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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

PLAINTIFF’S OPPOSITION TO STATE DEFENDANTS’ MOTION TO VACATE DEFAULTS [ECF 241] ON JURISDICTIONAL GROUNDS, AND PLAINTIFF’S MOTION TO SCHEDULE AN EVIDENTIARY HEARING IN ACCORDANCE WITH THE *LORENZO* PRINCIPLE; CERTIFICATE OF SERVICE

PLAINTIFF'S OPPOSITION TO STATE DEFENDANTS' MOTION TO VACATE DEFAULTS [ECF 241] ON JURISDICTIONAL GROUNDS, AND PLAINTIFF'S MOTION TO SCHEDULE AN EVIDENTIARY HEARING IN ACCORDANCE WITH THE *LORENZO* PRINCIPLE

Plaintiff opposes State Defendants' motion to vacate defaults on jurisdictional grounds and moves to schedule an evidentiary hearing in accordance with the *Lorenzo* principle and State of Hawai'i common law. The State Defendants cannot blow hot and cold when dealing with its own common law regarding the legal question of whether the Hawaiian Kingdom continues to exist as a State. The reasons are set forth in the attached memorandum.

DATED: Honolulu, Hawai'i, September 1, 2022.

Respectfully submitted,

/s/ Dexter K. Ka'iama

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff opposes State Defendants' motion to vacate defaults on jurisdictional grounds and moves to schedule an evidentiary hearing in accordance with the *Lorenzo* principle and State of Hawai‘i common law.

I. INTRODUCTION

One year after the United States Congress passed the *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the*

United States for the overthrow of the Kingdom of Hawaii,[1] an appeal**,** was heard by the State of Hawai‘i Intermediate Court of Appeals**,** that centered on a claim that the Hawaiian Kingdom continues to exist as a State. In *State of Hawai‘i v. Lorenzo* ("*Lorenzo* court"),[2] the Intermediate Court of Appeals ("ICA") stated:

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

The *Lorenzo* court denied the motion to dismiss the indictment based on an evidentiary burden as described by the Ninth Circuit in its 1993 decision, *United States v. Lorenzo*, that "[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government."[4] As a result, the *Lorenzo* court stated, it "was incumbent on Defendant to present evidence supporting his claim. *United States v. Lorenzo*. Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state in

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[1] 107 Stat. 1510 (1993).
[2] *State of Hawai‘i v. Lorenzo*, 77 Hawai‘i 219; 883 P.2d 641 (Ct. App. 1994).
[3] *Id*., 220, 642.
[4] *United States v. Lorenzo*, 995 F.2d 1448, 1456; 1993 U.S. App. LEXIS 10548.

accordance with recognized attributes of a state's sovereign nature."[5] Neither the Ninth Circuit Court nor the *Lorenzo* court foreclosed the question but rather provided, what it saw at the time, instruction for the courts to arrive at the conclusion that the Hawaiian Kingdom, from an evidentiary basis, exists as a State. This is evidenced in a subsequent decision by the ICA in 2004, in *State of Hawai'i v. Araujo*, that made it clear, "[b]ecause Araujo has not, either below or on appeal, 'presented [any] factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature,' […] his point of error on appeal must fail."[6]

In *State of Hawai'i v. French*,[7] the ICA stated the *Lorenzo* court "held that presently there is 'no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'" The ICA used the word "presently" because it is an open legal question and not a political question. The ICA stated in a subsequent case, *State of Hawai'i v. Lee*, that the *Lorenzo* court "suggested that it is an open legal question whether the "[Hawaiian Kingdom]" **still exists** (emphasis added)."[8] The operative word here is "still exists," which means the *Lorenzo* court was referring to the

[5] *State of Hawai'i v. Lorenzo*, 221; 643.
[6] *State of Hawai'i v. Araujo*, 103 Haw. 508 (Haw. App. 2004).
[7] *State of Hawai'i v. French*, 77 Haw. 222, 228 (Haw. App. 1994).
[8] *State of Hawai'i v. Lee*, 90 Haw. 130, 142; 976 P.2d 444, 456 (Haw. App. 1999).

Hawaiian Kingdom from the nineteenth century and not the so-called native kingdom(s) or nations, which are a part of the contemporary political sovereignty movement.

Lorenzo also separates the Native Hawaiian sovereignty movement and nation building from the continued existence of the Hawaiian Kingdom as a State. The Hawai‘i Supreme Court, in *State of Hawai‘i v. Armitage*,[9] not only clarified the evidentiary burden but also discerned between a new Native Hawaiian nation brought about through nation-building, and the Hawaiian Kingdom that existed as a State in the nineteenth century. The Hawai‘i Supreme Court explained:

> Petitioners' theory of nation-building as a fundamental right under the ICA's decision in Lorenzo does not appear viable. Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the [Hawaiian Kingdom] "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him or her. Thus, Lorenzo does not recognize a fundamental right to build a sovereign Hawaiian nation.[10]

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

[9] *State of Hawai‘i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
[10] *Id*.

the decision was correct because Lorenzo did not meet his burden of proving his defense of lack of jurisdiction."[11] 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,"[12] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[13] Addressing the presumption of German State continuity after the overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[14]

"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

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

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."[15] 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*[16] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[17]

The *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*,[18] is a municipal law of the United States without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[19] 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

[15] 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).
[16] 9 Stat. 922 (1848).
[17] 30 Stat. 1754 (1898).
[18] 30 Stat. 750 (1898).
[19] *Black's Law Dictionary* (6th ed. 1990), 88.

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*.[20] International law does not permit annexation of territory of another state.[21]

Furthermore, in 1988, the Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion regarding the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve miles.[22] 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."[23] As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole

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[20] 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.

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

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

[23] *Id.*, 242.

representative with foreign nations,"[24] and not the Congress. The OLC further stated, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[25] Therefore, the OLC stated it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[26] That territorial sea referred to by the OLC was to be extended from three to twelve miles under the United Nations Law of the Sea Convention. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[27]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby, "[t]he constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might

[24] *Id.*, 242.
[25] *Id.*
[26] *Id.*, 262.
[27] *The Apollon*, 22 U.S. 362, 370 (1824).

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."[28] 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."[29]

II. THE *LORENZO* PRINCIPLE

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

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

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

> no reason why it should not adhere to the *Lorenzo* principle (emphasis added).[30]

The *Lorenzo* principle should not be confused with a final decision. A principle is "a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure or legal determination."[31] *Lorenzo*, as a principle, was cited by the Hawai'i Supreme Court in 8 cases, and by the ICA in 45 cases. The latest Hawai'i Supreme Court's citation of *Lorenzo* was in 2020 in *State of Hawai'i v. Malave*.[32] The most recent citation of *Lorenzo* by the ICA was in 2021 in *Bank of N.Y. Mellon v. Cummings*.[33] Since 1994, *Lorenzo* had risen to precedent, and, therefore, is common law. In none of these cases was the political question doctrine invoked.

Whether or not the Hawaiian Kingdom "exists as a state in accordance with recognized attributes of a state's sovereign nature," it is governed by international law, not State of Hawai'i or United States laws. While the existence of a State is a fact, a "State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact; that is, a legal status attaching to a certain

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[30] *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919, *3.
[31] Black's Law, 1193.
[32] *State of Hawai'i v. Malave*, 146 Haw. 341, 463 P.3d 998, 2020 Haw. LEXIS 80.
[33] *Bank of N.Y. Mellon v. Cummings*, 149 Haw. 173, 484 P.3d 186, 2021 Haw. App. LEXIS 102, 2021 WL 1345675.

state of affairs by virtue of certain [international] rules or practices."[34] The civilian law refers to this type of a fact to be a *juridical fact*. According to Professor Lenzerini:

> In the civil law tradition, a juridical fact (or legal fact) is a fact (or event)—determined either by natural occurrences or by humans—which produces consequences that are relevant according to law. Such consequences are defined juridical effects (or legal effects), and consist in the establishment, modification or extinction of rights, legal situations or juridical (or legal) relationships (privity). Reversing the order of the reasoning, among the multifaceted natural or social facts occurring in the world a fact is juridical when it is legally relevant, i.e. determines the production of legal effects per effect of a legal (juridical) rule (provision). In technical terms, it is actually the legal rule which produces legal effects, while the juridical fact is to be considered as the condition for the production of the effects. In practical terms, however, it is the juridical fact which activates a reaction by the law and makes the production of the effects concretely possible. At the same time, no fact can be considered as "juridical" without a legal rule attributing this quality to it.[35]

In *Larsen v. Hawaiian Kingdom*, the arbitral tribunal acknowledged the Hawaiian Kingdom as a *juridical fact* when it stated that in "the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including

[34] Crawford, 5.
[35] See Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* [ECF 174-2], 1.

by exchanges of diplomatic or consular representatives and the conclusion of treaties."[36]

Furthermore, the State Defendants have unequivocally waived its sovereign immunity pursuant to the *Lorenzo* principle. In *Lorenzo* and *Armitage*, the State of Hawai'i was the plaintiff-prosecutor that benefitted by the evidentiary standard set by the *Lorenzo* principle, where the Defendants in both cases failed to provide any factual or legal basis that the Hawaiian Kingdom continues to exist as a State. Unlike these defendants, the Plaintiff in these proceedings have provided a factual and legal basis for the continued existence of the Hawaiian Kingdom as a State, and neither the State Defendants nor the Federal Defendants provided any rebuttable evidence except to argue it is a political question, and, therefore, the Court lacks jurisdiction. Like the Federal Defendants, the State Defendants cannot blow hot and cold when the *Lorenzo* principle is at play in these proceedings.

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

When the *Lorenzo* court stated that the "United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event. P.L. 103-150, 107 Stat. 1510 (1993) [but] that recognition does not appear to be tantamount to a recognition that the Kingdom continues to exist,"[37]

[36] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).
[37] *State of Hawai'i v. Lorenzo*, 221, 643.

the Court implied that the United States "derecognized" the Hawaiian Kingdom, which it had previously recognized in the nineteenth century. It would appear that the *Lorenzo* court was confusing the recognition of government with the recognition of a State. Since the United States recognized the Hawaiian Kingdom as a State in the nineteenth century, the United States is estopped from derecognizing it.

According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[38] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[39] *Restatement (Third) of the Foreign Relations Law of the United States*, "[t]he duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood **may not be 'derecognized.'** If the entity ceases to meet those requirements, it ceases to be a state and derecognition is not necessary (emphasis added)."[40] By applying international law, the *Lorenzo* principle places the burden on the State Defendants to provide any factual (or legal) basis for concluding that the Kingdom "ceases to be a state," and not that it derecognized it.

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[38] Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).
[39] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).
[40] *Restatement (Third)*, §202, comment g.

The government of a State, however, may be de-recognized depending on factual or legal circumstances. Such was the case when President Jimmy Carter terminated the defense treaty with Taiwan after the government of Taiwan was de-recognized as the government of China.[41] In *Goldwater v. Carter*, the Supreme Court explained, "[a]brogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate authority in China."[42] In the case of the non-recognition of the government of Cuba, the Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*, stated:

> It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control [citation omitted].[43]

The *Lorenzo* principle is NOT a matter of recognition of government but rather the recognition of the Hawaiian State as evidenced by the Hawaiian-American Treaty of Friendship, Commerce and Navigation.[44] There is no evidence that the Executive branch de-recognized the government of the Hawaiian Kingdom. Rather,

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[41] *Goldwater v. Carter*, 444 U.S. 996 (1979).
[42] *Id*., 1007.
[43] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964).
[44] 9 Stat. 977 (1841-1851).

President Grover Cleveland, head of the Executive branch, admitted to an illegal overthrow of the Hawaiian government by the United States military and vowed to restore that government. Therefore, as a *juridical fact*, the United States cannot simply derecognize the Hawaiian State.

2. The Permanent Court of Arbitration's Explicit Acknowledgment of the Continued Existence of the Hawaiian Kingdom and the Council of Regency as its Government

The status of the Hawaiian Kingdom came to the attention of the United States in a complaint for injunctive relief filed with the United States District Court for the District of Hawai'i on August 4, 1999 in *Larsen v. United Nations, et al*.[45] The United States and the Council of Regency representing the Hawaiian Kingdom were named as defendants in the complaint.

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

[45] *Larsen v. United Nations et al.*, case #1:99-cv-00546-SPK, document #1.
[46] *Id*., document #6.

agreement was reached to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at the The Hague, the Netherlands, was entered into on October 30, 1999.[47] The stipulated settlement agreement was filed with the court by the plaintiff on November 5, 1999.[48] On November 8, 1999, a notice of arbitration was filed with the International Bureau of the Permanent Court of Arbitration ("PCA")—*Lance Paul Larsen v. Hawaiian Kingdom*.[49] An order dismissing the case by District Court Judge Samuel P. King, on behalf of the plaintiff, was entered on November 11, 1999.

Distinct from the subject matter jurisdiction of the *Larsen v. Hawaiian Kingdom* ad hoc arbitral tribunal, which was formed on June 9, 2000, the PCA had to first possess "institutional jurisdiction" by virtue of Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, I (1907 PCA Convention),[50] before it could establish the ad hoc tribunal in the first place ("The **jurisdiction of the Permanent Court** may, within the conditions laid down in the regulation, be extended to disputes [with] non-Contracting [States] (emphasis

[47] Agreement between plaintiff Lance Paul Larsen and defendant Hawaiian Kingdom to submit the dispute to final and binding arbitration at the Permanent Court of Arbitration at The Hague, the Netherlands (October 30, 1999), https://www.alohaquest.com/arbitration/pdf/Arbitration_Agreement.pdf.
[48] *Larsen v. United Nations et al.*, document #8.
[49] Notice of Arbitration (November 8, 1999), https://www.alohaquest.com/arbitration/pdf/Notice_of_Arbitration.pdf.
[50] 36 Stat. 2199 (1907).

added)").[51] According to UNCTAD, there are three types of jurisdictions at the PCA, "Jurisdiction of the Institution," "Jurisdiction of the Arbitral Tribunal," and "Contentious/Advisory Jurisdiction."[52] Article 47 of the Convention provides for the jurisdiction of the PCA as an institution. Before the PCA could establish an ad hoc arbitral tribunal for the *Larsen* dispute it needed to possess institutional jurisdiction beforehand by ensuring that the Hawaiian Kingdom is a State, thus bringing the international dispute within the auspices of the PCA.

Evidence of the PCA's recognition of the continuity of the Hawaiian Kingdom as a State and its government is found in Annex 2—*Cases Conducted Under the Auspices of the PCA or with the Cooperation of the International Bureau* of the PCA Administrative Council's annual reports from 2000 through 2011. Annex 2 of these annual reports stated that the *Larsen* arbitral tribunal was established "[p]ursuant to article 47 of the 1907 Convention."[53] Since 2012, the annual reports ceased to include all past cases conducted under the auspices of the PCA but rather only cases

[51] 36 Stat. 2199. The Senate ratified the 1907 PCA Convention on April 2, 1898 and entered into force on January 26, 1910.
[52] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: General Topics—1.3 Permanent Court of Arbitration* 15-16 (2003) (online at https://unctad.org/system/files/official-document/edmmisc232add26_en.pdf).
[53] Permanent Court of Arbitration, *Annual Reports*, Annex 2 (online at https://pca-cpa.org/en/about/annual-reports/).

on the docket for that year. Past cases became accessible at the PCA's case repository on its website at https://pca-cpa.org/en/cases/.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State to the 1907 PCA Convention, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States. Professor Lenzerini concluded that, "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[54]

The PCA Administrative Council that published the annual reports did not "recognize" the Hawaiian Kingdom as a new State, but merely "acknowledged" its continuity since the nineteenth century for purposes of the PCA's institutional jurisdiction. If the United States objected to the PCA Administrative Council's annual reports, which it is a member of the Council, that the Hawaiian Kingdom is a non-Contracting State to the 1907 PCA Convention, it would have filed a declaration with the Dutch Foreign Ministry as it did when it objected to Palestine's

[54] See Declaration of Professor Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* [ECF 55-2], para. 5.

accession to the 1907 PCA Convention on December 28, 2015. Palestine was seeking to become a Contracting State to the 1907 PCA Convention and submitted its accession to the Dutch government on October 30, 2015. In its declaration, which the Dutch Foreign Ministry translated into French, the United States explicitly stated, *inter alia*, "the government of the United States considers that 'the State of Palestine' does not answer to the definition of a sovereign State and does not recognize it as such (translation)."[55] The Administrative Council, however, did acknowledge, by vote of 54 in favor and 25 abstentions, that Palestine is a Contracting State to the 1907 PCA Convention in March of 2016.

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[56] As Professor Talmon states, "[t]he government,

[55] 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).
[56] *German Settlers in Poland,* 1923, *PCIJ, Series B, No. 6*, 22.

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."[57]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency.[58] The PCA identified the international dispute in *Larsen* as between a "State" and a "private entity" in its case repository.[59] 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).[60]

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[57] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).
[58] See Lenzerini, *Authority of the Council of Regency*.
[59] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[60] *Id*.

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on June 9, 2000.[61]

There is no legal requirement for the Council of Regency, being the successor in office to Queen Lili‘uokalani under the constitution and laws of the Hawaiian Kingdom, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States recognition of the Hawaiian Kingdom as an independent State on July 6, 1844,[62] was also the recognition of its government—a constitutional monarchy, as its agent. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili‘uokalani in 1891, the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.[63] Successors to King Kamehameha III were not

[61] See Declaration of David Keanu Sai, Ph.D. [ECF 55-1].
[62] U.S. Secretary of State Calhoun to Hawaiian Commissioners (July 6, 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[63] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).

established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. According to the *Restatement (Third) of the Foreign Relations Law of the United States*:

> *Recognition in cases of constitutional succession*. Where a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; **continued recognition is assumed** (emphasis added).[64]

In its cross motion to dismiss first amended complaint [ECF 188], the Federal Defendants attempted to conflate the subject matter jurisdiction of the arbitral tribunal with the institutional jurisdiction of the PCA pursuant to Article 47 of the 1907 Convention. Federal Defendants referred to the arbitral award that stated, "in the absence of the United States of America [as a party], the Tribunal can neither decide that Hawaii is not part of the USA, nor proceed on the assumption that it is not." What is left out is the follow up sentence, which states, "[t]o take either course would be to disregard a principle which goes to heart of the arbitral function in international law." This is a jurisdictional statement and not *dicta*. The arbitral tribunal "was precluded from addressing the merits because the United States, which was absent, was an indispensable third party."[65] In any event, the PCA already

[64] *Restatement (Third)*, §203, comment c.
[65] David J. Bederman and Kurt R. Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii," 95 *The American Journal of International Law* 927, 928 (2001).

determined that the Hawaiian Kingdom is a non-Contracting State prior to the formation of the *ad hoc* tribunal. As stated by the Lorenzo court, the status of the Hawaiian Kingdom as a State is "in accordance with recognized attributes of a state's sovereign nature" under international, and not by a determination an international arbitral tribunal.

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

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden on the party opposing the presumption, the State Defendants, to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law in light of the evidence the Plaintiff has proffered in these proceedings and in the instant pleading. The evidence proffered by the Plaintiff places the burden "on the party opposing that continuity to establish the facts substantiating its rebuttal." The State Defendants are precluded, by judicial estoppel, from arguing that this case give rise to the political question doctrine.

III. CONCLUSION

For these reasons, the Plaintiff respectfully requests that the Court schedule an evidentiary hearing in accordance with the *Lorenzo* principle for the State Defendants to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom ceases to exist as a State in light of the evidence and law in the

instant motion. If the State Defendants are unable to proffer rebuttable evidence, the Plaintiff respectfully requests that this Court transform into an Article II Occupation Court in order for the Court to possess subject matter and personal jurisdiction to consider the State Defendants' motion to set aside defaults. The transformation to an Article II Occupation Court is fully elucidated in the brief of *amici curiae* the International Association of Democratic Lawyers, the National Lawyers Guild, and the Water Protectors Legal Collective [ECF 96]. When the Court has jurisdiction, the Plaintiff will not oppose the State Defendants motion to set aside defaults.

Should the State Defendants proffer evidence of a treaty of cession that the Hawaiian Kingdom ceded its territory and sovereignty to the United States, whereby the Hawaiian State ceased to exist under international law, the Plaintiff will withdraw its amended complaint for declaratory and injunctive relief [ECF 55] and bring these proceedings to a close.

Plaintiff's request for an evidentiary hearing and judicial notice pursuant to the *Lorenzo* principle is in compliance with §34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. §1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

As the United States Supreme Court, in *Erie R.R. v. Tompkins*, stated, "federal courts are […] bound to follow decisions of the courts of the State in which the controversies arise."[66] This case is manifestly governed by *Erie* and the *Lorenzo* principle. It is not governed by *Baker v. Carr*[67] as to the political question doctrine.

DATED: Honolulu, Hawai'i, September 1, 2022.

Respectfully submitted,

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[66] *Erie R.R. v. Tompkins*, 30 U.S. 64, 87 (1938).
[67] *Baker v. Carr*, 369 U.S. 186 (1962).

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2022 I electronically filed the foregoing document by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by said CM/ECF system.

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