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13 December 2023

Mr. David Nanopoulos
Chief, Treaty Section
Office of Legal Affairs
United Nations Headquarters
Room No. DC2-0520
New York, NY 10017

Re: Hawaiian Kingdom's Instrument of Accession to the Rome Statute (28 November 2012)

Dear Mr. Nanopoulos:

My name is Dr. David Keanu Sai, Ph.D. I have been serving as the Hawaiian Kingdom's Minister of Foreign Affairs *ad interim* since 11 November 2019 after His Excellency Peter Umialiloa Sai, Minister of Foreign Affairs, died.[1] I also serve as Chairman of the Council of Regency, Minister of the Interior and Head of the Royal Commission of Inquiry. From 1999 to 2001, I also served as lead Agent for the Hawaiian Kingdom in arbitral proceedings—*Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration, PCA case no. 1999-01.[2] His Excellency Peter Umialiloa Sai served as First Deputy Agent.

Enclosed is a book titled "The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom." As Head of the Royal Commission of Inquiry, I am the editor and author along with Professor Matthew Craven, who authored the chapter titled "Continuity of the Hawaiian Kingdom as a State under International Law"; Professor William A. Schabas, authored the chapter titled "War

[1] Proclamation announcing Minister of Foreign Affairs at interim (11 Nov. 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Minister_Foreign_Affairs_Ad_interim.pdf).
[2] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/); see also award winning documentary on the Council of Regency (online at https://www.youtube.com/watch?v=CF6CaLAMh98.

Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom"; and Professor Federico Lenzerini, authored the chapter titled "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom." As you are aware, Professor Schabas is a recognized by the United Nations as an expert in international criminal law and human rights. I am also enclosing a recent book review by Dr. Anita Budziszewka, Department of Diplomacy and International Institutions, University of Warsaw, published in the *Polish Journal of Political Science*.

The Hawaiian Kingdom as an Independent State

To quote the *dictum* of the arbitral tribunal, in *Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration ("PCA"), "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."[3] As an independent State, the Hawaiian Kingdom entered into extensive treaty relations with a variety of States establishing diplomatic relations and trade agreements.[4] The Hawaiian Kingdom is also a Contracting State to the Universal Postal Union multilateral Postal Convention of 21 March 1885. The Hawaiian Kingdom has been a member of the Universal Postal Union since 1881, which, as you are aware, has been a United Nations Specialized Agency since 1948.

On 16 January 1893, a detachment of United States Marines invaded, without cause, the Hawaiian Kingdom, which led to the overthrow of the Hawaiian Kingdom Government the following day. After completing a presidential investigation into the overthrow, U.S. President Grover Cleveland acknowledged the invasion and overthrow was unlawful under international law. He entered into an executive agreement, by exchange of notes, with Queen Lili'uokalani on 18 December 1893 for her restoration to the throne as the Hawaiian Kingdom's constitutional Executive Monarch. Political wrangling in the Congress, however, prevented President Cleveland from restoring the Queen. Five years later on 7 July 1898, at the height of the Spanish-American War, the United States unilaterally annexed the Hawaiian Islands in violation of international law, and ever since has been imposing American municipal laws over Hawaiian territory, which is the war crime of

[3] Larsen v. Hawaiian Kingdom, 119 *International Law Reports* 566, 581 (2001).
[4] The Hawaiian Kingdom entered into treaties with Austria-Hungary (now separate States), 18 June 1875; Belgium, 4 Oct. 1862; Bremen (succeeded by Germany), 27 Mar. 1854; Denmark, 19 Oct. 1846; France, 8 Sept. 1858; French Tahiti, 24 Nov. 1853; Germany 25 Mar. 1879; New South Wales (now Australia), 10 Mar. 1874; Hamburg (succeeded by Germany), 8 Jan. 1848; Italy, 22 July 1863; Japan, 19 Aug. 1871, 28 Jan. 1886; Netherlands & Luxembourg, 16 Oct. 1862 (William III was also Grand Duke of Luxembourg); Portugal, 5 May 1882; Russia, 19 June 1869; Samoa, 20 Mar. 1887; Spain, 9 Oct. 1863; Sweden-Norway (now separate States), 5 Apr. 1855; and Switzerland, 20 July 1864; the United Kingdom of Great Britain and Ireland, now Northern Ireland), 26 Mar. 1846; and the United States of America, 20 Dec. 1849, 13 Jan. 1875, 11 Sept. 1883, and 6 Dec. 1884.

usurpation of sovereignty. Despite the overthrow of the Hawaiian Kingdom government and the unlawful imposition of American laws over Hawaiian territory, which is now at 130 years, the Hawaiian Kingdom as a State continues to exist under belligerent occupation.

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[5] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[6] Addressing the presumption of the German State's continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[7]

"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."[8] Evidence of "a valid demonstration of legal title, or sovereignty, on the part of the United States" would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[9] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[10]

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[5] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[6] *Id*.
[7] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).
[8] 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).
[9] 9 Stat. 922 (1848).
[10] 30 Stat. 1754 (1898).

There is no treaty of cession where the Hawaiian Kingdom ceded it sovereignty and territory to the United States.

United States' Unlawful Annexation of the Hawaiian Islands

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[11] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[12] International law does not permit annexation of territory of another state.[13]

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[14] 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."[15] 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,"[16] and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[17] Therefore, the OLC concluded it is "unclear which

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[11] 30 Stat. 750 (1898).
[12] 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.
[13] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
[14] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[15] *Id*., 242.
[16] *Id*.
[17] *Id*.

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."[18] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[19]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. […] Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[20] 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."[21]

Prolonged Occupation and Effective Control by the Occupant

The principle of effectiveness is at the core of international law because it is a decisive element when determining territorial sovereignty claims by a State. The principle asserts that "whenever an authority exercises effective control over territory it may be recognized as the government of that territory."[22] As the arbitral tribunal at the Permanent Court of Arbitration in the *Eritrea—Yemen* decision stated that the "modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions on a continuous and peaceful basis."[23]

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[18] *Id*., 262.
[19] *The Apollon*, 22 U.S. 362, 370 (1824).
[20] Kmiec, 252.
[21] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[22] Anne Schuit, "Recognition of Governments in International Law and the Recent Conflict in Libya," 14 *Int'l Comm. L. Rev.* 381, 389 (2012).
[23] Eritrea–Yemen arbitration, *Award of the Arbitral Tribunal in the first Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, Permanent Court of Arbitration, para. 239 (9 Oct. 1998) (online at https://pcacases.com/web/sendAttach/517).

In the nineteenth century, the international community of States explicitly recognized the Hawaiian Kingdom exercised effective control of its territory. However, when the United States overthrew the Hawaiian government, by an act of war, its status was that of an occupant and not the successor to the Hawaiian government. In this case, effective control by the occupant triggers the law of occupation, which has since been codified under the 1907 Hague Regulations. Article 42 states, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

In an occupied State there exists two legal orders, that of the occupant and that of the occupied State. Professor Marek explains that in "the first place: of these two legal orders, that of the occupied State is regular and 'normal,' while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is […] strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."[24] Therefore, military occupation "is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[25]

International humanitarian law is silent on a prolonged occupation because the authors of 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Professor Scobbie, "[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory."[26] The effective military control of occupied territory "can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation."[27] According to Professor Benvenisti:

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

[24] Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (1968).
[25] *Id*.
[26] Iain Scobbie, "International Law and the prolonged occupation of Palestine," *United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague*, 1 (20-22 May 2015).
[27] Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).

> interests while administering the occupied area, but also imposes obligations on the occupant to protect life and property of the inhabitants and to respect the sovereign interests of the ousted government.[28]

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law occupation that was convened by the International Committee of the Red Cross, the experts "pointed out that the norms of occupation law, in particular Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, had originally been designed to regulate short-term occupations. However, the [experts] agreed that [international humanitarian law] did not set any limits to the time span of an occupation. It was therefore recognized that nothing under [international humanitarian law] would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances."[29] They also concluded that since a prolonged occupation "could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation," they "emphasized the need to interpret occupation law flexibly when an occupation persisted." [30] The prolonged occupation of the Hawaiian Kingdom is, in fact, that case, where drastic unlawful "transformations and changes in the occupied territory" occurred.

Restoration of the Government of the Hawaiian Kingdom in 1997

According to Professor Rim, the State continues "to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain."[31] In 1997, the Hawaiian government was restored *in situ* by a Regency under Hawaiian constitutional law and by the doctrine of necessity in similar fashion to governments established in exile during the Second World War.[32] Through this process, the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

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[28] Benvenisti, 6.
[29] Report by Tristan Ferraro, legal advisor for the International Committee of the Red Cross, *Expert Meeting: Occupation and other forms of Administration of Foreign Territory* 72 (2012).
[30] *Id*.
[31] Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," 20(20) *European Journal of International Law* 1, 4 (2021).
[32] David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[33]

Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. While the last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917, the office of the Monarch remained vacant under Hawaiian constitutional law. There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to obtain recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom, as an independent State on 6 July 1844,[34] was also a recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997.

The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[35] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, "[w]here a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[36]

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

> As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821 [sic], as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to

[33] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).
[34] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[35] M.J. Peterson, Recognition of Governments: Legal Doctrines and State Practice, 1815-1995 26 (1997).
[36] *Restatement (Third)*, §203, comment c.

> convene the House of Representatives and the Senate and to leave it to their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.[37]

Article 33 provides that the Cabinet Council—comprised of the Minister of the Interior, the Minister of Finance, the Minister of Foreign Affairs, and the Attorney General, "shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King." Like the Belgian Council, the Hawaiian Council was bound to call into session the Legislative Assembly to provide for a regency, but because of the prolonged belligerent occupation and the effects of the war crime of denationalization of the population, it was impossible for the Legislative Assembly to function. Until the Legislative Assembly can be called into session, Article 33 provides that the Cabinet Council, comprised of the Ministers of the Interior, Foreign Affairs, Finance and the Attorney General, "shall be a Council of Regency, until the Legislative Assembly" can be called into session.

The Regency is a government restored in accordance with the constitutional laws of the Hawaiian Kingdom as they existed prior to the unlawful overthrow of the previous administration of Queen Lili'uokalani. It was not established through "extra-legal changes," and, therefore, did not require diplomatic recognition to give itself validity as a government. It was a successor in office to Queen Lili'uokalani as the Executive Monarch.

According to Professor Lenzerini, based on the *doctrine of necessity*, "the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[38] He also concluded that the Regency "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."[39]

Permanent Court of Arbitration Recognizes the Continuity of Hawaiian Statehood

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01. Larsen, a Hawaiian

[37] F.E. Oppenheimer, "Governments and Authorities in Exile," 36 *American Journal of International Law* 568-595, 569 (1942).
[38] Lenzerini, 324.
[39] *Id.*, 325.

subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[40] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes ("PCA Convention").[41] Article 47 states, "[t]he jurisdiction of the Permanent Court, may within the conditions laid down in the regulations, be extended to disputes between non-Contracting [States] or between Contracting [States] and non-Contracting [States], if the parties are agreed on recourse to this Tribunal."[42] This brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the rules of international law, that apply to established States, must be considered, and not those rules of international law that apply to new States such as Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[43]

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 can be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal on 9 June 2000, after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[44] As Professor Talmon states, the "government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[45]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously determined that the Hawaiian State was represented by its

[40] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[41] Permanent Court of Arbitration, *101st Annual Report*, Annex 2, p. 44, fn. 1 (2001) (online at https://docs.pca-cpa.org/2015/12/PCA-annual-report-2001.pdf).
[42] 36 Stat. 2199, 2224 (1907).
[43] Lenzerini, 322.
[44] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[45] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

government—the Council of Regency. In its case repository, the PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity." 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).[46]

It should also be noted that the PCA also acknowledged the Hawaiian Kingdom as a treaty partner with the United States to the 1849 Treaty of Friendship, Commerce and Navigation,[47] which the United States did not dispute. Furthermore, the United States, through its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.[48]

Enclosed is a legal opinion by Professor Lenzerini on the *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* that explains the Permanent Court of Arbitration's recognition of the Hawaiian State through the civil law tradition. For the legal basis of the Hawaiian Kingdom's continuity as a State under international law, please see the enclosed book—*The Royal Commission of Inquiry*.

The Council of Regency's strategic plan in addressing the prolonged occupation entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.[49] Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end by a treaty of peace. After the PCA verified the

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[46] *Id*.
[47] 9 Stat. 977 (1849), Appendix 6.
[48] Sai, The Royal Commission of Inquiry, 25-26.
[49] Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).

continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom* on 9 June 2000,[50] Phase II was initiated at the oral hearings held at the PCA on 7, 8, and 11 December 2000. Of note, Judge James Crawford served as the presiding arbitrator, and Judge Christopher Greenwood and Gavan Griffith both served as associate arbitrators.

Exposure of Hawaiian Statehood

Implementation of phase II was followed at the University of Hawai‘i at Mānoa when I entered the political science graduate program in 2001 after returning from The Hague, where I received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i*,[51] to *Nation Within—The History of the American Occupation of Hawai‘i*.[52] Coffman explained the change in his note on the second edition:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
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> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai‘i, the might of the United States does not make it right.[53]

[50] David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).
[51] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i* (1998).
[52] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai‘i* (2nd ed. 2009). Duke University Press published the second edition in 2016.
[53] *Id*., xvi.

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and members of the judiciary of the State of Hawai'i dated 25 February 2018.[54] Dr. deZayas stated:

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

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[55] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."[56]

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization ("NGO") of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[57] In its resolution, the IADL also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts

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[54] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

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

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

[57] International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/).

to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[58] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State."

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

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.
>
> The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.
>
> For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

[58] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States.

Acceding to the Rome Statute

On 28 November 2012, the Council of Regency acceded to the Rome Statute, by proclamation, and the accession was received by the Secretary General pursuant to Article 125(3) of the Rome Statute. Attached is the letter to the Secretary General and the signed receipt from its office in New York City. The ICC, however, has not publicly acknowledged the Hawaiian Kingdom's accession. When the Hawaiian Kingdom attempted to address this issue, we received a response dated 24 June 2013, that they would be getting back to us with a decision. We received their decision dated 18 July 2013, stating, in error, that we do not meet the preconditions of the Rome Statute. It would appear, that the Secretary General disregarded our instrument of accession, and we would like to rectify this situation.

Article 47 of the PCA Convention is synonymous with the *any State formula* applicable in the Rome Statute. As the depository for treaties, the practice of the Secretary General is to refrain from making a political determination as to whether an entity, that accedes to the treaty, is a State for the purposes of international law.

> [W]hen the Secretary-General addresses an invitation or when an instrument of accession is deposited with him, he has certain duties to perform in connexion therewith. In the first place, he must ascertain that the invitation is addressed to, or the instrument emanates from, an authority entitled to become a party to the treaty in question. Furthermore, where an instrument of accession is concerned, the instrument must, inter alia, be brought to the attention of all other States concerned and the deposit of the instrument recorded in the various treaty publications of the Secretariat, provided it emanates from a proper authority. There are certain areas in the world the status of which is not clear. If I were to invite or to receive an instrument of accession from any such area, I would be in a position of considerable difficulty, unless the Assembly gave me explicit directives on the areas coming within the "any State" formula. I would not wish to determine on my own initiative the highly political and controversial question whether or not the areas, the status of which was unclear, were States […]. Such a determination, I believe, falls outside my competence."[59]

[59] Official Records, United Nations General Assembly, eighteenth session, 1258th Plenary Meeting, 18 November 1963, para 100.

The position taken by Secretary General, on the *any State formula*, applies to entities in "certain areas in the world the status of which is not clear." This is not the case of the Hawaiian Kingdom. The arbitral tribunal in the *Larsen* case, clearly determined the status of the Hawaiian Kingdom under international law. Therefore, there is no reason for the General Assembly to give the Secretary General "explicit directives on the areas coming within the 'any State' formula."

Another practice of the Secretary General to determine the status of an entity as a State would be an act done by an intergovernmental organization on the same topic. When your office addressed the Secretary General's role regarding the membership of Yugoslavia, in place of the former Yugoslavia, the Handbook on *Final Clauses of Multilateral Treaties* stated:

> The Legal Counsel took the view in this regard that the Secretary-General was not in a position, as depository, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to the contrary either by a competent organ of the United Nations directing him in the exercise of this depository functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depository functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise.[60]

That "competent organ representative of the international community of States" is the PCA who currently has 120 Contracting States that are members of the United Nations. Furthermore, as you are aware, the PCA has held observer status in the General Assembly since 1993.

When States recognize the independence of other States it is a political act with legal consequences. Once a State is recognized as being independent it is no longer a political fact but rather becomes a juridical fact that could lead to a juridical act by a State, an international institution, *e.g.* PCA, or the Secretariat of that institution such as the UN Secretary General. In the case of the *any State formula*, the Secretary General, like the Secretariat of the PCA, would have to determine whether a juridical fact exists by ascertaining whether "the instrument emanates from […] an authority entitled to become a party to the treaty in question." This determination is administrative not political, which leads to the juridical act of recognizing the juridical fact of the acceding State. This then brings the instrument of accession to the "attention of all other States concerned and the

[60] United Nations, *Handbook—Final Clauses of Multilateral Treaties* 17-18 (2003).

deposit of the instrument recorded in the various treaty publications of the Secretariat" in accordance with the particular treaty.

Concerning the juridical act taken by the PCA, in *Larsen v. Hawaiian Kingdom*, Professor Lenzerini explains:

> At the time of the establishment of the Larsen arbitral tribunal by the PCA, the latter had 88 contracting parties. 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." 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 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 the which the Hawaiian Kingdom is actually—as 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." 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*."[61]

[61] Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration*, (5 Dec. 2021), filed in the U.S. District Court for the District of Hawai'i, Hawaiian Kingdom v. Biden et al., case no. 1:21-cv-00243-LEK-RT, document no. 174-2, p. 4.

If the United States objected to the PCA's juridical act of recognizing the Hawaiian Kingdom as a State, it would have filed a declaration as it did when it objected to Palestine's accession to the PCA Convention on 28 December 2015. Palestine was seeking to become a Contracting State to the PCA Convention and submitted its accession to the Dutch government on 30 October 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)."[62] The State of Palestine is a new State whose recognition is not yet universal, whereas the Hawaiian Kingdom is a State in continuity since the nineteenth century where it was universally recognized as a member of the *Family of Nations*. The United States made no such declaration against the PCA's finding that the Hawaiian Kingdom is a non-Contracting State to the PCA Convention.

The Hawaiian Kingdom's existence as a State and subject of international law is not a political matter. There is no "position of difficulty" the Secretary General can take when the Hawaiian Kingdom acceded to the Rome Statute. It is merely a lack of awareness on his part and on the Treaty Section of the Office of Legal Affairs as to the continuity of the Hawaiian State since the nineteenth century. Unless your office can provide rebuttable evidence under international law as to the continued existence of Hawaiian Statehood, the Secretary General is bound to receive the Hawaiian Kingdom's instrument of accession, which I am enclosing.

In the meantime, the Secretary General's disregard of the Hawaiian Kingdom's instrument of accession for the past 10 years is also a violation of the Hawaiian Kingdom's sovereign right to enter multilateral treaties of its choosing. As such, the Secretary General, by omission, has been violating the sovereign rights of the Hawaiian Kingdom, a non-Member State of the United Nations, and a Member State of a United Nations Specialized Agency, the Universal Postal Union, since 1881. In the absence of rebuttable evidence to the contrary, the Hawaiian Kingdom, although not a participating member because of the American occupation, invokes its membership of the Universal Postal Union as to its status as a sovereign and independent State.

Considering the above information and the severity of the situation, I kindly request a meeting at the Office of Legal Affairs in New York at your earliest convenience. My contact information is provided on the letter head of this correspondence.

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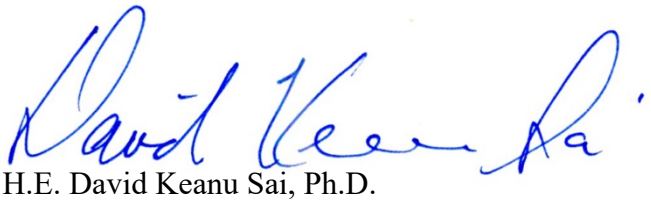
[62] Ministry of Foreign Affairs of the Kingdom of the Netherlands, *Notification of the Declaration of the United States translated into French* (January 29, 2016) (online at https://repository.overheid.nl/frbr/vd/003316/1/pdf/003316_Notificaties_11.pdf).

With sentiments of the highest regard,



H.E. David Keanu Sai, Ph.D.
Minister of Foreign Affairs *ad interim*

enclosures

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Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom

edited by Dr. David Keanu Sai, Head of the Hawaiian Royal Commission of Inquiry, 2020, 380pp.

DOI: 10.58183/pjps.02112022

The subject of review here is the multi-author publication *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, edited by Dr. David Keanu Sai, Head of the Hawaiian Royal Commission of Inquiry, published in 2020. The book is divided into three parts, i.e. Part 1 *Investigating war crimes and human rights violations committed in the Hawaiian Kingdom*; Part 2 *The prolonged occupation of the Hawaiian Kingdom*; and Part 3 *Hawaiian law, treaties with foreign states and international humanitarian law*. This final part represents a collection of source documents in such fields as Hawaiian law, but also international-law treaties with foreign states (in fact 18 including the USA) – dating back to the 19th century. A selection of treaties from the sphere of international humanitarian law has also been made and included.

The essence of the publication nevertheless resides in its two first parts, in which the authors offer an in-depth treatment of the complicated long-time relationship between Hawaii and the United States. Nevertheless, the thesis pursued here overall is the straightforward one that Hawaii has been

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occupied illegally and incorporated into the United States unlawfully, with that occupation continuing to the present day and needing to be understood in such terms. The authors also pursue the difficult thread of the story relating to war crimes.

The above main assumption of the book is emphasised from the very beginning of Part 1, which is preceded by the text of the Proclamation Establishing the Royal Commission of Inquiry, recalling that that Commission was established to "ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom."[1]

In fact, the main aim of the above institution as called into being has been to pursue any and all offences and violations in the spheres of humanitarian law, human rights and war crimes committed by the Americans in the course of their occupation of Hawaii – which is given to have begun on 17 January 1893.

Presented next is the genesis and history of the Commission's activity described by its aforementioned Head – Dr. David Keanu Sai. He presents the Commission's activity in detail, by reference to concrete examples; with this part going on to recreate the entire history of the Hawaiian-US relations, beginning with the first attempt at territorial annexation. This thread of the story is supplemented with examples and source texts relating to the recognition of the Hawaiian Kingdom by certain countries (e.g. the UK and France, and taken as evidence of international regard for the integrity of statehood). Particularly noteworthy here is the author's exceptionally scrupulous analysis of the history of Hawaii and its state sovereignty. No obvious flaws are to be found in the analysis presented.

It is then in the same tone that the author proceeds with an analysis relating to international law, so as to point to the aspects of Hawaii's illegal occupation by the United States – including an unprecedentedly detailed analysis of the contents of documents, resolutions, mutual agreements and official political speeches, but also reference to other scientific research projects. This very interesting strand of the story is followed by Matthew Craven in Chapter 3 on the *Continuity of the Hawaiian Kingdom as a State under International Law*. Notwithstanding the standpoint on the legality of the occupation or annexation of Hawaii by the United States, the matter of the right to self-determination keeps springing up now and again.

1. *Proclamation Establishing the Royal Commission of Inquiry*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 8.

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Considerable attention is also paid to the multi-dimensional nature of the plebiscite organised in 1959 (with regard to Hawaii's incorporation as a state into the United States of America), with the relative lack of transparency of organisation pointed out, along with various breaches and transgressions that may have taken place.

In turn, in Chapter 4 – on *War Crimes Related to the United States' Belligerent Occupation of the Hawaiian Kingdom* – William Schabas makes attempts to verify the assertion, explaining the term war crimes and referring to the wording of the relevant definition that international law is seen to have generated. The main problem emerging from this concerns lack of up-to-date international provisions as regards the above definition. The reader's attention is also drawn to the incomplete nature of the catalogue of actions or crimes that could have constituted war crimes (in line with the observations of Lemkin).[2]

While offering narration and background, this Chapter's author actually eschews Hawaiian-US examples. Instead, he brings the discussion around to cases beyond Hawaii, and in so doing also invokes examples from case-law (e.g. of Criminal Courts and Tribunals). While this is a very interesting choice of approach, it would still have been interesting for the valuable introduction to the subject matter to be supplemented by concrete examples relating to Hawaii, and to the events occurring there during the period under study.

Chapter 5 – on *International Human Rights Law and Self-Determination of Peoples Related to the United States' Occupation of the Hawaiian Kingdom* – allows its author Federico Lenzerini to contribute hugely to the analysis of the subject matter, given his consideration of the human rights protection system and its development with a focus on the right to self-determination. The author separates those dimensions of the law in question that do not relate to the Hawaiian Kingdom[3], as well as those that may have application to the Hawaiian society.[4] Indeed, the process ends with *Applicability of the Right to Self-Determination During the American Occupation* – a chapter written with exceptional thoroughness, objectivity and synthesis. The author first tells the story on how the human rights protection system came to be formulated (by the 1948 Universal Declaration of Human Rights and the Covenants of 1996, but also by reference to other Conventions). Rightly signalled is the institutional dimension to the protection of human rights, notably the Human Rights Committee founded to protect the rights outlined in the Covenant on Civil and Political Rights. It is of course recalled that the US is not a party to the relevant Protocols, which is preventing US citizens from assert-

2. W. Schabas, *War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 156.

3. F. Lenzerini, *International Human Rights Law and Self-Determination of Peoples Related to the United States' Occupation of the Hawaiian Kingdom*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 212.

4. Ibidem, p. 214.

ing the rights singled out in the 1966 Covenants.[5] Again rightly, attention is also paid to the regional human rights mechanism provided for by the 1969 American Convention on Human Rights, which also lacks the United States as a party.

The focus here is naturally on the right to self-determination, which the author correctly terms the only officially recognised right of a collective nature (if one excludes the rights of tribal peoples). The further part of the chapter looks at the obligations of states when it comes to safeguarding their citizens' fundamental human rights. The philosophical context underpinning the right to self-determination is considered next (with attention rightly paid first to liberty related aspects and the philosophical standpoints of Locke and Rousseau[6], along with the story of the formulation of this right's ideological basis and reference to what is at times a lack of clarity regarding its shape and scope (not least in Hawaii's case).[7] What is therefore welcome is the wide-ranging commentary offered on the dimensions to the above rights that do relate to Hawaiian society as well as those that do not.

In summing up the substantive and conceptual content, it is worth pointing to the somewhat interdisciplinary nature of the research encompassed. Somewhat simplifying things, this book can first be seen as an in-depth analysis of matters historical (with much space devoted to the roots of the relations between Hawaii and the United States, to the issue of this region's occupation and the genesis of Hawaii's incorporation into the USA). These aspects have all been discussed with exceptional thoroughness and striking scrupulousness, in line with quotations from many official documents and source texts. This is all pursued deliberately, given the authors' presumed intention to illustrate the genesis of the whole context underpinning the Hawaiian-US relations, as well as the further context through which Hawaii's loss of state sovereignty came about. This strand to the story gains excellent illustration thanks to Dr. Keanu Sai.

The second part is obviously international law related and it also has much space devoted to it by the authors. The publication's core theses gain support in the analysis of many and varied international documents, be these either mutual agreements between Hawaii and the United States or international Conventions, bilateral agreements of other profiles, resolutions, instruments developed under the aegis of the UN or those of a regional nature (though not only concerned with the Americas, as much space is devoted to European solutions, and European law on the protection of human rights in particular). There is also much reference to international case-law and juris-

5. Ibidem, p. 177.

6. Ibidem, p. 209.

7. Ibidem, p. 214.

prudence in a broader sense, the aim being to indicate the precedents already arrived at, and to set these against the international situation in which Hawaii finds itself.

However, notwithstanding this publication's title, the authors here do not seek to "force-feed" readers with their theses regarding Hawaii's legal status. Rather, by reaching out to a wide range of sources in international law as well as from history, they provide sufficient space for independent reflection and drawing of conclusions. In this regard, it would be interesting if few remarks were devoted to present-day relations between Hawaii and the rest of the USA, with a view to achieving a more-profound illustration of the state of this relationship. However, it might seem from the book's overall context that this was done deliberately so that the foundations of this unique dispute gain proper presentation. All is then augmented further by Part 3 – the collection of agreements and documents considered to sustain the main assumptions of the publication under review. Were I to force myself to point out any failure of the book to meet expectations, I would choose the cultural dimension. There is no way of avoiding an impression – only enhanced by cover-to-cover reading – that this publication is deeply rooted in the Hawaiians' sense of cultural and historical identity. So it would have been interesting to see the cultural dimension addressed, including through a more in-depth analysis of social awareness. At the very least, I have in mind here Article 27 UDHR, traditionally regarded as the source of the right to culture and the right to participate in cultural life. To be added to that might be Article 15 of the International Covenant on Economic, Social and Cultural Rights, as well as Article 27 of the International Covenant on Civil and Political Rights. While (as Boutros Boutros-Ghali noted in 1970) the right in question initially meant access to high culture, there has since been a long process of change that has seen an anthropological dimension conferred upon both culture and the right thereto. A component under that right is the right to a cultural identity[8] – which would seem to be the key space in the Hawaiian context. The UN and UNESCO have in fact been paying a great deal of attention to this matter, with the key relevant documents being the 2005 *Convention* on the *Protection* and *Promotion* of the Diversity of Cultural Expressions that in general links these issues with the human rights dimension as well as the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (1976).

So a deeply-rooted cultural-identity dimension would have offered an interesting complement to the publication's research material, all the more so as it would presumably reveal the attempts to annihilate that culture (thus striking not merely at statehood, but at national integrity of identity). An interesting approach would then have been to show in details whether and to what extent

8. See: Y.M. Donders, *Towards a Right to Cultural Identity?*, Intersentia 2002.

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this is resisted by the USA (e.g. in regard to the upholding of symbols of material and non-material cultural heritage).

However, given the assumption the book is based on – i.e. the focus on state sovereignty (not the right of cultural minorities, but the right of a nation to self-determination), the above "omission" actually takes nothing away from the value of the research presented. However, the aspect of national identity – of which cultural and historical identity is a key component – may represent an impulse for further, more in-depth research.

I regard this publication as an exceptionally valuable one that systematises matters of the legal status of the Hawaiian Kingdom, taking up the key issues surrounding the often ignored topic of a difficult historical context occurring between Hawaii and the United States. The issue at stake here has been regenerated synthetically, on multiple levels, with a penetrating analysis of the regulations and norms in international law applying to Hawaii – starting from potential occupied-territory status, and moving through to multi-dimensional issues relating to both war crimes and human rights. This is one of the few books – if not the only one – to describe its subject matter so comprehensively and completely. I therefore see this work as being of exceptional value and considerable scientific importance. It may serve not only as an academic source, but also a professional source of knowledge for both practicing lawyers and historians dealing with the matter on hand. The ambition of those who sought to take up this difficult topic can only be commended.

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Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom, ed. D.K. Sai, Royal Commission of Inquiry 2020.

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ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge the receipt of the following document from the Ambassador-at-large for the Hawaiian Kingdom, a State not a member of the United Nations, deposited with the Secretary General of the United Nations General Assembly, by the United Nations Treaty Section, pursuant to Article 125(3) of the Rome Statute:

1. Instrument of accession dated 28 November 2012.

Bernadette MUTIRENDE
(Signature)

Dec 10, 2012
(Date)

DAVID KEANU SAI, PH.D.
Ambassador-at-large for the Hawaiian Kingdom
P.O. Box 2194
Honolulu, HI 96805-2194
Tel: (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/

10 December 2012

Secretariat
Treaty Section
Office of Legal Affairs
United Nations
New York, NY 10017

Excellency:

In accordance with Article 125(3) of the Rome Statute, I have the honor on behalf of the *acting* government, a State not a member of the United Nations, of depositing with the United Nations Treaty Section my government's instrument of accession to the Roman Statute, and that my government understands that the Statute shall enter into force on the first day of the month after the 60th day following the deposit of my government's instrument of accession.

I am also enclosing my government's Protest and Demand of the prolonged occupation of the Hawaiian Kingdom that was deposited with the President of the United Nations General Assembly pursuant to Article 35(2) of the United Nations Charter on 10 August 2012. The Protest and Demand was acknowledged and received by Mrs. Hanifa Mezoui, Ph.D., Special Coordinator, Third Committee and Civil Society, Office of the President of the Sixty-Sixth Session of the General Assembly. Attached are the Protest and Demand and an accompanying CD with Annexes.

Please accept, Excellency, the assurances of my highest consideration,

David Keanu Sai

Enclosures

Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur

The Office of the Prosecutor

Our reference: OTP-CR-206/13

The Hague, 24 June 2013

Dear Sir, Madam

The Office of the Prosecutor of the International Criminal Court acknowledges receipt of your documents/letter.

This communication has been duly entered in the Communications Register of the Office. We will give consideration to this communication, as appropriate, in accordance with the provisions of the Rome Statute of the International Criminal Court.

As soon as a decision is reached, we will inform you, in writing, and provide you with reasons for this decision.

Yours sincerely,

M.P. Dillon
Head of Information & Evidence Unit
Office of The Prosecutor

David Keanu Sai
interior@hawaiiankingdom.org

Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur

The Office of the Prosecutor

Notre référence : OTP-CR-206/13

La Haye, le 24 juin 2013

Madame, Monsieur,

Le Bureau du Procureur de la Cour pénale internationale accuse réception de vos documents / de votre lettre.

Les informations y figurant ont été inscrites comme il se doit au registre des communications du Bureau et recevront toute l'attention voulue, conformément aux dispositions du Statut de Rome de la Cour pénale internationale.

Nous ne manquerons pas de vous communiquer par écrit la décision qui aura été prise à ce sujet, ainsi que les motivations qui la justifient.

Veuillez agréer, Madame, Monsieur, l'assurance de notre considération distinguée.

M.P. Dillon
Chef de l'Unité des informations et des éléments de preuve
Bureau du Procureur

David Keanu Sai
interior@hawaiiankingdom.org

Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur

The Office of the Prosecutor

Our Reference: OTP-CR-206/13

The Hague, Thursday, 18 July 2013

Dear Sir, Madam

On behalf of the Prosecutor, I thank you for your communication received on 17/6/2013, as well as any subsequent related information.

As you may know, the International Criminal Court ("the ICC" or "the Court") is governed by the Rome Statute, which entrusts the Court with a very specific and carefully defined jurisdiction and mandate. A fundamental feature of the Rome Statute (Articles 12 and 13) is that the Court may only exercise jurisdiction over international crimes if (*i*) its jurisdiction has been accepted by the State on the territory of which the crime was committed, (*ii*) its jurisdiction has been accepted by the State of which the person accused is a national, or (*iii*) the situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter.

Based on the information currently available, it appears that none of these preconditions are satisfied with respect to the conduct described. Accordingly, as the allegations appear to fall outside the jurisdiction of the Court, the Prosecutor has confirmed that there is not a basis at this time to proceed with further analysis. The information you have submitted will be maintained in our archives, and the decision not to proceed may be reconsidered if new facts or evidence provide a reasonable basis to believe that the allegations fall within the jurisdiction of the Court. The decision may also be reviewed if there is an acceptance of jurisdiction by the relevant States or a referral from the Security Council.

I hope you will appreciate that with the defined jurisdiction of the Court, many serious allegations will be beyond the reach of this institution to address. I note in this regard that the ICC is designed to complement, not replace national jurisdictions. Thus, if you wish to pursue this matter further, you may consider raising it with appropriate national or international authorities.

I am grateful for your interest in the ICC. If you would like to learn more about the work of the ICC, I invite you to visit our website at www.icc-cpi.int.

Yours sincerely,

David Keanu Sai
interior@hawaiiankingdom.org

M.P. Dillon
Head of the Information & Evidence Unit
Office of the Prosecutor

Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur

The Office of the Prosecutor

Notre référence: OTP-CR-206/13

La Haye, jeudi 18 juillet 2013

Madame, Monsieur,

Au nom du Procureur, je vous remercie de votre communication, reçue le 17/6/2013, ainsi que de tout autre renseignement connexe envoyé subséquemment.

Comme vous le savez peut-être, la Cour pénale internationale (ci-après nommée la "CPI" ou la "Cour") est régie par le Statut de Rome, lequel confère à la Cour une compétence et un mandat particuliers et bien définis. L'un des aspects fondamentaux du Statut de Rome (articles 12 et 13) est la stipulation que la Cour peut seulement avoir compétence sur les crimes internationaux si : *i*) l'État sur le territoire duquel le crime a été commis accepte la compétence de la Cour; *ii*) la personne accusée est ressortissante d'un État ayant accepté la compétence de la Cour; *iii*) la situation est déférée au Procureur par le Conseil de sécurité agissant en vertu du chapitre VII de la Charte des Nations unies.

Selon les renseignements dont nous disposons actuellement, il semble qu'aucune de ces conditions préalables sont remplies en ce qui concerne le comportement décrit. Par conséquent, comme les allégations ne semblent pas relever de la compétence de la Cour, le Procureur a confirmé qu'il n'existe actuellement aucune base justifiant une analyse plus poussée. Les renseignements que vous avez soumis seront versés dans nos archives, et la décision de ne pas poursuivre l'analyse pourra être revue si de nouveaux faits ou éléments de preuve fournissent une base raisonnable de croire que les allégations relèvent de la compétence de la Cour. La décision pourra également être revue si les États en question acceptent la compétence de la Cour ou si le Conseil de sécurité effectue un renvoi.

J'espère que vous comprenez que compte tenu de sa compétence, telle qu'elle est définie, la Cour ne pourra instruire bon nombre d'allégations graves. À ce sujet, je vous fais remarquer que la CPI a été conçue pour être le complément des juridictions nationales, et non pour les remplacer. Ainsi, si vous souhaitez poursuivre cette affaire, vous pourrez peut-être songer à la soumettre aux autorités nationales ou internationales compétentes.

Si vous désirez en apprendre davantage sur le travail de la CPI, vous pouvez consulter notre site Web, au www.icc-cpi.int. Je vous remercie de l'intérêt porté à la CPI et vous prie, Madame, Monsieur, de recevoir mes salutations cordiales.

David Keanu Sai
interior@hawaiiankingdom.org

M.P. Dillon
Chef de l'unité des informations et
des éléments de preuve
Bureau du Procureur

Larsen v. Hawaiian Kingdom

Case name	Larsen v. Hawaiian Kingdom
Case description	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. In determining whether to accept or decline to exercise jurisdiction, the Tribunal considered the questions of whether there was a legal dispute between the parties to the proceeding, and whether the tribunal could make a decision regarding that dispute, if the very subject matter of the decision would be the rights or obligations of a State not party to the proceedings. The Tribunal underlined the many points of agreement between the parties, particularly with respect to the propositions that Hawaii was never lawfully incorporated into the United States, and that it continued to exist as a matter of international law. The Tribunal noted that if there existed a dispute, it concerned whether the respondent has fulfilled what both parties maintain is its duty to protect the Claimant, not in the abstract but against the acts of the United States of America as the occupant of the Hawaiian islands. Moreover, the United States' actions would not give rise to a duty of protection in international law unless they were themselves unlawful in international law. The Tribunal concluded that it could not determine whether the Respondent has failed to discharge its obligations towards the Claimant without ruling on the legality of the acts of the United States of America – something the Tribunal was precluded from doing as the United States was not party to the case.
Name(s) of claimant(s)	Lance Paul Larsen (Private entity)
Name(s) of respondent(s)	The Hawaiian Kingdom (State)
Names of parties	
Case number	1999-01
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Other proceedings
Subject matter or economic sector	Treaty interpretation
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Other The 1849 Treaty of Friendship, Commerce and Navigation with the United States of America
Language of proceeding	English
Seat of arbitration (by country)	Netherlands
Arbitrator(s)	Dr. Gavan Griffith QC Professor Christopher J. Greenwood QC Professor James Crawford SC (President of the Tribunal)
Representatives of the claimant(s)	Ms. Ninia Parks, Counsel and Agent
Representatives of the respondent(s)	Mr. David Keanu Sai, Agent

	Mr. Peter Umialiloa Sai, First deputy agent Mr. Gary Victor Dubin, Second deputy agent and counsel
Representatives of the parties	
Number of arbitrators in case	3
Date of commencement of proceeding [dd-mm-yyyy]	08-11-1999
Date of issue of final award [dd-mm-yyyy]	05-02-2001
Length of proceedings	1-2 years
Additional notes	

Attachments

Award or other decision

>	Arbitral Award	15-05-2014	English

Other

>	Annex 1 - President Cleveland's Message to the Senate and the House of Representatives	18-12-1893	English
>	Joint Resolution - To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.	23-11-1993	English

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

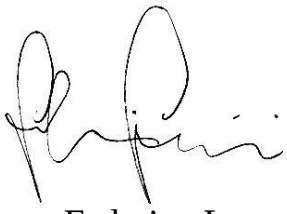
I, Federico Lenzerini, declare the following:

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

* 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

[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]

[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.

Instrument of Accession

Whereas the Statute of the International Criminal Court was concluded at Rome on 17 July 1998;

And Whereas Article 125(3) of the Statute specifies that the Statute shall be open to accession by all States;

Now Therefore, the Hawaiian Kingdom, having considered the Statute, hereby **Accedes** to it, and undertakes faithfully to abide by all the provisions contained therein.

In Witness Whereof, I have hereunto set my hand, and caused the Great Seal of the Kingdom to be affixed this 28TH day of November A.D. 2012.

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