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March 15, 2023

Anne E. Lopez
State of Hawai‘i Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Re: *State of Hawai‘i, Department of Hawaiian Home Lands v. Lawrence Costa, Jr.*,
civil no. 3DRC-23-0000008

Dear Attorney General Lopez:

My name is Dr. David Keanu Sai, and I am the head of the Royal Commission of Inquiry (“Royal Commission”). Your office was apprised of the Royal Commission’s mandate to investigate war crimes and human rights violations committed within the territorial jurisdiction of the Hawaiian Kingdom since the unlawful overthrow of the Hawaiian government in 1893, and the subsequent belligerent occupation by the United States that has ensued since, by letter to your predecessor Attorney General Clare E. Connors dated June 2, 2020.¹

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”² This “rule that States must investigate war crimes and prosecute the suspects is set forth in numerous

¹ Royal Commission’s Letter to State of Hawai‘i Attorney General Connors (June 2, 2020) (online at: [https://hawaiiankingdom.org/pdf/RCI_Ltr_to_State_of_HI_AG_\(6.2.20\).pdf](https://hawaiiankingdom.org/pdf/RCI_Ltr_to_State_of_HI_AG_(6.2.20).pdf)).

² Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general.”³

In 2019, the Royal Commission acquired a legal opinion by Professor William Schabas on war crime related to the United States belligerent occupation of the Hawaiian Kingdom.⁴ Professor Schabas is a renowned expert on international criminal law, war crimes and genocide at the United Nations and the International Criminal Court.⁵ His legal opinion provides the requisite elements of certain war crimes under customary international law committed in the Hawaiian Islands for the Royal Commission’s reports. As Professor Schabas stated, his legal opinion is “premised on the assumption that the Hawaiian Kingdom was occupied by the United States in 1893 and that it remained so since that time. Reference has been made to the expert report produced by Prof. Matthew Craven dealing with the legal status of Hawai‘i and the view that it has been and remains in a situation of belligerent occupation resulting in application of the relevant rules of international law, particularly those set out in the Hague Conventions of 1899 and 1907 and the fourth Geneva Convention of 1949.”⁶ In other words, war crimes can only arise because of the continued existence of the Hawaiian Kingdom as an independent State under a military occupation by the United States since 1893. If Hawai‘i is lawfully the 50th State of the United States, then war crimes would not arise and Professor Schabas would not have written his legal opinion. Hawai‘i is not the 50th State, but rather an occupied State under international law.

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. As

³ *Id.*, 608.

⁴ See William A. Schabas, *Legal opinion on war related to the United States occupation of the Hawaiian Kingdom since 17 January 1893* (July 25, 2019) (online at: https://hawaiiankingdom.org/pdf/Opinion_War-Crimes_Schabas_RCI.pdf); see also chapter 4, *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, David Keanu Sai (ed.) (2020) (online at: [https://www.hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://www.hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁵ United Nations, *Audio Visual Library of International Law* (online at: https://legal.un.org/avl/ls/Schabas_CLP.html); William A. Schabas, Geneva Academy of International Humanitarian Law and Human Rights (online at: <https://www.geneva-academy.ch/the-academy/about-us/experts/profile/37-william-a-schabas>); United Nations Human Rights, Office of the High Commissioner, *Council President appoints Members of Commission of Inquiry under HRC resolution S-21/1* (August 11, 2014) (online at: <https://www.ohchr.org/en/press-releases/2014/08/council-president-appoints-members-commission-inquiry-under-hrc-resolution-s>); Oxford University Press, William A. Schabas, *International Criminal Court—A Commentary on the Rome Statute* (2nd., 2016) (online at: <https://global.oup.com/academic/product/the-international-criminal-court-9780198739777?cc=us&lang=en&#>); and Cambridge University Press, *An Introduction to the International Criminal Court* (6th ed., 2020) (online at: <https://www.cambridge.org/core/books/an-introduction-to-the-international-criminal-court/49ECD7C86898655A241F37ED10A7090A#>).

⁶ Schabas legal opinion, 1; see also chapter 3, Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, David Keanu Sai (ed.)

explained by Judge Crawford, “[t]here is a presumption that the State continues to exist, with its rights and obligations...despite a period in which there is...no effective, government.”⁷ Crawford further concludes that “[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”⁸ 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.⁹

“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.”¹⁰ 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*¹¹ and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.¹²

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*.¹³ 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

⁷ James Crawford, *The Creation of States in International Law* 623 (2nd ed., 2006).

⁸ *Id.*

⁹ Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

¹⁰ 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).

¹¹ 9 Stat. 922 (1848).

¹² 30 Stat. 1754 (1898).

¹³ 30 Stat. 750 (1898).

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*.¹⁴ International law does not permit annexation of territory of another state.¹⁵

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 on the legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.¹⁶ 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."¹⁷ 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,"¹⁸ 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."¹⁹ Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."²⁰ This conclusion by the Department of Justice is an out of court statement that is an admission against interest, and the State of Hawai'i is bound by this statement. If it is unclear what constitutional power Congress exercised when it acquired Hawai'i by a joint resolution, it would be equally unclear how the Congress could establish the State of Hawai'i in 1959 with the Department of Hawaiian Home Lands as one of its agencies. This is not rebuttable evidence as to the existence of the Hawaiian Kingdom as a State under international law, therefore, as Professor Craven states, "the presumption remains."

¹⁴ 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.

¹⁵ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

¹⁶ Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).

¹⁷ *Id.*, 242.

¹⁸ *Id.*, 242.

¹⁹ *Id.*

²⁰ *Id.*, 262.

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.”²¹

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.”²² 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.”²³

In November of 2022, the Royal Commission published war criminal reports no. 22-0002 *re usurpation of sovereignty during military occupation* (Derek Kawakami and Arryl Kaneshiro); no. 22-0002-1, *re accomplice to usurpation of sovereignty during military occupation* (Matthew M. Bracken and Mark L. Bradbury); no. 22-0003 *re usurpation of sovereignty during military occupation* (Mitchell Roth and Maile David); no. 22-0003-1 *re accomplice to usurpation of sovereignty during military occupation* (Elizabeth A. Strance, Mark D. Disher and Dakota K. Frenz); no. 22-0004 *re usurpation of sovereignty during military occupation* (Michael Victorino and Alice L. Lee); no. 22-0004-1 *re accomplice to usurpation of sovereignty during military occupation* (Moana M. Lutey, Caleb P. Rowe and Iwalani Mountcastle); no. 22-0005 *re usurpation of sovereignty during military occupation* (David Yutake Ige, Ty Nohara, and Isaac W. Choy); no. 22-0005-1 *re accomplice to usurpation of sovereignty during military occupation* (Holly T. Shikada and Amanda J. Weston); no. 22-0006 *re usurpation of sovereignty during military occupation* (Anders G.O. Nervell); no. 22-0006-1 *re accomplice to usurpation of sovereignty during military occupation* (Scott I. Batterman); no. 22-0007 *re usurpation of sovereignty during military occupation* (Joseph Robinette Biden Jr., Kamala Harris, Admiral John Aquilino, Charles P. Rettig, Charles E. Schumer and Nancy Pelosi); no. 22-0007-1 *re accomplice to*

²¹ *The Apollon*, 22 U.S. 362, 370 (1824).

²² Kmiec, 252.

²³ Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

usurpation of sovereignty during military occupation (Brian M. Boynton, Anthony J. Coppolino and Michael J. Gerardi); no. 22-0008 *re usurpation of sovereignty during military occupation and deprivation of fair and regular trial* (Leslie E. Kobayashi and Rom A. Trader); no. 22-0009 *re usurpation of sovereignty during military occupation, deprivation of fair and regular trial and pillage* (Mark E. Recktenwald, Paula A. Nakayama, Sabrina S. McKenna, Richard W. Pollack, Michael D. Wilson, Todd W. Eddins, Glenn S. Hara, Greg K. Nakamura, Charles Prather, Sofia M. Hirose, Daryl Y. Dobayashi, James E. Evers, Josiah K. Sewell, Clifford L. Nakea, Bradley R. Tamm and Alana L. Bryant); and no. 22-0009-1 *re usurpation of sovereignty during military occupation and deprivation of fair and regular trial* (Derrick K. Watson, J. Michael Seabright, Leslie E. Kobayashi and Jill A. Otake).²⁴

Evidence of the *actus reus* and *mens rea* for the commission of these war crimes were retrieved from the pleadings in *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243, United States District Court for the District of Hawai‘i; *Deutsche Bank National Trust Company v. Gumapac et al.*, civil no. 11-1-0590, Third Circuit Court; *Wells Fargo Bank, N.A. v. Elaine Kawasaki*, civil no. 11-1-106, Third Circuit Court; *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623, Hawai‘i Supreme Court; and *Kaiama v. Chairperson of the Disciplinary Board of the Hawai‘i Supreme Court*, SCPW-22-0000634, Hawai‘i Supreme Court.

A symposium on the Royal Commission was held on February 11, 2023, at the University of Hawai‘i at Mānoa. Presenters included Professor Schabas, Professor Federico Lenzerini, and myself.²⁵ The National Lawyers Guild and the International Association of Democratic Lawyers were co-sponsors of the event along with the Kamehameha Schools Kanaeokana, University of Hawai‘i Native Hawaiian Student Services, and the University of Hawai‘i College of Education. I would highly recommend that you and your Deputy Attorneys General review the videos of the symposium at the website of the International Association of Democratic Lawyers.²⁶

This office received a letter from Lawrence Costa Jr. by certified mail no. 7019 0700 0001 3053 8992 dated February 22, 2023, enclosing his answer to the complaint for ejectment in *State of Hawai‘i, Department of Hawaiian Home Lands v. Lawrence Costa, Jr.*, civil no.

²⁴ Royal Commission of Inquiry webpage (online at: <https://hawaiiankingdom.org/royal-commission.shtml>).

²⁵ Hawaiian Society of Law and Politics, *Symposium at the University of Hawai‘i at Manoa—The Royal Commission of Inquiry – Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (February 11, 2023) (online at: <http://www2.hawaii.edu/~hjl/p/2023%20Symposium.html>).

²⁶ International Association of Democratic Lawyers, *Videos: Symposium on War Crimes Committed in the Hawaiian Islands by the United States* (February 11, 2023) (online at: <https://iadllaw.org/2023/02/videos-symposium-on-war-crimes-committed-in-the-hawaiian-islands-by-the-united-states/>).

3DRC-23-0000008. Mr. Costa’s enclosed statement to the court is accurate. The relevant war criminal reports are no. 22-0005, no. 22-0005-1, and no. 22-0009. The State of Hawai‘i, by its Department of Hawaiian Home Lands, claims to have derived its title by virtue of the 1898 *joint resolution to provide for annexing the Hawaiian Islands to the United States*. As a unilateral act, it is not land that has been ceded by a treaty. The Department of Hawaiian Home Lands is not the owner in fee-simple to the ahupua‘a of Humu‘ula and that the Third Circuit Court presiding over this complaint does not have subject matter jurisdiction because it was established by an act of *usurpation of sovereignty during military occupation*. Title to Humu‘ula is vested in the “heirs and successors to the Royal Office,”²⁷ which is currently the Council of Regency, being the successor to the throne, under the supervision of the Board of Commissioners of Crown Lands.²⁸

This letter provides you with notice that you and your Deputy Attorneys General Craig Y. Iha, Ryan K.P. Kanaka‘ole, and Alyssa-Marie Y. Kau are committing the war crime of *usurpation of sovereignty during military occupation* after Mr. Costa informed the Chair of the Hawaiian Homes Commission, William Aila, by letter dated April 13, 2022, and included as an exhibit in your complaint, and your office in his filed answer to the complaint of the prolonged occupation of the United States military occupation of the Hawaiian Kingdom since 1893 and the commission of war crimes. Neither you nor Mr. Aila provided any rebuttable evidence as to the Hawaiian Kingdom’s continued existence as an independent, but occupied, State. I am also aware that your office, without proffering any rebuttable evidence, proceeded to file a motion for summary judgment on March 10, 2023.

If you proceed against Mr. Costa in these extra-judicial proceedings, you will have met the requisite element of *mens rea* because you would have met the “requirement for the awareness of the factual circumstances that established the existence of the military occupation.”

Elements of the *war crime of usurpation of sovereignty during military occupation*:

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.

²⁷ *An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable* (January 3, 1865).

²⁸ Royal Commission of Inquiry, *Preliminary Report—Legal Status of Land Titles throughout the Realm* (July 16, 2020) (online at: https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).

3. The conduct took place in the context of and was associated with a military occupation.
4. The perpetrator was aware of factual circumstances that established the existence of the military occupation.

With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation*:

5. There is no requirement for a legal evaluation by the perpetrator as to the existence of the military occupation.
6. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the military occupation.
7. There is only a requirement for the awareness of the factual circumstances that established the existence of the military occupation that is implicit in the terms “took place in the context of and was associated with.”

Do not take this notice lightly. The historical facts and the law are not on your side, but rather only illegal force that has gone unchecked for 130 years. Force will not last, and it will only be a matter of time to prosecute the criminally culpable for war crimes committed within the territorial jurisdiction of the Hawaiian Kingdom. There are no statutes of limitations for war crimes or the granting of pardons, and the fourth Geneva Convention oblige States to hold war criminals accountable for their crimes. Last year Germany prosecuted a 97-year-old woman for Nazi war crimes committed during the Second World War.²⁹

Sincerely,



David Keanu Sai, Ph.D.
Head, Hawaiian Royal Commission of Inquiry

cc: Craig Y. Iha, Deputy Attorney General
Ryan K.P. Kanaka'ole, Deputy Attorney General
Alyssa-Marie Y. Kau, Deputy Attorney General

enclosure

²⁹ Associated Press, *German court convicts 97-year-old ex-secretary at Nazi camp* (December 20, 2022) (online at: <https://apnews.com/article/prisons-dceae7a28dfdee9a869bd8fe8a75c91a>).