decision stated that the “modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions on a continuous and peaceful basis.”<sup>36</sup>

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<sup>31</sup> *Id.*, 262.

<sup>32</sup> *The Apollon*, 22 U.S. 362, 370 (1824).

<sup>33</sup> Kmiec, 252.

<sup>34</sup> Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

<sup>35</sup> Anne Schuit, “Recognition of Governments in International Law and the Recent Conflict in Libya,” 14 *Int’l Comm. L. Rev.* 381, 389 (2012).

<sup>36</sup> Eritrea–Yemen arbitration, *Award of the Arbitral Tribunal in the first Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, Permanent Court of Arbitration, para. 239 (9 Oct. 1998) (online at <https://pcacases.com/web/sendAttach/517>).

In the nineteenth century, the international community of States explicitly recognized the Hawaiian Kingdom exercised effective control of its territory. However, when the United States overthrew the Hawaiian government, by an act of war, its status was that of an occupant and not the successor to the Hawaiian government. In this case, effective control by the occupant triggers the law of occupation, which has since been codified under the 1907 Hague Regulations. Article 42 states, “[t]erritory 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.”

In an occupied State there exists two legal orders, that of the occupant and that of the occupied State. Professor Marek explains that in “the first place: of these two legal orders, that of the occupied State is regular and ‘normal,’ while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is [...] strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness.”<sup>37</sup> Therefore, military occupation “is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.”<sup>38</sup>

International humanitarian law is silent on a prolonged occupation because the authors of 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Professor Scobbie, “[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory.”<sup>39</sup> The effective military control of occupied territory “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.”<sup>40</sup> According to Professor Benvenisti:

From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes on the occupant. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status; instead, it is bound to respect and maintain the political and other institutions that exist in that territory for the duration of the occupation. The law authorizes the occupant to safeguard its

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<sup>37</sup> Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (1968).

<sup>38</sup> *Id.*

<sup>39</sup> Iain Scobbie, “International Law and the prolonged occupation of Palestine,” *United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague*, 1 (20-22 May 2015).

<sup>40</sup> Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).



interests while administering the occupied area, but also imposes obligations on the occupant to protect life and property of the inhabitants and to respect the sovereign interests of the ousted government.<sup>41</sup>

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law of occupation that was convened by the International Committee of the Red Cross, the experts “pointed out that the norms of occupation law, in particular Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, had originally been designed to regulate short-term occupations. However, the [experts] agreed that [international humanitarian law] did not set any limits to the time span of an occupation. It was therefore recognized that nothing under [international humanitarian law] would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances.”<sup>42</sup> They also concluded that since a prolonged occupation “could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation,” they “emphasized the need to interpret occupation law flexibly when an occupation persisted.”<sup>43</sup> The prolonged occupation of the Hawaiian Kingdom is, in fact, that case, where drastic unlawful “transformations and changes in the occupied territory” occurred.



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<sup>41</sup> Benvenisti, 6.

<sup>42</sup> Report by Tristan Ferraro, legal advisor for the International Committee of the Red Cross, *Expert Meeting: Occupation and other forms of Administration of Foreign Territory* 72 (2012).

<sup>43</sup> *Id.*