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MEMORANDUM ON BRINGING THE AMERICAN OCCUPATION OF HAWAIʻI TO AN END BY ESTABLISHING AN AMERICAN MILITARY GOVERNMENT

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.

If the American military in Hawaiʻi complied with the law of occupation when Queen Liliʻuokalani conditionally surrendered to the United States on 17 January, the occupation would not have lasted 131 years. This memorandum will explain the role and function of a military government that presides over occupied territory of a State under international law. And despite the deliberate failure to establish a military government, international law and American military law still obliges the occupant to establish a military government that will eventually bring the American occupation to an end by a treaty of peace between the Hawaiian Kingdom and the United States.

United States Practice during Military Occupation

In a decisive naval battle off the coast of the Cuban city of Santiago de Cuba on 3 July 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 the President William McKinley to the War Department on 13 July 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.[1]

The Battle of Santiago de Cuba facilitated negotiations for a treaty of peace, called the Treaty of Paris, that was signed on 12 August 1898.[2] The Treaty of Paris came into effect on 11 April 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 2 September 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 Treaty of San Francisco, came into effect on 28 April 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 2 October 1990 after the Treaty on the Final Settlement with Respect to Germany was signed on 12 September 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.

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[1] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[2] 30 U.S. Stat. 1742 (1898)

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, "[f]rom 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."[3]

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. President Roosevelt to Secretary of War Henry Stimson dated November 10, 1943, where the President stated, "[a]lthough 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."[4] Military governors that preside over a military government are general officers of the Army.

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, "[t]his 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."[5] This authority is triggered by Article 42 that 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." 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*,[6] and FM 27-5, *Civil*

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[3] William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).
[4] Earl F. Ziemke, The U.S. Army in the Occupation of Germany 1944-1946 22 (1975).
[5] Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).
[6] Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956).

Affairs Military Government.[7] Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states, "[m]ilitary 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.[8] A military government is the civilian government of the Occupied State. The 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."
- 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."

[7] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947).
[8] Department of Defense, Manual for Courts-Martial United States, 2024 ed., IV-28.

- 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 ("UCMJ"), the failure to establish a military government is dereliction of duty, which is also the war crime by omission. According to article 92 of the UCMJ, the elements of dereliction of duty are: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

From a British Protectorate to a Sovereign and Independent State

Sovereignty is defined as the "supreme, absolute, and uncontrollable power by which any independent state is governed."[9] 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.[10]

In an agreement between King Kamehameha I and Captain George Vancouver on 25 February 1794, the Kingdom of Hawai'i joined the international community of States as a British Protectorate.[11] By 1810, the Kingdoms of Maui and Kaua'i were consolidated under Kamehameha I who's 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, "[t]he 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 whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was the

[9] *Black's Law Dictionary* 1396 (6th ed., 1990).
[10] Henry Wheaton, *Elements of International Law* §20 (3rd ed., 1866).
[11] George Vancouver, *A Voyage of Discovery to the North Pacific Ocean and Round the World*, vol. 3, 56 (1798). "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."

Chief of the principal Island of Owwhyee, or more modernly Hawaii."[12] The Kingdom of the Hawaiian Islands eventually became known as the Hawaiian Kingdom.

Government reform from an absolute to a constitutional monarchy began on 8 October 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 28 November 1843.[13] By this proclamation, Great Britain 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 6 July 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. 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.

Hawaiian Sovereignty Unaffected by Military Occupation

By orders of the U.S. resident Minister John Stevens, on 16 January 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

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

[13] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 120 (1895) ("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 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."

medical supplies."[14] President Grover Cleveland determined, after a Presidential investigation, that "[t]his military demonstration upon the soil of Honolulu was of itself an act of war."[15] He also concluded that the overthrow of the Hawaiian Government the following day on January 17th was also an "act of war."[16] President Cleveland concluded:

> Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister. Therefore the military occupation of Honolulu by the United States 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.[17]

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. 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,"[18] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[19] 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.[20]

"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

[14] Executive Documents, 451.
[15] *Id*.
[16] *Id*., 456.
[17] *Id*., 452.
[18] James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006).
[19] *Id*.
[20] Ian Brownlie, *Principles of Public International Law* 109 (4th ed., 1990).

States, absent of which the presumption remains."[21] 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*[22] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[23] 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.

While Hawaiian State sovereignty is maintained during military occupation, international law restricts the exercise of power by a foreign State within the territory of the Hawaiian Kingdom. 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."[24] 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).[25]

Since 1893, the United States has been exercising its authority over Hawaiian Kingdom 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 18 December 1893, that the "provisional government owes its existence to an armed invasion by the United States."[26] This status did not change when the insurgents changed their name to the Republic of Hawai'i on 4 July 1894. According to Professor Marek:

[21] 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/royal-commission.shtml).
[22] 9 Stat. 922 (1848).
[23] 30 Stat. 1754 (1898).
[24] *Island of Palmas* Case (Netherlands v. United States) 2 R.I.A.A. 838 (1928).
[25] *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", 50 *Cornell Law Quarterly* 5 (1964).
[26] Executive Documents, 454.

> 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 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.[27]

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. Instead, the United States continues to commit the war crime of denationalization where the national consciousness of the Hawaiian Kingdom has been obliterated through classroom instruction and propaganda, which concealed the prolonged occupation.

From 17 January 1893 to 7 July 1898, the United States has been unlawfully exercising its power, indirectly, over the territory of the Hawaiian State, through its puppet governments. From 7 July 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,[28] and was acknowledged by President Cleveland in his message to the Congress. President Cleveland stated:

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[27] Krystyna Marek, *Identity and Continuity of States in Public International Law* 115 (1968).
[28] Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* 43-45 (1993).

> 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 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.[29]

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, "[i]f the occupant has performed acts which are not legitimate acts [allowable under the law of occupation], postliminium makes their invalidity apparent."[30] 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

[29] Executive Documents, 455-456.

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

> 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.[31]

The Law of Armed Conflict Prohibits Annexation of the Occupied State

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*.[32] 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. 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*.[33] International law does not permit annexation of territory of another state.[34]

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.[35] 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."[36] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[37] and not the Congress.

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[31] Krystyna Marek, *Identity and Continuity of States in Public International Law* 83 (1968).
[32] 30 Stat. 750 (1898).
[33] 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.
[34] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
[35] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[36] *Id.*, 242.
[37] *Id.*, 242.

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."[38] 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."[39] 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."[40]

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."[41] 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 within the domain of international relations, and, therefore, beyond the reach of legislative acts."[42] 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."[43]

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[38] *Id.*
[39] *Id.*, 262.
[40] *The Apollon*, 22 U.S. 362, 370 (1824).
[41] Kmiec, 252.
[42] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[43] 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?," 6(2) *International Review of Contemporary Law* 64 (June 2024).

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."[44] 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.[45] By virtue of this 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.[46]

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 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 6 July 1844,[47] 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-

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[44] Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," 20(20) *European Journal of International Law* 1, 4 (2021).

[45] 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* 18-23 (2020); see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).

[46] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).

[47] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

legal changes in government" of an existing State.[48] 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, "[w]here 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."[49]

On 8 November 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 that 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.[50] 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 international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. 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.'"[51]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal on 9 June 2000 after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[52] As Professor Talmon states, the "government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[53]

[48] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[49] American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States* §203, comment c (1987).
[50] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[51] Lenzerini, *Legal Opinion*, 322.
[52] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[53] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, 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.[54] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawaiʻi.

> 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).[55]

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.[56]

As an American Puppet Regime, the Role of the Hawaiʻi 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 16 January 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 Commissioner James Blount on 17 June 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.”[57] 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.”[58] The insurgency renamed the Hawaiian Kingdom’s Royal Guard to the National

[54] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[55] *Id*.
[56] Sai, *The Royal Commission of Inquiry*, 25-26.
[57] Executive Documents, 972.
[58] *Id*.

Guard by *An Act to Authorize the Formation of a National Guard* on 27 January 1893.[59] Soper was thereafter commissioned 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 1 April 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 his investigation of the overthrow of the Hawaiian Kingdom government and notified the Congress on 18 December 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 Hawaiʻi on 4 July 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 13 August 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.[60]

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on 30 April 1900,[61] 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 2 April 1907, when he retired. The Hawaiʻi 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 18 March 1959.[62] The State of Hawaiʻi governmental infrastructure is the civilian government of the Hawaiian Kingdom.

Article V of the State of Hawaiʻi Constitution provides that the Governor is the Chief Executive of the State of Hawaiʻi. 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

[59] *An Act to Authorize the Formation of a National Guard,* Laws of the Provisional Government of the Hawaiian Islands 8 (1893).
[60] *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 29 (1895).
[61] *An Act To provide a government for the Territory of Hawaii*, 31 Stat. 141 (1900).
[62] *An Act To provide for the admission of the State of Hawaii into the Union*, 73 Stat. 4 (1959).

and commanding general of the militia of the State."[63] 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 […]."[64] In other words, the Adjutant General operates under two regimes of law, that of the State of Hawaiʻi and that of the United States Department of Defense.

The State of Hawaiʻi Constitution is an American municipal law that was approved by the Territorial Legislature of Hawaiʻi on 20 May 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 Hawaiʻi under *An Act To provide a government for the Territory of Hawaii*, on 30 April 1900.[65] The constitution was adopted by a vote of American citizens in the election throughout the Hawaiian Islands held on 7 November 1950. The State of Hawaiʻi 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 18 March 1959.[66]

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, "[n]either 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."[67] The Court also concluded that "[t]he 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."[68] Therefore, the State of Hawaiʻi cannot claim to be a *de jure* 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."[69] To do so is the war crime of usurpation of sovereignty during occupation.[70]

"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

[63] Hawaiʻi Revised Statutes, §121-7.
[64] *Id*., §121-9.
[65] 31 Stat. 141 (1900).
[66] 73 Stat. 4 (1959).
[67] *United States v. Curtiss Wright Export Corp*., 299 U.S. 304, 318 (1936).
[68] *The Apollon*, 22 U.S. 362, 370 (1824).
[69] *Lotus* case, 18.
[70] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157 (2020).

(especially in territories of common law tradition), as well as administrative regulations and executive orders."[71]

Conclusion

Any and all authority of the State of Hawaiʻi 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 Hawaiʻi is invalid because it never legally existed in the first place. What remains valid, however, is the authority of the State of Hawaiʻi 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 Army.

As the occupant in effective control of the majority 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 Hawaiʻi into a Military Government of Hawaiʻi 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. To guide this transformation is the Council of Regency's operational plan with essential and implied tasks.[72] The military government will continue to govern until a treaty of peace between the Hawaiian Kingdom and the United States shall take effect.

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

[72] Council of Regency, *Operational Plan Transitioning the State of Hawaiʻi into a Military Government* (August 14, 2023) (online at: https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf).