SCAD-22-0000623

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

DEXTER K. KA‘IAMA, Respondent (Bar No. 4249)

ORIGINAL PROCEEDING
(ODC Case No. 18-0339)

MOTION TO DISMISS PETITION FOR THE IMMEDIATE SUSPENSION FROM THE PRACTICE OF LAW PRUSUANT TO RSCH RULE 2.12A, FILED OCTOBER 20, 2022, PURSUANT TO HRCP 12(B)(2) AND THE *LORENZO* PRINCIPLE, AND TO SCHEDULE AN EVIDENTIARY HEARING, AND FOR STAY OF ORDER DIRECTING DEXTER K. KA`IAMA TO APPEAR BEFORE THE SUPREME COURT

MEMORANDUM OF POINTS AND AUTHORITIES

DECLARATION OF DEXTER K. KAIAMA, with EXHIBITS “A-D”

AND

CERTIFICATE OF SERVICE

Dexter K. Ka‘iama 4249
1486 Akeke Place
Kailua, HI 96734
Respondent

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Respondent DEXTER K. KA‘IAMA (hereafter “Respondent”) respectfully moves the Supreme Court of the State of Hawai‘i to schedule an evidentiary hearing for the Office of Disciplinary Counsel (“ODC”), to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom ceases to exist as a State in light of the evidence and law in the instant motion. If the ODC is unable to proffer rebuttable evidence, the Respondent respectfully requests that this Supreme Court dismiss the ODC’s instant Petition for the Immediate Suspension of Respondent from the Practice of Law Pursuant to RSCH Rule 2.12A and filed herein on October 20, 2022, pursuant to the HRCP 12(b)(2) and the *Lorenzo* principle. The reasons are set forth in the attached memorandum.

Respondent respectfully asserts that the Hawai‘i Supreme Court is mandated to dismiss the instant proceedings, under the *Lorenzo* principle, unless the ODC is able to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom ceases to exist as a State. Should the ODC prevail by complying with the *Lorenzo* principle in providing rebuttable evidence under international law, Respondent will then move for relief available under the Rules of the Supreme Court of the State of Hawai‘i or as otherwise provided under the Rules of the Disciplinary Board of the Hawai‘i Supreme Court.

DATED: Honolulu, Hawai‘i, October 30, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama
Dexter K. Ka‘iama (Bar No. 4249)

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MEMORANDUM OF POINTS AND AUTHORITES

Respondent Dexter K. Ka‘iama (“Respondent”) moves the Supreme Court of the State of Hawai‘i to schedule an evidentiary hearing in order to dismiss the Office of Disciplinary Counsel’s (“ODC”) Petition for the Immediate Suspension of Respondent from the Practice of Law Pursuant to RSCH Rule 2.12A, filed herein on October 20, 2022, Pursuant to HRCP 12(b)(2) and the *Lorenzo* Principle.

I. INTRODUCTION

One year after the United States Congress passed the *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii,*[1] an appeal was heard by the State of Hawai‘i Intermediate Court of Appeals, that centered

[1] 107 Stat. 1510 (1993).

on a claim that the Hawaiian Kingdom continues to exist as a State. In *State of Hawai'i v. Lorenzo* ("*Lorenzo* court"),[2] the Intermediate Court of Appeals ("ICA") stated:

> Lorenzo appeals, arguing that the lower court erred in denying his pretrial motion (Motion) to dismiss the indictment. The essence of the Motion is that the [Hawaiian Kingdom] (Kingdom) was recognized as an independent sovereign nation by the United States in numerous bilateral treaties; the Kingdom was illegally overthrown in 1893 with the assistance of the United States; the Kingdom still exists as a sovereign nation; he is a citizen of the Kingdom; therefore, the courts of the State of Hawai'i have no jurisdiction over him. Lorenzo makes the same argument on appeal. For the reasons set forth below, we conclude that the lower court correctly denied the Motion.[3]

The *Lorenzo* Court based its denial of the motion to dismiss the indictment on personal jurisdictional grounds based on an evidentiary burden as described by the Ninth Circuit in its 1993 decision, in *United States v. Lorenzo*, that "[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government."[4] As a result, the *Lorenzo* court stated, it "was incumbent on Defendant to present evidence supporting his claim. *United States v. Lorenzo*. Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature."[5] Neither the Ninth Circuit Court nor the *Lorenzo* Court foreclosed the question but rather provided, what it saw at the time, instruction for the courts to arrive at the conclusion that the Hawaiian Kingdom, from an evidentiary basis, exists as a State. This is evidenced in a subsequent decision by the ICA in 2004, in *State of Hawai'i v. Araujo*, that made it clear, "[b]ecause Araujo has not, either below or on appeal, 'presented [any] factual (or legal) basis for concluding that the Kingdom

[2] *State of Hawai'i v. Lorenzo*, 77 Hawai'i 219; 883 P.2d 641 (Ct. App. 1994).
[3] *Id*., 220, 642.
[4] *United States v. Lorenzo*, 995 F.2d 1448, 1456; 1993 U.S. App. LEXIS 10548.
[5] *State of Hawai'i v. Lorenzo*, 221; 643.

exists as a state in accordance with recognized attributes of a state's sovereign nature,' […] his point of error on appeal must fail."[6]

The *Lorenzo* court used the word "presently" because it is an open legal question and not a political question. The ICA stated in a subsequent case, *State of Hawai'i v. Lee*, that the *Lorenzo* court "suggested that it is an open legal question whether the "[Hawaiian Kingdom]" **still exists** (emphasis added)."[7] The operative word here is "still exists," which means the *Lorenzo* court was referring to the Hawaiian Kingdom from the nineteenth century and not the so-called native kingdom(s) or nations, which are a part of the political sovereignty movement of today.

Lorenzo also separates the Native Hawaiian sovereignty movement and nation building from the continued existence of the Hawaiian Kingdom as a State. The Hawai'i Supreme Court, in *State of Hawai'i v. Armitage*,[8] not only clarified this evidentiary burden but also discerned between a new Native Hawaiian nation brought about through nation-building, and the Hawaiian Kingdom that existed as a State in the nineteenth century. The Hawai'i Supreme Court explained:

> Petitioners' theory of nation-building as a fundamental right under the ICA's decision in Lorenzo does not appear viable. Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the [Hawaiian Kingdom] "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack jurisdiction over him or her. Thus, Lorenzo does not recognize a fundamental right to build a sovereign Hawaiian nation.[9]

However, the *Lorenzo* court did acknowledge that it may have misplaced the burden of proof and what needs to be proven. It stated, "[a]lthough the court's rationale is open to question

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[6] *State of Hawai'i v. Araujo*, 103 Haw. 508 (Haw. App. 2004).
[7] *State of Hawai'i v. Lee*, 90 Haw. 130, 142; 976 P.2d 444, 456 (Haw. App. 1999).
[8] *State of Hawai'i v. Armitage,* 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
[9] *Id*., 57; 1065.

in light of international law, the record indicates that the decision was correct because Lorenzo did not meet his burden of proving his defense of lack of jurisdiction."[10] 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,"[11] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[12] Addressing the presumption of German State continuity after the 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.[13]

"If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[14] Evidence of "a valid demonstration of

[10] *State of Hawai'i v. Lorenzo*, 221, 643.
[11] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[12] *Id*.
[13] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).
[14] 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).

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*[15] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[16]

The *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*,[17] is a municipal law of the United States without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[18] Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[19] International law does not permit annexation of territory of another state.[20]

Furthermore, in 1988, the Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion regarding 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

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[15] 9 Stat. 922 (1848).
[16] 30 Stat. 1754 (1898).
[17] 30 Stat. 750 (1898).
[18] *Black's Law Dictionary* (6th ed. 1990), 88.
[19] 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.
[20] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[21] 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."[22] As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[23] and not the Congress. The OLC further stated, "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."[24] Therefore, he stated 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."[25] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[26]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby, "[t]he 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

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[21] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[22] *Id.*, 242.
[23] *Id*., 242.
[24] *Id*.
[25] *Id.*, 262.
[26] *The Apollon*, 22 U.S. 362, 370 (1824).

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."[27] 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."[28]

The instant motion is filed under the international rule of the presumption of continuity of the Hawaiian Kingdom as a State.

II. THE *LORENZO* PRINCIPLE

Lorenzo became a precedent case on the subject of the Hawaiian Kingdom's existence as a State in State of Hawai'i courts, and is known in the federal court, in *United States v. Goo*, as the *Lorenzo* principle.

> Since the Intermediate Court of Appeals for the State of Hawaii's decision in *Hawaii v. Lorenzo*, the courts in Hawaii have consistently adhered to the *Lorenzo* court's statements that the Kingdom of Hawaii is not recognized as a sovereign state [*4] by either the United States or the State of Hawaii. *See Lorenzo*, 77 Haw. 219, 883 P.2d 641, 643 (Haw. App. 1994); *see also State of Hawaii v. French*, 77 Haw. 222, 883 P.2d 644, 649 (Haw. App. 1994) (stating that "presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognizing attributes of a state's sovereign nature") (quoting *Lorenzo*, 883 P.2d at 643). This court sees no reason why it should not adhere to the <u>*Lorenzo* principle</u> (emphasis added).[29]

[27] Kmiec, 252.
[28] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[29] *Goo*, *3.

The *Lorenzo* principle should not be confused with a final decision. A principle is "a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure or legal determination."[30] *Lorenzo*, as a principle, was cited by the Hawai'i Supreme Court in 8 cases, and by the ICA in 45 cases. The latest Hawai'i Supreme Court's citation of *Lorenzo* was in 2020 in *State of Hawai'i v. Malave*.[31] The most recent citation of *Lorenzo* by the ICA was in 2021 in *Bank of N.Y. Mellon v. Cummings*.[32] Since 1994, *Lorenzo* had risen to precedent, and, therefore, is common law.

Whether or not the Hawaiian Kingdom "exists as a state in accordance with recognized attributes of a state's sovereign nature," it is governed by international law, not State of Hawai'i or United States laws. While the existence of a State is a fact, a "State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact; that is, a legal status attaching to a certain state of affairs by virtue of certain [international] rules or practices."[33] The civilian law refers to this type of a fact to be a *juridical fact*. According to Professor Lenzerini:

> In the civil law tradition, a juridical fact (or legal fact) is a fact (or event)—determined either by natural occurrences or by humans—which produces consequences that are relevant according to law. Such consequences are defined juridical effects (or legal effects), and consist in the establishment, modification or extinction of rights, legal situations or juridical (or legal) relationships (privity). Reversing the order of the reasoning, among the multifaceted natural or social facts occurring in the world a fact is juridical when it is legally relevant, i.e. determines the production of legal effects per effect of a legal (juridical) rule (provision). In technical terms, it is actually the legal rule which produces legal effects, while the juridical fact is to be considered as the condition for the production of the effects. In practical terms, however, it is the juridical fact which activates a reaction by the law and makes the production of the effects concretely possible. At the same time,

[30] Black's Law, 1193.
[31] *State of Hawai'i v. Malave*, 146 Haw. 341, 463 P.3d 998, 2020 Haw. LEXIS 80.
[32] *Bank of N.Y. Mellon v. Cummings*, 149 Haw. 173, 484 P.3d 186, 2021 Haw. App. LEXIS 102, 2021 WL 1345675.
[33] Crawford, 5.

> no fact can be considered as "juridical" without a legal rule attributing this quality to it.[34]

In *Larsen v. Hawaiian Kingdom*, the arbitral tribunal acknowledged the Hawaiian Kingdom as a *juridical fact* when it stated that 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."[35]

a. Distinguishing Between Recognition of a State and Recognition of its Government

When the *Lorenzo* court stated that the "United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event. P.L. 103-150, 107 Stat. 1510 (1993) [but] that recognition does not appear to be tantamount to a recognition that the Kingdom continues to exist,"[36] the Court implied that the United States "derecognized" the Hawaiian Kingdom, which it had previously recognized in the nineteenth century. It would appear that the *Lorenzo* court was confusing the recognition of government with the recognition of a State. Since the United States recognized the Hawaiian Kingdom as a State in the nineteenth century, the United States is precluded from derecognizing it.

According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[37] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[38] *Restatement (Third) of the*

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[34] See Exhibit A, Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* [ECF 174-1], 1.
[35] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).
[36] *State of Hawai'i v. Lorenzo*, 221, 643.
[37] Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).
[38] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).

Foreign Relations Law of the United States, "[t]he duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood **may not be 'derecognized.'** If the entity ceases to meet those requirements, it ceases to be a state and derecognition is not necessary (emphasis added)."[39] By applying international law, the *Lorenzo* principle places the burden on the ODC to provide any factual (or legal) basis for concluding that the Kingdom "ceases to be a state," and not that it derecognized it.

The government of a State, however, may be de-recognized depending on factual or legal circumstances. Such was the case when President Jimmy Carter terminated the defense treaty with Taiwan after the government of Taiwan was de-recognized as the government of China.[40] In *Goldwater v. Carter*, the Supreme Court explained, "[a]brogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate authority in China."[41] In the case of the non-recognition of the government of Cuba, the Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*, stated:

> It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control [citation omitted].[42]

The *Lorenzo* principle is NOT a matter of recognition of government but rather the recognition of the Hawaiian State as evidenced by the Hawaiian-American Treaty of Friendship,

[39] *Restatement (Third),* §202, comment g.
[40] *Goldwater v. Carter*, 444 U.S. 996 (1979).
[41] *Id*., 1007.
[42] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964).

Commerce and Navigation.[43] There is no evidence that the Executive branch de-recognized the government of the Hawaiian Kingdom. Rather, President Grover Cleveland, head of the Executive branch, admitted to an illegal overthrow of the Hawaiian government by the United States military and vowed to restore that government. Therefore, as a *juridical fact*, the United States cannot simply derecognize the Hawaiian State.

b. United States Explicit Recognition of the Continued Existence of the Hawaiian Kingdom and the Council of Regency as its Government

The status of the Hawaiian Kingdom came to the attention of the United States in a complaint for injunctive relief filed with the United States District Court for the District of Hawai'i on August 4, 1999 in *Larsen v. United Nations, et al*.[44] The United States and the Council of Regency representing the Hawaiian Kingdom were named as defendants in the complaint.

On October 13, 1999, a notice of voluntary dismissal without prejudice was filed as to the United States and nominal defendants [United Nations, France, Denmark, Sweden, Norway, United Kingdom, Belgium, Netherlands, Italy, Spain, Switzerland, Russia, Japan, Germany, Portugal and Samoa] by the plaintiff.[45] On October 29, 1999, the remaining parties, Larsen and the Hawaiian Kingdom, entered into a stipulated settlement agreement dismissing the entire case without prejudice as to all parties and all issues and submitting all issues to binding arbitration. An agreement was reached to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at the The Hague, the Netherlands was entered into on October 30, 1999.[46]

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[43] 9 Stat. 977 (1841-1851).
[44] *Larsen v. United Nations et al.*, case #1:99-cv-00546-SPK, document #1.
[45] *Id*., document #6.
[46] Agreement between plaintiff Lance Paul Larsen and defendant Hawaiian Kingdom to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at The Hague, the Netherlands (October 30, 1999), https://www.alohaquest.com/arbitration/pdf/Arbitration_Agreement.pdf.

The stipulated settlement agreement was filed with the court by the plaintiff on November 5, 1999.[47] On November 8, 1999, a notice of arbitration was filed with the International Bureau of the Permanent Court of Arbitration ("PCA")—*Lance Paul Larsen v. Hawaiian Kingdom*.[48] An order dismissing the case by District Court Judge Samuel P. King, on behalf of the plaintiff, was entered on November 11, 1999.

Distinct from the subject matter jurisdiction of the *Larsen v. Hawaiian Kingdom* ad hoc arbitral tribunal, which was formed on June 9, 2000, the PCA had to first possess "institutional jurisdiction" by virtue of Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, I (1907 PCA Convention), before it could establish the ad hoc tribunal in the first place ("The **jurisdiction of the Permanent Court** may, within the conditions laid down in the regulation, be extended to disputes [with] non-Contracting [States] [emphasis added].").[49] According to UNCTAD, there are three types of jurisdictions at the PCA, "Jurisdiction of the Institution," "Jurisdiction of the Arbitral Tribunal," and "Contentious/Advisory Jurisdiction."[50] Article 47 of the Convention provides for the jurisdiction of the PCA as an institution. Before the PCA could establish an ad hoc arbitral tribunal for the *Larsen* dispute it needed to possess institutional jurisdiction beforehand by ensuring that the Hawaiian Kingdom is a State, thus bringing the international dispute within the auspices of the PCA.

[47] *Larsen v. United Nations et al.*, document #8.
[48] Notice of Arbitration (November 8, 1999), https://www.alohaquest.com/arbitration/pdf/Notice_of_Arbitration.pdf.
[49] 36 Stat. 2199. The Senate ratified the 1907 PCA Convention on April 2, 1898 and entered into force on January 26, 1910.
[50] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: General Topics—1.3 Permanent Court of Arbitration* 15-16 (2003) (online at https://unctad.org/system/files/official-document/edmmisc232add26_en.pdf).

Evidence of the PCA's recognition of the continuity of the Hawaiian Kingdom as a State and its government is found in Annex 2—*Cases Conducted Under the Auspices of the PCA or with the Cooperation of the International Bureau* of the PCA Administrative Council's annual reports from 2000 through 2011. Annex 2 of these annual reports stated that the *Larsen* arbitral tribunal was established "[p]ursuant to article 47 of the 1907 Convention."[51] Since 2012, the annual reports ceased to include all past cases conducted under the auspices of the PCA but rather only cases on the docket for that year. Past cases became accessible at the PCA's case repository on its website at https://pca-cpa.org/en/cases/.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State to the 1907 PCA Convention, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States. 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.'"[52]

The PCA Administrative Council that published the annual reports did not "recognize" the Hawaiian Kingdom as a new State, but merely "acknowledged" its continuity since the nineteenth century for purposes of the PCA's institutional jurisdiction. If the United States objected to the PCA Administrative Council's annual reports, which it is a member of the Council, that the

[51] Permanent Court of Arbitration, *Annual Reports*, Annex 2 (online at https://pca-cpa.org/en/about/annual-reports/).
[52] See Exhibit B, Declaration of Professor Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* [ECF 55-2], para. 5.

Hawaiian Kingdom is a non-Contracting State to the 1907 PCA Convention, it would have filed a declaration with the Dutch Foreign Ministry as it did when it objected to Palestine's accession to the 1907 PCA Convention on December 28, 2015. Palestine was seeking to become a Contracting State to the 1907 PCA Convention and submitted its accession to the Dutch government on October 30, 2015. In its declaration, which the Dutch Foreign Ministry translated into French, the United States explicitly stated, *inter alia*, "the government of the United States considers that 'the State of Palestine' does not answer to the definition of a sovereign State and does not recognize it as such (translation)."[53] The Administrative Council, however, did acknowledge, by vote of 54 in favor and 25 abstentions, that Palestine is a Contracting State to the 1907 PCA Convention in March of 2016.

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[54] As Professor Talmon states, "[t]he government, consequently, possesses the *jus repraesentationis omnimodae,* i.e. plenary and exclusive competence in international law to

[53] Ministry of Foreign Affairs of the Kingdom of the Netherlands, *Notification of the Declaration of the United States translated into French* (January 29, 2016) (online at https://repository.overheid.nl/frbr/vd/003316/1/pdf/003316_Notificaties_11.pdf).
[54] *German Settlers in Poland,* 1923, *PCIJ, Series B, No. 6,* 22.

represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[55]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency.[56] The PCA identified the international dispute in *Larsen* as between a "State" and a "private entity" in its case repository.[57] 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)."[58]

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom 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 on June 9, 2000.[59]

Furthermore, there is no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under the constitution and laws of the Hawaiian Kingdom, to get

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[55] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).
[56] See Exhibit B.
[57] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[58] *Id*.
[59] See Exhibit C, Declaration of David Keanu Sai, Ph.D. [ECF 55-1].

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,[60] was also the recognition of its government—a constitutional monarchy, as its agent. 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, 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.[61] 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 the *Restatement (Third) of the Foreign Relations Law of the United States*:

> *Recognition in cases of constitutional succession*. 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** (emphasis added).[62]

The Respondent is an aboriginal Hawaiian subject and was appointed by the Council of Regency as acting Attorney General for the Hawaiian Kingdom on August 11, 2013, and, therefore, meets the requirement set by the Supreme Court in *Armitage* "that he…is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him."[63]

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[60] U.S. Secretary of State Calhoun to Hawaiian Commissioners (July 6, 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[61] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[62] *Restatement (Third)*, §203, comment c.
[63] See Exhibit D, Commission of Dexter Ke‘eaumoku Ka‘iama as Attorney General.

c. Shifting the Burden of Proof in the *Lorenzo* principle

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 on the party opposing the presumption, the ODC, to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. When the *Lorenzo* court acknowledged that Lorenzo pled in his motion to dismiss the indictment that the Hawaiian Kingdom "was recognized as an independent sovereign nation by the United States in numerous bilateral treaties,"[64] it set the presumption to be the Hawaiian Kingdom's existence as a State under international law. This would have resulted in placing the burden "on the party opposing that continuity to establish the facts substantiating its rebuttal." Under international law, it was not the burden of Lorenzo to provide evidence that the Hawaiian Kingdom "exists" when the *Lorenzo* court already acknowledged its existence and recognition by the United States. Rather, it was the burden of the prosecution to provide rebuttable evidence that the Hawaiian Kingdom "does not exist" as a State.

III. CONCLUSION

For these reasons, Respondent respectfully requests that the Hawai'i Supreme Court schedule an evidentiary hearing for the ODC to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom ceases to exist as a State in light of the evidence and law in the instant motion. If the ODC is unable to proffer rebuttable evidence, Respondent respectfully requests that this Supreme Court dismiss the instant petition, as well as the original proceeding (ODC Case No. 18-0339) in its entirety, pursuant to the HRCP 12(b)(2) and the *Lorenzo* principle.

[64] *State of Hawai'i v. Lorenzo*, 220; 642.

IV. REQUEST TO STAY PETITION

Respondent, on October 26, 2022, filed his Petition for Writ of Mandamus or Extraordinary Writ Direct to the Chairperson of the Disciplinary Board of the Hawai‘i Supreme, in SCPW-22-0000634 (“Writ of Mandamus”), disputing and challenging the September 13, 2022 Order Denying Respondent Ka‘iama’s Motions and October 5, 2022 Order Rejecting Reconsideration, by Office of Disciplinary Counsel, of the Hawai‘i Supreme Court, Chairperson/Board Officer Clifford L. Nakea (“DBO Nakea”) in ODC Case No. 18-0339. Petitioner Ka‘iama’s Writ of Mandamus and the instant petition for suspension arise out of the same case (ODC Case No. 18-0339).

Respondent Ka‘iama herein, hereby respectfully submits that his Petition for Writ of Mandamus, in SCPW-22-0000634, and his instant Motion to Dismiss the ODC Petition for Immediate Suspension in SCAD-22-0000623, are predicate procedural matters mandating this honorable Supreme Court’s full and complete review, consideration and ruling prior to addressing the ODC Petition for Immediate Suspension.

A favorable ruling of this Supreme Court, for Respondent in SCAD-22-0000623, would result in either a complete dismissal of ODC’s Petition for Immediate Suspension, or, in the alternative, a stay of ODC’s said Petition and the scheduling of an evidentiary hearing for the ODC to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom ceases to exist as a State in light of the evidence and law, in response to Respondent Ka‘iama’s instant Motion to Dismiss Pursuant to HRCP 12(b)(2) and the *Lorenzo* Principle.

Likewise, a favorable ruling for Petitioner, in SCPW-22-0000634, would result in an order granting Petitioner Ka‘iama’s Writ of Mandamus and order of remand, to ODC-DBO Nakea, to schedule an evidentiary hearing for the ODC to provide rebuttable evidence, whether factual or

legal, that the Hawaiian Kingdom ceases to exist as a State in light of the evidence and law, in response to Respondent Ka‘iama (in ODC Case No. 18-0339) Motion to Dismiss Subpoena dated August 31, 2022 Pursuant to HRCP 12(b)(2), filed September 6, 2022, and Motion to Alter or Amend Judgment Dated September 13, 2022, Pursuant to HRCP 59(e), filed September 21, 2022, both filed in ODC Case No. 18-0339.

Accordingly, with due respect to the Court, Respondent additionally moves and/or hereby requests a stay of ODC’s Petition for Respondent Ka‘iama’s Immediate Suspension, including any deadline for Respondent Ka‘iama’s answer and/or response to the instant Petition for Suspension, until this Court has fully reviewed, considered and issued its ruling on Respondent Ka‘iama’s instant Motion to Dismiss after the Supreme Court has scheduled an evidentiary hearing, or in the alternative by granting Petitioner’s request for a writ of mandamus or other extraordinary writ directing DBO Nakea to schedule an evidentiary hearing.

DATED: Honolulu, Hawai‘i, October 30, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

Dexter K. Ka‘iama (Bar No. 4249)
Respondent

SCAD-22-0000623

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

DEXTER K. KA‘IAMA, Respondent (Bar No. 4249)

ORIGINAL PROCEEDING
(ODC Case No. 18-0339)

DECLARATION OF DEXTER K. KA‘IAMA, with EXHIBITS “A-D”

DECLARATION OF DEXTER K. KA‘IAMA

I, Dexter K. Ka‘iama, declare the following:

1. I am an aboriginal Hawaiian Kingdom subject, the Respondent in SCAD-22-0000623, and make this declaration from my personal knowledge, unless otherwise so indicated.

2. I am also *Acting* Attorney General and legal counsel for Plaintiff in the matter of the *Hawaiian Kingdom v. Joseph Robinette Biden, Jr., et al.*, Civil No. 1:21:cv-00243-LEK-RT in the United States District Court for the District of Hawai`i (hereinafter referred to as “*Hawaiian Kingdom v. Biden*”).

3. That attached to this declaration as Exhibit “A” is a true and correct copy of the Declaration of Professor Federico Lenzerini; Exhibit “1” that I filed as Document 174-1 in *Hawaiian Kingdom v. Biden* on December 6, 2021;

4. That attached to this declaration as Exhibit “B” is a true and correct copy of the Declaration of Professor Federico Lenzerini; Exhibit “2” that I filed as Document 55-2 in *Hawaiian Kingdom v. Biden* on August 11, 2021;

5. That attached to this declaration as Exhibit “C” is a true and correct copy of the Declaration of David Keanu Sai, Ph.D.; Exhibit “1” that I filed as Document 55-1 in *Hawaiian Kingdom v. Biden* on August 11, 2021;

6. That attached to this declaration as Exhibit “D” is a true and correct copy of my appointment as the *Acting* Attorney General, by the Council of Regency for the Hawaiian Kingdom on August 11, 2013. The appointment affirms my standing as an aboriginal Hawaiian Kingdom subject.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Kailua, Hawai‘i, October 30, 2022.

/s/ Dexter K. Ka‘iama
Dexter K. Ka‘iama

Exhibit "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM, Plaintiff, v. JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al., Defendants.	Civil No. 1:21:cv-00243-LEK-RT DECLARATION OF PROFESSOR FEDERICO LENZERINI; EXHIBIT "1"

DECLARATION OF PROFESSOR FEDERICO LENZERINI

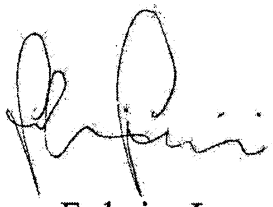
I, Federico Lenzerini, declare the following:

1. I am an Italian citizen residing in Poggibonsi, Italy. I am the author of the legal opinion on the civil law on juridical fact of the Hawaiian State and the consequential juridical act by the Permanent Court of Arbitration, which a true and correct copy of the same is attached hereto as Exhibit "1".

2. I have a Ph.D. in international law and I am a Professor of International Law, University of Siena, Italy, Department of Political and International Sciences. For further information see https://docenti.unisi.it/it/lenzerini. I can be contacted at federico.lenzerini@unisi.it.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Siena, Italy, 5 December 2021.



Professor Federico Lenzerini

Exhibit "1"

CIVIL LAW ON JURIDICAL FACT OF THE HAWAIIAN STATE AND THE CONSEQUENTIAL JURIDICAL ACT BY THE PERMANENT COURT OF ARBITRATION

FEDERICO LENZERINI*

5 December 2021

Juridical Facts

In the civil law tradition, a *juridical fact* (or *legal fact*) is a fact (or event) – determined either by natural occurrences or by humans – which produces consequences that are relevant according to law. Such consequences are defined *juridical effects* (or *legal effects*), and consist in the establishment, modification or extinction of rights, legal situations or *juridical* (or *legal*) *relationships* (*privity*). Reversing the order of the reasoning, among the multifaceted natural or social facts occurring in the world a fact is *juridical* when it is *legally relevant*, i.e. determines the production of *legal effects* per effect of a *legal* (*juridical*) *rule* (*provision*). In technical terms, it is actually the legal rule which produces legal effects, while the juridical fact is to be considered as the *condition* for the production of the effects. In practical terms, however, it is the juridical fact which activates a reaction by the law and makes the production of the effects concretely possible. At the same time, no fact can be considered as "juridical" without a legal rule attributing this quality to it.[1]

Both *rights*, *powers* or *obligations* – held by/binding a person or another subject of law (in international law, a State, an international organization, a people, or any other entity to which international law attributes legal personality) – may arise from a juridical fact.

Sometimes a juridical fact determines the production of legal effects irrespective of the action of a person or another subject of law. In other terms, in some cases legal effects are automatically produced by a(n *inactive*) juridical fact – only by virtue of the mere existence of the latter – without any need of an action by a legal subject. "Inactive juridical facts are events which occur more or less spontaneously, but still have legal effects because a certain reaction is regarded to be necessary to deal with the newly arisen circumstances".[2] Inactive juridical facts may be based on an occasional situation, a quality of a person or a thing, or the course of time.[3]

Juridical Acts

In other cases, however, the legal effects arising from a juridical fact only exist *potentially*, and, in order to concretely come into existence they need to be activated through a behaviour by a subject of law, which may consist of either an action or a passive behaviour. The legal effects may arise from either an *operational act* – i.e. a behaviour to which the law attributes legally-relevant effects for the sole ground of its existence, "although the acting [subject] had no intention to create this legal

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* Professor of International Law and Human Rights, University of Siena (Italy), Department of Political and International Sciences. Professor at the LL.M. Program on Intercultural Human Rights, St. Thomas University School of Law, Miami, FL, USA.

[1] See Lech Morawski, "Law, Fact and Legal Language", (1999) 18 *Law and Philosophy* 461, at 463.

[2] See "Legal System of Civil Law in the Netherlands", available at <http://www.dutchcivillaw.com/content/legalsystem022aa.htm> (accessed on 4 December 2021).

[3] Ibidem.

effect"[4] – or an act that a subject of law performs intentionally, "because he[/she/it] knows that the law will respond to it by acknowledging the conception of a particular legal effect. The act is explicitly [and voluntarily] chosen to let this legal effect arise".[5] In order to better comprehend this line of reasoning, one may consider the example of adverse possession,[6] which is determined by the juridical fact that a given span of time has passed during which the thing has continuously been in the possession without being claimed by its owner. However, in order for the possessor to effectively acquire the right to property, it is usually necessary to activate a legal action before the competent authority aimed at obtaining its legal recognition. In this and other similar cases a subject of law intentionally performs an act "to set the law in motion" with the purpose of producing a desired juridical effect. The legal subject concerned knows that, through performing such an act, the wanted juridical effect will be produced as a consequence of the existence of a juridical fact. Acts that are intentionally performed by a subject of law with the purpose of producing a desired legal effect are defined as *juridical acts* (or *legal acts*). It follows that an act consequential to a juridical fact (i.e. having the purpose of producing a given juridical effect in consequence of the existence of a juridical fact) is called *juridical* (or *legal*) *act*. The entitlement to perform a *juridical act* is the effect of a *power* attributed by the *juridical fact* to the legal subject concerned. The most evident difference between *juridical facts* and *juridical acts* is that, while the former "produce legal consequences regardless of a [person]'s will and capacity", the latter "are licit volitional acts – in the form of a manifestation of will – that are intended to produce legal consequences".[7]

Effects of Juridical Acts on Third Parties

One legal subject may only perform a juridical act unilaterally when it falls within her/his/its own legal sphere, but an unilateral juridical act may produce effects for other legal subjects as well. For instance, in private law unilateral juridical acts exist which produce juridical effects on third parties – for instance a will or a promise to donate a sum of money. Usually, unilateral juridical acts start to produce their effects from the moment when they are known by the beneficiary, and from that moment their withdrawal is precluded, unless otherwise provided for by applicable law (depending on the specific act concerned).

Similarly, bilateral or plurilateral juridical acts influencing the life of third parties are also provided by law – e.g. a contract in favour of third parties or a trust, typical of the common law tradition. Then, of course, the beneficiary of such acts may decide to refuse the benefits (if any) arising from them; however, if such benefits are not refused, said acts will definitely produce their effects, and may only be withdrawn within the limits established by law. Juridical acts also include the laws and regulations adopted by national parliaments, administrative acts, and, more in general, all acts determining – i.e. creating, modifying or abrogating – legal effects. *Acts of the judiciary* (judgments, orders, decrees, etc.) are also included in the concept of juridical acts. For instance, a judgment recognizing natural filiation produces the effects of filiation – with *retroactive effects* – "transform[ing] the [juridical] fact of procreation (in itself insufficient to create a legal relationship)

[4] Ibidem.

[5] Ibidem.

[6] Adverse possession refers to a legal principle – in force in many countries, especially of civil law – according to which a subject of law is granted property title over another subject's property by keeping continuous possession of it for a given (legally defined) period of time, on the condition that the title over the property is not claimed by the owner throughout the whole duration of that period of time.

[7] See Nikolaos A. Davrados, "A Louisiana Theory of Juridical Acts" (2020) 80 *Louisiana Law Review* 1119, at 1273.

into a state of filiation (recognized child) that is relevant to the law".[8] In this case, a juridical act of the judge actually leads to the recognition of a legal state – productive of a number of juridical effects, including *ex tunc* – arising from the juridical fact of the natural filiation. This is a perfect example of a juridical fact (exactly the natural filiation) whose legal effects exist *potentially*, and are activated by the juridical act represented by the judge's decision.

The Juridical Act of the Permanent Court of Arbitration (PCA) Recognizing the Juridical Fact of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government

According to the *PCA Arbitration Rules*,[9] disputes included within the competence of the PCA include the following instances:

- disputes between two or more States;
- disputes between two parties of which only one is a State (i.e., disputes between a State and a private entity);
- disputes between a State and an international organization;
- disputes between two or more international organizations;
- disputes between an international organization and a private entity.

It is evident that, in order for a dispute to fall within the competence of the PCA, it is *always* necessary that either a State or an international organization are involved in the controversy. The case of *Larsen v. Hawaiian Kingdom*[10] was qualified by the PCA as a dispute between a State (The Hawaiian Kingdom) and a Private entity (Lance Paul Larsen).[11] In particular, the Hawaiian Kingdom was qualified as a non-Contracting Power under Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes.[12] In addition, since the PCA allowed the Council of Regency to represent the Hawaiian Kingdom in the arbitration, it also implicitly recognized the former as the government of the latter.[13]

According to a civil law perspective, the juridical act of the International Bureau of the PCA instituting the arbitration in the case of *Larsen v. Hawaiian Kingdom* may be compared – *mutatis mutandis* – to a juridical act of a domestic judge recognizing a juridical fact (e.g. *filiation*) which is productive of certain legal effects arising from it according to law. Said legal effects may include, depending on applicable law, the power to stand before a court with the purpose of invoking certain rights. In the context of the *Larsen* arbitration, the juridical fact recognized by the PCA in favour of the Hawaiian Kingdom was its quality of *State* under international law. Among the legal effects produced by such a juridical fact, the entitlement of the Hawaiian Kingdom to be part of an international arbitration under the auspices of the PCA was included, since the existence of said juridical fact actually represented an indispensable condition for the Hawaiian Kingdom to be admitted in the *Larsen* arbitration, *vis-à-vis* a private entity (Lance Paul Larsen). Consequently, the

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[8] See Armando Cecatiello, "Recognition of the natural child", available at <https://www.cecatiello.it/en/riconoscimento-del-figlio-naturale-2/> (accessed on 4 December 2021).

[9] The *PCA Arbitration Rules 2012* (available at <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf>, accessed on 5 December 2021) constitute a consolidation of the following set of PCA procedural rules: the *Optional Rules for Arbitrating Disputes between Two States (1992)*; the *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State* (1993); the *Optional Rules for Arbitration Between International Organizations and States* (1996); and *the Optional Rules for Arbitration Between International Organizations and Private Parties (1996)*.

[10] Case number 1999-01.

[11] See <https://pca-cpa.org/en/cases/35/> (accessed on 5 December 2021).

[12] Available at <https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> (accessed on 5 December 2021).

[13] See Declaration of Professor Federico Lenzerini [ECF 55-2].

International Bureau of the PCA carried out the juridical act consisting in establishing the arbitral tribunal as an effect of the recognition of the juridical fact in point. Likewise, e.g., the recognition of the juridical fact of filiation by a domestic judge, also the recognition of the Hawaiian Kingdom as a State had in principle retroactive effects, in the sense that the Hawaiian Kingdom did *not* acquire the condition of State per effect of the PCA's juridical act. Rather, the Hawaiian Kingdom's Statehood was a juridical fact that the PCA recognized as *pre-existing* to its juridical act.

The Effects of the Juridical Act of the PCA Recognizing the Juridical Fact of the Continued Existence of the Hawaiian Kingdom as a State and the Council of Regency as its government

At the time of the establishment of the *Larsen* arbitral tribunal by the PCA, the latter had 88 contracting parties.[14] One may safely assume that the PCA's juridical act consisting in the recognition of the juridical fact of the Hawaiian Kingdom as a State, through the institution of the *Larsen* arbitration, reflected a view shared by all such parties, on account of the fact that the decision of the International Bureau of the PCA was not followed by any complaints by any of them. In particular, it is especially meaningful that there was "no evidence that the United States, being a Contracting State [indirectly concerned by the *Larsen* arbitration], protested the International Bureau's recognition of the Hawaiian Kingdom as a State in accordance with Article 47".[15] On the contrary, the United States appeared to provide its acquiescence to the establishment of the arbitration, as it entered into an agreement with the Council of Regency of the Hawaiian Kingdom to access all records and pleadings of the dispute.

Under international law, the juridical act of the PCA recognizing the juridical fact of the Hawaiian Kingdom as a State may reasonably be considered as an important manifestation of – contextually – State practice and *opinio juris*, in support of the assumption according to which the Hawaiian Kingdom is actually – and has never ceased to be – a sovereign and independent State pursuant to customary international law. As noted a few lines above, it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau. In fact, in 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 [or an international institution] would be called for".[16] The case in discussion is evidently a situation in the context of which, in the event that any of the PCA contracting parties would have disagreed with the recognition of the continued existence of the Hawaiian Kingdom as a State by the International Bureau through its juridical act, an explicit reaction would have been necessary. Since they "did not do so [...] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*".[17]

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[14] See <https://pca-cpa.org/en/about/introduction/contracting-parties/> (accessed on 5 December 2021).

[15] See 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 2020) 12, at 25.

[16] See Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006), at para. 2.

[17] 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.

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM,

Plaintiff,

v.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; JANE HARDY, in her official capacity as Australia's Consul General to Hawai'i and the United Kingdom's Consul to Hawai'i; JOHANN URSCHITZ, in his official capacity as Austria's Honorary Consul to Hawai'i; M. JAN RUMI, in his official capacity as Bangladesh's Honorary Consul to Hawai'i and Morocco's Honorary Consul to Hawai'i; JEFFREY DANIEL LAU, in his official capacity as Belgium's Honorary Consul to Hawai'i; ERIC G. CRISPIN, in his official capacity as Brazil's Honorary Consul to Hawai'i; GLADYS VERNOY, in her official capacity as Chile's Honorary Consul General to Hawai'i; JOSEF SMYCEK, in his official capacity as the Czech Republic's Deputy Consul General for Los Angeles that oversees the Honorary Consulate in

Civil No. 1:21-cv-00243-LEK-RT

DECLARATION OF PROFESSOR FEDERICO LENZERINI

Hawai'i; BENNY MADSEN, in his official capacity as Denmark's Honorary Consul to Hawai'i; KATJA SILVERAA, in her official capacity as Finland's Honorary Consul to Hawai'i; GUILLAUME MAMAN, in his official capacity as France's Honorary Consul to Hawai'i; DENIS SALLE, in his official capacity as Germany's Honorary Consul to Hawai'i; KATALIN CSISZAR, in her official capacity as Hungary's Honorary Consul to Hawai'i; SHEILA WATUMULL, in her official capacity as India's Honorary Consul to Hawai'i; MICHELE CARBONE, in his official capacity as Italy's Honorary Consul to Hawai'i; YUTAKA AOKI, in his official capacity as Japan's Consul General to Hawai'i; JEAN-CLAUDE DRUI, in his official capacity as Luxembourg's Honorary Consul to Hawai'i; ANDREW M. KLUGER, in his official capacity as Mexico's Honorary Consul to Hawai'i; HENK ROGERS, in his official capacity as Netherland's Honorary Consul to Hawai'i; KEVIN BURNETT, in his official capacity as New Zealand's Consul General to Hawai'i; NINA HAMRE FASI, in her official capacity as Norway's Honorary Consul to Hawai'i; JOSELITO A. JIMENO, in his official capacity as the Philippines's Consul General to Hawai'i; BOZENA ANNA JARNOT, in her official capacity as Poland's Honorary Consul to Hawai'i; TYLER DOS SANTOS-TAM, in his official capacity as Portugal's Honorary Consul to Hawai'i; R.J. ZLATOPER, in his official capacity as Slovenia's Honorary Consul to Hawai'i; HONG, SEOK-IN, in his official capacity as the Republic of South Korea's Consul General to Hawai'i; JOHN HENRY

FELIX, in his official capacity as Spain's Honorary Consul to Hawai'i; BEDE DHAMMIKA COORAY, in his official capacity as Sri Lanka's Honorary Consul to Hawai'i; ANDERS G.O. NERVELL, in his official capacity as Sweden's Honorary Consul to Hawai'i; THERES RYF DESAI, in her official capacity as Switzerland's Honorary Consul to Hawai'i; COLIN T. MIYABARA, in his official capacity as Thailand's Honorary Consul to Hawai'i; DAVID YUTAKA IGE, in his official capacity as Governor of the State of Hawai'i; TY NOHARA, in her official capacity as Commissioner of Securities; ISSAC W. CHOY, in his official capacity as the director of the Department of Taxation of the State of Hawai'i; CHARLES E. SCHUMER, in his official capacity as U.S. Senate Majority Leader; NANCY PELOSI, in her official capacity as Speaker of the United States House of Representatives; RON KOUCHI, in his official capacity as Senate President of the State of Hawai'i; SCOTT SAIKI, in his official capacity as Speaker of the House of Representatives of the State of Hawai'i; the UNITED STATES OF AMERICA; and the STATE OF HAWAI'I,

Defendants.

DECLARATION OF PROFESSOR FEDERICO LENZERINI

Exhibit 2

DECLARATION OF PROFESSOR FEDERICO LENZERINI

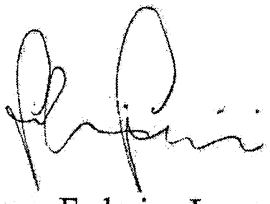
I, Federico Lenzerini, declare the following:

1. I am an Italian citizen residing in Siena, Italy. I am the author of the legal opinion on the authority of the Council of Regency of the Hawaiian Kingdom dated 24 May 2020, which a true and correct copy of the same is attached hereto.

2. I have a Ph.D. in international law and I am a Professor of International Law, University of Siena, Italy, Department of Political and International Sciences. For further information see https://docenti.unisi.it/it/lenzerini. I can be contacted at federico.lenzerini@unisi.it.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Siena, Italy, 13 May 2021.



Professor Federico Lenzerini

LEGAL OPINION ON THE AUTHORITY OF THE COUNCIL OF REGENCY OF THE HAWAIIAN KINGDOM

PROFESSOR FEDERICO LENZERINI*

As requested in the Letter addressed to me, on 11 May 2020, by Dr. David Keanu Sai, Ph.D., Head of the Hawaiian Royal Commission of Inquiry, I provide below a legal opinion in which I answer the three questions included in the above letter, for purposes of public awareness and clarification of the Regency's authority.

a) Does the Regency have the authority to represent the Hawaiian Kingdom as a State that has been under a belligerent occupation by the United States of America since 17 January 1893?

1. In order to ascertain whether the Regency has the authority to represent the Hawaiian Kingdom *as a State*, it is preliminarily necessary to ascertain whether the Hawaiian Kingdom can actually be considered a State under international law. To this purpose, two issues need to be investigated, i.e.: a) whether the Hawaiian Kingdom was a State at the time when it was militarily occupied by the United States of America, on 17 January 1893; b) in the event that the solution to the first issue would be positive, whether the continuous occupation of Hawai'i by the United States, from 1893 to present times, has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law.
2. With respect to the first of the abovementioned issues, as acknowledged by the Arbitral Tribunal of the Permanent Court of Arbitration (PCA) in the *Larsen* case, "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."[1] At the time of the American occupation, the Hawaiian Kingdom fully satisfied the four elements of statehood prescribed by customary international law, which were later codified by the *Montevideo Convention on the Rights and Duties of States* in 1933[2]: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. This is confirmed by the fact that

> "the Hawaiian Kingdom became a full member of the Universal Postal Union on 1 January 1882, maintained more than a hundred legations and consulates throughout the world, and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary,

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[1] See *Larsen v. Hawaiian Kingdom*, 119 *International Law Reports*, 2001, 566, at 581.

[2] See *Montevideo Convention on the Rights and Duties of States*, 1933, 165 *LNTS* 19, Article 1. This article codified the so-called *declarative* theory of statehood, already accepted by customary international law; see Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", 37 *Columbia Journal of Transnational Law*, 1998-1999, 403; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity*", The Hague/Boston/London, 2000, at 77; David J.

> Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States".[3]

It is therefore unquestionable that **in the 1890s the Hawaiian Kingdom was an independent State and, consequently, a subject of international law**. This presupposed that its territorial sovereignty and internal affairs could not be legitimately violated by other States.

3. Once established that the Hawaiian Kingdom was actually a State, under international law, at the time when it was militarily occupied by the United States of America, on 17 January 1893, it is now necessary to determine whether the continuous occupation of Hawai'i by the United States from 1893 to present times has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law. This issue is undoubtedly controversial, and may be considered according to different perspectives. As noted by the Arbitral Tribunal established by the PCA in the *Larsen* case, in principle the question in point might be addressed by means of a careful assessment carried out through "having regard *inter alia* to the lapse of time since the annexation [by the United States], subsequent political, constitutional and international developments, and relevant changes in international law since the 1890s".[4]
4. However – beyond all speculative argumentations and the consequential conjectures that might be developed depending on the different perspectives under which the issue in point could be addressed – in reality the argument which appears to overcome all the others is that a long-lasting and well-established rule of international law exists establishing that military occupation, irrespective of the length of its duration, *cannot* produce the effect of extinguishing the sovereignty and statehood of the occupied State. In fact, the validity of such a rule has *not* been affected by whatever changes occurred in international law since the 1890s. Consistently, as emphasized by the Swiss arbitrator Eugène Borel in 1925, in the famous *Affaire de la Dette publique ottomane*,

> "[q]uels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté [...] L'occupation, par l'un des belligérants, de [...] territoire de l'autre belligérant est un pur fait. C'est un état de choses essentiellement provisoire, qui ne substitue pas légalement l'autorité du belligérant envahisseur à celle du belligérant envahi".[5]

This position was confirmed by, among others, the US Military Tribunal at Nuremberg in 1948, holding that "[i]n belligerent occupation the occupying power does not hold enemy territory by virtue of any legal right. On the contrary, it merely exercises a precarious and temporary actual control".[6] Indeed, as noted, much more recently, by Yoram Dinstein, "occupation does not affect sovereignty. The displaced sovereign loses possession of the occupied territory de facto but it retains title *de jure* [i.e. "as a matter of law"]".[7] In this regard, as previously specified, this

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[3] See David Keanu Sai, "Hawaiian Constitutional Governance", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 58, at 64 (footnotes omitted).

[4] See *Larsen v. Hawaiian Kingdom*, *supra* n. 1, at 9.2.

[5] See *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, *Reports of International Arbitral Awards*, Volume I, 529, also available at <https://legal.un.org/riaa/cases/vol_I/529-614.pdf> (accessed on 16 May 2020), at 555 ("whatever are the effects of the occupation of a territory by the enemy before the re-establishment of peace, it is certain that such an occupation alone cannot legally determine the transfer of sovereignty [...] The occupation, by one of the belligerents, of [...] the territory of the other belligerent is nothing but a pure fact. It is a state of things essentially provisional, which does not legally substitute the authority of the invading belligerent to that of the invaded belligerent").

[6] See *USA v. Otto Ohlendorf et al. (Einsatzgruppen Trial)*, 10 April 1948, (1948) *LRTWC* 411, at 492.

conclusion can in no way be influenced by the length of the occupation in time, as "[p]rolongation of the occupation does not affect its innately temporary nature".[8] It follows that "'precarious' as it is, the sovereignty of the displaced sovereign over the occupied territory is not terminated" by belligerent occupation.[9] Under international law, "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur",[10] which means, in the words of the famous jurist Oppenheim, that "[t]he only form in which a cession [of sovereignty] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war".[11] Such a conclusion corresponds to "a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts".[12]

5. The United States has taken possession of the territory of Hawai'i solely through de facto occupation and unilateral annexation, without concluding any treaty with the Hawaiian Kingdom. Furthermore, it appears that such an annexation has taken place in contravention of the rule of *estoppel*. At it is known, in international law "the doctrine of estoppel protects legitimate expectations of States induced by the conduct of another State".[13] On 18 December 1893 President Cleveland concluded with Queen Lili'uokalani a treaty, by executive agreement, which obligated the President to restore the Queen as the Executive Monarch, and the Queen thereafter to grant clemency to the insurgents.[14] Such a treaty, which was never carried into effect by the United States, would have precluded the latter from claiming to have acquired Hawaiian territory, because it had evidently induced in the Hawaiian Kingdom the legitimate expectation that the sovereignty of the Queen would have been reinstated, an expectation which was unduly frustrated through the annexation. It follows from the foregoing that, according to a plain and correct interpretation of the relevant legal rules, **the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and a subject of international law**, despite the long and effective exercise of the attributes of government by the United States over Hawaiian territory.[15] In fact, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[16] since "illegal occupation cannot of itself terminate statehood".[17] The possession of the attribute of statehood by the Hawaiian Kingdom was substantially confirmed by the PCA, which, before establishing the Arbitral Tribunal for the *Larsen* case, had to get assured that one of the parties of the arbitration was a State, as a necessary precondition for its jurisdiction to exist. In

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[8] Ibid.

[9] Ibid. (footnotes omitted). See also, consistently, Peter M.R. Stirk, *The Politics of Military Occupation*, Edinburgh, 2009, at 168 and 230.

[10] See *Affaire de la Dette publique ottomane*, *supra* n. 5, at 555 ("the transfer of sovereignty can only be considered legally effected by the entry into force of a treaty which establishes it and from the date of such entry into force").

[11] See Lassa FL Oppenheim, *Oppenheim's International Law*, 7th Ed., vol. 1, 1948, at 500.

[12] See Jean S. Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, Geneva, 1958, at 275.

[13] See Thomas Cottier, Jörg Paul Müller, "Estoppel", *Max Planck Encyclopedias of International Law*, April 2007, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1401> (accessed on 20 May 2020).

[14] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 1269, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).

[15] In this respect, it is to be emphasized that "a sovereign State would continue to exist despite its government being overthrown by military force"; see 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 in the Hawaiian Kingdom*, Honolulu, 2020, 12, at 14.

[16] See James Crawford, *The Creation of States in International Law*, 2nd Ed., Oxford, 2006, at 702.

that case, the Hawaiian Kingdom was actually qualified as a "State", while the Claimant – Lance Paul Larsen – as a "Private entity."[18]

6. The conclusion according to which the Hawaiian Kingdom cannot be considered as having been extinguished – as a State – as a result of the American occupation also allows to confirm, *de plano*, that the Hawaiian Kingdom, as an independent State, **has been under uninterrupted belligerent occupation by the United States of America, from 17 January 1893 up to the moment of this writing**. This conclusion cannot be validly contested, even by virtue of the hypothetical consideration according to which, since the American occupation of Hawai'i has not substantially involved the use of military force, and has not encountered military resistance by the Hawaiian Kingdom,[19] it consequently could not be considered as "belligerent". In fact, a territory is considered occupied "when it is placed under the authority of the hostile army [...] The law on occupation applies to all cases of partial or total occupation, even if such occupation does not encounter armed resistance. The essential ingredient for applicability of the law of occupation is therefore the actual control exercised by the occupying forces".[20] This is consistent with the rule expressed in Article 42 of the Regulations annexed to the *Hague Convention (IV) respecting the Laws and Customs of War on Land* of 1907 – affirming that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" – as well as with Article 2 common to the four Geneva Conventions of 1949, establishing that such Conventions apply "to all cases of partial or total occupation of the territory of a High Contracting Party, *even if the said occupation meets with no armed resistance*" (emphasis added).
7. Once having ascertained that, under international law, the Hawaiian Kingdom continues to exist as an independent State, it is now time to assess the legitimacy and powers of the Regency. According to the *Lexico Oxford Dictionary*, a "regency" is "[t]he office of or period of government by a regent".[21] In a more detailed manner, the *Black's Law Dictionary*, which is the most trusted and widely used legal dictionary in the United States, defines the term in point as "[t]he man or body of men intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the king".[22] Therefore, it appears that, in consideration of the current situation of the Hawaiian Kingdom, a regency is the right body entitled to provisionally exercise the powers of the Hawaiian Executive Monarch in the absence of the latter, an absence which forcibly continues at present due to the persistent situation of military occupation to which the Hawaiian territory is subjected.
8. In legal terms, the legitimacy of the Hawaiian Council of Regency is grounded on Articles 32 and 33 of the *Hawaiian Kingdom Constitution* of 1864. In particular, Article 32 states that "[w]henever, upon the decease of the Reigning Sovereign, the Heir shall be less than eighteen years of age, the Royal Power shall be exercised by a Regent Council of Regency; as hereinafter provided". As far as Article 33 is concerned, it affirms that

> "[i]t shall be lawful for the King at any time when he may be about to absent himself from the Kingdom, to appoint a Regent or Council of Regency, who shall administer the Government in

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[18] See <https://pcacases.com/web/view/35> (accessed on 16 May 2020).

[19] It is to be noted, in this respect, that no armed resistance was opposed to the occupation despite the fact that, as acknowledged by US President Cleveland, the Queen "had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal"; see United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 453, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).

[20] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", Geneva, June 2002, available at <https://www.icrc.org/en/doc/assets/files/other/law9_final.pdf> (accessed on 17 May 2020), at 3.

[21] See <https://www.lexico.com/en/definition/regency> (accessed on 17 May 2020).

> His name; and likewise the King may, by His last Will and Testament, appoint a Regent or Council of Regency to administer the Government during the minority of any Heir to the Throne; and should a Sovereign decease, leaving a Minor Heir, and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent of 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, until he shall have attained the age of eighteen years, which age is declared to be the Legal Majority of such Sovereign".

The Council of Regency was established by proclamation on February 28, 1997, by virtue of the offices made vacant in the Cabinet Council, on the basis of the doctrine of necessity, the application of which was justified by the absence of a Monarch. Therefore, **the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom**. The Council of Regency, composed by *de facto* officers, is actually serving as the provisional government of the Hawaiian Kingdom, and, should the military occupation come to an end, it shall immediately convene the Legislative Assembly, which "shall proceed to choose by ballot, a Regent of 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" until it shall not be possible to nominate a Monarch, pursuant to Article 33 of the Hawaiian Kingdom Constitution of 1864.

9. In light of the foregoing – particularly in consideration of the fact that, under international law, the Hawaiian Kingdom continues to exist as an independent State, although subjected to a foreign occupation, and that the Council of Regency has been established consistently with the constitutional principles of the Hawaiian Kingdom and, consequently, possesses the legitimacy of temporarily exercising the functions of the Monarch of the Kingdom – it is possible to conclude that **the Regency actually has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.**

b) Assuming the Regency does have the authority, what effect would its proclamations have on the civilian population of the Hawaiian Islands under international humanitarian law, to include its proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State on 3 June 2019?

10. As previously ascertained, the Council of Regency actually possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom and, consequently, has the authority to represent the Hawaiian Kingdom as a State pending the American occupation and, in any case, up to the moment when it shall be possible to convene the Legislative Assembly pursuant to Article 33 of the Hawaiian Kingdom Constitution of 1864. This means that **the Council of Regency is exactly in the same position of a government of a State under military occupation, and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law.**
11. In principle, however, such rights and powers are quite limited, by reason of the fact that the governmental authority of a government of a State under military occupation has been replaced by that of the occupying power, "[t]he authority of the legitimate power having in fact passed into the

hands of the occupant".[23] At the same time, the ousted government retains the function and the duty of, to the extent possible, preserving order, protecting the rights and prerogatives of local people and continuing to promote the relations between its people and foreign countries. In the *Larsen* case, the claimant even asserted that the Council of Regency had "an obligation and a responsibility under international law, to take steps to protect Claimant's nationality as a Hawaiian subject";[24] the Arbitral Tribunal established by the PCA, however, did not provide a response regarding this claim. In any event, leaving aside the latter specific aspect, in light of its position the Council of Regency may to a certain extent interact with the exercise of the authority by the occupying power. This is consistent with the fact that the occupant is under an international obligation to "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".[25] Indeed, as noted by the eminent jurist Robert Y. Jennings in an influential article published in 1946,[26] one of the main purposes of the law of belligerent occupation is to protect the sovereign rights of the legitimate government of the occupied territory, and the obligations of the occupying power in this regard continue to exist "even when, in disregard of the rules of international law, it claims [...] to have annexed all or part of an occupied territory".[27] It follows that, the ousted government being the entity which represents the "legitimate government" of the occupied territory, it may "attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority, or both. One way to accomplish such goals is to legislate for the occupied population".[28] In fact, "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".[29] While in several cases occupants have maintained the inapplicability to the occupied territory of new legislation enacted by the occupied government, for the reason that it "could undermine their authority [...] the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local law, most notably in matters of personal status".[30] The Swiss Federal Tribunal has even held that "[e]nactments by the [exiled government] are constitutionally laws of the [country] and applied *ab initio* to the territory occupied [...] even though they could not be effectively implemented until the liberation".[31] Although this position was taken with specific regard to exiled governments, and the Council of Regency was not established *in exile* but *in situ*, the conclusion, to the extent that it is considered valid, would not substantially change as regards the Council of Regency itself.

12. It follows from the foregoing that, under international humanitarian law, **the proclamations of the Council of Regency are not divested of effects as regards the civilian population of the Hawaiian Islands**. In fact, considering these proclamations as included in the concept of "legislation" referred

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[23] See Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

[24] See *Larsen v. Hawaiian Kingdom, supra* n. 1, at 12.8.

[25] See Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

[26] See "Government in Commission", 23 *British Year Book of International Law*, 1946, 112.

[27] See Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, supra* n. 12, at 276.

[28] See Eyal Benvenisti, *The International Law of Occupation*, 2nd Ed., Oxford, 2012, at 104.

[29] 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.

[30] See Benvenisti, *The International Law of Occupation, supra* n. 28, at 104-105.

to in the previous paragraph,[32] they might even, if the concrete circumstances of the case so allow, apply retroactively at the end of the occupation, irrespective of whether or not they must be respected by the occupying power during the occupation, on the condition that the legislative acts in point do not "disregard the rights and expectations of the occupied population".[33] It is therefore necessary that the occupied government refrains "from using the national law as a vehicle to undermine public order and civil life in the occupied area".[34] In other words, in exercising the legislative function during the occupation, the ousted government is subjected to the condition of not undermining the rights and interests of the civilian population. However, once the latter requirement is actually respected, the proclamations of the ousted government – including, in the case of Hawai'i, those of the Council of Regency – may be considered applicable to local people, unless such applicability is explicitly refuted by the occupying authority, in its position of an entity bearing "the ultimate and overall responsibility for the occupied territory".[35] In this regard, however, it is reasonable to assume that the occupying power should not deny the applicability of the above proclamations when they do not undermine, or significantly interfere with the exercise of, its authority. This would be consistent with the obligation of the occupying power "to maintain the status quo ante (i.e. as it was before) in the occupied territory as far as is practically possible",[36] considering that local authorities are better placed to know what are the actual needs of the local population and of the occupied territory, in view of guaranteeing that the status quo ante is effectively maintained.

13. As regards, specifically, 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,[37] it reads as follows:

> "Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai'i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:
> Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize 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;
> And, We do hereby further proclaim that the State of Hawai'i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law".

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[32] This is consistent with the assumption that the expression "laws in force in the country", as used by Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 (see *supra*, text corresponding to n. 25), "refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents [...] as well as administrative regulations and executive orders"; see Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 16 *European Journal of International Law*, 2005, 661, at 668-69.

[33] See Benvenisti, *The International Law of Occupation*, *supra* n. 28, at 105.

[34] Ibid., at 106.

[35] See *supra*, text corresponding to n. 29.

[36] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", *supra* n. 20, at 9.

[37] Available at <https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf> (accessed on 18 May

As it is evident from a plain reading of its text, this Proclamation pursues the clear purpose of ensuring the protection of the Hawaiian territory and the people residing therein against the prejudicial effects which may arise from the occupation to which such a territory is actually subjected. Therefore, it represents a legislative act aimed at furthering the interests of the civilian population through ensuring the correct administration of their rights and of the land. As a consequence, it has the nature of an act that is equivalent, in its rationale and purpose (although not in its precise subject), to a piece of legislation concerning matters of personal status of the local population, requiring the occupant to give effect to it.[38] It is true that the Proclamation of 3 June 2019 takes a precise position on the status of the occupying power, the State of Hawai'i and its Counties being a direct emanation of the United States of America. However, in doing so, the said Proclamation simply reiterates an aspect that is self-evident, since the fact that the State of Hawai'i and its Counties belong to the political organization of the occupying power, and that they are de facto administering the Hawaiian territory, is objectively irrefutable. It follows that the Proclamation in discussion simply restates rules already existing under international humanitarian law. In fact, the latter clearly establishes the obligation of the occupying power to preserve the sovereign rights of the occupied government (as previously ascertained in this opinion),[39] the "overarching principle [of the law of occupation being] that an occupant does not acquire sovereignty over an occupied territory and therefore any occupation must only be a temporary situation".[40] Also, it is beyond any doubts that an occupying power is bound to guarantee and protect the human rights of the local population, as defined by the international human rights treaties of which it is a party as well as by customary international law. This has been authoritatively confirmed, *inter alia*, by the International Court of Justice.[41] While the Proclamation makes reference to the duty of the State of Hawai'i and its Counties to protect the human rights of the local population "under Hawaiian Kingdom law", and not pursuant to applicable international law, this is consistent with the obligation of the occupying power to respect, to the extent possible, the law in force in the occupied territory. In this regard, respecting the domestic laws which protect the human rights of the local population undoubtedly falls within "the extent possible", because it certainly does not undermine, or significantly interfere with the exercise of, the authority of the occupying power, and is consistent with existing international obligations. In other words, the occupying power cannot be considered "absolutely prevented"[42] from applying the domestic laws protecting the human rights of the local population, unless it is demonstrated that the level of protection of human rights guaranteed by Hawaiian Kingdom law is less advanced than human rights standards established by international law. Only in this case, the occupying power would be under a duty to ensure in favour of the local population the higher level of protection of human rights guaranteed by international law. In sum, **the Council of Regency's Proclamation of 3 June 2019 may be considered as a domestic act implementing international rules at the internal level,**

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[38] See *supra* text corresponding to n. 30.

[39] See, in particular, *supra*, para. 11.

[40] See United Nations, Officer of the High Commissioner of Human Rights, "Belligerent Occupation: Duties and Obligations of Occupying Powers", September 2017, available at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_belligerent_occupation_-_legal_note_en.pdf> (accessed on 19 May 2020), at 3.

[41] See, in particular, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports*, 2004, at 111-113; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgement of 19 December 2005, at 178. For a more comprehensive assessment of this issue see Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 173, at 203-205.

which should be effected by the occupying power pursuant to international humanitarian law, since it does not undermine, or significantly interfere with the exercise of, its authority.

14. It may be concluded that, under international humanitarian law, **the proclamations of the Council of Regency** – including the Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State on 3 June 2019 – **have on the civilian population the effect of acts of domestic legislation aimed at protecting their rights and prerogatives, which should be, to the extent possible, respected and implemented by the occupying power.**

c) Comment on the working relationship between the Regency and the administration of the occupying State under international humanitarian law.

15. As previously noted, "occupation law [...] 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".[43] This said, it is to be kept well in mind that belligerent occupation necessarily has a *non-consensual nature*. In fact, "[t]he absence of consent from the state whose territory is subject to the foreign forces' presence [...] [is] a precondition for the existence of a state of belligerent occupation. Without this condition, the situation would amount to a 'pacific occupation' not subject to the law of occupation".[44] At the same time, we also need to remember that the absence of armed resistance by the territorial government can in no way be interpreted as determining the existence of an implied consent to the occupation, consistently with the principle enshrined by Article 2 common to the four Geneva Conventions of 1949.[45]. On the contrary, the consent, "for the purposes of occupation law, [...] [must] be genuine, valid and explicit".[46] It is evident that such a consent has never been given by the government of the Hawaiian Kingdom. On the contrary, the Hawaiian government opposed the occupation since its very beginning. In particular, Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, on 17 January 1893 stated that,

> "to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands".[47]

The opposition to the occupation has never been abandoned up to the time of this writing, although for some long decades it was stifled by the policy of *Americanization* brought about by the US government in the Hawaiian Islands. It has eventually revived in the last three lustrums, with the establishment of the Council of Regency.

16. Despite the fact that the occupation inherently configures as a situation unilaterally imposed by the occupying power – any kind of consent of the ousted government being totally absent – there still is some space for "cooperation" between the occupying and the occupied government – in the specific case of Hawai'i between the State of Hawai'i and its Counties and the Council of Regency.

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[43] See *supra*, text corresponding to n. 29.
[44] See Spoerri, "The Law of Occupation", supra n. 29, at 190.
[45] See *supra*, para. 6.
[46] See Spoerri, "The Law of Occupation", supra n. 29, at 190.
[47] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*,

Before trying to specify the characteristics of such a cooperation, it is however important to reiterate that, under international humanitarian law, the last word concerning any acts relating to the administration of the occupied territory is with the occupying power. In other words, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [...] [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory".[48] This vertical sharing of authority would reflect "the hierarchical relationship between the occupying power and the local authorities, the former maintaining a form of control over the latter through a top-down approach in the allocation of responsibilities".[49]

17. The cooperation referred to in the previous paragraph is implied or explicitly established in some provisions of the Fourth Geneva Convention of 1949. In particular, Article 47 states that

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory".

Through referring to possible agreements "concluded between the authorities of the occupied territories and the Occupying Power", this provision clearly implies the possibility of establishing cooperation between the occupying and the occupied government. More explicitly, Article 50 affirms that "[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children", while Article 56 establishes that, "[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory [...]".

As far as United States practice is concerned, it acknowledges that "[t]he functions of the [occupied] government – whether of a general, provincial, or local character – continue only to the extent they are sanctioned".[50] With specific regard to cooperation with the occupied government, it is also recognized that "[t]he occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions".[51]

18. Importantly, the provisions referred to in the previous paragraph exactly refer to issues related to the protection of civilian persons and of their rights, which is one of the two main aspects (together with the preservation of the sovereign rights of the Hawaiian Kingdom government) dealt with by 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.[52] In practice, the cooperation advocated by the provisions in point may take different forms, one of which translates into the possibility for the ousted government to adopt legislative provisions concerning the above aspects. As previously seen, the occupying power has, *vis-à-vis* the ensuing legislation, a duty not to oppose to it, because it normally does not undermine, or significantly interfere with the exercise of, its authority. Further to this, it is reasonable to assume that – in light of the spirit and the contents of the provisions referred to in the previous paragraph – the occupying power has a duty to cooperate in giving

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[48] See International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report*, Geneva, 2012, available at <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> (accessed on 20 May 2020), at 20.

[49] Ibid., at footnote 7.

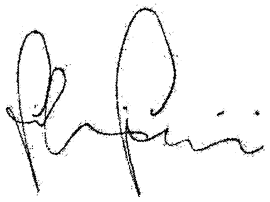
[50] See "The Law of Land Warfare", *United States Army Field Manual* 27-10, July 1956, Section 367(a).

[51] Ibid., Section 367(b).

realization to the legislation in point, unless it is "absolutely prevented" to do so. This duty to cooperate appears to be reciprocal, being premised on both the Council of Regency and the State of Hawai'i and its Counties to ensure compliance with international humanitarian law.

19. The latter conclusion is consistent with the logical (and legally-grounded) assumption that the ousted government is better placed than the occupying power in order to know what are the real needs of the civilian population and what are the concrete measures to be taken to guarantee an effective response to such needs. It follows that, through allowing the legislation in discussion to be applied – and through contributing in its effective application – the occupying power would better comply with its obligation, existing under international humanitarian law and human rights law, to guarantee and protect the human rights of the local population. It follows that the occupying power has a duty – if not a proper legal obligation – to cooperate with the ousted government to better realize the rights and interest of the civilian population, and, more in general, to guarantee the correct administration of the occupied territory.
20. In light of the foregoing, it may be concluded that **the 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.

24 May 2020



Professor Federico Lenzerini

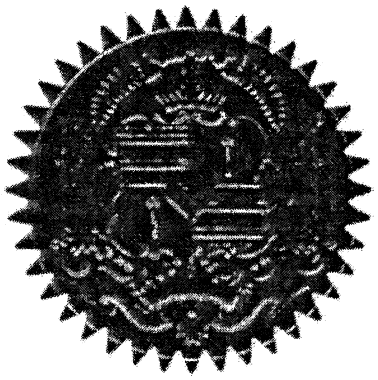
Exhibit "D"

Council of Regency,

Acting Cabinet Council of the Hawaiian Islands:

To Dexter Ke'eaumoku Ka'iama, Esq. *Greeting:*

Know ye, that this Executive Office, reposing special trust and confidence in your wisdom, integrity and fidelity, have constituted and appointed you acting **Attorney General**, to faithfully discharge and perform all the duties pertaining to said Office, under the Constitution and Laws of the Kingdom, and to hold office as such during this Office's pleasure: And all persons are hereby ordered to respect this your authority.



In Witness Whereof, I have hereunto set my hand, and caused the Great Seal of the Kingdom to be affixed this 11 day of August A.D. 2013.

Peter Umialiloa Sai,
Vice-Chairman of the Acting Council of Regency
Acting Minister of Foreign Affairs

By the Council

Kau'i P. Sai-Dudoit,
Acting Minister of Finance

SCAD-22-0000623
IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

DEXTER K. KA‘IAMA, Respondent (Bar No. 4249)

ORIGINAL PROCEEDING
(ODC Case No. 18-0339)

CERTIFICATE OF SERVICE

1. MOTION TO DISMISS PETITION FOR THE IMMEDIATE SUSPENSION FROM THE PRACTICE OF LAW PRUSUANT TO RSCH RULE 2.12A, FILED OCTOBER 20, 2022, PURSUANT TO HRCP 12(B)(2) AND THE *LORENZO* PRINCIPLE, AND TO SCHEDULE AN EVIDENTIARY HEARING, AND FOR STAY OF ORDER DIRECTING DEXTER K. KA‘IAMA TO APPEAR BEFORE THE SUPREME COURT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DEXTER K. KA‘IAMA; EXHIBITS “A-D”

The undersigned hereby certifies that a true and filed copy of the foregoing documents were duly served via JEFS/JIMS electronic filing on those individuals or entities identified on the below service list.

DATED: Kailua, Hawai‘i, October 30, 2022.

/s/ Dexter K. Ka‘iama
Dexter K. Ka‘iama
Respondent

By JEFS/JIMS electronic filing:

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