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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN KINGDOM,

Plaintiff-Appellant,

v.

JOSEPH R. BIDEN JR., in his official capacity as President of the United States; et al.,

Defendants-Appellees.

No. 22-15637

D.C. No. 1:21-cv-00243-LEK-RT

PLAINTIFF-APPELLANT HAWAIIAN KINGDOM’S NOTICE OF MOTION AND MOTION TO DISMISS FOR *FORUM NON CONVENIENS*; EXHIBITS 1-6; CERTIFICATE OF SERVICE

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TO THE COURT AND TO ALL PARTIES HEREIN:

Please take notice that Plaintiff-Appellant HAWAIIAN KINGDOM will move this Court, at the Ninth Circuit Court of Appeals, for an order dismissing Plaintiff Hawaiian Kingdom's Notice of Appeal to a Competent Court of Appeals to be hereafter established by the United States as the Occupying Power [ECF 228], filed with the United District Court for the District of Hawai'i on April 24, 2022, based on *forum non conveniens*[1] on the ground that an appropriate forum for this action is an Article II Appellate Court to be hereafter established in compliance with international humanitarian law. This motion is in response to the Order of the Clerk of the U.S. Court of Appeals for the Ninth Circuit filed on May 3, 2022, that "[w]ithin 21 days after the date of this order, appellant shall either move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction." Order [DktEntry: 2].

This motion is based on the following documents: this Motion to Dismiss for *Forum Non Conveniens*, the Jurisdiction and Venue and Factual Allegations sections of the Amended Complaint [ECF 55] with Exhibits 1 [ECF 55-1] and 2 [ECF 55-2]; Brief of *Amicus Curiae* International Association of Democratic Lawyers, National

[1] *Forum non conveniens* is a doctrine that applies when an alternative forum is in another country.

Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96]; Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration [ECF 174] and Exhibit 1 [ECF 174-2]; and Notice of Appeal to a Competent Court of Appeals to be hereafter established by the United States as the Occupying Power [ECF 228], and all other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at any hearing on the motion ordered by the Court.

DATED: Honolulu, Hawai‘i, May 20, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 11, 2021, Plaintiff-Appellant HAWAIIAN KINGDOM (hereafter "Hawaiian Kingdom") filed an Amended Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Hawai'i. The Hawaiian Kingdom raised a preliminary issue in its Amended Complaint regarding the District Court of Hawai'i's status as an Article III Court situated within the territory of the Hawaiian Kingdom.

Under international law there is a presumption that an established sovereign and independent State, being a subject of international law, continues to exist despite the overthrow of its government. See Professor Quincy Wright, "The Status of Germany and the Peace Proclamation," 46, no. 2 *American Journal of International Law* 299, 307 (April 1952) ("[i]nternational law distinguishes between a government and the state it governs. This distinction makes it clear that the extinction of the Nazi Government and the temporary absence of any German Government did not necessarily mean that Germany as a state ceased to exist"); see also Professor 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) (the State continues "to exist even in the factual absence of government so long as the

people entitled to reconstruct the government remain"). According to Professor Ian Brownlie, *Principles of Public International Law*, 109 (4th ed., 1990):

> 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 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.

Therefore, the Hawaiian Kingdom as a State is presumed to continue to exist despite its government being unlawfully overthrown by the Defendant Appellee UNITED STATES OF AMERICA's (hereafter "United States") military on January 17, 1893. As such, the District Court of Hawai'i is not a properly constituted court in accordance with international humanitarian law, and, therefore, had to transform itself into an Article II Occupation Court.

After Magistrate Judge Rom Trader granted leave on September 30, 2021 [ECF 90], the International Association of Democratic Lawyers, the National Lawyers Guild, and the Water Protectors Legal Collective filed an *amicus curiae* brief bringing to the "Court's attention customary international law norms and judicial precedent regarding Article II occupation courts that bear on the long-standing belligerent occupation of the Hawaiian Kingdom by the United States at issue in this case." [ECF 96, p. 4].

Neither defendants nor the Court provided any evidence rebutting the presumption of continuity of the Hawaiian Kingdom as an independent State that

has been under a prolonged belligerent occupation by the United States since January 17, 1893, when Her late Majesty Queen Lili'uokalani conditionally surrendered to the United States. In its pleading, the United States admitted to the war crime of usurpation of sovereignty[2] when it stated, "[t]he United States annexed Hawaii in 1898, [*Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, 30 Stat. 750 (1898)] and Hawaii entered the union as a state in 1959. Hawaii Admission Act, Pub. L. 86-4, 73 Stat. 4 (1959)." [ECF 188-1, p. 2]. This pleading does not constitute rebuttable evidence.

The annexation of the territory of the Hawaiian Kingdom was done as a war measure in its war with the Spanish in its colonies of the Philippines and Guam in the Pacific Ocean five years after the illegal overthrow of the Hawaiian government. See David Keanu Sai, "Backstory—*Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration (1999-2001)," 4 *Hawaiian Journal of Law and Politics* 133, 145-152 (2022). When the U.S. Senate went into secret session on May 31, 1898, Senator Henry Cabot Lodge stated that the "Administration was compelled to violate

[2] See William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157, 167 (2020), https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf. (The *actus reus* of the offense of usurpation of sovereignty occurs where 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.").

the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity." *Id*., 150. Without a treaty, international law does not permit a State to annex the territory of another State while under belligerent occupation. According to *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995):

> The annexation of conquered territory is prohibited by international law. This necessarily means that if one state achieves power over parts of another state's territory by force or threat of force, the situation must be considered temporary by international law. 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*.[3] International law does not permit annexation of territory of another state. It follows from this that all measures taken by the occupying authorities should affect only the administration of the territory, avoiding far-reaching changes to the existing order. In this sense, the occupying power assumes 'responsibility for the occupied territory and its inhabitants.'

The United States District Court for the District of Hawai'i, as an Article III Court, is not a properly constituted court as a result of the international rule of the presumption of State continuity unless there is rebuttable evidence to the contrary. Congress established the United States District Court for the District of Hawai'i as

[3] 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.

an Article III Court by virtue of section 9(a), *An Act To provide for the admission of the State of Hawaii into the Union*, Public Law 86-3, 73 Stat. 4, 8 (1959). Previously the District Court of Hawai‘i was an Article IV Court by virtue of section 86, *An Act To provide a government for the Territory of Hawaii*, 31 Stat. 141, 158 (1900). In its brief, the *Amici* stated:

> The facts here show that Congress has no legitimate power over Hawai‘i because there was never a peace treaty between nations ending the occupation and Congress has no extraterritorial capabilities. Essentially Congress exceeded its constitutional powers and legislated a legal framework over a sovereign Nation that never ceded its state sovereignty nor the ability and desire to rule itself. Rather than wait to ratify a negotiated peace treaty with Hawai‘i to end the occupation and remedy the illegal annexation and later acquisition of Hawai‘i, Congress admitted Hawai‘i into the Union as the 50th State seeking to sweep a century of inconvenient truths and illegal acts under the rug. The extensive judicial and political infrastructure in modern Hawai‘i exists in violation of the laws of war and norms of international law applicable to occupying powers. Yet the Hawaiian Kingdom persists and the United States occupation of Hawai‘i that began in 1893 has never effectively ended. [ECF 96, p. 25].

These Congressional laws have no effect within the territory of the Hawaiian Kingdom, and, therefore, are not voidable but rather are *void ab initio*—having no legal effect from inception. Until the District Court for Hawai‘i transforms itself into an Article II Court, being a properly constituted court with jurisdiction, the Hawaiian Kingdom was unable to seek relief in its complaint nor could it file any motions. When the Hawaiian Kingdom filed a Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential

Juridical Act by the Permanent Court of Arbitration [ECF 174] to assist the Court in transforming to an Article II Court, it was the Court that changed the Request into a Motion [ECF 175].

The Ninth Circuit, however, is an Article III Appellate Court that allows the Hawaiian Kingdom to file its motion based on *forum non conveniens* without infringing on the presumption of State continuity because this Court is sitting within the territory of the United States and not in the territory of the Hawaiian Kingdom.

Accordingly, this case should be dismissed based on *forum non conveniens* because the proper forum under international humanitarian law is an Article II Appellate Court unless the United States provides rebuttable evidence that the Hawaiian Kingdom was extinguished under international law, *i.e.*, treaty of cession.

II. FACTUAL BACKGROUND

In the interest of judicial economy, the Hawaiian Kingdom incorporates the Jurisdiction and Venue and Factual Allegations sections of the Amended Complaint [ECF 55] with Exhibits 1 [ECF 55-1] and 2 [ECF 55-2]; Brief of *Amicus Curiae* International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96]; Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent

Court of Arbitration [ECF 174] and Exhibit 1 [ECF 174-2]; and Notice of Appeal [ECF 228], filed concurrently herewith.

III. MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

In *U.S. Bank Tr., N.A. v. Fonoti*, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295, at *10, the issue of the Hawaiian Kingdom's continued existence as a State was addressed. The *Fonoti* decision quotes *State v. French*, 77 Hawai'i 222, 228; 883 P.2d 644, 650 (Ct. App. 1994) that makes specific reference to *State of Hawai'i v. Lorenzo*, 77 Hawai'i 219; 883 P.2d 641, (Ct. App. 1994), which has become a precedent case on this matter and is known in the United States District Court in Hawai'i since 2002 as the *Lorenzo* principle. Black's Law Dictionary, 1193 (6th ed., 1990) (a principle is a "comprehensive rule or doctrine which furnishes a basis or origin for others"). As the District Court stated, in *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919 *3:

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

In *French,* the Court applied the *Lorenzo* principle when it stated, "this particular kind of claim was rejected in State v. Lorenzo, [internal citation omitted] which 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 (emphasis added)." *French*, 228, 650. The *Lorenzo* Court clearly stated the reason for its rejection was because "[i]t 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 […]." *Lorenzo,* 220; 642. The reason for "presently" was because Lorenzo did not "present evidence supporting his claim." The Court did not foreclose the question but rather provided, what it saw at the time, instruction for the Court to arrive at the conclusion "that the [Hawaiian] Kingdom [continues to] exists as a state" based on evidence of a "factual (or legal) basis."

The *Lorenzo* Court's standard of review in determining whether the Hawaiian Kingdom "exists as a state" placed the burden of proof on the Defendant. *United States v. Lorenzo*, 995 F.2d 1448, *1455; 1993 U.S. App. LEXIS 10548, **17, ("[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government […]."). The term "Kingdom of Hawaii" is the "Hawaiian Kingdom." The *Lorenzo* Court, however, did acknowledge that its "rationale is open to question in light of international law,"

Lorenzo, 220, 642, and that "[t]he illegal overthrow leaves open the question whether the present governance system should be recognized […]" under international law. *Id*., 221, 643, n. 2.

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. According to 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, or no effective, government." James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006). "Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State." *Id*. According to Professor Craven, "[i]f one were to speak about a presumption of continuity, 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." 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).

Therefore, the *Lorenzo* principle of placing the burden on the Defendant is misplaced because international law places the burden "on the party opposing that continuity to establish the facts substantiating its rebuttal." In 2001, the international arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Reports 566, 581 (2001), stated "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 conclusions of treaties (emphasis added)." From a juridical standpoint, the *Larsen* case shifted the burden in the *Lorenzo* principle, but it wasn't applied by the federal courts.

In its Amended Complaint, the Hawaiian Kingdom provided a legal basis as well as a factual basis of the Hawaiian Kingdom's continued existence. The presumption of State continuity is the legal basis, and the factual basis is that the Hawaiian Kingdom's continued existence is a *juridical fact*, whereby the Permanent Court Arbitration, by a *juridical act*, acknowledged the Hawaiian Kingdom, in *Larsen v. Hawaiian Kingdom*, to be a non-Contracting "State" pursuant to Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes ("1907 PCA Convention"), 36 Stat. 2199. See Declaration of David Keanu Sai, Ph.D. [ECF 55-1], and Exhibit #1—Memorandum of Professor 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]; see also Declaration of Professor Federico Lenzerini [ECF 55-2], *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom*, para. 1-6. The Hawaiian Kingdom was not applying the *Lorenzo* principle but merely provided the factual and legal basis of its existence for the District Court. Judge Kobayashi raised the *Lorenzo* principle in her two Orders that cited *Fonoti*.

Additional factual basis of "continuity" includes the delivering of an oral statement to the United Nations Human Rights Council on March 22, 2022, by Dr. David Keanu Sai, as Minister of Foreign Affairs *ad interim*.[4] Dr. Sai was accredited by the Office of the United Nations High Commissioner for Human Rights for his statement. Dr. Sai stated to the Human Rights Council:

> 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.

[4] International Association of Democratic Lawyers, *Dr. Keanu Sai oral statement on the U.S. Occupation of Hawai'i to UN Human Rights Council* (March 22, 2022), https://www.youtube.com/watch?v=EinKf6QEUew.

> 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.

The United States, who is a current member State of the Human Rights Council, did not object to Dr. Sai's statement that "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," thereby, acquiescing to the Hawaiian Kingdom's continued existence as a State and the United States' commission of the war crime of usurpation of sovereignty for over a century.

According to the International Court of Justice, acquiescence "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstance such that a response expressing disagreement or objection in relation to the conduct of another State would be called for." *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of June 15, 1962, I.C.J. Reports 1962, p. 6, at 23. Under international law, the "function of acquiescence may be equated with that of consent," whereby the "primary purpose of acquiescence is evidential; but its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which

is both objective and practical." I.C. MacGibbon, "The Scope of Acquiescence in International Law," 31 *British Yearbook of International Law* 143, 145 (1954). In *The Paquette Habana*, 175 U.S. 677, 700 (1900), "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

The failure of the United States to disagree or object to the Hawaiian Kingdom being acknowledged as a non-Contracting State to the 1907 PCA Convention, by virtue of Article 47, and its failure to disagree or object to the statement to the Human Rights Council regarding the war crime of usurpation of sovereignty are official acts by the United States under customary international law. War crimes can only be committed in an international armed conflict between two or more States, and, therefore, the United States acquiescence are official acts that bind this Court. "[W]hen the executive branch of the government, which is charged with our foreign relations […] assumes a fact […] it is conclusive on the judicial department." *Williams v. Suffolk Insurance Co.*, 36 U.S. 415, 420 (1839). The aforementioned facts are confirmed by the United States' acquiesence and, therefore, "is conclusive" on this Court as evidential.

United States President John Tyler, by letter of Secretary of State John C. Calhoun on July 6, 1844, to Hawaiian officials, recognized the Hawaiian Kingdom

as a sovereign and independent State. On December 20, 1849, the United States entered into a Treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom (9 Stat. 977) and maintained a diplomatic Legation[5] in Honolulu and Consulates throughout the islands. The Hawaiian Kingdom maintained a diplomatic Legation in Washington, D.C., and Consulates throughout the United States. *Jones v. United States*, 137 U.S. 202, 212 (1890) ("[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial […] question.").

In its pleadings, the United States has not provided any rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom was extinguished as a State under international law. Rather it pled that the United States, by Congressional legislation, annexed the Hawaiian Islands in 1898 and Hawai'i became a State of the Union in 1959. From an international law standpoint, "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." *Lotus*, PCIJ, ser. A no. 10 (1927), 18.

[5] A Legation is "[a]n embassy; a diplomatic minister and his suite." Black's Law, 898.

From a municipal law standpoint, both the 1898 Joint Resolution of annexation and the 1959 Hawai‘i Admission Act are municipal laws and "can have no force to control the sovereignty or rights of any other nation within its own jurisdiction." *The Apollon,* 22 U.S. 362, 370 (1824); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory […], and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law"; see also Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238, 242, 252 (1988) ("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. […] It is therefore unclear which constitutional power of Congress exercised when it acquired Hawaii by joint resolution.").

"The clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, the President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.' U.S. Const. art. II, §2, cl. 2. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either

purchase or conquest." *Id*., 247. Neither the Joint Resolution of annexation nor the Hawai‘i Admission Act are treaties or conventions.

The failure of the United States to have extinguished Hawaiian Statehood under international law renders these laws in violation of Article VIII of the 1849 Hawaiian-United States Treaty, 9 Stat. 977, 979, "and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states, shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but **subject always to the laws and statutes of the two countries respectively** (emphasis added)," and Article 43 of the 1907 Hague Regulations, 36 Stat. 2277, 2306, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, **the laws in force in the country** (emphasis added)." According to Professor Eyal Benvinisti, *The International Law of Occupation* 19 (1993):

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

would then choose to operate through extraterritorial prescription of its national institutions.

IV. EVIDENTIARY HEARING PURSUANT TO THE *LORENZO* PRINCIPLE

The Hawaiian Kingdom requests an evidentiary hearing pursuant to the *Lorenzo* principle to compel the United States to provide evidence rebutting the presumption of continuity of the Hawaiian Kingdom as a State under international law. Should the United States provide rebuttable evidence acceptable under international law, *i.e.*, treaty of cession, this Court would then be able to consider that it "may lack jurisdiction over this appeal because the order challenged in the appeal may not be final or appealable." Until such time, the presumption of continuity remains and the doctrine of *forum non conveniens* applies.

In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007), the Supreme Court held that a district court can exercise its discretion to immediately consider a motion based upon *forum non conveniens* before taking up jurisdictional issues. Motions of this sort are normally filed by a defendant appellee and not by the plaintiff appellant, but this case is *sui generis*. When the Hawaiian Kingdom filed its Notice of Appeal, it was to be heard by an Article II Court of Appeals to be hereafter established by the United States as an Occupying Power. It was the Clerk for the District Court of Hawai'i that transferred the appeal to the Ninth Circuit and not the Hawaiian Kingdom.

Although the facts and laws in this motion to dismiss based on *forum non conveniens* are in favor of dismissal, the Hawaiian Kingdom invokes the *Lorenzo* principle to compel the United States to provide rebuttable evidence of the Hawaiian Kingdom's continued existence as a State. The international rule of the presumption of continuity is international law and, therefore, is an accepted part of American law that must be applied by federal courts. See *The Paquette Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States*, §111(3) ("customary international law must be enforced in U.S. courts even in the absence of implementing legislation or whether they appear in a treaty").

There have been seventeen federal cases that applied the *Lorenzo* principle in error,[6] two of which have come before the Ninth Circuit, and the United States should be compelled to prove with rebuttable evidence that the federal courts were **NOT** in error. On a broader level, failure to do so consequently renders all federal

[6] *United States v. Lorenzo*, 995 F.2d 1448; 1993 U.S. App. LEXIS 10548; *First Interstate Mortgage Co. v. Lindsey*, 1995 U.S. Dist. LEXIS 18172; *Hawaii v. Macomber*, 40 Fed. Appx. 499; 2002 U.S. App. LEXIS 12593; *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919; *Villanueva v. Hawaii*, 2005 U.S. Dist. LEXIS 49280; *Shinn v. Norton*, 2006 U.S. Dist. LEXIS 111053; *Epperson v. Hawaii*, 2009 U.S. Dist. LEXIS 100045; *Kupihea v. United States*, 2009 U.S. Dist. LEXIS 59023; *Simeona v. United States*, 2009 U.S. Dist. LEXIS; *Baker v. Stehura*, 2010 U.S. Dist. LEXIS 93679; *Waialeale v. Officers of the United States Magistrate(s)*, 2011 U.S. Dist. LEXIS 68634; *Piedvache v. Ige*, 2016 U.S. Dist. LEXIS 152224; *Vincente v. Chu Takayama*, 2016 U.S. Dist. LEXIS 137959; *Kapu v. AG*, 2017 U.S. Dist. LEXIS 166103; *Mo'i Kapu v. AG*, 2017 U.S. Dist. LEXIS 73469; *U.S. Bank Tr., N.A. v. Fonoti*, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295; *Megeso-William-Alan v. Ige*, 538 F. Supp. 3d 1063; 2021 U.S. Dist. LEXIS 91037.

court decisions, whether as an Article III Court since 1959 or as an Article IV Court since 1900, null and void because the presumption of Hawaiian State continuity was triggered on January 17, 1893, and, therefore, remains under international law.

In *Shillaber v. Waldo et al.*, 1 Haw. 31, 32 (1848), Chief Justice William Lee stated, "[i]n the language of another, 'Let justice be done though the heavens fall.' Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequences."

V. CONCLUSION

For the foregoing reasons, the Notice of Appeal should be dismissed under *forum non conveniens* unless the United States provides rebuttable evidence to the presumption of continuity of the Hawaiian Kingdom as a State, the absence of which the presumption remains.

DATED: Honolulu, Hawai'i, May 20, 2022.

Respectfully submitted,

/s/ Dexter K. Ka'iama

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Exhibit “1”

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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; JANE HARDY, in her official capacity as Australia’s Consul General to Hawai‘i and the United Kingdom’s Consul to Hawai‘i; JOHANN URSCHITZ, in his official capacity as Austria’s Honorary Consul to Hawai‘i; M. JAN RUMI, in his official capacity as Bangladesh’s Honorary Consul to Hawai‘i and Morocco’s Honorary Consul to Hawai‘i; JEFFREY DANIEL LAU, in his official capacity as Belgium’s Honorary Consul to

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

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; EXHIBITS 1 & 2

Hawai‘i; ERIC G. CRISPIN, in his official capacity as Brazil’s Honorary Consul to Hawai‘i; GLADYS VERNOY, in her official capacity as Chile’s Honorary Consul General to Hawai‘i; JOSEF SMYCEK, in his official capacity as the Czech Republic’s Deputy Consul General for Los Angeles that oversees the Honorary Consulate in Hawai‘i; BENNY MADSEN, in his official capacity as Denmark’s Honorary Consul to Hawai‘i; KATJA SILVERAA, in her official capacity as Finland’s Honorary Consul to Hawai‘i; GUILLAUME MAMAN, in his official capacity as France’s Honorary Consul to Hawai‘i; DENIS SALLE, in his official capacity as Germany’s Honorary Consul to Hawai‘i; KATALIN CSISZAR, in her official capacity as Hungary’s Honorary Consul to Hawai‘i; SHEILA WATUMULL, in her official capacity as India’s Honorary Consul to Hawai‘i; MICHELE CARBONE, in his official capacity as Italy’s Honorary Consul to Hawai‘i; YUTAKA AOKI, in his official capacity as Japan’s Consul General to Hawai‘i; JEAN-CLAUDE DRUI, in his official capacity as Luxembourg’s Honorary Consul to Hawai‘i; ANDREW M. KLUGER, in his official capacity as Mexico’s Honorary Consul to Hawai‘i; HENK ROGERS, in his official capacity as Netherland’s Honorary Consul to Hawai‘i; KEVIN BURNETT, in his official capacity as New Zealand’s Consul General to Hawai‘i; NINA HAMRE FASI, in her official capacity as Norway’s Honorary Consul to Hawai‘i; JOSELITO A. JIMENO, in his official capacity as the Philippines’s Consul General to Hawai‘i; BOZENA ANNA JARNOT, in her official capacity as

Poland's Honorary Consul to Hawai'i; TYLER DOS SANTOS-TAM, in his official capacity as Portugal's Honorary Consul to Hawai'i; R.J. ZLATOPER, in his official capacity as Slovenia's Honorary Consul to Hawai'i; HONG, SEOK-IN, in his official capacity as the Republic of South Korea's Consul General to Hawai'i; JOHN HENRY FELIX, in his official capacity as Spain's Honorary Consul to Hawai'i; BEDE DHAMMIKA COORAY, in his official capacity as Sri Lanka's Honorary Consul to Hawai'i; ANDERS G.O. NERVELL, in his official capacity as Sweden's Honorary Consul to Hawai'i; THERES RYF DESAI, in her official capacity as Switzerland's Honorary Consul to Hawai'i; COLIN T. MIYABARA, in his official capacity as Thailand's Honorary Consul to Hawai'i; DAVID YUTAKA IGE, in his official capacity as Governor of the State of Hawai'i; TY NOHARA, in her official capacity as Commissioner of Securities; ISAAC W. CHOY, in his official capacity as the director of the Department of Taxation of the State of Hawai'i; CHARLES E. SCHUMER, in his official capacity as U.S. Senate Majority Leader; NANCY PELOSI, in her official capacity as Speaker of the United States House of Representatives; RON KOUCHI, in his official capacity as Senate President of the State of Hawai'i; SCOTT SAIKI, in his official capacity as Speaker of the House of Representatives of the State of Hawai'i; the UNITED STATES OF AMERICA; and the STATE OF HAWAI'I,

Defendants.

INTRODUCTION

1. The Council of Regency, in its official capacity as a government representing the HAWAIIAN KINGDOM, brings this action to protect its officers of the Council of Regency, Dr. David Keanu Sai, Ph.D., Chairman of the Council of Regency, Minister of the Interior, and Minister of Foreign Relations *ad interim*, and Mrs. Kauʻi P. Sai-Dudoit, Minister of Finance.

2. The Council of Regency also brings this action on behalf of all Hawaiian subjects and resident aliens that reside within the territorial jurisdiction of the HAWAIIAN KINGDOM that are subject to its laws.

JURISDICTION AND VENUE

3. While this court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA, its jurisdiction is found as a *de facto* Article II Court. According to Professor Bederman:

> What, then, is distinctive about a court established under Article II of the Constitution? First, executive tribunals are established *without* an act of Congress or any other form of legislative concurrence. Congressional intent concerning the status of a presidential court is irrelevant because no congressional approval is needed. The fact that the President alone can create an executive court places it outside the scope of Article III of the Constitution, which demands that Congress shall establish courts inferior to the Supreme Court. Second, the executive courts are created pursuant only to the power and authority granted to the

> President in Article II of the Constitution. In practice, the only presidential power that would call for the creation of a court is that arising from his responsibility as Commander in Chief of the armed services and his subsequent war-making authority.[1]

4. The authority for this Court to assume jurisdiction as a *de facto* Article II Court is fully elucidated in the *Amicus Curiae* brief previously lodged in these proceedings by virtue of the Motion for Leave to File *Amicus Curiae* Brief on July 30, 2021 [ECF 45] by the International Association of Democratic Lawyers (IADL), the National Lawyers Guild (NLG), and the Water Protector Legal Collective (WPLC). The *Amicus* brief is instructional for the Court to transition to a *de facto* Article II Court.

5. An Article II Court was established in Germany after hostilities ceased in 1945 during the Second World War. After the surrender, western Germany came under belligerent occupation by the United States, France and Great Britain. The military occupation officially came to an end on May 5, 1955, with the entry into force of peace treaties called the Bonn Conventions between the Federal Republic of Germany and the three Occupying States.[2] During the

[1] David J. Bederman, "Article II Courts," 44 *Mercer L. Rev.* 825, 831 (1992-1993).
[2] Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327; Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219; Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 253.

occupation, these Article II Courts had jurisdiction "over all persons in the occupied territory," except for Allied armed forces, their dependents, and civilian officials, for "[a]ll offenses against the laws and usages of war[,] […] [a]ll offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces, [and] [a]ll offenses under the laws of the occupied territory or any part thereof."[3]

6. Like the Article II Court in Germany, this Court has Jurisdiction as a *de facto* Article II Court because this action arises under international humanitarian law—law of armed conflict, which include the 1907 Hague Convention, IV (1907 Hague Regulations),[4] the 1907 Hague Convention, V,[5] the 1949 Geneva Convention, IV (1949 Fourth Geneva Convention),[6] and Hawaiian Kingdom law. Article 43 of the 1907 Hague Regulations states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

[3] United States Military Government, Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2189, 2190-91 (1947).
[4] 36 Stat. 2277 (1907).
[5] 36 Stat. 2310 (1907).
[6] 6.3 U.S.T 3516 (1955).

7. The Court is authorized to award the requested declaratory and injunctive relief as a *de facto* Article II Court because it is situated within the territory of the HAWAIIAN KINGDOM that has been under a prolonged belligerent occupation by the United States of America since January 17, 1893.

8. Venue is proper because the events giving rise to this claim occurred in this District, and the Defendants are being sued in their official capacities.

PARTIES

9. DAVID KEANU SAI, Ph.D., is the Minister of the Interior, Minister of Foreign Affairs *ad interim*,[7] and Chairman of the Council of Regency. As Minister of the Interior he is responsible for having "a general supervision over internal affairs of the kingdom, and to faithfully and impartially execute the duties assigned by law to his department."[8] As Minister of Foreign Affairs *ad interim* he is responsible for conducting "the correspondence of this Government, with diplomatic and consular agents of all foreign nations, accredited to this Government, and with the public ministers, consuls, and other agents of the Hawaiian Islands, in foreign countries, in conformity with

[7] His Excellency Peter Umialiloa Sai, Minister of Foreign Affairs, died on October 17, 2018, and, thereafter, by proclamation of the Council of Regency on November 11, 2019, His Excellency Dr. David Keanu Sai was designated "to be Minister of Foreign Affairs *ad interim* while remaining as Minister of the Interior and Chairman of the Council of Regency," https://hawaiiankingdom.org/pdf/Proc_Minister_Foreign_Affairs_Ad_interim.pdf.

[8] §34, *Hawaiian Civil Code*, Compiled Laws of the Hawaiian Kingdom (1884).

the law of nations, and as the [Regency] shall, from time to time, order and instruct."[9] As Chairman of the Council of Regency he is responsible for the direction and overall management of the Council. The Chairman also served as Agent for the HAWAIIAN KINGDOM in *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration case no. 1999-01.

10. KAU'I P. SAI-DUDOIT is the Minister of Finance. The Minister of Finance is responsible for having "a general supervision over the financial affairs of the Kingdom, and to faithfully and impartially execute the duties assigned by law to [her] department. [She] is charged with the enforcement of all revenue laws; the collection of duties on foreign imports; the collection of taxes; the safe keeping and disbursement of the public moneys, and with all such other matters as may, by law, be placed in [her] charge."[10] The Minister of Finance also served as 3rd Deputy Agent for the HAWAIIAN KINGDOM in *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration case no. 1999-01.

11. DEXTER KE'EAUMOKU KA'IAMA is the Attorney General. The Attorney General is charged with representing the Hawaiian Kingdom in Court on matters of public concern.

[9] *Id.*, §437.
[10] *Id.*, §469.

12. The Civil Code of the HAWAIIAN KINGDOM provides "[t]he laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws."[11]

13. The Council has an interest in protecting the health, safety, and welfare of its residents during the prolonged occupation of its territory by the United States since January 17, 1893 and ensuring international humanitarian law is complied with. Article 43 of the 1907 Hague Regulations and Article 46 of the 1949 Fourth Geneva Convention, obliges the United States, as the occupying State, to administer the laws of the HAWAIIAN KINGDOM, the occupied State. The Council also has an interest in the federal system where "in the case of international compacts and agreements [when it forms] the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[12] The Council's interests extend to all residents within Hawaiian territory to include resident aliens.

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[11] *Id*., §6.

[12] *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 330-31 (1936).

14. Defendant JOSEPH ROBINETTE BIDEN, JR. is the President of the United States. He is responsible for the faithful execution of United States laws.

15. Defendant KAMALA HARRIS is the Vice-President of the United States and President of the United States Senate. She is responsible for the faithful execution of United States laws and the enactment of United States legislation when presiding as President of the United States Senate.

16. Defendant ADMIRAL JOHN AQUILINO is the Commander of the U.S. Indo-Pacific Command.

17. Defendant CHARLES P. RETTIG is the Commissioner of the Internal Revenue Service. He is responsible for the United States tax system.

18. Defendant JANE HARDY is Australia's Consul General to Hawai'i.

19. Defendant JOHANN URSCHITZ is Austria's Honorary Consul to Hawai'i.

20. Defendant M. JAN RUMI is Bangladesh's Honorary Consul to Hawai'i and Morocco's Honorary Consul to Hawai'i.

21. Defendant JEFFREY DANIEL LAU is Belgium's Honorary Consul to Hawai'i.

22. Defendant ERIC G. CRISPIN is Brazil's Honorary Consul to Hawai'i.

23. Defendant GLADYS VERNOY is Chile's Honorary Consul General to Hawai'i.

24. JOSEF SMYCEK is the Czech Republic's Deputy Consul General for Los Angeles that oversees the Honorary Consulate in Hawai‘i.

25. Defendant BENNY MADSEN is Denmark's Honorary Consul to Hawai‘i.

26. Defendant KATJA SILVERAA is Finland's Honorary Consul to Hawai‘i.

27. Defendant GUILLAUME MAMAN is France's Honorary Consul to Hawai‘i.

28. Defendant DENIS SALLE is Germany's Honorary Consul to Hawai‘i.

29. Defendant KATALIN CSISZAR is Hungary's Honorary Consul to Hawai‘i.

30. Defendant SHEILA WATUMULL is India's Honorary Consul to Hawai‘i.

31. Defendant MICHELE CARBONE is Italy's Honorary Consul to Hawai‘i.

32. Defendant YUTAKA AOKI is Japan's Consul General to Hawai‘i.

33. Defendant JEAN-CLAUDE DRUI is Luxembourg's Honorary Consul to Hawai‘i.

34. Defendant ANDREW M. KLUGER is Mexico's Honorary Consul to Hawai‘i.

35. Defendant HENK ROGERS is Netherland's Honorary Consul to Hawai‘i.

36. Defendant KEVIN BURNETT is New Zealand's Consul General to Hawai‘i.

37. Defendant NINA HAMRE FASI is Norway's Honorary Consul to Hawai‘i.

38. Defendant JOSELITO A. JIMENO is the Philippines's Consul General to Hawai‘i.

39. Defendant BOZENA ANNA JARNOT is Poland's Honorary Consul to Hawai‘i.

40. Defendant TYLER DOS SANTOS-TAM is Portugal's Honorary Consul to Hawai'i.

41. Defendant R.J. ZLATOPER is Slovenia's Honorary Consul to Hawai'i.

42. Defendant HONG, SEOK-IN is the Republic of South Korea's Consul General to Hawai'i.

43. Defendant JOHN HENRY FELIX is Spain's Honorary Consul to Hawai'i.

44. Defendant BEDE DHAMMIKA COORAY is Sri Lanka's Honorary Consul to Hawai'i.

45. Defendant ANDERS G.O. NERVELL is Sweden's Honorary Consul to Hawai'i.

46. Defendant THERES RYF DESAI is Switzerland's Honorary Consul to Hawai'i.

47. Defendant COLIN T. MIYABARA is Thailand's Honorary Consul to Hawai'i.

48. Defendant DAVID YUTAKE IGE is the Governor of the State of Hawai'i. He is responsible for faithful execution of State of Hawai'i laws.

49. Defendant ISAAC W. CHOY is the director of the Department of Taxation of the State of Hawai'i.

50. Defendant TY NOHARA is the Commissioner of Securities for the State of Hawai'i.

51. Defendant CHARLES E. SCHUMER is the Majority Leader of the United States Senate. He is responsible for the enactment of United States legislation.

52. Defendant NANCY PELOSI is the Speaker of the United States House of Representatives. She is responsible for the enactment of United States legislation.

53. Defendant RON KOUCHI is the President of the Senate of the State of Hawai‘i. He is responsible for the enactment of State of Hawai‘i legislation.

54. Defendant SCOTT SAIKI is the Speaker of the House of Representatives of the State of Hawai‘i. He is responsible for the enactment of State of Hawai‘i legislation.

55. Defendant UNITED STATES OF AMERICA includes all branches of government, their agencies and departments.

56. Defendant STATE OF HAWAI‘I includes all branches of government, their agencies and departments.

ALLEGATIONS

A. The Ongoing State of War in the Legal Sense Between the Hawaiian Kingdom and the United States Since January 16, 1893

57. The law of nations, which is international law, is divided into private and public international law. Private international law regulates private relationships across State borders, *i.e.*, interstate conflict of laws or choice of laws. Public international law regulates the relationships between

governments of sovereign and independent States and entities legally recognized as international actors, *e.g.*, Permanent Court of Arbitration. Under public international law it is further separated into the laws of peace and the laws of war, and the latter is further divided into *jus ad bellum*—authorization to go to war, and *jus in bello*—regulating war.

58. "Traditional international law," states Judge Greenwood, "was based upon a rigid distinction between the state of peace and the state of war."[13] This bifurcation provides the proper context by which certain rules of international law would or would not apply. A state of war "automatically brings about the full operation of all the rules of war,"[14] and the laws of war "continue to apply in the occupied territory even after the achievement of military victory, until either the occupant [State] withdraws or a treaty of peace is concluded which transfers sovereignty to the occupant [State]."[15] According to the United States Supreme Court, in *The Prize Cases*,

> The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the

[13] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* 39 (1999).
[14] Myers S. McDougal and Florentino P. Feliciano, "The Initiation of Coercion: A Multi-temporal Analysis," 52 *Am. J. Int'l. L.* 241, 247 (1958).
[15] Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* 224 (1996).

> enemies of each other—**all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, all treaties between the belligerent parties are annulled […].** War also effects a change in the mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral. […] This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war […] (emphasis added).[16]

59. The Supreme Court's statement, "will be found described in every approved work on the subject of international law," is referring to the writing of scholars, which is a source of the rules of international law. In *The Paquette Habana*, the Supreme Court stated that "Wheaton places among the principal

[16] *The Prize Cases*, 67 U.S. 635, 688 (1862).

sources of international law, 'text writers of authority'".[17] The Court explained, "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[18] The Hawaiian Kingdom in its amended complaint cites the work of scholars as to the rules of international law.

60. Belligerent rights, under the laws of war, stem from war as a legal concept as opposed to a material fact, for rights cannot arise from a factual or material situation but rather from a legal situation. The Supreme Court has distinguished between war in "the material sense" and war "in the legal sense."[19] Justice Nelson, in the *Prize Cases*, although dissenting, made the distinction.

> An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district or country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war […].

[17] *The Paquete Habana*, 175 U.S. 677, 700 (1900).
[18] *Id*; see also Restatement Third—Foreign Relations Law §103(c).
[19] *The Prize Cases* and *The Three Friends*, 166 U.S. 1 (1897).

> Now in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the General Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a […] war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State.[20]

61. To constitute a war in the legal sense, there must be an act that proceeds from a State's competent authority under its municipal law to recognize or to make war. In the United States, the competent authority to declare war is the Congress, but the competent authority to recognize war is the President. "As Commander-in-Chief," says Professor Wright, "he may employ the armed forces in defense of American citizens abroad, as he did in the bombardment of Greytown, the Koszta case and the Boxer rebellion, and thereby commit acts of war, which the government they offend may consider the initiation of a state of war."[21]

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[20] *Id.*, 690.

[21] Quincy Wright, *The Control of Foreign Relations* 285 (1922).

62. In similar fashion to the United States, the competent authority to recognize war in the Hawaiian Kingdom is the Executive Monarch and the competent authority to declare war is the Legislative Assembly. According to Article 26 of the Hawaiian Constitution, the Monarch "is the Commander-in-Chief of the Army and Navy, and of all other Military Forces of the Kingdom, by sea and land; and has full power by Himself, or by any officer or officers He may appoint, to train and govern such forces, as He may judge best for the defense and safety of the Kingdom. But he shall never proclaim war without the consent of the Legislative Assembly."[22]

63. "Action by one state is enough. The state acted against may be forced into a state of war against its will."[23] The Queen's conditional surrender of January 17, 1893, was an act of cessation of hostilities—*commercia belli,*[24] and it was countersigned by the members of her cabinet pursuant to Article 42, as required by Hawaiian constitutional law, which made the conditional surrender under Hawaiian municipal law valid and legal.[25] It did not require approval from the Legislative Assembly.

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[22] 1864 Hawn. Const. art. 26.
[23] Quincy Wright, "When Does War Exist?," 26 *Am. J. Int'l. L.* 327, 363, n. 6 (1932).
[24] *Black's Law Dictionary*, 270 (6th ed. 1990).
[25] 1864 Hawn. Const. art. 42 ("No act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible").

> I, Liliuokalani, by the Grace of God, and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.
>
> Done at Honolulu this 17th day of January, A.D. 1893.
>
> Liliuokalani, R.
> Samuel Parker,
> *Minister of Foreign Affairs.*
> Wm. H. Cornwell,
> *Minister of Finance.*
> Jno. F. Colburn,
> *Minister of the Interior.*
> A.P. Peterson,
> *Attorney General.*[26]

64. This act of State was a political determination of the existence of a state of war, not a declaration of war. According to McNair and Watts, "the absence

[26] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 586 (1895) (hereafter "Executive Documents").

of a declaration […] will not of itself render the ensuing conflict any less a war."[27] In *New York Life Ins. Co. v. Bennion*, the Court explained that "the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor [on December 7th]."[28]

65. Although the United States Government did not know that U.S. troops committed "acts of war" on Hawaiian territory until after President Cleveland conducted an investigation, customary international law "leads to the conclusion that in so far as a 'state of war' had any generally accepted meaning it was a situation **regarded by one** or both of the parties to a conflict as constituting a 'state of war (emphasis added).'"[29] By its conditional surrender, the Hawaiian Government manifestly regarded the situation as a state of war. Furthermore, the Council of Regency, being the successor to Queen Lili'uokalani, as the Executive Monarch, also regards the situation of a state of war as unchanged.

66. A "victim of an act of war, if a recognized state, may always if it wishes, regard the act as instituting a state of war, and if it does, a state of war exists.

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[27] Lord McNair and A.D. Watts, *The Legal Effects of War* 7 (1966).
[28] *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (C.C.A. 10th, 1946).
[29] Ian Brownlie, *International Law and the Use of Force by States*, n. 7 at 38 (1963).

States victims of […] intervention have usually been much weaker than the state employing such methods."[30] The Hawaiian Kingdom was, at the time of the invasion, a "recognized state" and in a "state of war," which was clearly acknowledged by Secretary of State Walter Gresham in his correspondence to President Cleveland on October 18. The Secretary of State stated:

> The Government of Hawaii surrendered its authority under a threat of **war**, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign […].
>
> Should not the great wrong done to a feeble but **independent State** by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice (emphasis added).[31]

67. In *Williams v. Suffolk Insurance Co.*, the Supreme Court stated, "when the executive branch of the government, which is charged with our foreign relations […] assumes a fact in regard to the sovereignty of any […] country, it is **conclusive on the judicial department** (emphasis added)."[32] This Court is bound to take judicial notice of Queen Lili'uokalani's conditional surrender

[30] Wright, "When Does War Exist," 365.
[31] Executive Documents, 462-463.
[32] *Williams v. Suffolk Insurance Co.*, 36 U.S. 415, 420 (1839).

of January 17, 1893 and President Cleveland's message to the Congress of December 18, 1893.

68. The President's confirmation that the invasion on January 16, 1893, was an "act of war," transformed the situation from a state of peace to a state of war on that date. "[B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces,"[33] the Hawaiian Government would not have conditionally surrendered to the United States. The Hawaiian Government's conditional surrender was not a termination of the state of war. Only by means of a treaty of peace proclaimed by both States can the situation return to a state of peace.

69. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, the Supreme Court concluded that the United States' war power does not end in "a technical state of war, [but] only with the ratification of a treaty of peace or a proclamation of peace."[34] And in *J. Ribas y Hijo v. United States*, the Supreme Court stated, in the case of the Spanish-American War, that a "state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, does not terminate the war, but it is one of the *commercia belli* which suspends operations […]. At the expiration of the

[33] Executive Documents, 455.
[34] *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919).

truce, hostilities may recommence […].'"[35] The Cleveland-Lili'uokalani executive agreement of restoration of December 18, 1893 was an attempt to secure a treaty of peace, but the Congress prevented President Cleveland from carrying into effect.[36]

B. Continuity of the Hawaiian Kingdom as an Independent and Sovereign State after its Government was Illegally Overthrown by the United States on January 17, 1893

70. "[I]n 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."[37] In a message to the Congress, President Cleveland acknowledged that "[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without the authority of Congress [on January 17, 1893], the Government of a feeble but friendly and confiding people has been overthrown."[38]

71. As a subject of international law, the Hawaiian State would continue to exist despite its government being unlawfully overthrown by the United States on

[35] *J. Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904).
[36] Executive Documents, 1269.
[37] *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Reports 566, 581 (2001).
[38] Executive Documents, 456.

January 17, 1893. President Cleveland entered into a treaty, by exchange of notes, with Queen Lili'uokalani on December 18, 1893, whereby the President committed to restoring the Queen as the Executive Monarch, and, thereafter, the Queen committed to granting a full pardon to the insurgents. Political wrangling in the Congress, however, prevented President Cleveland from carrying out his obligations under the executive agreement. Five years later, the United States Congress enacted a joint resolution for the purported annexation of the Hawaiian Islands that was signed into law on July 7, 1898, by President William McKinley.

72. Professor Wright, a renowned American political scientist, states that "international law distinguishes between a government and the state it governs."[39] And Judge Crawford of the International Court of Justice clearly explains that "[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[40] Crawford's conclusion is based on the "**presumption that the State continues to exist**, with its rights and obligations ... despite a period

[39] Quincy Wright, "The Status of Germany and the Peace Proclamation," 46(2) *Am. J. Int'l L.* 299, 307 (1952).
[40] James Crawford, *Creation of States in International Law* 34 (2nd ed., 2006).

in which there is...no effective government (emphasis added)."[41] Applying this principle to the Second Gulf War, Crawford explains, the

> occupation of Iraq in 2003 illustrated the difference between 'government' and 'State'; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid "restoration of Iraq's sovereignty", they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored.[42]

73. Professor Craven opined, "[i]f one were to speak about a presumption of continuity, 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."[43]

74. The belligerent occupation, however, has prevented Hawaiian subjects since January 17, 1893, from exercising their right of internal self-determination. Article 1 of both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights states that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

[41] *Id*.
[42] *Id*, n. 157.
[43] Craven, 128.

development." This type of self-determination is internal where the national population of an existing sovereign and independent State shall "choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves."[44]

75. When a State comes under the belligerent occupation of another State after its government has been overthrown, the national population of the occupied State is temporarily prevented from exercising its civil and political rights it previously enjoyed prior to the occupation. Therefore, as Professor Craven points out:

> [T]he Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and restoration of the sovereign rights of the disposed government."[45]

C. Constraints on United States Municipal Laws

76. All Federal, State of Hawai'i and County laws are not HAWAIIAN KINGDOM law but rather constitute the municipal laws of the United States. As a result of the continuity of the Hawaiian State and its legal order, the law

[44] Antonio Cassese, *Self-determination of peoples* 53 (1995).
[45] 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* 126 (2020).

of occupation obliges the United States, as the occupying State, to administer the laws of the HAWAIIAN KINGDOM, not the municipal laws of the Defendant UNITED STATES OF AMERICA, until a peace treaty brings the occupation to an end. Article 43 of the 1907 Hague Regulations provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[46] Article 64 of the 1949 Fourth Geneva Convention also states, "[t]he penal laws of the occupied territory shall remain in force."[47]

77. Article 43 does not transfer sovereignty to the occupying power.[48] Section 358, United States Army Field Manual 27-10, declares, "military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." "The occupant," according to Professor Sassòli, "may therefore not extend its own

[46] 36 Stat. 2277, 2306 (1907).
[47] 6.3 U.S.T. 3516, 3558 (1955).
[48] See Eyal Benvenisti, *The International Law of Occupation* 8 (1993); Gerhard von Glahn, *The Occupation of Enemy of Territory—A Commentary on the Law and Practice of Belligerent Occupation* 95 (1957); Michael Bothe, "Occupation, Belligerent," in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 3, 765 (1997).

legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation." Professor Sassòli further explains that the "expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders."[49]

78. These provisions of the 1907 Hague Regulations and the 1949 Fourth Geneva Convention were customary international law before its codification under Article 43 of the 1899 Hague Convention, II, and succeeded under Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. Prior to its codification, these customary laws were recognized by the United States during the Spanish-American War, when U.S. forces overthrew Spanish governance in Santiago de Cuba in July of 1898. This overthrow did not transfer Spanish sovereignty to the United States but triggered the customary international laws of occupation, which formed the

[49] Marco Sassòli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century," *International Humanitarian Law Research Initiative* 6 (2004) (online at https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf).

basis for General Orders no. 101 issued by President McKinley to the War Department on July 13, 1898:

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. … Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[50]

79. An armistice was eventually signed by the Spanish Government on August 12, 1898, after its territorial possessions of Philippines, Guam, Puerto Rico and Cuba were under the effective occupation and control of U.S. troops. This led to a treaty of peace that was signed by representatives of both countries in Paris on 10 December 1898. The United States Senate ratified the treaty on February 6, 1899, and Spain on March 19. The treaty came into full force and effect on April 11, 1899.[51] It was after April 11 that Spanish title and sovereignty was transferred to the United States and American municipal laws

[50] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[51] 30 Stat. 1754 (1899) (online at https://uniset.ca/fatca/b-es-ust000011-0615.pdf).

enacted by the Congress replaced Spanish municipal laws that once applied over the territories of Philippines, Guam, and Puerto Rico. Under the treaty, Cuba would become an independent State. There is no treaty of cession between the Hawaiian Kingdom and the United States that would have transformed the state of war to a state of peace.

80. In 1988, the Office of Legal Counsel (OLC), U.S. Department of Justice, examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored the opinion for Abraham Sofaer, legal advisor to the U.S. Department of State. After covering the limitation of congressional authority, the OLC found that 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."[52] The OLC cited constitutional scholar Westel Willoughby, who stated:

> The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in the 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

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

> necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted.[53]

81. This OLC's conclusion is a position taken by the National Government similar to the OLC's position that federal prosecutors cannot charge a sitting president with a crime.[54] From a policy standpoint, OLC opinions bind the National Government to include its courts. If it was unclear how Hawai'i was annexed by legislation, it would be equally unclear how the Congress could create a territorial government, under *An Act To provide a government for the Territory of Hawaii* in 1900, within the territory of a foreign State by legislation.[55] It would also be unclear how the Congress could rename the Territory of Hawai'i to the State of Hawai'i in 1959, under *An Act To provide for the admission of the State of Hawaii into the Union* by legislation.[56]

82. In its 1824 decision in *The Apollon*, the Supreme Court concluded that the "laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[57] The Hawaiian

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[53] *Id*.
[54] Randolph D. Moss, "A Sitting President's Amenability to Indictment and Criminal Prosecution," 24 *Op. O.L.C.* 222-260 (2000).
[55] 31 Stat. 141 (1900).
[56] 73 Stat. 4 (1959).
[57] *The Apollon*, 22 U.S. 362, 370 (1824).

Kingdom Supreme Court also cited *The Apollon* in its 1858 decision, *In re Francis de Flanchet*, where the court stated that the "laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction."[58] Both the *Apollon* and *Flanchet* cases addressed the imposition of French municipal laws within the territories of the United States and the Hawaiian Kingdom. Furthermore, the United States Supreme Court reiterated this principle in its 1936 decision in *United States v. Curtiss Wright Export Corp.*, where the Court stated:

> Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family.[59]

83. In the 1927 *Lotus* case, the Permanent Court of International Justice explained that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may

[58] *In Re Francis de Flanchet*, 2 Haw. 96, 108-109 (1858).
[59] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

not exercise its power in any form in the territory of another State."[60] Therefore, it is a legal fact that United States legislation regarding Hawai'i, whether by a statute or by a joint resolution, have no extraterritorial effect except by a "permissive rule," e.g., consent by the HAWAIIAN KINGDOM government. There is no such consent. A joint resolution of annexation is not a treaty and, therefore, the HAWAIIAN KINGDOM never consented to any cession of its territorial sovereignty to the Defendant UNITED STATES OF AMERICA. Defendant UNITED STATES OF AMERICA could no more unilaterally annex the Hawaiian Islands by enacting a municipal law in 1898 than it could unilaterally annex Canada today by enacting a municipal law.

84. Furthermore, the HAWAIIAN KINGDOM entered into a Treaty of Friendship, Commerce and Navigation with the United States on December 20, 1849.[61] Article 8 provides, "and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states, shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but **subject always to the laws and statutes of the two countries respectively** (emphasis added)." The treaty was ratified by both

[60] *Lotus*, PCIJ, ser. A no. 10 (1927), 18.
[61] 9 Stat. 977 (1841-1851).

parties and ratifications were exchanged on August 24, 1850. The treaty was proclaimed on November 9, 1850.

D. Restoration of the Government of the Hawaiian Kingdom

85. After the passing of Queen Lili'uokalani on November 11, 1917, the throne became vacant to be later filled by an elected Monarch in accordance with Article 22 of the 1864 Constitution.[62] This was the case when King Lunalilo was elected on January 8, 1873, and the election of King Kalākaua on February 12, 1874. Until such time that this provision can be effectively carried out when the United States occupation shall come to an end, 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,[63] shall serve as a Council of Regency in the absence of the Monarch. Hawaiian constitutional law provides that when the office of the Monarch is

[62] Art. 42, 1864 Hawaiian Constitution, provides, "In case there is no heir as above provided, then the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life; but should there be no such appointment and proclamation, and the Throne should become vacant, then the Cabinet Council, immediately after the occurring of such vacancy, shall cause a meeting of the Legislative Assembly, who shall elect by ballot some native Alii of the Kingdom as Successor to the Throne; and the Successor so elected shall become a new *Stirps* for a Royal Family; and the succession from the Sovereign thus elected, shall be regulated by the same law as the present Royal Family of Hawaii."

[63] *Id*., Art. 42 provides, "The King's cabinet shall consist of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom."

vacant, "a Regent or Council of Regency…shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King."[64]

86. Since November 11, 1917, the office of the Monarch became vacant and remained vacant until the Hawaiian Kingdom Government was restored on February 28, 1997 by proclamation of the *acting* Regent.[65] On September 26, 1999, the office of Regent was transformed into a Council of Regency by Privy Council resolution.[66] The legal basis for the restoration of the Hawaiian Government was Hawaiian constitutional law and the doctrine of necessity as utilized by governments that were formed in exile, while their countries were belligerently occupied by a foreign State. The difference, however, is that the Hawaiian Government was restored *in situ* and not in exile. In the words of Professor Wright, "mutual respect by states for one another's independence

[64] *Id*., Art. 33.
[65] David Keanu Sai, "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* 18-21 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[66] *Id*., at 21.

leaves the form and continuance of its government to the domestic jurisdiction of a state."[67]

87. With a view to bringing compliance with international humanitarian law by the State of Hawai'i and its County governments, and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations, the Council of Regency proclaimed and recognized their existence as the *de facto* administration of the occupying State on June 3, 2019. The proclamation read:

> Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai'i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:
>
> Now, therefore, We, the *acting* Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize the State of Hawai'i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;

[67] Quincy Wright, "Non-Military Intervention," in K.W. Deutsch and S. Hoffman (eds.), *The Relevance of International Law: Essays in Honor of Leo Gross* 14 (1968).

> And, We do hereby further proclaim that the State of Hawai‘i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law.[68]

88. The State of Hawai‘i and its Counties, under the laws and customs of war during occupation, can now serve as the *de facto* administrator of the ‘laws in force in the country,’ which includes the 2014 decree of provisional laws by the Council of Regency in accordance with Article 43. The 2014 proclamation read:

> And, We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void.[69]

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[68] Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (June 3, 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

[69] Council of Regency, Proclamation of Provisional Laws of the Realm (October 10, 2014) (online at https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).

89. Professor Lenzerini provided the legal basis, under both Hawaiian Kingdom law and the applicable rules of international law, for concluding that the Council of 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 January 17, 1893, both at the domestic and international level."[70] He added that "the Council of Regency is exactly in the same position of a government of a State under military occupation, and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law."[71]

90. As an Italian scholar of international law, Professor Lenzerini's legal opinion is to be recognized as a means for determination of the rules of international law, unlike how legal opinions operate within the jurisprudence of the United States. The latter types of legal opinions are limited to an "understanding of the law as applied to the assumed facts."[72] They are not regarded as a source of the rules of United States law, which include the United States constitution,

[70] Lenzerini, *Legal Opinion*, at para. 9. A copy of the legal opinion is attached as Exhibit 2.
[71] *Id*., para. 10. See also Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf).
[72] *Black's Law*, 896.

State constitutions, Federal and State statutes, common law, case law, and administrative law. Instead, these types of legal opinions have persuasive qualities but are not a source of the rules of law.

91. On the international plane, there is "no 'world government' [and] no central legislature with general law-making authority."[73] International law, however, is an essential component in the international system, which "has the character and qualities of law, and serves the functions and purposes of law, providing restraints against arbitrary state action and guidance in international relations."[74] Article 38(1)(d) of the Statute of the International Court of Justice, when applied by the Court to settle international disputes, international law includes "the teachings of the most highly qualified publicists of the various nations for the determination of rules of law."

92. The American Law Institute also concludes that, when "determining whether a rule has become international law, substantial weight is accorded to…the writings of scholars."[75] In the seminal case *The Paquete Habana*, the U.S. Supreme Court highlighted that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction

[73] American Law Institute, *Restatement of the Law (Third)—The Foreign Relations Law of the United States* 17 (1987).
[74] *Id*.
[75] *Id*., §103(2)(c).

> as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. **Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is** (emphasis added).[76]

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

93. The unlawful imposition of American municipal laws came to the attention of the Defendant UNITED STATES OF AMERICA 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.*[77] Defendant UNITED STATES OF AMERICA and the Council of Regency representing the HAWAIIAN KINGDOM were named as defendants in the complaint.

> COUNT ONE
>
> 141. Plaintiff repeats and realleges paragraphs 1 through 140.
>
> 142. Defendant UNITED STATES OF AMERICA and Defendant HAWAIIAN KINGDOM are in continual violation of the said 1849 Treaty of Friendship, Commerce and Navigation between the same, and in violation of the principles of

[76] *The Paquete Habana*, 175 U.S. 677, 700 (1900).
[77] *Larsen v. United Nations et al.*, case #1:99-cv-00546-SPK, document #1.

international law laid in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful imposition of American municipal laws over Plaintiff's person within the territorial jurisdiction of the Hawaiian Kingdom.

COUNT TWO

143. Plaintiff repeats and realleges paragraphs 1 through 140.

144. Defendant UNITED STATES OF AMERICA and Defendant HAWAIIAN KINGDOM are in continual violation of principles of international comity by allowing the unlawful imposition of American municipal laws over Plaintiff's person within the territorial jurisdiction of the Hawaiian Kingdom.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Issue a permanent injunction on all proceedings by Defendant UNITED STATES OF AMERICA and its political subdivision, the State of Hawai'i and its several Counties, against this Plaintiff in Hawai'i State Courts, including the Hilo and Puna District Courts of the Third Circuit, and the Honolulu District Court of the First Circuit, until the International Title to the Hawaiian Islands can be properly adjudicated between Defendant UNITED STATES OF AMERICA and Defendant HAWAIIAN KINGDOM at the Permanent Court of Arbitration at The Hague, Netherlands, in accordance with the Treaty of Friendship, Commerce and Navigation between the United States and the Hawaiian Kingdom, December 20, 1849, 18 U.S. Stat. 406, The Hague Convention for the Pacific Settlement of International Disputes, 1907, 36 U.S. Stat. 2199, and the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), as well as principles of international comity arising from those instruments, and in order to establish the rights of other subjects of the Hawaiian Kingdom and foreign nationals within the Hawaiian Islands similarly situated.

94. On October 13, 1999 a notice of voluntary dismissal without prejudice was filed as to the Defendant UNITED STATES OF AMERICA 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.[78] On October 29, 1999, the remaining parties, Larsen and the HAWAIIAN KINGDOM, entered into a stipulated settlement agreement dismissing the entire case without prejudice as to all parties and all issues and submitting all issues to binding arbitration. An agreement between Claimant Lance Paul Larsen and Respondent HAWAIIAN KINGDOM 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.[79] The stipulated settlement agreement was filed with the court by the plaintiff on November 5, 1999.[80] On November 8, 1999, a notice of arbitration was filed with the International Bureau of the Permanent Court of Arbitration—*Lance Paul Larsen v. Hawaiian Kingdom*.[81]

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[78] *Id*., document #6.
[79] 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.
[80] *Larsen v. United Nations et al.*, document #8.
[81] Notice of Arbitration (November 8, 1999), https://www.alohaquest.com/arbitration/pdf/Notice_of_Arbitration.pdf.

An order dismissing the case by Judge Samuel P. King, on behalf of the plaintiff, was entered on November 11, 1999.

95. As stated in Larsen's complaint, the "International Title to the Hawaiian Islands can be properly adjudicated between Defendant UNITED STATES OF AMERICA and Defendant HAWAIIAN KINGDOM at the Permanent Court of Arbitration at The Hague, Netherlands," by virtue of the Permanent Court of Arbitration's institutional jurisdiction.

96. Distinct from the subject matter jurisdiction of the *Larsen v. Hawaiian Kingdom* ad hoc arbitral tribunal, the PCA must first possess "institutional jurisdiction" by virtue of Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, I (1907 PCA Convention), before it could establish the ad hoc tribunal in the first place ("The jurisdiction of the Permanent Court may, within the conditions laid down in the regulation, be extended to disputes [with] non-Contracting [States] [emphasis added].").[82] 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."[83] Article 47 of the Convention provides

[82] 36 Stat. 2199. The Senate ratified the 1907 PCA Convention on April 2, 1898 and entered into force on January 26, 1910.
[83] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: General Topics—1.3 Permanent Court of Arbitration* 15-16 (2003)

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.

97. 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."[84] Since 2012, the annual reports ceased to include all past cases conducted under the auspices of the PCA but rather only cases on the docket for that year. Past cases became accessible at the PCA's case repository on its website at https://pca-cpa.org/en/cases/.

98. In determining the continued existence of the HAWAIIAN KINGDOM as a non-Contracting State to the 1907 PCA Convention, the relevant rules of

(online at https://unctad.org/system/files/official-document/edmmisc232add26_en.pdf).

[84] Permanent Court of Arbitration, *Annual Reports*, Annex 2 (online at https://pca-cpa.org/en/about/annual-reports/).

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.'"[85] The PCA Administrative Council 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. What was sought by the plaintiff in *Larsen v. United Nations, et al*., where the "International Title to the Hawaiian Islands can be properly adjudicated between Defendant UNITED STATES OF AMERICA and Defendant HAWAIIAN KINGDOM at the Permanent Court of Arbitration at The Hague, Netherlands," was accomplished by virtue of Article 47 of the 1907 PCA Convention.

[85] Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* para. 5 (May 24, 2020) (online at https://hawaiiankingdom.org/pdf/Legal_Opinion_Re_Authority_of_Regency_Lenzerini.pdf).

99. If the United States objected to the PCA Administrative Council's annual reports, which it was a member State, 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 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)."[86] 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.

100. While the State of Palestine is a new State, the HAWAIIAN KINGDOM is a State in continuity since the nineteenth century. Furthermore, since the Defendant UNITED STATES OF AMERICA explicitly recognized the

[86] 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).

validity of the HAWAIIAN KINGDOM as an independent State in the nineteenth century it is precluded from "contesting its validity at any future time."[87]

101. 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."[88] As Professor Talmon states, "[t]he 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."[89]

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[87] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *Am. J. Int'l L.* 308, 316 (1957).
[88] *German Settlers in Poland*, 1923, *PCIJ, Series B, No. 6*, 22.
[89] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

102. 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. The PCA identified the international dispute in *Larsen* as between a "State" and a "private entity" in its case repository. 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)."[90]

103. In 1994, the Intermediate Court of Appeals (ICA), in *State of Hawai'i v. Lorenzo*,[91] opened the door to the question as to whether or not the HAWAIIAN KINGDOM continues to exist as a State. According to the ICA, Lorenzo argued, "the Kingdom was illegally overthrown in 1893 with the

[90] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[91] *State of Hawai'i v. Lorenzo*, 77 Haw. 219; 883 P.2d 641 (1994).

assistance of the United States; the Kingdom still exists as a sovereign nation [and] he is a citizen of the Kingdom."[92] Judge Heen, author of the decision, denied Lorenzo's appeal and upheld the lower court's decision to deny Lorenzo's motion to dismiss. He explained that Lorenzo "presented no factual (or legal) basis for concluding that the Kingdom [continues to exist] as a state in accordance with recognized attributes of a state's sovereign nature."[93] While the ICA affirmed the trial court's decision, it admitted "the court's rationale is open to question in light of international law."[94] In other words, the ICA and the trial court did not apply international law in their decisions.

104. The PCA Administrative Council's annual reports from 2000-2011 clearly states that the Defendant UNITED STATES OF AMERICA, as a member of the PCA Administrative Council, explicitly acknowledged the continued existence of the HAWAIIAN KINGDOM as a non-Contracting State to the 1907 PCA Convention as evidenced in the PCA Administrative Council's annual reports. Unlike the ICA and the trial court in *Lorenzo*, the PCA did apply international law in their determination of the continued existence of the HAWAIIAN KINGDOM as an independent and sovereign State for jurisdictional purposes. As such, the treaties between the HAWAIIAN

[92] *Id*., 220; 642.
[93] *Id*., 221; 643.
[94] *Id*.

KINGDOM and the Defendant UNITED STATES OF AMERICA remain in full force and effect except where the law of occupation supersedes them. The other Contracting States with the HAWAIIAN KINGDOM in its treaties, which include Austria,[95] Belgium,[96] Denmark,[97] France,[98] Germany,[99] Great Britain,[100] Hungary,[101] Italy,[102] Japan,[103] Luxembourg,[104] Netherlands,

[95] Embassy of Austria, whose address is Van Alkemadelaan 342, 2597 AS Den Haag, Netherlands.
[96] Embassy of Belgium, whose address is Johan van Oldenbarneveltlaan 11, 2582 NE Den Haag, Netherlands.
[97] Embassy of Denmark, whose address is Koninginnegracht 30, 2514 AB Den Haag, Netherlands.
[98] Embassy of France, whose address is Anna Paulownastraat 76, 2518 BJ Den Haag, Netherlands.
[99] Embassy of Germany, whose address is Groot Hertoginnelaan 18-20, 2517 EG Den Haag, Netherlands.
[100] Embassy of Great Britain, whose address is Lange Voorhout 10, 2514 ED Den Haag, Netherlands.
[101] Embassy of Hungary, whose address is Hogeweg 14, 2585 JD Den Haag, Netherlands.
[102] Embassy of Italy, whose address is Parkstraat 28, 2514 JK Den Haag, Netherlands.
[103] Embassy of Japan, whose address is Tobias Asserlaan 5, 2517 KC Den Haag, Netherlands.
[104] Embassy of Luxembourg, whose address is Nassaulaan 8, 2514 JS Den Haag, Netherlands.

Norway,[105] Portugal,[106] Russia,[107] Spain,[108] Sweden,[109] and Switzerland,[110] are also members of the PCA Administrative Council and, therefore, their acknowledgment of the continuity of the Hawaiian State is also an acknowledgment of the full force and effect of their treaties with the HAWAIIAN KINGDOM except where the law of occupation supersedes them.[111]

105. The Consular Corps Hawai‘i is comprised of 38 countries, 32 of which are also members of the PCA Administrative Council in The Hague, Netherlands. These countries include, Australia, Austria, Bangladesh, Belgium, Brazil,

[105] Embassy of Norway, whose address is Eisenhowerlaan 77J, 2517 KK Den Haag, Netherlands.
[106] Embassy of Portugal, whose address is Zeestraat 74, 2518 AD Den Haag, Netherlands.
[107] Embassy of Russia, whose address is Andries Bickerweg 2, 2517 JP Den Haag, Netherlands.
[108] Embassy of Spain, whose address is Lange Voorhout 50, 2514 EG Den Haag, Netherlands.
[109] Embassy of Sweden, whose address is Johan de Wittlaan 7, 2517 JR Den Haag, Netherlands.
[110] Embassy of Switzerland, whose address is Lange Voorhout 42, 2514 EE Den Haag, Netherlands.
[111] For treaties of the Hawaiian Kingdom with Austria, Belgium, Denmark, France, Germany, Great Britain,Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland see “Treaties with Foreign States,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

Chile, Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Italy, Japan, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Slovenia, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand and the United Kingdom via the Australian Consulate.

106. §458 of the Hawaiian Civil Code states, "[n]o foreign consul, or consular or commercial agent shall be authorized to act as such, or entitled to recover his fees and perquisites in the courts of this Kingdom, until he shall have received his exequatur." These consulates have not presented their credentials to the HAWAIIAN KINGDOM in order to receive exequaturs but rather received their exequaturs from the Defendant UNITED STATES OF AMERICA under the municipal laws of the United States.

107. In diplomatic packages sent to the foreign embassies in Washington, D.C., that maintain consulates in the territory of the HAWAIIAN KINGDOM by DAVID KEANU SAI, as Minister of Foreign Affairs *ad interim*, on April 15th and 20th of 2021, the Ambassadors were notified that their Consulates "within the territory of the Hawaiian Kingdom is by virtue of 'American municipal laws,' which stand in violation of Hawaiian sovereignty and independence, and, therefore constitutes an internationally wrongful act." The diplomatic note further stated that the "Council of Regency acknowledges that

[foreign] nationals should be afforded remedial prescriptions regarding defects in their real estate holdings that have resulted from the illegal occupation in accordance with 'laws and established customs' of the Hawaiian Kingdom." This subject is covered in the Royal Commission of Inquiry's Preliminary Report re *Legal Status of Land Titles throughout the Realm*[112] and its Supplemental Report re *Title Insurance*."[113]

108. The maintenance of Defendants' foreign Consulates in the territory of the Hawaiian Kingdom also constitutes acts of belligerency. On June 30, 2021, the Czech Republic filed a letter to this Court announcing the temporary closure of its Honorary Consulate in the Hawaiian Kingdom.[114] The Hawaiian Kingdom acknowledges this act of State to be in conformity with Article 30(a) of *Responsibility of States for Internationally Wrongful Acts* (2001), whereby "[t]he State responsible for the internationally wrongful act is under an obligation (a) to cease that act, if it is continuing." Article 30(b), however, states that the responsible State shall "offer appropriate assurances and

[112] Royal Commission of Inquiry, Preliminary Report—*Legal Status of Land Titles throughout the Realm* (16 July 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).
[113] *Id*., Supplemental Report—*Title Insurance* (28 October 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Supp_Report_Title_Insurance.pdf).
[114] Letter from Josef Smycek, Czech Deputy Consul General Los Angeles, to Magistrate Judge Rom A. Trader, [ECF 34] Czech Republic Note Verbale, 14 July 2021 (Filed 2021-07-14).

guarantees of non-repetition, if circumstances so require." The Czech Republic has yet to assure the government of the HAWAIIAN KINGDOM guarantees of non-repetition. Furthermore, Article 31 provides that the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act," and that the "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of State."

109. When this case was initiated by filing a Complaint on May 20, 2021, a Notice of a Lawsuit and Request to Waive Service of a Summons (AO 398) form and a Waiver of the Service of Summons (AO 399) form along with a copy of the complaint was mailed by USPS to the foreign Consulates. Defendant foreign Consulates did not waive service of summons, and, therefore, are subject to be served a summons with a copy of Amended Complaint. While these foreign Consulates are situated within the territory of the HAWAIIAN KINGDOM and not in the territory of the UNITED STATES OF AMERICA, service of summons in accordance with the U.S. Foreign Sovereignty Immunities Act (FSIA) of 1976 is not applicable because the FSIA is a municipal law of the United States. Under Hawaiian Kingdom law, foreign Consulates as opposed to foreign Legations, are not privileged and, therefore, subject to being served

a summons.[115] Furthermore, Defendant foreign Consulates have not been granted an exequatur by the government of the HAWAIIAN KINGDOM in accordance with §458 of the Hawaiian Civil Code, and, therefore, are not *bona fide* Consulates in the first place. The HAWAIIAN KINGDOM views these foreign entities operating within the territorial jurisdiction of the HAWAIIAN KINGDOM as *de facto* foreign Consulates that must transform themselves into *de jure* Consulates by receiving an exequatur under the laws of the HAWAIIAN KINGDOM. Until then, the presence of Defendant foreign Consulates constitutes an internationally wrongful act.

110. The explicit recognition by the United States of the continued existence of the HAWAIIAN KINGDOM as a State and the Council of Regency as its government prevents the denial of this civil action in the courts of the United States under the political question doctrine. In *Williams v. Suffolk Insurance Co.*, the Supreme Court rhetorically asked whether there could be "any doubt, that when the executive branch of the government, which is charged with our foreign relations…assumes a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department."[116] In *Sai v. Clinton*[117] and

[115] *In the Matter of Landais*, 1 Haw. 353 (1855).
[116] *Williams v. Suffolk Insurance Co.*, 36 U.S. 415, 420 (1839).
[117] *Sai v. Clinton*, 778 F. Supp. 2d 1 - Dist. Court, Dist. of Columbia (2011).

in *Sai v. Trump*[118] the court erred when it invoked the political question doctrine. In both cases the plaintiff provided evidence of the Hawaiian Kingdom's continuity by virtue of the proceedings at the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*.

111. In *Jones v. United States*, the Supreme Court concluded that "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this Court, and has been affirmed under a great variety of circumstances."[119] As a leading constitutional scholar, Professor Corwin, concluded, "[t]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations."[120] The 'executive' did determine '[w]ho is the sovereign' of the HAWAIIAN KINGDOM, and, therefore, since there is no political question, it 'binds the judges, as well as all other officers, citizens, and subjects of that government.'

[118] *Sai v. Trump*, 325 F. Supp. 3d 68 - Dist. Court, Dist. of Columbia (2018).
[119] *Jones v. United States*, 137 U.S. 202, 212 (1890).
[120] Edward Corwin, *The President: Office and Powers*, 1787-1984 214 (1957).

F. United States Practice of Recognizing New Governments of Existing States

112. The restoration of the Hawaiian government by a "Council of Regency, as officers *de facto*, was a political act of self-preservation, not revolution, and was grounded upon the legal doctrine of limited necessity."[121] As such, according to pertinent U.S. practice, the Council of Regency did not require recognition by any other government, to include the United States, nor did it have to be in effective control of the HAWAIIAN KINGDOM's territory unless it was a new regime born out of revolutionary changes in government. The legal doctrine of recognizing "new" governments of an existing State only arises when there are "extra-legal changes in government."[122] The Council of Regency was not established through "extra-legal changes in government" but rather through existing laws of the kingdom as it stood before January 17, 1893. The Council of Regency was not a new government but rather a successor in office to Queen Lili'uokalani in accordance with Hawaiian law. In other words, "[t]he existence of the restored government *in situ* was not dependent upon diplomatic recognition by foreign States, but rather operated

[121] Sai, *Royal Commission of Inquiry*, 22.
[122] M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* 26 (1997).

on the presumption of recognition these foreign States already afforded the Hawaiian government as of 1893."[123]

113. If the Council of Regency was a new regime within an independent State, like the insurgency of 1893 that called themselves a provisional government, it would require *de facto* recognition by foreign governments after securing effective control of the territory away from the monarchical government. As stated by U.S. Secretary of State John Foster in a dispatch to resident Minister John Stevens in the Hawaiian Islands dated January 28, 1893, "[t]he rule of this Government has uniformly been to recognize and enter into relation with an actual government in **full possession of effective power with the assent of the people** (emphasis added)."[124] Applying this rule, President Cleveland concluded that the provisional government "was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition."[125] As such, the legal order of the Hawaiian Kingdom remained intact for it "is a dictum of international law that it will presume the old order as continuing."[126]

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[123] Sai, *Royal Commission of Inquiry*, 22.
[124] Executive Documents, 1179.
[125] *Id.*, 453 (online at https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).
[126] Osmond K. Fraenkel, *A Digest of Cases on International Law Relating to Recognition of Governments* 4 (1925).

114. In the context of the international legal order, at the core of sovereignty is effective control of the territory of the State. However, under international humanitarian law, which is also called the laws of war and belligerent occupation, the principle of effectiveness is reversed. When the United States bore the responsibility of illegally overthrowing, by an "act of war," the HAWAIIAN KINGDOM government, it transformed the state of affairs from a state of peace to a state of war, where you have the existence of two legal orders in one and the same territory, that of the occupying State—the Defendant UNITED STATES OF AMERICA—and that of the occupied State—the HAWAIIAN KINGDOM.[127]

115. 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."[128] Therefore, belligerent occupation "is thus the classical case

[127] David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 99-103 (2020).
[128] Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (1968).

in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[129] When the Hawaiian government was restored in 1997, it was not required to be in effective control of Hawaiian territory in order to give it legitimacy under international law. In needed only to be a successor of the last reigning Monarch in accordance with the laws of the HAWAIIAN KINGDOM.

G. United States explicit recognition of the continued existence of the Hawaiian Kingdom as an independent and sovereign State triggers the *Supremacy Clause* among all States of the Federal Union and Precludes the Political Question from Arising

116. There are two instances through which the Defendant UNITED STATES OF AMERICA continued to recognize the HAWAIIAN KINGDOM's Head of State after January 17, 1893, by executive agreements, through exchange of notes. The first was the executive agreement of restoration between Queen Lili'uokalani and President Grover Cleveland, by his U.S. Minister Albert Willis, of December 18, 1893, which took place eleven months after the overthrow of the Hawaiian government.[130] The second instance occurred between the Defendant UNITED STATES OF AMERICA, by its Department

[129] *Id.*

[130] United States House of Representatives, 53d Cong., *Executive Documents on Affairs in Hawaii: 1894-95* 1179 (1895), ("Executive Documents") (online at https://hawaiiankingdom.org/pdf/EA_2(HI%20Claim).pdf).

of State through its embassy in The Hague, and the Council of Regency after the PCA confirmed the existence of the Hawaiian State and its government in accordance with Article 47, and prior to the PCA's formation of the *Larsen* tribunal on June 9, 2000. According to the Chairman of the Council of Regency, Dr. DAVID KEANU SAI, when he served as Agent for the HAWAIIAN KINGDOM in *Larsen v. Hawaiian Kingdom*:

> Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with [the Chair], as agent for the Hawaiian Kingdom, over the telephone and recommended that the Hawaiian government provide an invitation to the United States to join in the arbitration. The Hawaiian government agreed with the recommendation, which resulted in a conference call meeting on 3 March 2000 in Washington, D.C., between [the Chair of the Council], Larsen's counsel, Mrs. Ninia Parks, and John Crook from the State Department. The meeting was reduced to a formal note and mailed to Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Council of Regency to the PCA Registry for record that the United States was invited to join in the arbitral proceedings. The note was signed off by the [Chair] as "Acting Minister of Interior and Agent for the Hawaiian Kingdom."
>
> Thereafter, the PCA's Deputy Secretary General, Phyllis Hamilton, informed the [Chair] that the United States, through its embassy in The Hague, notified the PCA, by note verbal, that the United States declined the invitation to join the arbitral proceedings. Instead, the United States requested permission from the Hawaiian government to have access to the pleadings and records of the case. The Hawaiian government consented to the request. The PCA, represented by the Deputy Secretary

> General, served as an intermediary to secure an agreement between the Hawaiian Kingdom and the United States.[131]

117. The request by the United States of the Council of Regency's permission to access all records and pleadings of the arbitral proceedings, together with the subsequent granting of such a permission by the Council of Regency, constitutes an agreement under international law. As Oppenheim asserts, "there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty."[132] The request by the Defendant UNITED STATES OF AMERICA constitutes an offer, and the Council of Regency's acceptance of the offer created an obligation, on the part of the HAWAIIAN KINGDOM, to allow the Defendant UNITED STATES OF AMERICA unfettered access to all records and pleadings of the arbitral proceedings. According to Hall, "a valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an

[131] David Keanu Sai, "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* 25 (2020). See also declaration of David Keanu Sai as Exhibit 1.

[132] Lassa Oppenheim, *International Law* 661 (3rd ed., 1920).

engagement, and so soon as such acceptance clearly indicated."[133] If, for the sake of argument, the Council of Regency later denied the Defendant UNITED STATES OF AMERICA access to the records and pleadings of the arbitral proceedings, the latter would, no doubt, call the former's action a violation of the agreement.

118. When the President of the Defendant UNITED STATES OF AMERICA enters into executive agreements, through his authorized agents, with foreign governments, it preempts U.S. state law or policies by operation of the *Supremacy Clause* under Article VI, para. 2 of the U.S. Constitution ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in [the State of Hawai'i] shall be bound thereby, anything in the Constitution or laws of [the State of Hawai'i] to the contrary notwithstanding."). In *United States v. Belmont*, the Court stated, "[p]lainly, the external powers of the United States are to be exercised without regard to [State of Hawai'i] laws or policies,"[134] and "[i]n respect of all international

[133] William Edward Hall, *A Treatise on International Law* 383 (1904).
[134] *United States v. Belmont*, 301 U. S. 324, 330 (1937),

negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."[135]

119. While the supremacy of treaties is expressly stated in the Constitution, the Supreme Court, in *United States v. Curtiss-Wright Export Corp.*, stated that the same rule holds "in the case of international compacts and agreements [when it forms] the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[136] In *United States v. Pink*, the Supreme Court reiterated that:

> No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.[137]

120. The "curtailment or interference" by the Defendant STATE OF HAWAI'I is its unqualified denial of the Council of Regency as a government and its authorized power to issue government bonds. The Defendant STATE OF

[135] *Id.*
[136] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 330-31 (1936).
[137] *United States v. Pink*, 315 U.S. 203, 229-31, 233-34 (1942).

HAWAI‘I is precluded from denying the status of the Council of Regency as a government by virtue of the *Supremacy Clause*, because the ‘National Government’ already recognized the Council of Regency as the government of the Hawaiian State in its agreement with the Council of Regency by virtue of the PCA’s institutional jurisdiction under Article 47 of the 1907 PCA Convention and with regard to accessing the *Larsen* arbitral pleadings and records. The ‘National Government,’ as a member of the PCA Administrative Council and co-publisher of the annual reports of 2000 through 2011, explicitly acknowledged the HAWAIIAN KINGDOM as a State and its government—the Council of Regency—pursuant to Article 47 of the 1907 PCA Convention. The action taken by the ‘National Government,’ as a member of the PCA Administrative Council, was by virtue of a treaty provision. The United States signed the Convention on October 18, 1907, and the Senate gave its consent to ratification on April 2, 1908. The Convention entered into force on January 26, 1910, and, consequently, the PCA Convention became the supreme law of the land by virtue of the *Supremacy Clause.*

121. The annual reports are a function of the PCA Administrative Council pursuant to Article 49 of the Convention. As such, the Defendant STATE OF HAWAI‘I is precluded from any ‘curtailment or interference’ of the actions taken by the

Defendant UNITED STATES OF AMERICA, as a member of the PCA Administrative Council and co-publisher of the annual reports. Therefore, the Defendant STATE OF HAWAI‘I is precluded from denying these facts and actions taken by the Defendant UNITED STATES OF AMERICA as a Contracting State to the 1907 PCA Convention because the Defendant UNITED STATES OF AMERICA, from a domestic standpoint, enjoys “legal superiority over any conflicting provision of a State constitution or law.”[138]

122. The 1907 PCA Convention, which has been ratified by the U.S. Senate, and the action taken by the Defendant UNITED STATES OF AMERICA, as a member State of the PCA Administrative Council, pursuant to Article 49, preempt Defendant STATE OF HAWAI‘I laws through the operation of the *Supremacy Clause*. The agreement entered into between the U.S. Department of State, by its embassy in The Hague, and the Council of Regency stems from the “Executive [that has] authority to speak as the sole organ” of international relations for the United States.[139] The Department of State, speaking on behalf of the Defendant UNITED STATES OF AMERICA, did not require Congressional approval or ratification of the Senate, or consultation with the Defendant STATE OF HAWAI‘I. Therefore, the Defendant UNITED

[138] Black’s Law, 1440.
[139] *Belmont*, 330.

STATES OF AMERICA's agreement with the Council of Regency to access all records and pleadings of the *Larsen* arbitral proceedings also preempts the Defendant STATE OF HAWAI'I, through the operation of the *Supremacy Clause*, from denying this international agreement or acting in ways inconsistent with it.

H. Unlawful presence of U.S. military forces in the Hawaiian Kingdom

123. To preserve its political independence, should war break out in the Pacific Ocean, the HAWAIIAN KINGDOM ensured that its neutrality would be recognized beforehand. Provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway (1852),[140] Spain (1863)[141] and Germany (1879).[142] "A nation that wishes to secure her own peace," says

[140] Article XV states, "All vessels bearing the flag of Sweden and Norway in time of war shall receive every possible protection, short of actual hostility, within the ports and waters of His Majesty the King of the Hawaiian Islands; and His Majesty the King of Sweden and Norway engages to respect in time of war the neutral rights of the Hawaiian Kingdom, and to use his good offices with all other powers, having treaties with His Majesty the King of the Hawaiian Islands, to induce them to adopt the same policy towards the Hawaiian Kingdom;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf.

[141] Article XXVI states, "All vessels bearing the flag of Spain shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, in time of war the neutrality of the Hawaiian Islands, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/Spanish_Treaty.pdf.

[142] Article VIII states, "All vessels bearing the flag of Germany or Hawaii shall in times of war receive every possible protection, short of actual hostility, within the

de Vattel, "cannot more successfully attain that object than by concluding treaties" of neutrality.[143]

124. The gravity of the Hawaiian situation has been heightened by North Korea's announcement that "all of its strategic rocket and long-range artillery units are assigned to strike bases of the U.S. imperialist aggressor troops in the U.S. mainland and on Hawaii."[144] The New York Times also reported that the North Korean command stated, "[t]hey should be mindful that everything will be reduced to ashes and flames the moment the first attack is unleashed."[145]

125. On April 13, 2021, the New York Times reported "China's effort to expand its growing influence represents one of the largest threats to the United States, according to a major annual intelligence report released on Tuesday, which also warned of the broad national security challenges posed by Moscow and Beijing."[146] Furthermore, on April 21, 2021, the New York Times reported

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ports and waters of the two countries, and each of the High Contracting Parties engages to respect under all circumstances the neutral rights of the flag and the dominions of the other;" accessed January 17, 2021, http://hawaiiankingdom.org/pdf/German_Treaty.pdf.

[143] Emerich De Vattel, *The Law of Nations*, 6th ed., 333 (1844).

[144] Choe Sang-Hun, North Korea Calls Hawaii and U.S. Mainland Targets, New York Times (Mar. 26, 2013) (online at http://www.nytimes.com/2013/03/27/world/asia/north-korea-calls-hawaii-and-us-mainland-targets.html).

[145] *Id*.

[146] Julian E. Barnes, China Poses Biggest Threat to U.S., Intelligence Report Says, New York Times (April 13, 2021) (online at

that Russian President Vladimir "Putin says nations that threaten Russian's security will 'regret their deeds.'"[147] The New York Times also reported that "Russia's response will be 'asymmetric, fast and tough' if it is forced to defend its interests, Mr. Putin said, pointing to what he claimed were Western efforts at regime change in neighboring Belarus as another threat to Russia's security."[148]

126. The island of O'ahu serves as headquarters for the U.S. Indo-Pacific Command, with its Subordinate Component Commands—U.S. Marine Forces Pacific, U.S. Pacific Fleet, U.S. Army Pacific, U.S. Pacific Air Forces and Special Operations Command Pacific. "Camp H.M. Smith, home of the headquarters of Commander, U.S. Indo-Pacific Command and the Commanding General of Marine Forces Pacific, is located on Oahu's Halawa Heights at an elevation of about 600 feet above Pearl Harbor near the community of Aiea."[149] Defendant JOHN AQUILINO stated, "[t]he most

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https://www.nytimes.com/2021/04/13/us/politics/china-national-security-intelligence-report.html).

[147] Andrew E. Kramer, Ivan Nechepurenko, Anton Troianovski and Katie Rogers, Putin says nations that threaten Russia's security will 'regret their deeds,' New York Times (Mar. 26, 2013) (online at https://www.nytimes.com/2021/04/21/world/europe/putin-russia-threats.html).

[148] *Id*.

[149] Indo-Pacific Command, *History of United States Indo-Pacific Command* (online at https://www.pacom.mil/About-USINDOPACOM/History/#:~:text=Camp%20H.M.%20Smith%2C%20home%20of,near%20the%20community%20of%20Aiea).

dangerous concern is that of military force against Taiwan. To combat that, the forward posture west of the international dateline is how [current INDO-PACOM Commander Adm. Phil] Davidson describes it—and I concur with that: forces positioned to be able to respond quickly, and not just our forces."[150]

127. The significance of North Korea's declaration of war of March 30, 2013, and China's threat to Taiwan has specifically drawn the HAWAIIAN KINGDOM, being a neutral State, into the region of war because it has been targeted as a result of the United States 118 military bases and installations throughout the territory of the HAWAIIAN KINGDOM.[151] There is no consent or status of forces agreement between the HAWAIIAN KINGDOM and the Defendant UNITED STATES OF AMERICA that would have allowed stationing of U.S. military forces.

128. The maintenance of DEFENDANT UNITED STATES OF AMERICA's military installations within the territory of the HAWAIIAN KINGDOM,

[150] Megan Eckstein, Senate Confirms Aquilino to Serve as Next INDO-PACOM Commander, USNI News (April 21, 2021) (online at https://news.usni.org/2021/04/21/senate-confirms-aquilino-to-serve-as-next-indo-pacom-commander#:~:text=U.S.%20Pacific%20Fleet%20Commander%20Adm,currently%20filled%20by%20Adm.%20Phil%E2%80%A6).

[151] U.S. Department of Defense's Base Structure Report (2021) (online at https://www.acq.osd.mil/eie/Downloads/BSI/Base%20Structure%20Report%20FY12.pdf).

being a neutral State, are an imminent threat to the civilian population of the HAWAIIAN KINGDOM and is a violation of Article 4 of the 1907 Hague Convention, V, whereby, "[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.".[152] Article 1 provides that "[t]he territory of neutral Powers is inviolable."[153] The 1907 Hague Convention, V, was ratified by the United States Senate on March 10, 1908 and came into force on January 26, 1910. As such, the 1907 Hague Convention, V, comes under the *Supremacy Clause*.

I. *Jus cogens* and certain war crimes committed in the Hawaiian Kingdom

129. Professor Schabas, who authored a legal opinion for the Royal Commission of Inquiry on the elements of war crimes committed in the Hawaiian Kingdom, notes the Defendant UNITED STATES OF AMERICA's position on war crimes during the First Gulf War:

> In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that 'under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.' [154]

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[152] 36 Stat. 2310, 2323 (1907).
[153] *Id*., 2322.
[154] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal*

130. Municipal laws of the Defendant UNITED STATES OF AMERICA being imposed in the HAWAIIAN KINGDOM constitute a violation of the law of occupation, which, according to Professor Schabas, is the war crime of *usurpation of sovereignty*. The actus reus of the offense "would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation."[155] All war crimes committed in the HAWAIIAN KINGDOM have a direct nexus and extend from the war crime of *usurpation of sovereignty*.

131. According to Professor Schabas, the requisite elements for the following war crimes are:

> *Elements of the war crime of usurpation of sovereignty during 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.

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[155] *Id.*, 157.

3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.[156]

Elements of the war crime of denationalization

1. The perpetrator participated in the imposition or application of legislative or administrative measures of the occupying power directed at the destruction of the national identity and national consciousness of the population.
2. The perpetrator was aware that the measures were directed at the destruction of the national identity and national consciousness of the population.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstance that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of pillage

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

[156] *Id.*, 167.

Elements of the war crime of confiscation or destruction of property

1. The perpetrator confiscated or destroyed property in an occupied territory, be it that belonging to the State or individuals.
2. The confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
3. The perpetrator was aware that the owner of the property was the State or an individual and that the act of confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstance that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of deprivation of fair and regular trial

1. The perpetrator deprived one or more persons in an occupied territory of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.
2. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstance that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of deporting civilians of the occupied territory

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons in the occupied State to another State or location, including the occupying State, or to another location within the occupied territory, by expulsion or coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

132. With regard to the last two elements of the aforementioned war crimes, Schabas states:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict as international [...].
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international [...].
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict [...].[157]

[157] *Id.*, 167.

133. The prohibition of war crimes is an "old norm which [has] acquired the character of *jus cogens*."[158] According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), international crimes, which include war crimes, are "universally condemned wherever they occur,"[159] because they are "peremptory norms of international law or jus cogens."[160] *Jus cogens* norms are peremptory norms that "are nonderogable and enjoy the highest status within international law."[161] Schabas' legal opinion is undeniably, and pursuant to *The Paquette Habana* case, a means for the determination of the rules of international criminal law.

134. In a letter of correspondence from DAVID KEANU SAI, as Head of the Royal Commission of Inquiry (RCI), to Attorney General Clare E. Connors, dated June 2, 2020, the Attorney General was notified that:

> Imposition of United States legislative and administrative measures constitutes the war crime of *usurpation of sovereignty*

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[158] Grigory I. Tunkin, "Jus Cogens in Contemporary International Law," 3 *U. Tol. L. Rev.* 107, 117 (1971).
[159] ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, 156 (Dec. 10, 1998).
[160] ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgement, para. 520 (Jan. 14, 2000).
[161] *Committee of United States Citizens in Nicaragua, et al., v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); see also *Vienna Convention on the Law of Treaties*, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining a jus cogens norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

> under customary international law. This includes the legislative and administrative measures of the State of Hawai‘i and its Counties. Professor William Schabas, renowned expert in international criminal law, authored a legal opinion for the Royal Commission that identified *usurpation of sovereignty*, among other international crimes, as a war crime that has and continues to be committed in the Hawaiian Islands.[162]

135. Carbon copied to that letter was Governor David Ige, Lieutenant Governor Josh Green, President of the Senate Ron Kouchi, Speaker of the House of Representatives Scott Saiki, Adjutant General Kenneth Hara, City & County of Honolulu Mayor Kirk Caldwell, Hawai‘i County Mayor Harry Kim, Maui County Mayor Michael Victorina, Kaua‘i County Mayor Derek Kawakami, United States Senator Brian Schatz, United States Senator Mazie Hirono, United States Representative Ed Case, and United States Representative Tulsi Gabbard. For the purposes of international criminal law, it meets the requisite fourth element of the war crime of *usurpation of sovereignty* whereby the "perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation."

136. Furthermore, on November 10, 2020, the National Lawyers Guild (NLG) sent a letter to Governor Ige that stated:

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[162] *Letter of the Royal Commission of Inquiry to State of Hawai‘i Attorney General Clare E. Connors* (June 2, 2020), https://hawaiiankingdom.org/pdf/RCI_Ltr_to_State_of_HI_AG_(6.2.20).pdf.

> International humanitarian law recognizes that proxies of an occupying State, which are in effective control of the territory of the occupied State, are obligated to administer the laws of the occupied State. The State of Hawai‘i and its County governments, and not the Federal government, meet this requirement of effective control of Hawaiian territory under Article 42 of the 1907 Hague Regulations, and need to immediately comply with the law of occupation. The United States has been in violation of international law for over a century, exercising, since 1893, the longest belligerent occupation of a foreign country in the history of international relations without establishing an occupying government.[163]

137. The NLG also stated that it "supports the Hawaiian Council of Regency, who represented the HAWAIIAN KINGDOM at the Permanent Court of Arbitration, in its effort 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."[164] The NLG further stated that it "supports the actions taken by the Council of Regency and the RCI in its efforts to ensure compliance with the international law of occupation by the United States and the State of Hawai‘i and its Counties."[165]

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[163] *National Lawyers Guild Letter to State of Hawai‘i Governor David Ige* (November 10, 2020) (online at https://nlginternational.org/newsite/wp-content/uploads/2020/11/Letter-from-the-NLG-to-State-of-HI-Governor-.pdf).
[164] *Id.*, 2.
[165] *Id.*, 3.

138. The NLG received the backing and support of the International Association of Democratic Lawyers (IADL) in its resolution adopted on February 7, 2021, *Calling Upon the United States to Immediately Comply with International Humanitarian Law in Its Prolonged Occupation of the Hawaiian Islands—Hawaiian Kingdom*. The IADL also "supports the Hawaiian Council of Regency"[166] and "calls on all United Nations members States and non-member States to not recognize as lawful a situation created by a serious violation of international law, and to not render aid or assistance in maintaining the unlawful situation. As an internationally wrongful act, all States shall cooperate to ensure the United States complies with international humanitarian law and consequently bring to an end the unlawful occupation of the Hawaiian Islands."[167] Furthermore, the "IADL fully supports the NLG's November 10, 2020 letter to State of Hawai'i Governor David Ige urging him to 'proclaim the transformation of the State of Hawai'i and its Counties into

[166] Resolution of the International Association of Democratic Lawyers *Calling Upon the United States to Immediately Comply with International Humanitarian Law in Its Prolonged Occupation of the Hawaiian Islands—Hawaiian Kingdom* 3 (February 7, 2021) (online at https://hawaiiankingdom.org/pdf/IADL_Resolution_on_the_Hawaiian_Kingdom.pdf).

[167] *Id.*

an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom'."[168]

139. Defendant DAVID YUTAKA IGE has met the 'requirement for the awareness of the factual circumstances that established the existence of an armed conflict' regarding war crimes.

J. State of Hawai'i violates international law and the *Supremacy Clause* by attacking officers of the Council of Regency

140. In a letter dated March 15, 2021, Bruce Schoenberg of the Securities Enforcement Branch of the State of Hawai'i (SOH-Enforcement Branch) stated, "[t]he Commissioner of Securities of the State of Hawaii is about to commence an enforcement action against [David Keanu Sai] and [Kau'i Sai-Dudoit] based upon the sale of unregistered Kingdom of Hawaii Exchequer Bonds, in violation of HRS § 485A-301."[169]

141. By letter dated March 26, 2021, attorney Stephen Laudig, on behalf of [David Keanu Sai] and [Kau'i Sai-Dudoit], responded to the March 15, 2021 letter from the SOH-Enforcement Branch.[170] Attorney Laudig's letter included specific notice of the: (a) Explicit Recognition by the United States of the

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[168] *Id*.
[169] Bruce A. Schoenberg to Stephen Laudig (March 15, 2021) (online at https://hawaiiankingdom.org/pdf/Schoenberg_to_Laudig_ltr_(3.15.21).pdf).
[170] Stephen Laudig to Bruce A. Schoenberg (March 26, 2021) (online at https://hawaiiankingdom.org/pdf/Laudig_to_Schoenberg_(3.26.21).pdf).

Continuity of the HAWAIIAN KINGDOM and its restored government by its Council of Regency; (b) Authority of the Council of Regency; (c) Sovereign Immunity; (d) Preemption of the State of Hawai`i from Interference in International Relations between the Defendant UNITED STATES OF AMERICA and the HAWAIIAN KINGDOM; (e) Defendant UNITED STATES OF AMERICA's Practice of Recognition of "New" Governments of Existing States; (f) "Constraints on United States Municipal Laws; and (g) Usurpation of Sovereignty and Jus Cogens.

142. After having received neither an acknowledgement of receipt, nor a response to his March 26, 2021 communication, but merely an April 8, 2021 communication from the SOH-Enforcement Branch, by email, asking whether he would "accept service of process on behalf of Mr. Sai and Ms. Goodhue", Attorney Laudig, by communication dated April 12, 2021, submitted his supplemental communication to the SOH-Securities Enforcement Branch.[171] Included in his April 12, 2021 supplemental communication, Attorney Laudig stated:

> I am not authorized to accept service of process until the SOH: 1] acknowledges receipt of the communication of the 26th; and, 2] responds to the points made in it regarding the United States' explicit recognition of the continuity of the Hawaiian Kingdom

[171] Stephen Laudig to Bruce A. Schoenberg (April 12, 2021) (online at https://hawaiiankingdom.org/pdf/Laudig_to_Schoenberg_(4.12.21).pdf).

as a State and the Council of Regency as its government, which it did during arbitral proceedings at the Permanent Court of Arbitration (PCA) between 8 November 1999, when the arbitral proceedings were initiated, and 9 June 2000 when the arbitral tribunal was formed. This explicit recognition by the U.S. Department of State, acting through its embassy in The Hague which sits as a member of the PCA Administrative Council, triggers the Supremacy Clause. According to the USPS, your office received the communication of 26 March on 29 March.

As stated in that communication, the actions taken by the SOH have serious repercussions under U.S. constitutional law and also international humanitarian law. These include the war crime of usurpation of sovereignty. This non-response is an acquiescence to the facts and the law cited in that communication and precludes the SOH from proceeding without violating the Supremacy Clause.

According to *Notes of Advisory Committee on Proposed Federal Rules of Evidence* (Rule 801):

> Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick §246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue.1
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> [Ft. nt. 1, citing Cornell Law School, Legal Information Institute, "Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay," https://www.law.cornell.edu/rules/fre/rule_801. [Last accessed as of 14 April 2021]

Furthermore, according to the New York Court of Appeals, in *People v. Vining*, 2017 NY Slip Op 01144:

> An adoptive admission occurs "when a party acknowledges and assents to something 'already uttered by another person, which thus becomes effectively the party's own admission'" (People v Campney, 94 NY2d 307, 311 [1999], citing 4 75 Wigmore, Evidence § 1609, at 100 [Chadbourne rev]). Assent can be manifested by silence, because "a party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission" (Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 8:17 [2016]; see also People v Koerner, 154 NY 355, 374 [1897] ["If he is silent when he ought to have denied, the presumption of acquiescence arises"]). We have also recognized that "an equivocal or evasive response may similarly be used against [a] party either as an adoptive admission by silence or an express assent" (Campney, 94 NY2d at 316 [Smith, J., dissenting], quoting 2 McCormick, Evidence, op cit., § 262, at 176). Here, despite the dissent's characterization, the defendant was not silent in the face of the victim's accusations. He gave "equivocal or evasive response[s]" (id.).2
>
> [Ft. Nt. 2, citing *People v. Vining*, 2017 NY Slip Op 01144, https://law.justia.com/cases/new-york/court-of-appeals/2017/1.html. [Last accessed 14 April 2021]

My clients look forward to the SOH's response to the communication and the specific points that were made. Upon receipt I will consult with my clients accordingly, regarding the SOH inquiry as to service of process.

> If you are of the opinion that I have a mis-stated either a fact, or a principle of international law, Hawaiian Kingdom law, or United States domestic law, I look forward to you providing what the SOH contends is authority that, in your opinion, contradicts any of the facts or counters any of the conclusions of law stated.

143. Thereafter, by letter dated April 15, 2021, the SOH-Enforcement Branch, while acknowledging receipt, was non-responsive and/or provided equivocal or evasive responses to Attorney Laudig's letters dated March 15, 2021 and April 12, 2021.[172] Instead, the SOH-Enforcement Branch affirmed its commitment to pursue enforcement claims against DAVID KEANU SAI and KAU'I SAI-DUDOIT in violation of HAWAIIAN KINGDOM law, the *Supremacy Clause* and international humanitarian law.

144. The allegation by the Defendant STATE OF HAWAI'I that HAWAIIAN KINGDOM government bonds, issued by the Council of Regency, are commercial bonds and subjected to the securities regulations is absurd. It would appear that the Defendant STATE OF HAWAI'I has taken a dubious position that the Council of Regency is a not a government and that the HAWAIIAN KINGDOM does not exist. This position runs counter to the Defendant UNITED STATES OF AMERICA's explicit recognition of the continuity of the HAWAIIAN KINGDOM, as a State, and its government—

[172] Bruce A. Schoenberg to Stephen Laudig (April 15, 2021) (online at https://hawaiiankingdom.org/pdf/Schoenberg_to_Laudig_ltr_(4.15.21).pdf).

the Council of Regency, when arbitral proceedings were instituted at the Permanent Court of Arbitration on November 8, 1999, thereby triggering the *Supremacy Clause* that preempts any interference by the Defendant STATE OF HAWAI'I.

145. While commercial bonds or securities "represent a share in a company or a debt owed by a company,"[173] a government bond is "[e]vidence of indebtedness issued by the government to finance its operations."[174] On its face, the HAWAIIAN KINGDOM is not a commercial entity or business and the bondholders, who submit an application to purchase government bonds, are aware that they are loaning money to the Hawaiian government 'to finance its operations.'[175]

146. In similar fashion to the conditional redemption of Irish bonds when Ireland was fighting for its independence from the United Kingdom,[176] Hawaiian bonds shall be redeemable at par within 1 year after the 5th year from the date when the United States of America's military occupation of the Hawaiian

[173] Black's Law 1354 (6th ed., 1990).
[174] *Id*., 179.
[175] Hawaiian Kingdom bonds, Frequently Asked Questions (online at https://hawaiiankingdom.org/bonds/).
[176] The Irish government sold bonds in the United States with the following condition, "Said Bond to bear interest at five percent per annum from the first day of the seventh month after the freeing of the territory of the Republic of Ireland from Britain's military control and said Bond to be redeemable at par within one year thereafter."

Islands has come to an end and that the Hawaiian government is in effective control in the exercising of its sovereignty, as explicitly stated on the bond. HAWAIIAN KINGDOM bonds are authorized under *An Act To authorize a National Loan and to define the uses to which the money borrowed shall be applied* (1886). Under Section 1 of the Act, "The Minister of Finance with the approval of the King in Cabinet Council is hereby authorized to issue coupon bonds of the Hawaiian Government."

147. The actions taken by Defendant STATE OF HAWAI'I against government officials of the HAWAIIAN KINGDOM—the occupied State, is also a violation of Article 54 of the Fourth Geneva Convention, which states, "[t]he Occupying Power may not alter the status of public officials…in the occupied territories, or in any way apply sanctions to take measures of coercion or discrimination against them."[177] The Fourth Geneva Convention was ratified by the United States Senate on July 6, 1955 and came into force on February 2, 1956. As such, the Fourth Geneva Convention comes under the *Supremacy Clause*. Furthermore, as the U.S. Supreme Court stated in *Underhill v. Hernandez*, "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in

[177] 6.3 U.S.T 3516, 3552 (1955).

judgment on the acts of the government of another done within its own territory."[178]

148. The Council of Regency expressly limits its waiver of sovereign immunity solely for and, to the extent necessary, to pursue the claims and obtain judicial remedies set forth in this amended complaint, and in all other instances fully reserve, retain and does not waive its sovereign immunity. In light of the awareness of the occupation by the aforementioned leadership of the Defendant STATE OF HAWAI'I, these allegations against Hawaiian government officials constitute malicious intent—*mens rea*. As pointed out by Professor Lenzerini, under the rules of international law, "the working relationship between the Regency and the administration of the occupying State would have the form of a cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory."[179] These unwarranted attacks is a violation of the law of occupation, and as a proxy for Defendant UNITED STATES OF AMERICA, it also constitutes an act of State and an internationally wrongful act.

[178] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).
[179] Lenzerini, *Legal Opinion*, para. 20.

CAUSE OF ACTION

COUNT I

(*Supremacy Clause*)

149. The foregoing allegations are realleged and incorporated by reference herein.

150. The *Supremacy Clause* prohibits the Defendant STATE OF HAWAI'I from 'any curtailment or interference' of the Defendant UNITED STATES OF AMERICA's explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM.

151. As the government of the HAWAIIAN KINGDOM, the Council of 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…and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law.'

152. The *Supremacy Clause* reserves foreign relations to the 'National Government' and, therefore, regulation of the sale of foreign government bonds "within" the United States where State statutes provide an exemption from registration of securities guaranteed by a foreign government which the United States maintains diplomatic relations. HAWAIIAN KINGDOM bonds

"within" Hawaiian territory are regulated by Hawaiian municipal laws and not U.S. municipal laws.

153. The Council of Regency possesses the statutory power to issue Exchequer Bonds in accordance with *An Act To authorize a National Loan and to define the uses to which the money borrowed shall be applied* (1886).

154. Through actions described in this Complaint, Defendant TY NOHARA has violated the *Supremacy Clause*, the 1907 Hague Regulations, and the 1949 Fourth Geneva Convention. Defendant's violation inflicts ongoing harm to the officers of the Council of Regency and the sovereign interests of the HAWAIIAN KINGDOM within its own territory.

CAUSE OF ACTION

COUNT II

(Usurpation of Sovereignty)

155. The foregoing allegations are realleged and incorporated by reference herein.

156. The 1907 Hague Regulations and the 1949 Fourth Geneva Convention, prohibits the imposition of all laws of the United States and the State of Hawai'i and its Counties, to include the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, and administrative law within the territory of the HAWAIIAN KINGDOM as an occupied State. As a neutral State, the

1907 Hague Convention, V, prohibits the maintenance of Defendant UNITED STATES OF AMERICA's military installations within the territory of the HAWAIIAN KINGDOM, which includes the territorial sea.

157. In enacting and implementing the laws of the Defendant UNITED STATES OF AMERICA, to include the laws of Defendant STATE OF HAWAI'I and its Counties, *i.e.*, the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, and administrative law within the territory of the HAWAIIAN KINGDOM and the maintenance of Defendant UNITED STATES OF AMERICA's military installations are acts contrary to the 1907 Hague Regulations, the 1907 Hague Convention, V, the 1949 Fourth Geneva Convention and Hawaiian Kingdom law.

158. Furthermore, in enacting and implementing the laws of the United States, to include the laws of the State of Hawai'i and its Counties, *i.e.*, the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations, Defendants JOSEPH ROBINETTE BIDEN JR., KAMALA HARRIS, ADMIRAL JOHN AQUILINO, CHARLES P. RETTIG, CHARLES E. SCHUMER, NANCY PELOSI, DAVID YUTAKE IGE,

ISAAC W. CHOY, RON KOUCHI, and SCOTT SAIKI have exceeded their statutory authority, engaged in violating the 1907 Hague Regulations, the 1907 Hague Convention, V, and the 1949 Fourth Geneva Convention, and has failed to comply with international humanitarian law by administering the laws of the HAWAIIAN KINGDOM, which include the 1864 constitution, statutes, common law, case law, and administrative law.

159. Through their actions described in this Complaint, Defendants have violated the substantive requirements of international humanitarian law. Defendants' violations inflict ongoing harm upon residents of the Hawaiian Islands, to include resident aliens, and the sovereign interests of the HAWAIIAN KINGDOM.

CAUSE OF ACTION

COUNT III

(Pillaging and Destruction of Property)

160. The foregoing allegations are realleged and incorporated by reference herein.

161. International humanitarian law prohibits pillaging and destruction of property through the unlawful presence of U.S. military forces, maintenance of U.S. military installations and exercise of U.S. military forces headed by Defendant ADMIRAL JOHN AQUILINO in the HAWAIIAN KINGDOM.

162. The unlawful presence, maintenance of military installations and exercise of military forces headed by Defendant ADMIRAL JOHN AQUILINO in the HAWAIIAN KINGDOM has resulted in undisputed, extensive and irreparable destruction of lands and natural resources within the territory of the HAWAIIAN KINGDOM in violation of international humanitarian law, which includes the 1907 Hague Regulations, and the 1949 Fourth Geneva Convention and Hawaiian Kingdom law.

163. The unlawful presence, maintenance of military installations and exercise of military forces headed by Defendant ADMIRAL JOHN AQUILINO in the HAWAIIAN KINGDOM has drawn the HAWAIIAN KINGDOM, being a neutral State, into the region of war and thereby exposing the HAWAIIAN KINGDOM to nuclear annihilation, targeted as a result of the United States 118 military bases and installations throughout the territory of the HAWAIIAN KINGDOM without the consent or a status of forces agreement with the HAWAIIAN KINGDOM that would otherwise permit the stationing of U.S. military forces in the HAWAIIAN KINGDOM.

164. The maintenance of UNITED STATES OF AMERICA's military installations within the territory of the HAWAIIAN KINGDOM, being a neutral State, are an imminent threat to the civilian population of the HAWAIIAN KINGDOM and is a violation of Article 4 of the 1907 Hague

Convention, V, whereby, "[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.".[180] Article 1 provides that "[t]he territory of neutral Powers is inviolable."[181] The 1907 Hague Convention, V, was ratified by the United States Senate on March 10, 1908 and came into force on January 26, 1910. As such, the 1907 Hague Convention, V, comes under the *Supremacy Clause*.

165. International humanitarian law also prohibits pillaging and destruction of property through the collection of taxes that are exacted from the residents of the HAWAIIAN KINGDOM by the Internal Revenue Service of the Defendant UNITED STATES OF AMERICA and the Department of Taxation of the Defendant STATE OF HAWAI'I in violation of Article 43 of the 1907 Hague Regulations, and Article 64 of the 1949 Fourth Geneva Convention.

166. The Internal Revenue Service is an agency of the Defendant UNITED STATES OF AMERICA, and the Department of Taxation is an agency of the Defendant STATE OF HAWAI'I.

167. International humanitarian law provides for the Defendant UNITED STATES OF AMERICA, as the occupying State, to collect taxes as provided under

[180] 36 Stat. 2310, 2323 (1907).
[181] *Id*., 2322.

HAWAIIAN KINGDOM law and not the laws of the Defendant UNITED STATES OF AMERICA.

168. In implementing Defendant UNITED STATES OF AMERICA tax laws, these agencies have and continue to commit violations of the international criminal law of pillaging and destruction of property. This, among other actions by Defendants CHARLES P. RETTIG and ISAAC W. CHOY, impacts substantive rights of the civilian population whose rights are envisaged under Article 4 of the 1949 Geneva Convention, IV, as "protected persons."

169. Through their actions described in this Complaint, Defendants CHARLES P. RETTIG and ISAAC W. CHOY have violated international humanitarian law, which includes the 1907 Hague Regulations, the 1949 Fourth Geneva Convention, and Hawaiian Kingdom law. Defendants' violations inflict ongoing harm upon the residents of the Hawaiian Islands, to include resident aliens, and the sovereign interests of the HAWAIIAN KINGDOM.

CAUSE OF ACTION

COUNT V

(Exequaturs)

170. The foregoing allegations are realleged and incorporated by reference herein.

171. §458 of the Hawaiian Civil Code requires foreign consulates to receive exequaturs from the Hawaiian Kingdom government and not from the government of the United States.

172. International humanitarian law prohibits *usurpation of sovereignty* by granting exequaturs to foreign consulates under American municipal laws within the territory of the HAWAIIAN KINGDOM in violation of Article 43 of the 1907 Hague Regulations, and Article 64 of the 1949 Fourth Geneva Convention.

173. International humanitarian law provides for the United States, as the occupying State, to ensure that foreign consulates within the territory of the HAWAIIAN KINGDOM are following HAWAIIAN KINGDOM law and not the laws of the Defendant UNITED STATES OF AMERICA.

174. Through their actions described in this Complaint, Defendants, JANE HARDY, JOHANN URSCHITZ, M. JAN RUMI, JEFFREY DANIEL LAU, ERIC G. CRISPIN, GLADYS VERNOY, JOSEF SMYCEK, BENNY MADSEN, KATJA SILVERAA, GUILLAUME MAMAN, DENIS SALLE, KATALIN CSISZAR, SHEILA WATUMULL, MICHELE CARBONE, YUTAKA AOKI, JEAN-CLAUDE DRUI, ANDREW M. KLUGER, HENK ROGERS, KEVIN BURNETT, NINA HAMRE FASI, JOSELITO A. JIMENO, BOZENA ANNA JARNOT, TYLER DOS SANTOS-TAM, R.J.

ZLATOPER, HONG, SEOK-IN, JOHN HENRY FELIX, BEDE DHAMMIKA COORAY, ANDERS G.O. NERVELL, THERES RYF DESAI, and COLIN T. MIYABARA, who preside over foreign Consulates in the territory of the HAWAIIAN KINGDOM, have violated international humanitarian law, which includes the 1907 Hague Regulations, the 1949 Fourth Geneva Convention, the 1851 Hawaiian-British Treaty, the 1875 Hawaiian-Austro/Hungarian Treaty, the 1862 Hawaiian-Belgian Treaty, the 1846 Hawaiian-Danish Treaty, the 1857 Hawaiian-French Treaty, the 1879 Hawaiian-German Treaty, 1863 Hawaiian-Italian Treaty, the 1871 Hawaiian-Japanese Treaty, the 1862 Hawaiian-Dutch Treaty, the 1852 Hawaiian-Norwegian/Swedish Treaty, the 1882 Hawaiian-Portuguese Treaty, the 1863 Hawaiian-Spanish Treaty, the 1864 Hawaiian-Swiss Treaty, and the principles of international law. Defendants have violated the sovereign interests of the HAWAIIAN KINGDOM and these acts of State constitute internationally wrongful acts.

PRAYER FOR RELIEF

175. WHEREFORE, the HAWAIIAN KINGDOM prays that the Court:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal

and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the 1907 Hague Regulations, the 1907 Hague Convention, V, the 1949 Fourth Geneva Convention, and Hawaiian Kingdom law;

b. Declare the *Supremacy Clause* prohibits the State of Hawai‘i from ‘any curtailment or interference’ of the United States of America’s explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM, and that as the government of the HAWAIIAN KINGDOM, the Council of Regency has the authority to represent the Hawaiian Kingdom as a State at both the domestic and international level and is vested with the rights and power the government of an occupied State possesses pursuant to international humanitarian law.

c. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the

maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;

d. Enjoin Defendants who are or serve as agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

e. Award such additional relief as the interests of justice may require.

DATED: Honolulu, Hawai'i, August 11, 2021.

Respectfully submitted,

/s/ Dexter K. Ka'iama

DEXTER K. KA'IAMA (Bar No. 4249)
Attorney General of the Hawaiian Kingdom

DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM

Attorney for Plaintiff, Hawaiian Kingdom

Exhibit “2”

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

HAWAIIAN KINGDOM,

Plaintiff,

v.

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

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

DECLARATION OF DAVID KEANU SAI, Ph.D.

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

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

Defendants.

DECLARATION OF DAVID KEANU SAI, Ph.D.

Exhibit 1

DECLARATION OF DAVID KEANU SAI, Ph.D.

I, David Keanu Sai, declare the following:

1. Declarant is a Hawaiian subject residing in Mountain View, Island of Hawai‘i, Hawaiian Kingdom. I am the Minister of the Interior, Minister of Foreign Affairs *ad interim*, and Chairman of the Council of Regency. Declarant served as Agent for the Hawaiian Kingdom in *Larsen v. Hawaiian Kingdom* arbitral proceedings at the Permanent Court of Arbitration from 1999-2001.

2. On or about mid-February 2000, declarant, as Agent for the Hawaiian Kingdom, had a phone conversation with the Secretary General of the Permanent Court of Arbitration (PCA), Tjaco T. van den Hout. In that conversation, the Secretary General stated to the declarant that the Secretariat was not able to find any evidence that the Hawaiian Kingdom had been extinguished as a State and admitted that the 1862 Hawaiian-Dutch Treaty was not terminated. The declarant understood that the Hawaiian Kingdom satisfied the PCA's institutional jurisdiction pursuant to Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, I, whereby the PCA would be accessible to Non-Contracting States. The arbitral tribunal was not formed until June 9, 2000.

3. The Secretary General then stated to the declarant that in order to maintain the integrity of these proceedings, he recommended that the Hawaiian Kingdom Government provide a formal invitation to the United States to join in the arbitral proceedings. The declarant stated that he will bring this request up with the Council of Regency. After discussion, the Council of Regency accepted the Secretary General's request and declarant travelled by airplane with Ms. Ninia Parks, counsel for claimant, Lance P. Larsen, to Washington, D.C., on or about March 1, 2000.

4. On March 2, 2000, Ms. Parks and the declarant met with Sonia Lattimore, Office Assistant, L/EX, at 10:30 a.m. on the ground floor of the Department of State and presented her with two (2) binders, the first comprised of an Arbitration Log Sheet with accompanying documents on record at the Permanent Court of Arbitration. The second binder comprised of divers documents of the Acting Council of Regency as well as diplomatic correspondence with treaty partners of the Hawaiian Kingdom.

5. Declarant stated to Ms. Lattimore that the purpose of our visit was to provide these documents to the Legal Department of the U.S. State Department in order for the U.S. Government to be apprised of the arbitral proceedings already in train and that the Hawaiian Kingdom, by consent of the Claimant, extends an opportunity for the United States to join in the

arbitration as a party. Ms. Lattimore assured the declarant that the package would be given to Mr. Bob McKenna for review and assignment to someone within the Legal Department. Declarant told Ms. Lattimore that he and Ms. Parks will be in Washington, D.C., until close of business on Friday, and she assured declarant that she will call on declarant's cell phone by the close of business that day with a status report.

6. At 4:45 p.m., Ms. Lattimore contacted the declarant by phone and stated that the package had been sent to John Crook, Assistant Legal Advisor for United Nations Affairs. She stated that Mr. Crook will be contacting the declarant on Friday (March 3, 2000), but declarant could give Mr. Crook a call in the morning if desired.

7. At 11:00 a.m., March 3, 2000, declarant called Mr. Crook and inquired about the receipt of the package. Mr. Crook stated that he did not have ample time to critically review the package but will get to it. Declarant stated that the reason for our visit was the offer by the Respondent Hawaiian Kingdom, by consent of the Claimant, by his attorney, for the United States Government to join in the arbitral proceedings already in motion. Declarant also advised Mr. Crook that Secretary General van den Hout of the PCA was aware of our travel to Washington, D.C., and the offer to join in the

arbitration. The Secretary General requested that the dialogue be reduced to writing and filed with the International Bureau of the PCA for the record.

8. Declarant further stated to Mr. Crook that enclosed in the binders were Hawaiian diplomatic protests lodged by declarant's former country men and women with the Depart of State in the summer of 1897, that are on record at the U.S. National Archives, in order for him to understand the gravity of the situation. Declarant also stated that included in the binders were two (2) protests by the declarant as an officer of the Hawaiian Government against the State of Hawai'i for instituting unwarranted criminal proceedings against the declarant and other Hawaiian subjects under the guise of American municipal laws within the territorial dominion of the Hawaiian Kingdom.

9. In closing, the declarant stated to Mr. Crook that after a thorough investigation into the facts presented to his office, and following zealous deliberations as to the considerations offered, the Government of the United States shall resolve to decline our offer to enter the arbitration as a Party, the present arbitral proceedings shall continue without affect pursuant to the 1907 Hague Conventions IV and V, and the UNCITRAL Rules of arbitration. Mr. Crook acknowledged what was said and the conversation then came to a close. That day a letter confirming the content of the discussion was drafted by the declarant and sent to Mr. Crook. The letter

was also carbon copied to the Secretary General of the PCA, Ms. Parks, Mr. Keoni Agard, appointing authority for the arbitral proceedings, and Ms. Noelani Kalipi, Hawai‘i Senator Daniel Akaka’s Legislative Assistant.

10. Thereafter, the PCA’s Deputy Secretary General, Phyllis Hamilton, spoke with declarant over the phone and informed declarant that the United States, through its embassy in The Hague, notified the PCA that the United States had declined the invitation to join in the arbitral proceedings. Instead, the United requested permission from the Hawaiian Government and the Claimant to have access to the pleadings and records of the case. Both the Hawaiian Government and the Claimant consented to the United States’ request.

11. On March 21, 2000, Professor Christopher Greenwood, QC, was confirmed as an arbitrator, and on March 23, 2000, Gavan Griffith, QC, was confirmed as an arbitrator. On May 28, 2000, the arbitral tribunal was completed by the appointment of Professor James Crawford as the presiding arbitrator. On June 9, 2000, the parties jointly notified, by letter, to the Deputy Secretary General of the PCA that the arbitral tribunal had been duly constituted.

12. After written pleadings were filed by the parties with the PCA, oral hearings were held at the PCA on December 7, 8 and 11, 2000. The arbitral award was filed with the PCA on February 5, 2000 where the tribunal found that it

lacked subject matter jurisdiction because it concluded that the United States was an indispensable third party. Consequently, the Claimant was precluded from alleging that the Hawaiian Kingdom, by its Council of Regency, was liable for the unlawful imposition of American municipal laws over the Claimant's person within the territorial jurisdiction of the Hawaiian Kingdom without the participation of the United States.

13. After returning from The Hague in December of 2000, the Council of Regency determined that the declarant would enter University of Hawai'i at Mānoa as a graduate student in the political science department in order to directly address the misinformation regarding the continuity of the Hawaiian Kingdom as an independent and sovereign State that has been under a prolonged occupation by the United States since January 17, 1893 through research and publication of articles. The decision made by the Council of Regency was in accordance with Section 495—*Remedies of Injured Belligerent*, United States Army FM-27-10 states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: *a.* Publication of the facts, with a view to influencing public opinion against the offending belligerent."

14. The declarant received his master's degree in political science specializing in international relations and law in 2004 and received his Ph.D. degree in

political science with particular focus on the continuity of the Hawaiian Kingdom. Declarant has published multiple articles and books on the prolonged occupation of the Hawaiian Kingdom and its continued existence as a State under international law. Declarant's curriculum vitae can be accessed online at http://www2.hawaii.edu/~anu/pdf/CV.pdf. Declarant can be contacted at interior@hawaiiankingdom.org.

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

DATED: Mountain View, Hawaiian Kingdom, May 19, 2021.

David Keanu Sai

Exhibit “3”

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

HAWAIIAN KINGDOM,

Plaintiff,

v.

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

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

DECLARATION OF PROFESSOR FEDERICO LENZERINI

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

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

Defendants.

DECLARATION OF PROFESSOR FEDERICO LENZERINI

Exhibit 2

DECLARATION OF PROFESSOR FEDERICO LENZERINI

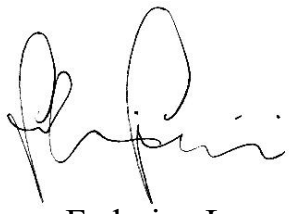
I, Federico Lenzerini, declare the following:

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

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

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

DATED: Siena, Italy, 13 May 2021.



Professor Federico Lenzerini

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

PROFESSOR FEDERICO LENZERINI*

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

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

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

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

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* Ph.D., International Law. Professor of International Law, University of Siena (Italy), Department of Political and International Sciences. For further information see <https://docenti.unisi.it/it/lenzerini> The author can be contacted at federico.lenzerini@unisi.it

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

[2] See *Montevideo Convention on the Rights and Duties of States*, 1933, 165 *LNTS* 19, Article 1. This article codified the so-called *declarative* theory of statehood, already accepted by customary international law; see Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", 37 *Columbia Journal of Transnational Law*, 1998-1999, 403; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity*", The Hague/Boston/London, 2000, at 77; David J. Harris (ed.), *Cases and Materials on International Law*, 6th Ed., London, 2004, at 99.

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

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

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

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

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

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

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

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

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

[7] See Yoram Dinstein, *The International Law of Belligerent Occupation*, 2nd Ed., Cambridge, 2019, at 58.

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

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

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[8] Ibid.

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

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

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

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

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

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

[15] In this respect, it is to be emphasized that "a sovereign State would continue to exist despite its government being overthrown by military force"; see David Keanu Sai, "The Royal Commission of Inquiry", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom*, Honolulu, 2020, 12, at 14.

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

[17] See Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford, 2008, at 78.

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

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

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

[18] See <https://pcacases.com/web/view/35> (accessed on 16 May 2020).
[19] It is to be noted, in this respect, that no armed resistance was opposed to the occupation despite the fact that, as acknowledged by US President Cleveland, the Queen "had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal"; see United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 453, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).
[20] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", Geneva, June 2002, available at <https://www.icrc.org/en/doc/assets/files/other/law9_final.pdf> (accessed on 17 May 2020), at 3.
[21] See <https://www.lexico.com/en/definition/regency> (accessed on 17 May 2020).
[22] See <https://thelawdictionary.org/regency/> (accessed on 17 May 2020).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] See *Ammon v. Royal Dutch Co.*, 21 *International Law Reports*, 1954, 25, at 27.

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

13. As regards, specifically, the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019,[37] it reads as follows:

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

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

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

[34] Ibid., at 106.

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

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

[37] Available at <https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf> (accessed on 18 May 2020).

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

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

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

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

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

[42] See *supra*, text corresponding to n. 25

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

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

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

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

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

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

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

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[43] See *supra*, text corresponding to n. 29.
[44] See Spoerri, "The Law of Occupation", supra n. 29, at 190.
[45] See *supra*, para. 6.
[46] See Spoerri, "The Law of Occupation", supra n. 29, at 190.
[47] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 586.

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

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

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

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

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

18. Importantly, the provisions referred to in the previous paragraph exactly refer to issues related to the protection of civilian persons and of their rights, which is one of the two main aspects (together with the preservation of the sovereign rights of the Hawaiian Kingdom government) dealt with by the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019.[52] In practice, the cooperation advocated by the provisions in point may take different forms, one of which translates into the possibility for the ousted government to adopt legislative provisions concerning the above aspects. As previously seen, the occupying power has, *vis-à-vis* the ensuing legislation, a duty not to oppose to it, because it normally does not undermine, or significantly interfere with the exercise of, its authority. Further to this, it is reasonable to assume that – in light of the spirit and the contents of the provisions referred to in the previous paragraph – the occupying power has a duty to cooperate in giving

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

[49] Ibid., at footnote 7.

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

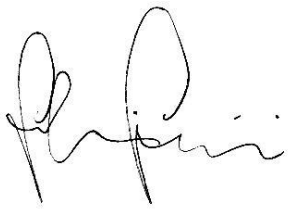
[51] Ibid., Section 367(b).

[52] See *supra*, text following n. 37.

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

19. The latter conclusion is consistent with the logical (and legally-grounded) assumption that the ousted government is better placed than the occupying power in order to know what are the real needs of the civilian population and what are the concrete measures to be taken to guarantee an effective response to such needs. It follows that, through allowing the legislation in discussion to be applied – and through contributing in its effective application – the occupying power would better comply with its obligation, existing under international humanitarian law and human rights law, to guarantee and protect the human rights of the local population. It follows that the occupying power has a duty – if not a proper legal obligation – to cooperate with the ousted government to better realize the rights and interest of the civilian population, and, more in general, to guarantee the correct administration of the occupied territory.
20. In light of the foregoing, it may be concluded that **the working relationship between the Regency and the administration of the occupying State should have the form of a cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory**, provided that there are no objective obstacles for the occupying power to cooperate and that, in any event, the "supreme" decision-making power belongs to the occupying power itself. This conclusion is consistent with the position of the latter as "administrator" of the Hawaiian territory, as stated in the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019 and presupposed by the pertinent rules of international humanitarian law.

24 May 2020



Professor Federico Lenzerini

Exhibit “4”

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

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

HAWAIIAN KINGDOM,
Plaintiff,

v.

JOSEPH R. BIDEN, President of the United States, et al.,
Defendants.

BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, NATIONAL LAWYERS GUILD, AND WATER PROTECTOR LEGAL COLLECTIVE IN SUPPORT OF PLAINTIFF'S AMENDED COMPLAINT

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state the following:

(1) They have no parent corporations; and

(2) They are not-for-profit corporations and as such, no publicly held corporations own 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are three organizations of lawyers and jurists throughout the United States and the world with ample expertise concerning international law, international human rights, humanitarian law, and norms regarding statehood, sovereignty, self-determination, and the rule of law.

Amici submit this brief to ensure a proper understanding and application of the international law and judicial precedent regarding occupation courts that are relevant to this case. Amici submit this brief to explain how the international norms and judicial precedent in Article II occupation courts support the Plaintiff's request for Declaratory Judgment and Injunctive Relief.

Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Counsel for Plaintiff Hawaiian Kingdom have consented to the filing of this brief. There is no opposition to the filing of the brief at this time as Defendants have either not taken a position or not entered an appearance in this case.[1] The Court has granted leave to file this brief [ECF No. 90].

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[1] *Amici* hereby certify that no party or person other than *amici* and their counsel authored this brief in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). Defendants County of Kaua'i and County of Hawai'i had opposed the filing of the initial amicus brief but have since been dismissed from this case.

The International Association of Democratic Lawyers ("IADL") is an international organization of lawyers and jurists with member associations and individual members in over 90 countries. IADL was founded in 1946 by a large group of lawyers, many of whom served as prosecutors at the Nuremberg trials. Shortly thereafter, the IADL, through its first President, the French jurist Rene Cassin, helped author the Universal Declaration of Human Rights (UDHR). IADL has consultative status to the Economic and Social Council of the United Nations (ECOSOC), the United Nations Educational Scientific and Cultural Organization (UNESCO), and the United Nations Children's Emergency Fund (UNICEF).

The National Lawyers Guild ("NLG") is a progressive public interest association of lawyers, law students, paralegals, and others founded in 1937 dedicated to the need for basic and progressive change for the furtherance of human rights. NLG was the first racially integrated bar association and has been involved in key social justice struggles throughout its history. The National Lawyers Guild is also dedicated to promoting human rights and the rights of ecosystems over property rights, and advances social justice struggles against entrenched inequalities throughout the globe. As such, the National Lawyers Guild has a long trajectory of international legal work and support for struggles involving international humanitarian law, statehood, sovereignty and self-determination.

The Water Protector Legal Collective ("WPLC") is an Indigenous-led legal non-profit organization that began in 2016 as the on-the-ground legal team at Oceti Sakowin camp at Standing Rock in defense of Water Protectors in frontline resistance to the Dakota Access Pipeline. The Water Protector Legal Collective provides legal support and advocacy for Indigenous Peoples and Original Nations, the Earth, and climate justice movements across Turtle Island (what is known as North America) and internationally. WPLC is dedicated to the protection and defense of sacred lands and cultural resources threatened by extractive industry and mass development, advancing Earth and climate justice, supporting the sovereignty and self-determination of Indigenous Peoples and Original Nations around the world, and international human rights advocacy.

INTRODUCTION

The purpose of this brief is to bring to the Court's attention customary international law norms and judicial precedent regarding Article II occupation courts that bear on the long-standing belligerent occupation of the Hawaiian Kingdom by the United States at issue in this case.

In assessing the legality of the US occupation of Hawai'i, the Court should be cognizant of customary international law and international human rights treaties that are incorporated into domestic law by virtue of Article VI, section 2 of the Constitution (the "Supremacy Clause"). International law, which includes treaties ratified by the United States as well as customary international law, is part of U.S. law and must be faithfully executed by the President and enforced by U.S. courts except when clearly inconsistent with the U.S. Constitution or subsequent acts of Congress.

The question here is not whether the Hawaiian Kingdom has standing in an Article III court. The question is whether this court can sit as an Article II occupation court and whether the claims of the Hawaiian Kingdom can be redressed. The answer to both questions is yes.

ARGUMENT

In deciding this matter, the Court must do so in a manner that is consistent with the United States' obligations under international law.

I. The Hawaiian Kingdom is an Occupied yet Inherently Sovereign Nation under International Law

The Court should render its decision for the Plaintiff consistent with the United States' obligations under international law.[2] In an 1801 Supreme Court case, the Court ordered the President to restore a French merchant ship to its owner pursuant to treaty obligations: "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted."[3]

Federal courts look to international law for interpretative guidance of constitutional and statutory provisions, as well as to ensure compliance with international legal obligations. *Graham v. Florida*, 560 U.S. 48, 80 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting international authority as "instructive for [the Court's] interpretation" of the Constitution); *Lawrence v.*

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[2] "Taking notice" of treaty obligations comports with a core principle of statutory construction announced by the Supreme Court in *Murray* v. *The Charming Betsy*: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *see aff'd, e.g.*, *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 542 U.S. 155, 164 (2004).

[3] *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

Texas, 539 U.S. 558, 572–73 (2003). *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("International law . . . is part of our law, and must be ascertained and administered by the courts of justice . . . .").

When the United States entered into the 1849 Treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom, it created obligations under international law and the U.S. Constitution which recognizes treaties as part of U.S. law. Customary international law is also part of U.S. law and is enforceable by U.S. courts.[4] Under the Supremacy Clause of the Constitution, "treaties made ... under the authority of the United States, shall be the supreme law of the land, and judges of every state shall be bound thereby."[5]

The United States violated that treaty, and the Vienna Convention on the Law of Treaties, by imposing American law over people within the territorial jurisdiction of the Hawaiian Kingdom. The U.S. has duties to the Hawaiian Kingdom pursuant to its treaty obligations as a signatory (as of April 24, 1970) to the Vienna Convention on the Law of Treaties. Although the US hasn't ratified the Vienna Convention, it is U.S. policy to regard it as an expression of customary

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[4] In *The Paquete Habana*, the Supreme Court held that customary international law "is part of our law" and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls. 175 U.S. 677, 700 (1900). *See also* Restatement (Third) of the Foreign Relations Law of the United States § 111(3) (customary international law must be enforced in U.S. courts even in the absence of implementing legislation or whether they appear in a treaty).

[5] U.S. Const. art. VI, cl. 2.

international law, including the provisions under Part V. applicable to Invalidity, Termination and Suspension of the Operation of Treaties.

Despite the customary international law and the duties under treaties and other international instruments, the history of the Hawaiian Kingdom shows a usurpation of sovereignty via the illegal occupation of Hawai‘i by the United States.

a. International Law Protects Sovereignty and Self-Determination of Peoples and Nations

The United Nations Charter states that all states are juridically equal and enjoy the same rights and duties based upon their existence under international law. The right of nations to determine their own political status and exercise permanent sovereignty within their territorial jurisdictions is widely recognized.[6] Sovereignty, is the most essential attribute of the state and is often defined as complete self-sufficiency and supremacy in domestic policy and independence in foreign policy. Taken together with the principle of self-determination and the prohibition against the use of force, has developed into one of the *jus cogens* norms of modern international law.

As stated in the Charter of the United Nations (United Nations 1945) (treaty ratified by the United States in 1945) and in Article 1 of the

[6] General Assembly Res. 1803 (XVII) of December 14, 1962, United Nations. *See also* International Covenant on Civil and Political Rights.

International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN General Assembly 1966) and the International Covenant on Civil and Political Rights (ICCPR) (treaty signed by the United States in 1992), "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The right to self-determination attributes peoples a free choice to determine their own destiny, particularly in political terms. In 1918, United States President Woodrow Wilson consecrated self-determination as "a paramount principle of international legitimation" and declared that "[n]ational aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesman will henceforth ignore at their peril."[7]

Despite the protections under international law, it is these norms of sovereignty and self-determination of the Hawaiian Kingdom and the Hawaiian people that the United States has violated in its ongoing occupation.

b. Under International Law, the Hawaiian Kingdom was an Independent State in 1893 Prior to US Occupation

At the time of the American occupation, the Hawaiian Kingdom fully satisfied the four elements of statehood prescribed by customary international law,

[7] *See* President Woodrow Wilson's address to Congress, *The Washington Post* 912 Feb. 1918).

which were later codified by the Montevideo Convention on the Rights and Duties of States in 1933: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.[8] This instrument codified the so-called declarative theory of statehood, already accepted by customary international law.

It is undisputed that in the nineteenth century, the Hawaiian Kingdom existed as an independent State recognized by the United States and the international community, including by exchanges of diplomatic or consular representatives, and the conclusion of treaties, which to-date have never been rescinded.[9] Undoubtedly, the Hawaiian Kingdom was a State at the time when the United States of America militarily occupied it on January 17, 1893.[10]

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[8] *See* Montevideo Convention on the Rights and Duties of States, 1933, 165 LNTS 19, Article 1.

[9] Treaties include: The 1851 Hawaiian-British Treaty, the 1875 Hawaiian-Austro/Hungarian Treaty, the 1862 Hawaiian-Belgian Treaty, the 1846 Hawaiian-Danish Treaty, the 1857 Hawaiian-French Treaty, the 1879 Hawaiian-German Treaty, 1863 Hawaiian-Italian Treaty, the 1871 Hawaiian- Japanese Treaty, the 1862 Hawaiian-Dutch Treaty, the 1852 Hawaiian- Norwegian/Swedish Treaty, the 1882 Hawaiian-Portuguese Treaty, the 1863 Hawaiian-Spanish Treaty, the 1864 Hawaiian-Swiss Treaty.

[10] Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* (2020). https://hawaiiankingdom.org/pdf/Legal_Opinion_Re_Authority_of_Regency_Lenzerini.pdf (Last visited July 29, 2021).

c. International Law Prohibits Occupation of Sovereign States and Imposes Duties on Occupying Powers

The U.S. Supreme Court stated in *Underhill v. Hernandez*, "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Additionally, it is a rule of international law as enunciated in *Lotus,* "[that] the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[11] The usurpation of sovereignty is thus considered a war crime under international law.[12]

Similarly, Article 54 of the Fourth Geneva Convention states, "[t]he Occupying Power may not...in any way apply sanctions to or take any measures of coercion or discrimination against them." The Fourth Geneva Convention was ratified by the United States Senate on July 6, 1955 and came into force on February 2, 1956; it is binding on the United States.

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[11] *See Lotus*, PCIJ Series A, No. 10, 18 (1927).

[12] WILLIAM SCHABAS, WAR CRIMES RELATED TO THE UNITED STATES BELLIGERENT OCCUPATION OF THE HAWAIIAN KINGDOM. (The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom, edited by David Keanu Sai, 151–169. Honolulu: Ministry of the Interior, Hawaiian Kingdom, Royal Commission of Inquiry).

On November 10, 2020, the National Lawyers Guild (NLG) sent a letter to Governor Ige that stated:

> "International humanitarian law recognizes that proxies of an occupying State, which are in effective control of the territory of the occupied State, are obligated to administer the laws of the occupied State. The State of Hawai'i and its County governments, and not the Federal government, meet this requirement of effective control of Hawaiian territory under Article 42 of the 1907 Hague Regulations, and need to immediately comply with the law of occupation. The United States has been in violation of international law for over a century, exercising, since 1893, the longest belligerent occupation of a foreign country in the history of international relations without establishing an occupying government."[13]

Article 43 of The Hague Regulations respecting the laws and customs of war on land with special relation to military authority over the territory of a hostile state (1907) states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[14]

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

[14] 36 Stat. 2306; *see also* Marco Sassoli, "Article 43 of the Hague Resolution and Peace Operations in the Twenty-first Century," *International Humanitarian Law Research Initiative (2004) (online* at https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf*)* (explaining that an occupying force may not extend its own legislation over the

d. The Hawaiian Kingdom is an Occupied Nation Since January 17, 1893

The operative question here is whether the continuous occupation of Hawai‘i by the United States, from 1893 to the present, extinguished the Hawaiian Kingdom as an independent State and, consequently, as a subject of international law.[15] Pending the outcome of that question, it can be established whether the courts in Hawai‘i are Article III courts properly established under the Constitution or if, as *de facto* product of a belligerent occupation by the United States, they are occupation courts under Article II war-making powers of the Executive. The historical facts support the continuity of the Hawaiian Kingdom as a state and that its courts are Article II occupation courts.

While the history of the Hawaiian Kingdom is undoubtedly known to this Court, it is important to restate the essential facts. The United States occupation began on January 17, 1893, when a small group of American businessmen and politicians who favored annexation by the United States, supported by John Stevens, the U.S. Minister to Hawai‘i, and a contingent of Marines from the warship U.S.S. Boston, overthrew Queen Lili‘uokalani in a *coup de main* and proclaimed a provisional government.

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occupied territory – “it must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation.”).

[15] *See* Lenzerini *supra* note 10.

There has been no "treaty of peace or a proclamation of peace" ending the state of war between the Hawaiian Kingdom and the United States. Instead, in violation of international law, customary law, and the laws of war, the United States annexed, later acquired, and finally added Hawai'i as a State of the Union in 1959.

i. President Cleveland's Promise to Queen Lili'uokalani

Shortly into his presidency, Cleveland appointed Special Commissioner Blount to look into the events in the Hawaiian Islands leading to Queen Lili'uokalani's yielding her authority temporarily. Special Commissioner Blount found that Minister Stevens had acted improperly and after Queen Lili'uokalani yielded her executive authority "until such time as the Government of the United States shall, upon facts being presented to it, undo the actions of its representative… [and restore the Queen] as the constitutional sovereign of the Hawaiian Islands."[16]

The President is also obligated to respect international law pursuant to his constitutional duty faithfully to execute the law and respect treaties as the supreme law of the land.[17] This was the intent of the Framers.[18] President Cleveland

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[16] United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawai'i: 1894-95, 586 (1895)
[17] U.S. CONST. art. II, sec. 3.

promised Queen Lili‘uokulani that she would be restored, but Sanford Dole, the president of the Provisional Government of Hawai‘i, refused to turn over power and unilaterally proclaimed Hawai‘i a republic in 1894.

ii. The Illegal Annexation of Hawai‘i

On June 16, 1897, with President William McKinley recently inaugurated, McKinley and representatives of the self-proclaimed government of the Republic of Hawai‘i signed a treaty of annexation which was submitted for ratification to the U.S. Senate. That treaty was defeated in the Senate due to the organizing of fierce opposition from over 21,269 native Hawaiian subjects and resident aliens opposed to annexation.

Nevertheless, when the Spanish-American war broke out, part of which was fought in the Philippines, the strategic value of the Hawaiian islands became palatable and pro-annexation forces in Congress submitted a proposal to annex Hawai‘i by joint resolution.

On July 12, 1898, a Joint Resolution passed requiring only a simple majority in both houses of Congress to annex Hawai‘i. While annexation is historically a permissible mode of acquiring title to some territory, “it is now regarded as illegitimate and primarily as a consequence of the general prohibition on the use of

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[18] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett ed. 1969).

force as expressed in article 2(4) of the UN Charter" and other declarations since than such as the General Assembly Resolution 2625 on Friendly Relations which provides: "The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."[19]

Congress exceeded its authority to annex Hawai'i by legislation rather than executive determination of foreign policy. The laws of the United States must comport with and be interpreted in a manner consistent with international law wherever possible. So, even if the President is not directly bound by international law, he is obligated to comply with the Constitution itself and all applicable legislation enacted by Congress within its authority must also comply with international norms incorporated into domestic law.

iii. Hawai'i's Admission to the Union and the Apology Resolution of 1993

Once annexed by the United States, Hawai'i remained a U.S. territory until 1959, when it became the 50th state to be admitted to the Union on March 18, 1959. Nevertheless, purported Hawaiian statehood does not comport with international

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[19] Declaration of Principles of International Law, GA Resn. 2625; *see also* Professor Matthew Craven, *Continuity of the Hawaiian Kingdom as A State Under International Law,* Ch. 3, pg. 126-149 in The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom, ed. Dr. David Keanu Sai (2020).

law. The admission into the Union was premised on an illegal annexation and a plebiscite that presented several irregularities including tactics that favored non-native Hawaiian residents rather than nationals of the Hawaiian Kingdom when the United States held a plebiscite on June 27, 1959 regarding the admission of Hawai‘i into the Union.[20]

Article 73(e) of the UN Charter requires UN Member States which administer "territories whose peoples have not yet attained a full measure of self-government" to report these territories to the Secretary General. In 1946, the United States reported Hawai‘i along with the territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands. Of those territories, only Hawai‘i was self-governing, since November 28, 1843 when the United Kingdom recognized the independence of the Hawaiian Kingdom.

Public Law No. 103-150 of the 103rd Congress, approved by President Clinton on November 23, 1999, known as the Apology Resolution, "acknowledge[d] the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and [offered] an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." Importantly, Congress noted that "the indigenous Hawaiian people never directly relinquished

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[20] *See* H. Hannum, 'Rethinking Self-Determination', 34 Va. J. Int'l. L. 1, 37 (1993).

their claims to their inherent sovereignty as people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."

iv. International Recognition of the Hawaiian Kingdom post-*Larsen* Arbitral Proceedings at the Hague in 2001

Purported statehood did not extinguish the Hawaiian Kingdom. In the *Larsen v. Hawaiian Kingdom* arbitral proceedings that began at the Hague in 1999 and concluded in 2001, the Arbitral Tribunal of the Permanent Court of Arbitration (PCA) acknowledged that: "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[21] Further, in its annual reports, the Permanent Court of Arbitration, as an intergovernmental organization, acknowledged the continuity of the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 Convention on the Pacific Settlement of International Disputes.[22]

In Defendant County of Kaua'i's Motion to Dismiss to Plaintiffs' original

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[21] *See Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).

[22] *See* PCA Annual Reports 2000-2011, Annex 2, *Cases Conducted under the Auspices of the PCA or with the Cooperation of the International Bureau* ("Pursuant to article 47 of the 1907 Convention (article 26 of the 1899 Convention)").

Complaint, the County cites *Hawai'i v. French*, 77 Haw. 222, 228, 883 P.2d 644, 650 (Ct. App. 1994) in support of the statement that 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." [ECF No. 15-1, Page ID #158]. This assertion is factually and legally incorrect. The 1994 ruling in *French* stands in stark contrast to the 2001 Arbitral Award of the Permanent Court of Arbitration of the *Larsen v. Hawaiian Kingdom* and the PCA Annual Reports from 2000-2011, that explicitly found Hawai'i to be a continued state to-date under international public law.

On February 25, 2018, Dr. Alfred M. deZayas, a United Nations Independent Expert from the Office of the High Commissioner for Human Rights, communicated to two State of Hawai'i trial judges and members of the judiciary:

> "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)."[23]

In a resolution dated February 7, 2021, the International Association of Democratic Lawyers (IADL) "call[ed] on all United Nations members States and

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[23] *See* Letter from National Lawyers Guild to State of Hawai'i, pg. 3.

non-member States to not recognize as lawful a situation created by a serious violation of international law, and to not render aid or assistance in maintaining the unlawful situation. As an internationally wrongful act, all States shall cooperate to ensure the United States complies with international humanitarian law and consequently bring to an end the unlawful occupation of the Hawaiian Islands."[24]

The laws of the United States must be interpreted in accordance with the Constitution, treaties, and international law.

II. There is Judicial Precedent of other Article II Occupation Courts

The bare assertion that "this Court is not an Article II Court" [ECF No. 15-1, Page ID #155] is conclusory without any supporting law or discussion of historical precedent. In actuality, there is ample historical precedent regarding Article II courts, or occupation courts. This history is not widely known given the majority of courts are Article III ("Constitutional" courts) or Article I ("legislative" courts). Nevertheless, academic legal scholars and legal history show ample precedent for Article II courts when the United States has militarily occupied territory.

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[24] Resolution of the International Association of Democratic Lawyers *Calling Upon the United States to Immediately Comply with International Humanitarian Law in Its Prolonged Occupation of the Hawaiian Islands—Hawaiian Kingdom* (February 7, 2021) (online at https://hawaiiankingdom.org/pdf/IADL_Resolution_on_the_Hawaiian_Kingdom.pdf).

a. What is an Article II Occupation Court?

i. General Characteristics

The central attribute of an Article II court is an executive action that grants it criminal and civil jurisdiction over civilians in an occupied territory. The President's ability to create Article II courts extends from the responsibility as commander in chief to govern areas occupied by U.S. forces.[25] Most Article II courts in history have been created by an executive order—either before the creation of the court or by ratification after-the-fact—but creation of an Article II court does not require such express action. The President can authorize local commanders to form a civil government for the occupied territory.[26] Any court whose jurisdiction over an occupied territory flows from the exercise of executive war powers is an Article II court.[27] This authority remains until: (1) a peace treaty grants sovereignty of the occupied territory to the United States; and (2) an act of Congress transfers criminal and civil jurisdiction over civilians to a legislative court.[28] The President alone has power to negotiate treaties as "part of a general

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[25] *See Cross v. Harrison*, 57 U.S. (16 How.) 164, 189 (1853) (Wayne, J.); *see also* David J. Bederman, *Article II Courts*, Mercer Law Review Vol. 44 (1993), pg. 825-879 at 851.
[26] *Bederman* at 851.
[27] *Cf. Mechanics' & Traders' Bank v. Union Bank,* 89 U.S. (22 Wall.) 276 (1874), aff'g 25 La. Ann. 387 (1873).
[28] *See American Insurance Co. v. Canter,* 26 U.S. (l Pet.) 511 (1828).

authority to control diplomatic communications."[29] The Senate must ratify any treaty by a two-thirds majority, but the legislature has no other role in the treaty process.

b. Historical Precedent of Article II Courts

Article II courts—also known as "occupation courts"—have existed throughout United States history, starting with the Mexican War in 1846 and followed by the "heyday of occupation courts" during the Civil War as large tracts of Confederate territory came under Union control in the 1860s and there was a need for provisional military governments and provisional tribunals. This continued during the Spanish-American War in 1899 and occupation courts were established after World War II from 1949 until 1971 in Okinawa and Ryukyu Islands, when the United States returned those territories to Japan. At least twelve occupation tribunals, organized under the executive war-making power of the President, were established throughout that time.[30]

"Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops. Because military occupation invariably entailed the replacement of one sovereign with another, American jurists

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[29] National Constitution Center, *Interactive Constitution- Article II, Section 2: Treaty Power and Appointments*, https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346

[30] *Bederman supra* note 25 at 837-849 (providing a survey of executive courts in the history of the United States).

were particularly sensitive to the constitutional implications of this presidential war-making power."[31]

Essential juridical principals of military occupation that stemmed from these tribunals apply to the present day: 1) the President, by virtue of his war making powers under Article II, may govern regions subject to belligerent occupation; 2) it is implicit that the President substantially delegates to his army and navy commanders the responsibility for the actual conduct of the military government; 3) no apparent restrictions force the President, or his commanders, to conduct the belligerent occupation in a particular fashion; and 4) at some point the occupation must come to an end—presumably, but not necessarily, by the conclusion of hostilities—and, at that time, the President's exclusive and unfettered powers of military occupation should lapse[32]

Executive tribunals are, "[f]irst and foremost, [a] testament to the elasticity of a constitutional text that can stretch to accommodate circumstances of national emergency without snapping in defense of basic freedoms."[33]

Particularly analogous to the situation here are the Provost Courts of Louisiana, first established by the military and President Lincoln in 1862 as the Union Army occupied New Orleans and surrounding areas. After the authority of

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[31] *Id.* at 849.
[32] *Id.* at 851.
[33] *Id.* at 877.

these Article II courts was challenged, the U.S. Supreme Court "for the first time"[34] addressed the distinction between Article III and Article II courts. In *Mechanics' & Traders' Bank v. Union Bank of La.*, Justice Strong wrote of Article III, "That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupancy of the conquering army." 89 U.S. 276 at 295 (1874). Given that, as previously discussed, Hawai'i remains belligerently occupied by the United States, Article III courts similarly should have no application in the instant case, and must instead be replaced by an Article II court.

Moreover, the Louisiana precedent demonstrates that Article II occupation courts can continue to exist after military battles have subsided, as is the case in Hawai'i: "[t]he Provisional Court for Louisiana…carried on with its work long after the state had been militarily subdued."[35] These courts also continued to apply the laws of the occupied state. As a contemporary *American Law Register* article makes clear, "These courts were all of them ever guided by the laws of Louisiana in the administration of justice."[36] So, too, must the court here apply the laws of the occupied Hawaiian Kingdom.

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[34] *Id.* at 853
[35] *Id.* at 861.
[36] Anonymous, *Provisional Judiciary of Louisiana*, 4 AM. L. REG. 257, 268 (March 1865)

III. The Federal and State Courts of Hawai‘i are *de facto* Article II Occupation Courts

There is no dispute that the United States gained control of Hawai‘i through an act of war. [ECF No. 1, Page ID #15] After the *coup de main*, the U.S. forces controlling Hawai‘i allowed the contemporary court system of the Hawaiian Kingdom to maintain operations. While this is not the creation of new courts by direct executive order, this is an example of a local commander exercising executive authority to govern occupied territory. The Hawaiian Kingdom's government had been overthrown. In this situation, the President's power to govern occupied territory is the only valid power that could grant jurisdiction to the Hawaiian Kingdom courts. Consequently, this means Article II courts have existed *de facto* in Hawai‘i since 1893.

The authority of those Article II courts has never been abrogated. It is true that Congress has organized Hawai‘i into a territory and later admitted it into the Union. However, there is no peace treaty between the Hawaiian Kingdom and the United States. Whenever an Article II court's power has been abrogated by Congressional action, there has first been a treaty that granted the United States sovereignty over the occupied territory. Accordingly, "neither the end of hostilities nor the conclusion of a treaty of peace marks the end of presidential power to continue to administer justice through occupation courts. Instead, Congress must

establish courts, thereby supplanting presidential authority in this realm."[37] Through such treaties, the governments previously in control relinquished all claim to the occupied territories. This transfer of sovereignty is a necessary condition for Congress to organize a territory because Congress has no power outside U.S. territory. [ECF No. 1, Page ID # 21].

The facts here show that Congress has no legitimate power over Hawai'i because there was never a peace treaty between nations ending the occupation and Congress has no extraterritorial capabilities. Essentially Congress exceeded its constitutional powers and legislated a legal framework over a sovereign Nation that never ceded its state sovereignty nor the ability and desire to rule itself. Rather than wait to ratify a negotiated peace treaty with Hawai'i to end the occupation and remedy the illegal annexation and later acquisition of Hawai'i, Congress admitted Hawai'i into the Union as the 50th State seeking to sweep a century of inconvenient truths and illegal acts under the rug. The extensive judicial and political infrastructure in modern Hawai'i exists in violation of the laws of war and norms of international law applicable to occupying powers. Yet the Hawaiian Kingdom persists and the United States occupation of Hawai'i that began in 1893 has never effectively ended.

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[37] *Bederman supra* note 25 at 878.

Because Article III courts are created expressly in the United States and organized under the Constitution, there can be no Article III courts outside the territory of the United States. Congress lacked authority to organize Hawai‘i as a state because its legislative powers have no extraterritorial effect. Any court in Hawai‘i at present, therefore, cannot be an Article I legislative tribunal or an Article III court.[38] As such, the only remaining possibility is that courts in Hawai‘i are *de facto* Article II occupation courts and may hear this case while applying the laws of the Hawaiian Kingdom, as required under international law.

IV. Exigent Circumstances Require the Court to Assume Jurisdiction

While the issue of Hawaiian sovereignty may be familiar to this Court, this matter is undoubtedly a case of first impression. However, there are exigent circumstances that necessitate this court's assuming jurisdiction as an Article II occupation court.

This court can sit as an Article II court because the United States controls Hawai‘i not as a sovereign but as an occupying power and there has been no peace

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[38] *See Mechanics' & Traders' Bank v. Union Bank of La.,* 89 U.S. 276, 22 L. Ed. 871 (1874). The United States Supreme Court offered some guidance in this area and articulated the distinction between executive tribunals and Article III tribunals stating that Article III "has no application to the abnormal condition of conquered territory in the occupancy of the conquering army."

treaty between states to end the occupation.[39] Article II courts can extend their jurisdiction to maintain orderly control of an occupied territory. Exercising Article II jurisdiction and granting the requested injunctive relief complies with public international law. In this manner, this Court could apply local law as required of an occupying power by the laws of war.

Article II courts can extend their jurisdiction to maintain orderly control of an occupied territory. For example, the Provisional Court of Louisiana held Article II jurisdiction over the sections of Louisiana under the control of Union forces.[40] The Provisional Court (as provost courts established by military commanders immediately after capturing the territory) first heard cases concerning soldiers and the laws of war but eventually extended its jurisdiction to civil and criminal matters in the occupied territory. Concurrently, Union military commanders revived the local parish courts in occupied territory. These parish courts directed their judgments to the Louisiana Supreme Court for appellate review. One problem: the Louisiana Supreme Court sat in Baton Rouge, which the Confederacy still controlled. Judge Peabody, the chief judge of the Provisional Court, remedied this problem by transferring all cases pending before the Louisiana Supreme Court to his tribunal. By extending his jurisdiction Judge

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[39] *See supra* section on continuity of the Hawaiian Kingdom as a Nation-State under International Law at note 13 and note 15.
[40] *See generally* Bederman supra note 25 at 843-44.

Peabody was able to maintain orderly control of an occupied territory. Louisianans could have their cases heard in local courts applying local law without giving up their right to appellate review. This Court could do the same by assuming jurisdiction as an Article II court and allow Hawaiians to have their cases heard by an occupying court applying local law, as required by the laws of war.

Most importantly, functioning as an Article II court here would not undermine all this Court's past judgments; previous judgments and laws of the United States would remain in effect unless they are at odds with the laws of the occupied Hawaiian Kingdom.[41]

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[41] *See* Proclamation of the Council of Regency of the Hawaiian Kingdom, October 10, 2014, p. 7 ("We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void[.]").

CONCLUSION

Under the concept of *void ab initio,* there are structures that have no legal effect from inception. The United States occupation of Hawai‘i began with unclean hands, and this can only be remedied by a clean slate and a new beginning. Recognition of the prolonged occupation of the Hawaiian Kingdom by the United States through Declaratory Judgment is not only a redressable claim, it is long overdue and would only be consistent with what is already known to the international community and clear under international law. Additionally, granting the Hawaiian Kingdom injunctive relief would acknowledge the Kingdom's continuous sovereignty, mitigate the United States' liability for its war crimes against the Hawaiian people, and apply local law as required of an occupying power by the international law of war. Acknowledging extraterritoriality and occupation would have the practical effect of applying the laws of the Hawaiian Kingdom but as was the case with prior occupation courts, this would not nullify any prior decisions of any of the courts currently operating in Hawai‘i, so long as they are not inconsistent with local law.

For the foregoing reasons, *amici* request that the Court consider U.S. obligations under international law, which forms part of U.S. law, in evaluating the long-standing occupation of the Hawaiian Kingdom.

Dated: October 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amended Brief of *Amici Curiae* with the Clerk of the Court for the United States District Court for the District of Hawai'i by using the CM/ECF system on October 6, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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

Dated: October 6, 2021

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Exhibit “5”

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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 HAWAIIAN KINGDOM’S REQUEST FOR JUDICIAL NOTICE PURSUANT TO FRCP 44.1 RE: CIVIL LAW ON JURIDICAL FACT OF THE HAWAIIAN STATE AND THE CONSEQUENTIAL JURIDICAL ACT BY THE PERMANENT COURT OF ARBITRATION; DECLARATION PROFESSOR FEDERICO LENZERINI; EXHIBIT “1”; CERTIFICATE OF SERVICE

PLAINTIFF HAWAIIAN KINGDOM’S REQUEST FOR JUDICIAL NOTICE PURSUANT TO FRCP 44.1 RE: CIVIL LAW ON JURIDICAL FACT OF THE HAWAIIAN STATE AND THE CONSEQUENTIAL JURIDICAL ACT BY THE PERMANENT COURT OF ARBITRATION

TO THE COURT AND TO ALL PARTIES HEREIN:

Plaintiff HAWAIIAN KINGDOM hereby requests that, pursuant to FRCP Rule 44.1, the Court take judicial notice of the civil law regarding 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.

Attached to the accompanying declaration as Exhibit "1" is an expert opinion of Professor Federico Lenzerini, a professor of international law at the University of Siena, Italy. Italy's legal system is civil law and Professor Lenzerini is very familiar with the civil law tradition providing the ontological legal basis of the *juridical fact* of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government, and of the *juridical act* taken by the PCA within the "reasonings and analogies of the…civil law."[1] Furthermore, the PCA is situated in the Netherlands, which is a civil law country like Italy.

Plaintiff contends, in support of its amended complaint for declaratory and injunctive relief, that the Court's transformation to an Article II Court has a direct nexus to the PCA's *juridical act* of acknowledging the Hawaiian Kingdom, a *juridical fact*, as a non-Contracting State to the 1907 Hague Convention for the Pacific Settlement of International Disputes.[2] Accordingly, in support of said

[1] *Bullions v. Loring Brothers & Co.*, 1 Haw. 372, 377 (1856).
[2] 36 Stat. 2199, 2224 (1907).

allegations and such evidence, Plaintiff requests that the Court takes judicial notice of the relevant provisions of the civil law regarding *juridical facts* and *juridical acts*.

FRCP Rule 44.1 provides as follows:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Although a sworn statement by a professor of law, i.e., formal expert opinion, is not a prerequisite to proving foreign law when an issue concerning the law in a foreign country arises, the Plaintiff has nonetheless provided the Court with a sworn statement from an expert on civil law. *U.S. v. First Nat. Bank of Chicago*, 699, F.2d 341, 343-344 (7th Cir. 1983); and see *Kalmich v. Bruno*, 553 F.2d 549, 555, n. 4 (7th Cir. 1977), cert denied 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (the court held that an unsworn opinion letter as to the law of Yugoslavia, not subject to cross-examination, which was prepared by plaintiff's Yugoslavian law expert and offered for the first time in connection with plaintiff's motion to alter judgment, was relevant and properly considered by the trial court).

According to Keefe, Landis, and Shaad, "[i]n a case which involves the law of a civil-law country […], a New York judge is not usually competent to investigate on his own and to take judicial notice of the law as his own and to take judicial notice

of the law as his researches indicate it. He will sensibly require all the aid that formal proof and argument of counsel can give him."[3] Accordingly, the accompanying legal opinion on the civil law regarding the *juridical fact* of the Hawaiian State's continued existence, and the PCA's consequential *juridical act* are properly submitted and should be considered by the Court in this matter.

For the foregoing reasons, Plaintiff respectfully requests the Court to take judicial notice of the civil law regarding the *juridical act* of the Permanent Court of Arbitration Recognizing the *juridical fact* of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government.

DATED: Honolulu, Hawai'i, December 6, 2021.

Respectfully submitted,

/s/ Dexter K. Ka'iama

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Attorney General of the Hawaiian Kingdom
DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM

Attorney for Plaintiff, Hawaiian Kingdom

[3] Arthur John Keefe, William B. Landis, Jr. and Robert B. Shaad, "Sense and Nonsense about Judicial Notice," 2(4) *Stanford Law Review* 664, 681 (1950).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

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JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al.,

Defendants.

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

DECLARATION OF PROFESSOR FEDERICO LENZERINI; EXHIBIT “1”

DECLARATION OF PROFESSOR FEDERICO LENZERINI

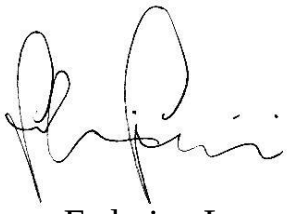
I, Federico Lenzerini, declare the following:

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

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

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

DATED: Siena, Italy, 5 December 2021.



Professor Federico Lenzerini

Exhibit “1”

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

FEDERICO LENZERINI*

5 December 2021

Juridical Facts

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

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

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

Juridical Acts

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

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[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.

Exhibit “6”

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IN THE UNITED STATES DISTRICT COURT
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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 HAWAIIAN KINGDOM’S NOTICE OF APPEAL TO A COMPETENT COURT OF APPEALS TO BE HEREAFTER ESTABLISHED BY THE UNITED STATES AS THE OCCUPYING POWER; CERTIFICATE OF SERVICE

PLAINTIFF HAWAIIAN KINGDOM’S NOTICE OF APPEAL TO A COMPETENT COURT OF APPEALS TO BE HEREAFTER ESTABLISHED BY THE UNITED STATES AS THE OCCUPYING POWER

TO THE COURT AND TO ALL PARTIES HEREIN:

PLEASE TAKE NOTICE that Plaintiff HAWAIIAN KINGDOM, hereby preserves the record of these proceedings by its notice to appeal to a competent court of appeals to be hereafter established in the Hawaiian Kingdom by the United States as an Occupying Power in accordance with international humanitarian law from the Order granting in part and denying in part Defendant Nervell's Motion to Dismiss [ECF 222], Order denying Plaintiff's Motion for Judicial Notice [ECF 223], and Minute Order denying Plaintiff's Motion for Reconsideration and Motion to Amend [ECF 227] (hereafter "Minute Order").

The Court, in its Minute Order, did not deny the customary international rule of the presumption of continuity of the Hawaiian Kingdom as a sovereign and independent State as fully elucidated in Plaintiff's Motion for Reconsideration and Motion to Amend [ECF 225], nor did the Court provide any rebuttable evidence to the presumption of continuity that the Hawaiian Kingdom was extinguished as a State under international law. The international rule of the presumption of continuity is international law and, therefore, is an accepted part of American law that must be applied by federal courts. See *The Paquette Habana*, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

In its Minute Order, the Court disregarded international law and simply stated, "[a]lthough Plaintiff argues there are manifest errors of law in the 3/30/22 Order and the 3/31/22 Order, Plaintiff merely disagrees with the Court's decision." This terse statement of the Court neither denies the international rule of the presumption of continuity nor provides rebuttable evidence to the contrary. As such, the Court, by not providing rebuttable evidence to the presumption of continuity, acknowledged the continuity of the Hawaiian Kingdom as a sovereign and independent State and yet disregarded its obligation under international law to transform itself into an Article II Occupation Court.

Although the "Occupying Power is […] free to decide whether or not the competent courts of appeal are to sit in occupied territory," Article 66 of the *Fourth Geneva Convention* "states that they should 'preferably' sit in the occupied country; this would be likely to provide the protected persons with additional safeguards." *See* Jean S. Pictet, *Commentary IV Geneva Convention* (1958), 341. The United States has not established "competent courts of appeal" in the Hawaiian Kingdom or in the United States to address the Hawaiian Kingdom's instant appeal.

Consequently, the Court's disregard of obligations mandated under international law, in its refusal to transform, and the inability of Plaintiff to appeal to an Article II appellate court has willfully deprived Plaintiff of its "rights of fair

and regular trial," thus being a "grave breach" of the 1949 Fourth Geneva Convention, Article 147, 6.3 U.S.T. 3516, 3618 (1955); 18 U.S.C. §2441(c)(1).

In accordance with common Article 3 of the Geneva Conventions, only a "regularly constituted court" may pass judgment. This Court, while situated in the territory of the Hawaiian Kingdom, was established by virtue of a United States municipal law (*An Act to provide for the admission of the State of Hawaii into the Union*, section 9, Pub. L. 86-4, 73 Stat. 4, 8 (1959)), which cannot "extend beyond [U.S. territory] […] [and] can have no force to control the sovereignty or rights of any other nation within its own jurisdiction." *The Apollon*, 22 U.S. 362, 370 (1824); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[n]either the [federal] Constitution nor the [federal] laws passed in pursuance of it have any force in foreign territory"); *In Re Francis de Flanchet*, 2 Haw. 96, 108-109 (1858) ("[t]he laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction"); see also Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," 12 *Op. O.L.C.* 238, 342, 252 (1988) regarding the annexation of Hawai'i by a joint resolution ("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. […] It is therefore unclear which constitutional power of Congress exercised when it acquired Hawaii by joint resolution."). Kmiec further concluded, "[t]he clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, the President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.' U.S. Const. art. II, §2, cl. 2. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either purchase or conquest." *Id*., 247. Neither the 1898 Joint Resolution of annexation nor the 1959 Hawai'i Admissions Act come under the treaty making power of the President. Therefore, this Court is not a "regularly constituted court."

In *Hamden v. Rumsfeld*, 548 U.S. 1, 69 (2006), the Supreme Court addressed what constitutes a "regularly constituted court" under international law.

> The [International Committee of the Red Cross] commentary accompanying a provision of the Fourth Geneva Convention […] defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV [1949 Geneva Convention IV] Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted"); see also *Yamashita,* 327 U.S., at 44, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for a particular trial"). And

> one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

This Court was not "established and organized in accordance with the laws and procedures already in force" in the Hawaiian Kingdom, nor "in accordance with the recognized principles governing the administration of justice." Accordingly, the Hawaiian Kingdom's notice of appeal is submitted for purposes of preserving the record of these proceedings in its appeal until this Court transforms or a competent Article II appellate court is established in compliance with international humanitarian law and Hawaiian Kingdom law.

The Court can learn from the Hawaiian Kingdom Supreme Court, in *Shillaber v. Waldo et al.*, 1 Haw. 31, 32 (1848), where Chief Justice William Lee stated, "In the language of another, 'Let justice be done though the heavens fall.' Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequences."

DATED: Honolulu, Hawai‘i, April 24, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

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