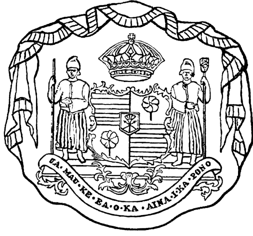


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# MEMORANDUM ON THE ROLE AND FUNCTION OF THE MILITARY GOVERNMENT OF HAWAI‘I

For the past 130 years, the United States, as the occupying State, has not complied with the law of occupation since securing effective control of Hawaiian territory by virtue of Queen Lili‘uokalani's conditional surrender of 17 January 1893. When the provisional government was formed, through intervention, it only replaced the Executive Monarch and her Cabinet with insurgents calling themselves an Executive and Advisory Councils. All other government officials remained in place. With the oversight of United States troops, all Hawaiian government officials who remained in place were coerced into signing oaths of allegiance to the new regime.[1] This continued when the American puppet changed its name to the so-called Republic of Hawai‘i on 4 July 1894 with alien mercenaries having replaced American troops.

After investigating the overthrow of the Hawaiian government, President Cleveland reported to the Congress on 18 December 1893 that the provisional government was "neither a government *de facto* nor *de jure*,"[2] and that it "owes its existence to an armed invasion by the United States."[3] A government created through intervention is a puppet regime of the intervening State, and, as such, has no lawful authority. "Puppet governments," according to Professor Marek, "are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements [because] such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant."[4]

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[1] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95,* 211 (1895) (hereafter "Executive Documents").
[2] *Id*., 453.
[3] *Id*., 454.
[4] Krystyna Marek, *Identity and Continuity of States in Public International Law* 114 (2nd ed., 1968).

*Annexation and United States Practice*

United States practice proscribes annexation during military occupation until a treaty of peace has been agreed upon by both States. In *American Insurance Company v. Canter*, U.S. Chief Justice John Marshall wrote that "the holding of conquered territory [is] mere military occupation, until its fate shall be determined at the treaty of peace."[5] Furthermore, as Professor Craven explains:

> It should be pointed out, however, that even if annexation/conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that 'the principle of conquest shall not […] be recognized as admissible under American public law.' It had, furthermore, later taken the lead in adopting a policy of non-recognition of 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' (the 'Stimpson Doctrine') which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.[6]

Nevertheless, under the guise of a Congressional joint resolution of annexation,[7] the United States armed forces physically reoccupied the Hawaiian Kingdom on 12 August 1898 at the height of the Spanish-American War. In a secret session of the U.S. Senate on 31 May 1898, Senator Morgan, an advocate for annexation, stated, "I am here delighted, Mr. President, with the opportunity now, if I am permitted to do so, of entering into the discussion not of the propriety of the annexation of Hawaii as a measure of national policy, but of entering into the discussion as the necessity of annexing Hawaii or taking it under military control while the war is going on."[8] From a domestic law standpoint, Senator William Allen clearly stated the limitations of United States laws when the joint resolution of annexation was being debated on the floor of the Senate on 4 July 1898. Allen stated:

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[5] *American Insurance Company v. Canter*, 26 U.S. 511 (Pet.) (1828).

[6] 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* 134 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[7] *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, 30 U.S. 750 (1898).

[8] "Senate Secret Debate on Seizure of the Hawaiian Islands," 1 *Haw. J.L. & Pol.* 230, 243 (2004).

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

Despite the unlawfulness, the Congress passed the joint resolution of annexation, and it was signed into law by President William McKinley on 7 July 1898. Patriotic societies and many of the Hawaiian citizenry boycotted the annexation ceremony in Honolulu held at ‘Iolani Palace on 12 August 1898, and "they protested annexation occurring without the consent of the governed."[10] Professor Marek explains that, "a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State."[11] Even the U.S. Department of Justice in a 1988 legal opinion concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution,"[12] because congressional acts have no extraterritorial effect.

Furthermore, when the Congress took over the Republic of Hawai‘i by *An Act To provide a government for the Territory of Hawaii* on 30 April 1900,[13] it was an attempt to clothe the insurgents with United States law. Section 1 of the Act states that "the phrase ‘laws of Hawaii,’ as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii."[14] The leadership of the Republic of Hawai‘i remained the leadership of the Territory of Hawai‘i. Despite the flagrant usurpation of Hawaiian sovereignty and the violations of international humanitarian law, the Congress, in 1959, renamed the Territory of Hawai‘i to the State of Hawai‘i under *An Act To provide for the admission of the State of Hawaii into the Union*.[15] These Congressional laws, which have no effect within the territory of the Hawaiian Kingdom, did not transform the puppet regime into a *de jure* government. The maintenance of the puppet also stands in direct violation of customary international law as it was in 1893, and later the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. The governmental infrastructure of

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[9] 31 Cong. Rec. 6635 (1898).

[10] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* 322 (2016). Coffman initially published this book in 1998 titled *Nation Within: The Story of the American Annexation of the Nation of Hawai‘i*. Coffman explained, "In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation," at xvi.

[11] Marek, 110.

[12] Douglas Kmiec, "Department of Justice, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Op. O.L.C.* 238, 252 (1988).

[13] *Act to provide a government for the Territory of Hawaii*, 31 Stat. 141 (1900).

[14] *Id*.

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

the Hawaiian Kingdom continued as the governmental infrastructure of the current State of Hawai‘i.

*The Law of Occupation*

Article 43 of the 1907 Hague Regulations provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The "text of Article 43," according to Professor Benvenisti, "was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law."[16] Professor Graber also states, that "nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code."[17] Furthermore, the United States government also recognizes that this principle is customary international law that predates the Hague Conventions. In a 1943 legal opinion, the United States stated:

> The Hague Convention clearly enunciated the principle that the laws applicable in an occupied territory remain in effect during the occupation, subject to change by the military authorities within the limits of the Convention. Article 43: […] This declaration of the Hague Convention amounts only to a reaffirmation of the recognized international law prior to that time.[18]

The administration of occupied territory is set forth in the 1907 Hague Regulations, being Section III of the 1907 Fourth Hague Convention. According to Professor Schwarzenberger, "Section III of the Hague Regulations on Land Warfare of 1907 was declaratory of international customary international law."[19] Also, consistent with what was generally considered the international law of occupation, in force at the time of the Spanish-American War, the "military governments established in the territories occupied by armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials."[20] Many other authorities also viewed the 1907 Hague Regulations as mere codification of customary international law, which was applicable at the time of the overthrow of the Hawaiian government and

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[16] Eyal Benvenisti, *The International Law of Occupation* 8 (1993).
[17] Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914* 143 (1949).
[18] Opinion on the Legality of the Issuance of AMG (Allied Military Government) Currency in Sicily, 23 Sept. 1943, reprinted in Occupation Currency Transactions: Hearings Before the Committees on Appropriations Armed Services and Banking and Currency, U.S. Senate, 80th Congress, First Session, 73, 75 (17-18 Jun. 1947).
[19] Georg Schwarzenberger, "The Law of Belligerent Occupation: Basic Issues," 30 *Nordisk Tidsskrift Int'l Ret* 11 (1960).
[20] Munroe Smith, "Record of Political Events," 13(4) *Pol. Sci. Q.* 745, 748 (1898).

subsequent military occupation. Commenting on the occupation of the Hawaiian Kingdom, Professor Dumberry states,

> [T]he 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.[21]

It is also important to note, for the purposes of international law, that the United States never made an international claim to the Hawaiian Islands through *debellatio*, which is a questionable mode of acquiring sovereignty through "the disintegration and eventual disappearance of its government and the total absence of organized resistance by citizens and soldiers of the defeated state."[22] Instead, the United States, in 1959, failed to mention its military occupation and unlawful overthrow of the Hawaiian government in 1893 when it reported to the United Nations Secretary General that "Hawaii has been administered by the United States since 1898. As early as 1900, Congress passed an Organic Act, establishing Hawaii as an incorporated territory in which the Constitution and laws of the United States, which were not locally inapplicable, would have full force and effect."[23] This extraterritorial application of American municipal laws is not only in violation of *The Lotus* case principle,[24] but is also prohibited by the rules of international humanitarian law. This subject is fully treated by Professor Benvenisti, who states:

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation

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[21] Patrick Dumberry, "The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continuity as an Independent State under International Law" 1(2) *Chinese J. Int'l L.* 655, 682 (2002).

[22] Gehard von Glahn, *Law Among Nations* 723 (6th ed., 1992)

[23] United Nations, *Cessation of the transmission of information under Article 73e of the Charter: communication from the Government of the United States of America*, Document no. A/4226, Annex 1, 2 (24 Sep. 1959).

[24] *Lotus* case (France v. Turkey), PCIJ Series A, No. 10, 19-20 (1927). According to the Permanent Court of International Justice, "[n]ow 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."

> administration would then choose to operate through extraterritorial prescription of its national institutions.[25]

The hostile army, in this case, included not only United States armed forces, but also its puppet regime that disguised itself as the so-called provisional government. As an entity created through intervention, this puppet regime existed as a civilian armed force that worked in tandem with the United States armed forces under the direction of the U.S. diplomat John Stevens. Furthermore, the occupant does not possess the sovereignty of the occupied State and therefore cannot compel allegiance. United States practice views "[b]elligerent occupation […], being based upon the possession of [occupied] territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional."[26] The prolonged nature of the American occupation is unprecedented.

*United States has Presented no Rebuttable Evidence to the Hawaiian Kingdom's Continued Existence as an Independent State*

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[27] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[28] Addressing the presumption of the German State's continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[29]

"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

[25] Benvenisti, 19.
[26] FM 27-10, section 353.
[27] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[28] *Id*.
[29] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[30] 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*[31] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[32]

Instead of a treaty, the United States unilaterally annexed the Hawaiian Islands in 1898 by a municipal law. As a municipal law of the United States, it is without extraterritorial effect. It is not a treaty. To annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[33] International law does not permit annexation of territory of another state.[34]

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[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, "[t]he President is the sole

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[30] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[31] 9 Stat. 922 (1848).
[32] 30 Stat. 1754 (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.

organ of the nation in its external relations, and its sole representative with foreign nations,"[37] 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."[38] Therefore, the OLC concluded "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 looked into it being accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by enacting a law because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[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, 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]

*War Crime of Usurpation of Sovereignty During Military Occupation*

For the Hawaiian Kingdom, a potent check to an abuse of power is international criminal law. Statutory limitation of war crimes is prohibited by customary international law,[43] and

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[37] *Id.*, 242.
[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] *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces*

the prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[44] On this subject, the Government of the United States, in a diplomatic note to the Government of Iraq in 1991 regarding its belligerent occupation of Kuwait, declared that "under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials."[45] Last year, Germany prosecuted a 97-year-old former Nazi secretary for war crimes committed during the Second World War.[46]

*Usurpation of sovereignty during military occupation* was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies, which included the United States. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative measures and policies of the occupying State over the territory of the occupied State. Usurpation is the "unlawful encroachment or assumption of the use of property, power or authority which belongs to another."[47]

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations. The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania, the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." The Commission listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and

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*armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, 286 (1999).

[44] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

[45] Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

[46] Reuters, *Former concentration camp secretary, 97, convicted of Nazi war crimes* (20 Dec. 2022) (online at https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/).

[47] Black's Law 1545 (6th ed., 1990).

administration ousted;" "[t]axes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "[p]ublic property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "[p]rohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "[t]he Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "[m]useums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[48]

The war crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this "rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[49] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, "there do not appear to have been any prosecutions for that crime by international criminal tribunals."[50] However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the United Nations' International Law Commission, "[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[51] In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.

[48] *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).
[49] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[50] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 156 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[51] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

The Royal Commission of Inquiry ("RCI"), established by the Council of Regency by proclamation on 17 April 2019,[52] views *usurpation of sovereignty during military occupation* as a war crime under "particular" customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the situation of Hawai'i, the war crime of *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State's proxies such as the State of Hawai'i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai'i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists' accommodations collected by the State of Hawai'i and the Counties.

The Counties of the State of Hawai'i have recently added 3% surcharges to the State of Hawai'i's 10.25% transient accommodations tax. Added with the State of Hawai'i's general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American duties on goods that are imported to the United States destined to Hawai'i. These

[52] "Proclamation establishing 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* 8-9 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

duty rates are collected by the United States according to the United States Tariff Act of 1930**,** as amended, and the Trade Agreements Act of 1979.

*The Council of Regency*

International humanitarian law reverses the principle of effective control of territory. According to Professor Marek, "in the first place: of these two legal orders, that of the occupied State is regular and 'normal,' while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is […] strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."[53] Therefore, belligerent occupation "is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[54]

In 1996, remedial steps were taken, under the *doctrine of necessity*, to reinstate the Hawaiian Kingdom government as it was under its legal order prior to the U.S. invasion in 1893.[55] An *acting* Council of Regency was established in accordance with the Hawaiian Constitution and the doctrine of necessity to serve in the absence of the Executive Monarch. By virtue of this process, an *acting* Government, comprised of officers *de facto*, was established as the successor to Queen Liliʻuokalani who died on November 11, 1917.

The Council was established in similar fashion to the Belgian Council of Regency after King Leopold was captured by the Germans during Second World War. As the Belgian Council of Regency was established under Article 82 of its 1831 Constitution, as amended, *in exile*, the Hawaiian Council of Regency was established under Article 33 of its 1864 Constitution, as amended, not *in exile* but *in situ*. Oppenheimer explained:

> As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821 [sic], as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While

[53] Marek, *Identity and Continuity of States*, 102.
[54] *Id.*
[55] 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) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

> this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.[56]

Article 33 provides that the Cabinet Council "shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately shall proceed to choose by ballot, a Regent or 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." Like the Belgian Council of Regency, the Hawaiian Council of Regency was bound to call into session the Legislative Assembly to provide for a regency but because of the prolonged belligerent occupation and the effects of denationalization it was impossible for the Legislative Assembly to be called into session. Until such time when the military occupation comes to end, Article 33 provides that the Cabinet Council, comprised of the Ministers of the Interior, Foreign Affairs, Finance and the Attorney General, "shall be a Council of Regency, until the Legislative Assembly" can be called into session. The operative word is "shall."

There was no legal requirement for the Council of Regency, being the successor in office to Queen Liliʻuokalani 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,[57] 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 Liliʻuokalani 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.[58] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. United States foreign relations law states that "[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."[59]

*Strategic Plan of the Council of Regency*

The strategic plan of the Council of Regency entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase

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[56] F.E. Oppenheimer, "Governments and Authorities in Exile," *Am. J. Int. Law* 36 (1942): 568-595, 569.
[57] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[58] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[59] *Restatement (Third)*, §203, comment c.

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. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention that established the PCA.[60] The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "[p]ursuant to article 47 of the 1907 Convention."[61] The PCA Administrative Council publishes the annual reports.

Along with the United States, the other Contracting States with the Hawaiian Kingdom in its treaties that are also members of the PCA Administrative Council, include Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden, and Switzerland. Their acknowledgment of the continuity of the Hawaiian State also acknowledges the full force and effect of their treaties with the Hawaiian Kingdom except where the law of occupation supersedes them.[62] Moreover, the United States entered into an agreement with the Council of Regency to have access to the records and pleadings of the arbitration after the PCA acknowledged Hawaiian Statehood.[63] This agreement constitutes explicit recognition of the Council of Regency as the government of the occupied State by the United States.

Implementation of phase II was initiated at the University of Hawaiʻi at Mānoa when the author of this memorandum entered the political science graduate program where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted

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[60] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/); see also David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).
[61] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.
[62] For treaties of the Hawaiian Kingdom with Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland see "Treaties with Foreign States," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[63] Sai, The Royal Commission of Inquiry, 25-26.

other master's theses, doctoral dissertations, peer review articles and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,[64] to *Nation Within—The History of the American Occupation of Hawai'i*.[65] Coffman explained the change in his note on the second edition:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai'i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai'i, the might of the United States does not make it right.[66]

As a result of the exposure, United Nations Independent Expert, Dr. deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i dated 25 February 2018.[67] Dr. deZayas stated:

> I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

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[64] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).
[65] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.
[66] *Id*., xvi.
[67] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[68] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."[69]

In a letter to David Ige, Governor of the State of Hawaiʻi, dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawaiʻi and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawaiʻi and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawaiʻi and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawaiʻi and its inhabitants.

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[68] Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf).

[69] National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/).

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization (NGO) of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[70] In its resolution, the IADL also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[71] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

On 22 March 2022, the author delivered an oral statement, on behalf of the IADL and AAJ, to the United Nations Human Rights Council ("HRC") at its 49th session in Geneva. The oral statement read:

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[70] International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/).
[71] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

> The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.
>
> For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.[72]

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for."[73] Silence conveys consent. Since they "did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[74]

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai'i, which includes President Joseph Biden Jr., Governor David Ige, Hawai'i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua'i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and all of the named perpetrators have met the requisite element of *mens rea*.[75] Prosecution for these war crimes can occur here or abroad. At present, a member of the current administration of State of Hawai'i Governor Josh Green, Attorney General Anne E. Lopez, was found by the RCI to have committed the war crime of *usurpation of sovereignty during military occupation* under War Criminal Report no. 23-0001.[76] The requisite elements of this war crime—*mens rea* and *actus reus,* have been met.

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[72] IADL, Video: Dr. Keanu Sai's oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom (online at https://iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/).
[73] Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).
[74] See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.
[75] Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.
[76] Royal Commission of Inquiry, *War Criminal Report no. 23-0001* (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf).

In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. "It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result."[77]

> 1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
>
> 2. The perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
>
> 3. Their conduct took place in the context of and was associated with a military occupation.
>
> 4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. Except for the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

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[77] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535 (2013).

### *Legal Status of the State of Hawai'i*

There is no legal basis for the existence of the State of Hawai'i, being the direct successor of the provisional government, except for international humanitarian law that calls such a group a "civilian armed force" of the occupying State. According to Henckaerts and Doswald-Beck of the *International Committee of the Red Cross*, "[m]any military manuals specify that the armed forces of a party to the conflict consist of all organised armed groups which are under a command responsible to that party for the conduct of its subordinates. This definition is supported by official statements and reported practice."[78] Article 1 of the 1907 Hague Regulations provides that the laws, rights and duties of war apply not only to the occupying State's army but also to its civilian armed forces. In other words, the State of Hawai'i can exist within the confines of international humanitarian law but not American municipal laws.

In this regard, the physical existence of the State of Hawai'i is not a matter of law but rather a situation of facts regulated by international humanitarian law and the law of occupation. As the administration of the occupying State,[79] the State of Hawai'i must begin to comply with the law of occupation and provisionally administer the laws of the Hawaiian Kingdom that have been brought up to date by the Council of Regency's proclamation of provisional laws dated 10 October 2014.[80] To do so would be to transform itself into a military government in accordance with United States practice and the law of occupation. To not do so, officials of the State of Hawai'i would become criminally culpable for war crimes, in particular, the war crime of *usurpation of sovereignty during military occupation*. With a view to bringing compliance with international humanitarian law by the State of Hawai'i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations,[81] the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The State of Hawai'i has yet to transform itself into a military government to administer the laws of the Hawaiian Kingdom.

[78] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* 14 (2009).
[79] Council of Regency, Proclamation Recognizing the State of Hawai'i and its Counties (3 June 2019) (online https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).
[80] Council of Regency, *Proclamation of Provisional Law* (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).
[81] Article 42 of the 1907 Hague Regulations 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."

*Military Government*

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 international humanitarian law 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."[82]

United States practice of establishing 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 is the responsibility of the U.S. Army. This is acknowledged by letter from U.S. President Roosevelt to Secretary of War Henry Stimson dated 10 November 1943, where President Roosevelt 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."[83] Military governors that preside over a military government are general officers of the Army. In the current command structure of the State of Hawaiʻi, that general officer is the Adjutant General whose office is currently held by Major General Kenneth Hara.[84]

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*,[85] and FM 27-5, *Civil Affairs Military Government*.[86] 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." FM 27-10 has been superseded by FM 6-27, *The Commander's Handbook on the Law of Land Warfare*. Chapter 6 covers occupation.

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[82] William E. Birkhimer, Military Government and Martial Law 21 (3rd ed., 1914).
[83] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* 22 (1975).
[84] State of Hawaiʻi Department of Defense, *The Adjutant General—Major General Kenneth Hara* (online at https://dod.hawaii.gov/department-info/leadership/the-adjutant-general/).
[85] Department of the Army, *Field Manual 27-10, The Law of Land Warfare* (1956).
[86] Department of the Army, *Field Manual 27-5, Civil Affairs Military Government* (1947).

Although the field manuals provide "substantive information on the required tasks to execute in an occupation,"[87] there is no clear doctrine that gives guidance as to how to conduct a military occupation. In the absence of a clear doctrine, the command estimate process, however, should be able to provide guidance in implementing a plan to conduct a military occupation. FM 101-5, *Staff Organization and Operations,* provides guidance for a commander's decision-making process. "The commander's estimate […] is an analysis of all the factors that could affect a mission. The commander integrates his personal knowledge of the situation, his analysis of METT-T factors, the assessments of his subordinate commanders, and any relevant details he gains from his staff."[88]

According to Major Burgess, a military occupation has "five mission essential tasks set forth in the Hague and Geneva Conventions […] as follows: (1) Restore and ensure public order and safety, (2) provide medical care, supplies and subsistence, (3) ensure the care and education of children, (4) respect private property and properly manage public property, and (5) provide for the security of the occupying force to facilitate mission accomplishment."[89]

Because the Hawaiian Kingdom is a neutral State by treaty[90] and its territory inviolable, the presence of U.S. troops is a violation of Article 2 of the 1907 Hague Convention V, whereby "[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power." Therefore, the fifth task is not applicable in the Hawaiian situation given the illegal presence of 118 U.S. military sites. The remaining four essential tasks can be achieved through the governmental infrastructure of the State of Hawai'i already in place with a few adjustments in order to align itself with the law of occupation and United States practice.

*Transforming the State of Hawai'i into a Military Government*

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when there is compliance with Article 43 of the 1907 Hague Regulations and the administration of the laws of the Hawaiian Kingdom. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation, being the longest occupation in the history of international relations. Therefore, given the scope and magnitude of the unlawful nature of the prolonged occupation and the implication of international criminal law upon individuals holding offices in the State of Hawai'i and its

[87] Major Christopher Todd Burgess, *US Army Doctrine and Belligerent Occupation* 52 (2004).
[88] Department of the Army, *Field Manual 101-5, Staff Organization and Operations,* Appendix C Staff Estimates C2 (1997). METT-T is the acronym for mission, enemy, terrain, troops, and time available.
[89] Burgess, 7.
[90] Hawaiian neutrality was expressly acknowledged in the treaties with Sweden-Norway in 1852, Spain in 1863, and Germany in 1879.

Counties, it would be the duty of the Adjutant General to proclaim the establishment of a military government. Necessity dictates such a step toward compliance with international humanitarian law and the law of occupation because war crimes are and continue to be committed with impunity. The Adjutant General is trained in Army doctrine and regulations, to include the 1907 Hague Regulations and the 1949 Fourth Geneva Conventions, for this type of a situation in occupied territory, where a civilian is not. The Adjutant General would be the military governor that presides over a military government.

This is a command decision to be made by the Adjutant General, which is where "a military commander, faced with a difficult choice or choices, taking the responsibility for a serious risk on the basis of this estimate of the situation."[91] According to Greenfield, a command decision "implies the presence of certain elements as basic ingredients of the act of decision: a desired objective or an assigned mission, a calculation of risk, exercise of authority, assumption of personal responsibility, and a decisive influence on the course of events."[92] Solace for this command decision to be made can be found in the words of Hawaiian Kingdom Chief Justice William Lee, in *Shillaber v. Waldo*:

> For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, "*The life of the land is preserved by righteousness*." We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, "Let justice be done though the heavens fall." Let the laws be obeyed, though it ruin every judicial and executive office in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.[93]

Although unlawful, the proclamation of 17 January 1893 by the so-called provisional government can be useful as to the wording of the military governor's proclamation today because government officials continued in place with the exception of Queen Liliʻuokalani, her Cabinet, and the Marshal of the police force. The laws were also continued to be in effect. In the situation now, government officials would remain in place, with exceptions not in line with the law of occupation, and the laws would continue to be in effect as provisional laws together with Hawaiian Kingdom laws that existed prior to 1893. The military governor's proclamation would, in a sense, be a reversal of the provisional

[91] Kent Roberts Greenfield, "Introductory Essay," in Kent Roberts Greenfield (ed.), *Command Decisions* 1 (1987).
[92] *Id*.
[93] *Shillaber v. Wilder, et al.*, 1 Haw. 31, 32 (1847).

government's proclamation and in line with the law of occupation. The 1893 proclamation read:

> 1. The Hawaiian Monarchical system of Government is hereby abrogated.
>
> 2. A Provisional Government for the control and management of public affairs and the protection of the public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.
>
> 3. Such Provisional Government shall consist of an Executive Council of four members who are hereby declared to be
>
> S.B. Dole,<br>J.A. King,<br>P.C. Jones,<br>W.O. Smith,
>
> Who shall administer the Executive Departments of the Government, the first named acting as President and Chairman of such Council and administering the Department of Foreign Affairs, and the other severally administering the Department of Interior, Finance and Attorney-General, respectively, in the order in which they are above enumerated, according to existing Hawaiian law as far as may be consistent with this Proclamation; and also of an Advisory Council which shall consist of fourteen members who are hereby declared to be
>
> S.M. Damon, A. Brown,<br>L.A. Thurston, J.F. Morgan,<br>J. Emmeluth, H. Waterhouse,<br>J.A. McClandless, E.D. Tenny,<br>F.W. McChesney, F. Wilhelm,<br>W.R. Castle, W.G. Ashley,<br>W.C. Wilder, C. Bolte.
>
> Such Advisory Council shall also have general legislative authority.
>
> Such executive and Advisory Council shall, acting jointly, have power to remove any member of the either Council and to fill such or any other vacancy.
>
> 4. All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exceptions of the following named persons:
>
> Queen Liliokalani,<br>Charles B. Wilson, Marshal,

> Samuel Parker, Minister of Foreign Affairs,
> W.H. Cornwell, Minister of Finance,
> John F. Colburn, Minister of the Interior,
> Arthur P. Peterson, Attorney-General,
>
> who are hereby removed from office.
>
> 5. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils.

The Council of Regency, being the government of the occupied State, should have a working relationship with the military government. Spoerri of the *International Committee of the Red Cross* states, "occupation law does not require an exclusive exercise of authority by the Occupying Power. It allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory."[94] And according to experts in the field of military occupation, "occupation law did not require authority to be exercised exclusively by the occupying power. It allows for authority to be shared by the occupant and the occupied government, provided the former continues to bear ultimate and overall responsibility for the occupied territory."[95] Moreover, Professor Lenzerini concluded:

> [T]he working relationship between the Regency and the administration of the occupying State should have the form of a cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory, provided that there are no objective obstacles for the occupying power to cooperate and that, in any event, the "supreme" decision-making power belongs to the occupying power itself. This conclusion is consistent with the position of the latter as "administrator" of the Hawaiian territory, as stated in the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019 and presupposed by the pertinent rules of international humanitarian law.[96]

The first order of business for the military government would be to disband the legislative bodies of the State of Hawai'i and the Counties in order to stop the enactment of American

[94] See Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 2014, 182, at 190.

[95] International Committee of the Red Cross, *Expert Meeting—Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro Legal Adviser, ICRC 10 (2012).

[96] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Haw. J.L. & Pol* 317, 333, para. 20 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).

municipal laws. The function of a military government is to administer the laws of the occupied State, which in this case include certain American municipal laws, as situations of fact, that have become provisional laws of the Hawaiian Kingdom in accordance with the formula to determine which American municipal laws can be considered provisional laws of the kingdom.[97] Furthermore, these legislative bodies have as their electorate American citizens that are subject to Hawaiian Kingdom laws and not American municipal laws while within Hawaiian territory. Section 6 of the Hawaiian Civil Code provides:

> 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.[98]

Furthermore, according to Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States, "each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects […] but subject always to the laws and statutes of the two countries respectively."[99] The enactment of American municipal laws within Hawaiian territory is not only a violation of international humanitarian law and international criminal law, but also a violation of the 1849 treaty.

Second order of business is for the military governor to determine which American municipal laws can be considered the provisional laws of the Hawaiian Kingdom during the American military occupation that augments and not replaces the Civil Code,[100] together with the session laws of 1884[101] and 1886,[102] and the Penal Code.[103] These provisional laws will need to be made public by proclamation of the military governor. Paragraph 6-53 of FM 6-27 states that "the population of the occupied territory must be

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[97] *See* Chairman of the Council of Regency's Memorandum on the Formula to Determine Provisional Laws (22 March 2023) (online at https://hawaiiankingdom.org/pdf/HK_Provisional_Laws_Formula.pdf).

[98] Hawaiian Civil Code, *Chapter II—Of the Effects of Laws*, §6 (online at https://hawaiiankingdom.org/civilcode/pdf/CL_Title_1.pdf).

[99] Treaty with the United States of America, in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 305, 307 (2020).

[100] Civil Code of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/civilcode/index.shtml).

[101] Session Laws of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

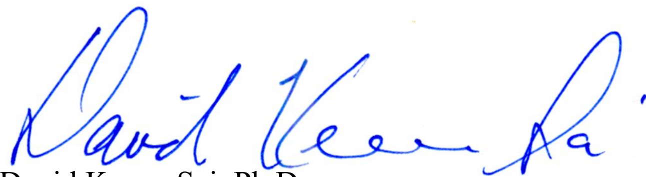
[102] Session Laws of the Hawaiian Kingdom (1886) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).

[103] Penal Code of the Hawaiian Kingdom (1869) (online at https://hawaiiankingdom.org/pdf/Penal_Code.pdf).

informed of any alteration, suspension, or repeal of existing laws and of the enactment of new laws." And paragraph 357 of FM 27-10 states:

> In a legal sense no proclamation of military occupation is necessary. However, on account of the special relations established between the inhabitants of the occupied territory and the occupant by virtue of the presence of the occupying forces, the fact of military occupation, with the extent of territory affected, should be made known. The practice of the United States is to make this fact known by proclamation.

In light of the legal opinion on war crimes related to the United States belligerent occupation of the Hawaiian Kingdom by Professor Schabas on 25 July 2019,[104] a renowned jurist and expert on international criminal law, genocide and war crimes, and the oral statement given to the United Nations Human Rights Council on 22 March 2022 by two NGOs—*International Association of Democratic Lawyers* and the *American Association of Jurists* that war crimes are being committed in Hawai'i, it should warrant the Adjutant General to take this matter seriously because of the legal consequences of the United States' violation of international humanitarian law for over a century.



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[104] 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* 157 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf); see also William Schabas, "Legal Opinion on War Crimes related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Haw. J.L. Pol.* 334 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).