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.
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> 2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
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> 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.
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> 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:
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> 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.
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> 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.
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> 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.