WAR CRIMINAL REPORT NO. 24-0001

The War Crime by Omission for willful failure to establish a military government

THE ROYAL COMMISSION OF INQUIRY:

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

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Dr. David Keanu Sai, Ph.D.
HEAD, ROYAL COMMISSION OF INQUIRY

Dr. Federico Lenzerini, Ph.D.
DEPUTY HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

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WAR CRIMINAL REPORT No. 24-0001

GUILTY OF WAR CRIME: Major General KENNETH S. HARA as the Adjutant General of the State of Hawai‘i

WAR CRIME COMMITTED: War crime by omission for *willful failure to establish a military government*

LOCATION OF WAR CRIME: Islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll[1]

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry ("RCI") on the war crime by omission for willful failure to obey an Army regulation and dereliction of duty addresses the willful omission to establish a military government of Hawai‘i imposed by international humanitarian law and the law of occupation upon Major General Kenneth S. Hara as the Adjutant General of the State of Hawai‘i ("MG Hara"). MG Hara's authority extends over 10,931 square miles, which include the islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll. This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,[2] which has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 ("1907 Hague Regulations"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in

[1] See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.
[2] Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).
[3] 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); see also Proclamation of the Council of Regency of 17 April 2019 establishing the Royal Commission of Inquiry (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

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Time of War, 1949 ("Fourth Geneva Convention").[4] All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are imposed upon an occupying Power. Only the Fourth Geneva Convention contains provisions that can be described as penal or criminal, by which responsibility is imposed upon individuals. Article 147 of the Fourth Geneva Convention provides a list of *grave breaches*, that is, violations of the Convention that incur individual criminal responsibility and that are commonly known as *war crimes*: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

According to Schindler, "the existence of an [international] armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. [...] Any kind of use of arms between two States brings the Conventions into effect."[5] Casey-Maslen further concludes that an international armed conflict "also exists whenever one state uses any form of armed force against another state, irrespective of whether the latter state fights back."[6]

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[7] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was […] an act of war,"[8] which coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "[n]ow, 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

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[4] The Royal Commission of Inquiry's governing law as to war crimes under customary international law is drawn from Professor William Schabas' legal opinion on war crimes. 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* 151 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[5] Dietrich Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols," *Recueil des cours, Hague Academy of International Law* 131 (1979).

[6] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).

[7] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 451 (1895) ("Executive Documents") (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).

[8] *Id*.

representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[9]

Military occupation stems from an international armed conflict under international humanitarian law, and the law of occupation is triggered when the occupying State obtains effective control of the territory (or part of the territory) of the occupied State pursuant to Article 42 of the 1907 Hague Regulations. By virtue of the conditional surrender on the 17th, the United States came into effective control of Hawaiian territory pending a treaty of peace. No treaty of peace has been adopted since then, and the occupation became prolonged.

There are other treaties that codify war crimes relevant to the conduct of an occupying Power but these have not been ratified by the United States. This notwithstanding, the United States is bound by the pre-existing rules of customary international law corresponding to the following article. Article 85 of the first Additional Protocol to the Geneva Conventions of 1977 defines the following as *grave breaches*, producing individual criminal responsibility when perpetrated against "persons in the power of an adverse Party," including situations of occupation:

> (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
> (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
> (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
> (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
> (e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

Some of these war crimes are listed in the Rome Statute of the International Criminal Court but it, too, has not been ratified by the United States.

As previously noted, in addition to crimes listed in applicable treaties, war crimes are also prohibited by customary international law. Customary international law applies generally to States regardless of whether they have ratified relevant treaties. The customary law of war crimes is thus

[9] *Id*., 586.

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applicable to the situation in Hawai'i. Many of the war crimes set out in the first Additional Protocol and in the Rome Statute codify pre-existing customary international law and are, therefore, applicable to the United States despite its failure to ratify the relevant treaties.

Crimes under general customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.[10] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[11] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized 'a penal offence, under national or international law' where the crime was not codified but rather was recognized under international law.

The International Military Tribunal ("the Nuremberg Tribunal") was empowered to exercise jurisdiction over "violations of the laws or customs of war." Article VI(b) of the Charter of the Tribunal provided a list of war crimes but specified that "[s]uch violations shall include, but not be limited to," confirming that the Tribunal had authority to convict persons for crimes under customary international law. The United States is a party to the London Agreement, to which the Charter of the International Military Tribunal is annexed. The corresponding provision in the Charter of the International Military Tribunal for the Far East ("the Tokyo Tribunal") does not even provide a list of war crimes, confining itself to authorizing the prosecution of "violations of the laws or customs of war."

More recently, the International Criminal Tribunal for the former Yugoslavia ("ICTY") was empowered to exercise jurisdiction over "violations of the laws or customs of war." Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in Security Council Resolution 827, listed several such violations but specified that the enumeration was not exhaustive. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the

[10] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I: Rules, 568-603 (2005).

[11] See ICRC concerning the identification of rules of customary international humanitarian law (online at https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf; and https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf).

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crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[12]

The Appeals Chamber of the ICTY explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to trigger individual criminal responsibility, the Tribunal said that the "violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[13] As an example of a violation that would not be serious enough, it provided the example of the appropriation of a loaf of bread belonging to a private individual by a combatant in occupied territory. It said that to meet the threshold of seriousness, it was not necessary for violations to result in death or physical injury, or even the risk thereof, although breaches of rules protecting important values often result in distress and anxiety for the victims.[14] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying Power,[15] there is no authority to support this rule being considered a war crime for which individuals are punishable. Moreover, the incidents of coerced swearing of allegiance in Hawai'i appear to date to the late nineteenth century, making criminal prosecution today entirely theoretical, as explained further below.

Evidence of recognition of crimes under customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of "violations of the laws and customs of war" was developed by the Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions of 1899 and 1907, although the preparatory work does not provide any precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was "not regarded as complete and exhaustive."[16] The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

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[12] *Prosecutor v. Brdanin*, Judgment of 1 September 2004 (Trial Chamber II), para. 595, and in *Prosecutor v. Strugar*, judgment of 31 January 2005 (Trial Chamber II), para. 229.

[13] *Kunarac, Kovac and Vokovic*, (Appeals Chamber), para. 66 (12 June 2002), "Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."

[14] *Prosecutor v.* Tadić (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).

[15] 1907 Hague Regulations, 3 *Martens Nouveau Recueil* (3d) 461, Art. 45. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 *British Foreign and State Treaties* 988.

[16] Violations of the Laws and Customs of War, *Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*, Conference of Paris, 1919 18 (1919) ("Commission of Responsibilities").

> Murders and massacres; systematic terrorism.
> Torture of civilians.
> Deliberate starvation of civilians.
> Rape.
> Abduction of girls and women for the purpose of enforced prostitution.
> Deportation of civilians.
> Internment of civilians under inhuman conditions.
> Forced labour of civilians in connection with the military operations of the enemy.
> Usurpation of sovereignty during military occupation.
> Compulsory enlistment of soldiers among the inhabitants of occupied territory.
> Attempts to denationalize the inhabitants of occupied territory.
> Pillage.
> Confiscation of property.
> Exaction of illegitimate or of exorbitant contributions and regulations.
> Debasement of the currency, and issue of spurious currency.
> Imposition of collective penalties.
> Wanton destruction of religious, charitable, educational, and historic buildings and monuments.[17]

Temporal issues

As a preliminary matter, two temporal issues require attention. First, international criminal law, like criminal law in general, is a dynamic phenomenon. Conduct that may not have been criminal at a certain time can become so, reflecting changing values and social development, just as certain acts may be decriminalized. It is today widely recognized that the recruitment and active use of child soldiers is an international crime. A century ago, the practice was not necessarily viewed in the same way. There is no indication of prosecution of child soldier-related offences concerning the Second World War, for example. Similarly, some acts that were once prohibited and that might even be viewed as criminal are now accepted as features of modern warfare.

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[18] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. It should also be noted that in 2022, Germany prosecuted a 97-year-old woman for Nazi war crimes.[19] Since the RCI's establishment in 2019, it serves little purpose to consider the

[17] *Id.*, 17-18
[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
[19] Reuters, *Former concentration camp secretary, 97, convicted of Nazi war crimes* (Dec. 20, 2022) (online at https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/#:~:text=BERLIN%2C%20Dec%2020%20(Reuters),for%20World%20War%20Two%20crimes.).

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international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary international law.[20] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[21] 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."[22]

The Duty of the Occupant to Establish a Military Government

The state of war between the Hawaiian Kingdom and the United States was triggered by the United States' *acts of war* committed by U.S. Marines in 1893. After completing a presidential investigation, President Grover Cleveland stated to the Congress, "[a]nd so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an act of war."[23] This invasion forced Queen Lili'uokalani to conditionally surrender to the United States on 17 January 1893, calling upon the President to investigate the actions taken by U.S. Minister John Stevens and the Marines that were landed by Minister Steven's orders, and, thereafter, to reinstate her as the Executive Monarch.

President Cleveland's investigation led to an agreement of restoration on 18 December 1893, but it was never implemented. Unlike the German situation where the military government under General Eisenhower, as the Military Governor, administered German laws after the surrender on 8 May 1945 until 23 May 1949, the United States did not administer the laws of the Hawaiian

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[20] *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, 286 (1999).
[21] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).
[22] Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.
[23] Executive Documents, 451.

Kingdom after the surrender but rather allowed their surrogate, calling itself the provisional government, to maintain control until the United States unilaterally annexed Hawaiian territory by congressional legislation on 7 July 1898.[24] According to President Cleveland, the "provisional government owes its existence to an armed invasion by the United States."[25] Instead of establishing a military government, the United States began to impose its municipal legislation over Hawaiian territory under *An Act To provide a government for the Territory of Hawaii* in 1900,[26] and *An Act To provide for the admission of the State of Hawaii into Union* in 1959.[27]

As in the case of the belligerent occupation of Germany after the defeat of the Nazi regime, Brownlie explains that the "very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty."[28] The Hawaiian Kingdom never consented to transferring its sovereignty to the United States and remains an occupied State.

Despite the prolonged nature of the occupation and 131 years of non-compliance with the law of occupation, there are two fundamental rules that prevail: (1) to protect the sovereign rights of the legitimate government of the occupied State; and (2) to protect the inhabitants of the occupied State from being exploited. From these two rules, the 1907 Hague Regulations and the Fourth Geneva Convention circumscribe the conduct and actions of a military government, notwithstanding the failure by the occupant to protect the rights of the occupied government and the inhabitants since 1893. These rights remain unaffected despite over a century of violating them. The failure to establish a military government facilitated the violations and constitutes a war crime by omission.

The law of occupation does not give the occupant unlimited power over the inhabitants of the occupied State. As President McKinley interpreted, this customary law of occupation that predates the 1899 and 1907 Hague Regulations during the Spanish-American War, the inhabitants of occupied territory "are entitled to security in their persons and property and in all their private rights and relations,"[29] and it is the duty of the commander of the occupant "to protect them in their homes, in their employments, and in their personal and religious beliefs."[30] Furthermore, "the municipal laws of the conquered territory, such as affect private rights of person and property and

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[24] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).
[25] Executive Documents, 454.
[26] 31 Stat. 141 (1900).
[27] 73 Stat. 4 (1959).
[28] Ian Brownlie, Principles of Public International Law 109 (4th ed., 1990).
[29] General Orders No. 101, 18 July 1898, *Foreign Relations of the United States, 1898*, 783. General Orders No. 101 is also reprinted in *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[30] *Id*.

provide for the punishment of crime, are considered as continuing in force"[31] and are "to be administered by the ordinary tribunals, substantially as they were before the occupation."[32]

United States practice under the law of occupation confirms that sovereignty remains in the occupied State, because, according to Army regulations, "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"[33] through effective control of the territory of the occupied State.

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over a territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by the law of armed conflict while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, "[f]rom a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction."[34]

The 1907 Hague Regulations assumed that after the occupant gains effective control of a territory it should establish its authority by establishing a system of direct administration. Since the Second World War, United States practice of a system of direct administration is for the Army to establish a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. This was acknowledged by letter from U.S. President Roosevelt to Secretary of War Henry Stimson dated November 10, 1943, where the President stated, "[a]lthough other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden."[35] Military governors that preside over a military government are general officers of the Army.

Under Article 43, the authority to establish a military government is with the occupant that is physically on the ground—colloquially referred to in the Army as "boots on the ground." Professor Benvenisti explains that "[t]his is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the 'occupying State' as the authority in power, but the delegates preferred to change the reference to 'the occupant.' This insistence on the distinct character of the occupation

[31] *Id*.
[32] *Id*.
[33] Department of the Army, Field Manual 27-10, *The Law of Land Warfare,* para. 358 (1956).
[34] William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).
[35] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* 22 (1975).

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administration should also be kept in practice."[36] This authority is triggered by Article 42, which states that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Only an "occupant," which is the "army," can establish a military government. Under international law, the occupant is an agent of the occupying State, and the responsibility for the acts of the former is attributed to the latter.

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals— FM 27-5, *Civil Affairs Military Government*[37] and FM 27-10, *The Law of Land Warfare*.[38] Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states that "[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."

According to the U.S. Manual for Courts-Martial United States, the duty to establish a military government may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.[39] A military government is the civilian government of the occupied State. Here follows the treaties and regulations to establish a military government in occupied territory.

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority."
- U.S. Department of Defense Directive 2000.13 states that "Civil affairs operations include…[e]stablish and conduct military government until civilian authority or government can be restored."
- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions oblige the occupant to administer the laws of the occupied State, after securing effective control of the territory according to Article 42 of the 1907 Hague Regulations.
- Para. 2-37, Army Field Manual 41-10, states that all "commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949."
- Para. 3, Army Field Manual 27-5, states that the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate

[36] Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).
[37] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947).
[38] Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956).
[39] Department of Defense, *Manual for Courts-Martial United States*, 2024 ed., IV-28.

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commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."

- Para. 62, Army Field Manual 27-10, states that "[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory."
- Para. 2-18, Army Field Manual 3-57, states that "DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations]."

International humanitarian law is silent on a prolonged occupation because the authors of the 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Scobbie, "[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory."[40] The effective control by the United States since Queen Lili'uokalani's conditional surrender on January 17, 1893, "can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation."[41]

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law occupation, that was convened by the International Committee of the Red Cross in 2012, the experts "pointed out that the norms of occupation law, in particular Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, had originally been designed to regulate short-term occupations. However, the [experts] agreed that [international humanitarian law] did not set any limits to the time span of an occupation. It was therefore recognized that nothing under [international humanitarian law] would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances."[42] They also concluded that, since a prolonged occupation "could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation," there is "the need to interpret occupation law flexibly when an occupation persisted."[43] The prolonged occupation of the

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[40] Iain Scobbie, "International Law and the prolonged occupation of Palestine," *United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague*, 1 (May 20-22, 2015).
[41] Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).
[42] Report by Tristan Ferraro, legal advisor for the International Committee of the Red Cross, *Expert Meeting: Occupation and other forms of Administration of Foreign Territory* 72 (2012).
[43] *Id*.

Hawaiian Kingdom is, in fact, that case where drastic unlawful "transformations and changes in the occupied territory" occurred.

As the occupant in effective control of 10,931 square miles of Hawaiian territory, the State of Hawai'i, being the civilian government of the Hawaiian Kingdom that was unlawfully seized in 1893, is obligated to transform itself into a military government in order "to protect the sovereign rights of the legitimate government of the Occupied State, and […] to protect the inhabitants of the Occupied State from being exploited." The military government has centralized control, headed by a military governor, and by virtue of this position the military governor has "supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."[44]

The reasoning for the centralized control of authority is so that the military government can effectively respond to situations that are fluid in nature. Under the law of occupation, this authority by the occupant, according to Lenzerini, is to be shared with the Council of Regency, being the government of the occupied State.[45] As the last word concerning any acts relating to the administration of the occupied territory is with the occupant, "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."[46]

War Crime of Usurpation of Sovereignty during Military Occupation

The war crime of *usurpation of sovereignty during military occupation* appears on the list issued by the Commission on Responsibilities. The Commission did not indicate the source of this crime in treaty law. It would appear to be Article 43 of the Hague Regulations: "[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."

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a

[44] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government,* para. 3 (1947).
[45] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333, 331 (2021).
[46] International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report,* Geneva, 20 (2012), online at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.

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subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[47]

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that "[t]his rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[48] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[49] In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.[50]

Article 64 of the Fourth Geneva Convention imposes a similar norm:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.
> Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces

[47] Commission of Responsibilities, 38.
[48] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[49] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[50] Australia's War Crimes Act of 1845, *Annex—Australian Law Concerning Trials of War Criminals by Military Courts* (online at https://www.legal-tools.org/doc/45b4ed/pdf/).

or administration, and likewise of the establishments and lines of communication used by them.

The Commentary to the Fourth Geneva Convention describes Article 64 as giving "a more precise and detailed form" to Article 43 of the 1907 Hague Regulations.[51]

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubts on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of usurpation of *sovereignty during military occupation* is undoubtedly a war crime under "particular" customary international law. According to the International Law Commission, "[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[52] In the 1919 report of the Commission on Responsibilities, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting Heads of State for the listed war crimes by conduct of omission.[53]

The RCI views *usurpation of sovereignty during military occupation* as a war crime under "particular" customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers, and Associated Powers that include Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Thailand, Czech Republic, formerly known as Czechoslovakia, and Uruguay.[54] The failure by the occupant to establish a military government has allowed for the unlawful imposition of American municipal laws over Hawaiian territory.

Territorial Sovereignty of a State

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the

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[51] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).
[52] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[53] Commission of Responsibilities, Annex II, 58-79.
[54] Treaty of Versailles (1919), preamble.

principles of international law."[55] The Court also concluded that "[t]he 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."[56] The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied territories.[57] Furthermore, under international law, the Permanent Court of International Justice stated:

> Now 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.[58]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and serves as a source for the commission of other war crimes within the territory of an occupied State, *i.e. compulsory enlistment*, *denationalization*, *pillage*, *destruction of property*, *deprivation of fair and regular trial*, *deporting civilians of the occupied territory*, and *transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions of the occupying State is addressed by Professor Benvenisti:

> The occupant 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.[59]

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Usurpation of sovereignty during military occupation came before the Permanent Court of Arbitration ("PCA") in 1999. In *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration convened an arbitral tribunal to resolve a dispute where Larsen, the claimant, alleged that the Government of the Hawaiian Kingdom, by its Council of Regency, the respondent, was liable "for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom."[60] The PCA accepted the case as a dispute

[55] *United States v. Curtiss Wright Export Corp*., 299 U.S. 304, 318 (1936).
[56] *The Apollon*, 22 U.S. 362, 370 (1824).
[57] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[58] *Lotus* case (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).
[59] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[60] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom,* PCA Case no. 1999-01 (https://pca-cpa.org/en/cases/35/). Regarding the Permanent Court of Arbitration's institutional jurisdiction in acknowledging the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 PCA

between a "State" and a "private party" and hence acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "[p]ursuant to article 47 of the 1907 Convention."[61] According to Bederman and Hilbert:

> At the center of the PCA proceeding was the argument that […] the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawai'i [and its County of Hawai'i].[62]

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the acting party, but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau of the PCA, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but its denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.[63] The Tribunal explained that it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[64] Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the Hawaiian situation, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. The RCI sees *usurpation of sovereignty* as a continuing offence, committed as long as the factual situation determined by *usurpation of sovereignty* itself persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has

Convention, 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 (2022).

[61] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

[62] David J. Bederman and Kurt R. Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii," 95 *American Journal of International Law* 927-933, 928 (2001).

[63] David Keanu Sai, "Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 25-26 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[64] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports, 596.

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been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is "characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred." Therefore, it is not "an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation."[65]

As an ongoing crime, the *actus reus* of the offence of *usurpation of sovereignty during military occupation* 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. The occupying Power is, therefore, entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.[66] The occupying Power is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights law.

Given that this is essentially a crime involving State action or policy or the action or policies of an occupying State's proxies, to be prosecuted a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights.

The War Crime by Omission for Failure to Obey a Regulation and Dereliction of Duty

According to the Uniform Code of Military Justice ("UCMJ"), dereliction of duty comes under the failure to obey an order or regulation. There is no *mens rea* for this offense. Military law maintains obedience and discipline to ensure that servicemembers are ready to perform their mission. A negligent dereliction offense provides commanders with one means to assure that the objectives of the military mission are achieved by holding servicemembers accountable for performance of their military duties, whether by court-martial or nonjudicial punishment, under Article 15, UCMJ.[67]

The war crime by omission has a direct link to the offenses of failure to obey a regulation and willful dereliction of duty, which, in this case, is the establishment of a military government. Para. 3, Army Field Manual 27-5, that states the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority,

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[65] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.
[66] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.
[67] See *United States v. Blanks*, 77 M.J. 239 (2018).

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limited only by the laws and customs of war and by directives from higher authority." The willful failure to follow this Army regulation in performing this duty has led to the continuing commission of the war crime of usurpation of sovereignty, which, by its nature, has set in motion "secondary" war crimes, *e.g.* deprivation of a fair and regular trial, destruction of property, unlawful confinement, *etc.* The failure or omission to establish a military government is a failure to obey a regulation and willful dereliction of duty.

Elements and Punishment for Failure to Obey a Regulation

Article 92(1) of the UCMJ provides the elements of the offense for failure to obey a regulation: (a) that there was in effect a certain lawful general order or regulation; (b) that the accused had a duty to obey it; and (c) that the accused violated or failed to obey the order or regulation. Article 92(1) also provides that the maximum punishment for failure to obey a regulation is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

Elements and Punishment for Dereliction in the Performance of Duties

Article 92(3) of the UCMJ provides the elements of the offense for dereliction in the performance of duties: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties. Article 92(3) also provides that the maximum punishment for willful dereliction in the performance of duties is bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

APPLICATION

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The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international law. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation. In phase II, the Council of Regency will invoke paragraph 495, U.S. Army Field Manual 27-10, which states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of […] [p]ublication of the facts, with a view to influencing public opinion against the offending belligerent."

Implementation of phase II was initiated at the University of Hawaiʻi at Mānoa, when the undersigned entered the political science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawaiʻi*,[68] to *Nation Within—The History of the American Occupation of Hawaiʻi*.[69] Coffman explained the change in his note on the second edition:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawaiʻi. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawaiʻi. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawaiʻi, the might of the United States does not make it right.[70]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva, dated 25 February 2018, to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawaiʻi.[71] Dr. deZayas stated:

> As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, The United Nations Human Rights Committee Case Law 1977-2008, and currently serving as the UN Independent Expert on the promotion of a democratic and equitable international order, I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but

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[68] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawaiʻi* (1998).
[69] Tom Coffman, *Nation Within: The History of the American Occupation of Hawaiʻi* (2nd ed. 2009). Duke University Press published the second edition in 2016.
[70] *Id*., xvi.
[71] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawaiʻi (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

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

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[72] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."[73]

In a letter to Governor Ige dated 10 November 2020, the NLG called upon the governor to begin to comply with international humanitarian by administering the laws of the occupied State. The NLG letter concluded:

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into 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. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that

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[72] Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf).
[73] National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/).

> international humanitarian law and human rights law have on the State of Hawaiʻi and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and is accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[74] In its resolution, the IADL "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ") —who is also a non-governmental organization with consultative status with the United Nations ECOSOC and is accredited as an observer in the Human Rights Council's sessions, sent a joint letter, dated 3 March 2022, to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[75] In its joint letter, the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."

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

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

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[74] International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/).
[75] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

> The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.
>
> For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

Notwithstanding the actions taken to seek compliance with international humanitarian law and the law of occupation, the United States, the State of Hawaiʻi, and its Counties refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*.

This omission of a duty to establish a military government prompted the undersigned, in my capacity as Head of the RCI, to schedule a meeting with MG Hara. The meeting was set for 13 April 2023, at 1:30 pm, at the Grand Naniloa Hotel in Hilo, Island of Hawaiʻi, and was reduced to writing in my letter to MG Hara dated 11 May 2023, attached herein as Enclosure 1. The subject of the meeting were the factual circumstances that established the existence of the United States military occupation of the Hawaiian Kingdom since 17 January 1893, and the omission by the United States to comply with customary international law by establishing a military government to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty had been entered into between the Hawaiian Kingdom and the United States.

In this meeting, the undesigned specifically stated to MG Hara that the failure to establish a military government is a war crime by omission. This is why the undersigned recommended to MG Hara that he should task his Staff Judge Advocate, Lieutenant Colonel Lloyd Phelps ("LTC Phelps"), to do his due diligence regarding the information provided him in the meeting. His task would be to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. The undersigned provided three weeks from the date of the letter, 1 June 2023, to complete his due diligence. Both MG Hara and the undersigned agreed that we would communicate with each other through an interlocutor we both know, John "Doza" Enos.

On 6 June 2023, the undersigned was made aware by the interlocutor that MG Hara stated that Phelps had made strides in his assigned task but still needs to complete his findings. The undersigned extended the timeline to 20 June, as evidenced in my letter to MG Hara dated 30 June 2023, attached herein as Enclosure 4. Starting in July, communications to MG Hara would be done

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by the undersigned as Chair of the Council of Regency. In a letter to MG Hara dated 7 July 2023, attached herein as Enclosure 5, the undersigned stated:

> Because the law of occupation "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," I am communicating with you in my capacity as Chairman of the Council of Regency representing the occupied government and not as Head of the Royal Commission of Inquiry.
>
> It has been conveyed to me that LTC Phelps has not provided you with rebuttable evidence that the Hawaiian Kingdom has ceased to exist as a State and subject of international law. Therefore, the Hawaiian Kingdom continues to exist as a State since the nineteenth century and its current legal status is that of an occupied State.

Since he was unable to provide any rebuttable evidence refuting the presumption of continuity of the Hawaiian Kingdom, the undersigned conveyed to MG Hara, through the interlocutor, that he had until 31 July 2023 to make a command decision regarding the establishment of a military government, attached herein as Enclosure 6. In a letter dated 24 July 2023, MG Hara was made aware of the significance of 31 July, which is a national holiday in the Hawaiian Kingdom, where the British occupation of the Hawaiian Islands came to an end in 1843, attached herein as Enclosure 7. In a letter dated 1 August 2023, the undersigned stated that he was told by the interlocutor that MG Hara acknowledged in a meeting with the interlocutor on 27 July 2023 that the Hawaiian Kingdom continues to exist. This satisfied the 31 July suspense date, attached herein as Enclosure 8. LTC Phelps was unable to provide rebuttable evidence as to the presumption of the continuity of the Hawaiian State and MG Hara's acknowledgement affirms that position.

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As Crawford explains, "[t]here is a presumption that the State continues to exist, with its right and obligations […] despite a period in which there is […] no effective government."[76] Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State."[77] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining 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."[78]

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[76] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[77] *Id*.
[78] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

In the last letter from the undersigned to MG Hara, dated 21 August 2023, attached herein as Enclosure 9, MG Hara was made aware of the Council of Regency's meeting on 14 August 2023, where an "Operational Plan for Transitioning the State of Hawai'i into a Military Government" was approved, which was enclosed in that letter. MG Hara was urgently called upon to establish a military government in light of the Lahaina brushfire. The letter stated:

> The insurgents, who were not held to account for their treasonous actions in 1893, were allowed by the United States to control and exploit the resources of the Hawaiian Kingdom and its inhabitants after the Hawaiian government was unlawfully overthrown by United States troops. Some of these insurgents came to be known as the Big Five, a collection of five self-serving large businesses, that wielded considerable political and economic power after 1893. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Company, American Factors (now Amfac), and Theo H. Davies & Company. One of the Big Five, Amfac, acquired an interest in Pioneer Mill Company in 1918, and in 1960 became a wholly owned subsidiary of Amfac. Pioneer Mill Company operated in West Maui with its headquarters in Lahaina. In 1885, Pioneer Mill Company was cultivating 600 of the 900 acres owned by the company and by 1910, 8,000 acres were devoted to growing sugar cane. In 1931, the Olowalu Company was purchased by Pioneer Mill Company, adding 1,200 acres of sugar cane land to the plantation. By 1935, over 10,000 acres, half-owned and half leased, were producing sugar cane for Pioneer Mill. To maintain its plantations, water was diverted, and certain lands of west Maui became dry.
>
> The Lahaina wildfire's tragic outcome also draws attention to the exploitation of the resources of west Maui and its inhabitants—water and land. West Maui Land Company, Inc., became the successor to Pioneer Mill and its subsidiary the Launiupoko Irrigation Company. When the sugar plantation closed in 1999, it was replaced with real estate development and water management. Instead of diverting water to the sugar plantation, it began to divert water to big corporations, hotels, golf courses, and luxury subdivisions. As reported by Hawai'i Public Radio, "Lahaina was formerly the 'Venice of the Pacific,' an area famed for its lush environment, natural and cultural resources, and its abundant water resources in particular." Lahaina became a deadly victim of water diversion and exploitation. It should be noted that Lahaina is but a microcosm of the exploitation of the resources of the Hawaiian Kingdom and its inhabitants throughout the Hawaiian Islands for the past century to benefit the American economy in violation of the law of occupation.
>
> Considering the devastation and tragedy of the Lahaina wildfire, your duty is only amplified and made much more urgent. It has been reported that the west Maui community, to their detriment, are frustrated with the lack of centralized control by departments and agencies of the federal government, the State of Hawai'i, and the County of Maui. The law of occupation will not change the support of these departments and agencies, but rather only change the dynamics of leadership under the centralized control by yourself as the military governor. The operational plan provides a comprehensive process of transition with essential tasks and implied tasks to be carried out.

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> The establishment of a military government would also put an end to land developers approaching victims of the fire who lost their homes to purchase their property. While land titles were incapable of being conveyed after January 17, 1893, for want of a lawful government and its notaries public, titles are capable of being remedied under Hawaiian Kingdom law and economic relief by title insurance policies. It is unfortunate that the tragedy of Lahaina has become an urgency for the State of Hawaiʻi to begin to comply with the law of occupation and establish a military government. To not do so is a war crime of omission.
>
> Given the severity of the situation in Maui and the time factor for aid to the victims, the Council of Regency respectfully calls upon you to schedule a meeting to go over its proposed operational plan and its execution.

MG Hara has not responded to the Council of Regency's urgent request to have a meeting to go over the operational plan to conform with the law of occupation in establishing a military government together with its essential and implied tasks. The interlocutor conveyed to the undersigned that MG Hara is concerned about usurping the authority of State of Hawaiʻi Governor Josh Green. This is not a valid excuse because to usurp authority is to assume the Governor has lawful authority.

All authority of the State of Hawaiʻi is by virtue of American municipal laws, giving rise to war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of Hawaiʻi is invalid because it never legally existed in the first place—*ex injuria jus non oritur* (law does not arise from injustice). What remains valid, however, is the authority of the State of Hawaiʻi Department of Defense, which is its Army and Air National Guard. The authority of both branches of the military continues as members of the United States Armed Forces that are situated in the occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the Army.

On May 24, 2024, MG Hara publicly announced that he will be resigning and then retiring as the Adjutant General on October 1, 2024, and retire from the Army on November 1, 2024, attached herein as Enclosure 10. His public announcement is evidence of willful disobeying an Army regulation and dereliction of duty, which constitutes the war crime by omission.

The RCI had been made aware that MG Hara previously informed a former Adjutant General that State of Hawaiʻi Attorney General Anne E. Lopez instructed him and Deputy Adjutant General Brigadier General Stephen Logan ("BG Logan") to ignore the efforts calling upon MG Hara to perform his military duty of transforming the State of Hawaiʻi into a military government. This prompted the undersigned to send a letter, dated 1 July 2024, to MG Hara, attached herein as Enclosure 11. The RCI stated:

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> Notwithstanding your failure to obey an Army regulation and dereliction of duty, both being offenses under the UCMJ and the war crime by omission, you are the most senior general officer of the State of Hawai'i Department of Defense. And despite your public announcement that you will be retiring as the Adjutant General on October 1, 2024, and resigning from the U.S. Army on November 1, 2024, you remain the theater commander over the occupied territory of the Hawaiian Kingdom. You are, therefore, responsible for establishing a military government in accordance with paragraph 3, FM 27-5. Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention imposes the obligation on the commander in occupied territory to establish a military government to administer the laws of the occupied State. Furthermore, paragraph 2-37, FM 41-10, states that "commanders are under a legal obligation imposed by international law."
>
> However, since paragraph 3 of FM 27-5 also states that you also have "authority to delegate authority and title, in whole or in part, to a subordinate commander" to perform the duty of establishing a military government. The RCI will consider this provision as time sensitive to conclude willfulness, on your part, to not delegate authority and title, thereby, completing the elements necessary for the war crime by omission. Therefore, you will delegate full authority and title to Brigadier General Stephen Logan so that he can establish a Military Government of Hawai'i no later than 1200 hours on July 31, 2024. BG Logan will be guided in the establishment of a military government by the RCI's memorandum on bringing the American occupation of Hawai'i to an end by establishing an American military government (June 22, 2024), and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).

On 3 July 2024, the RCI sent another letter to MG Hara to provide him a legal basis for disobeying Attorney General Lopez's instructions, attached herein as Enclosure 12. The letter stated:

> You currently have two conflicting duties to perform—follow the order given to you by the Attorney General or obey an Army regulation. To follow the former, you incur criminal culpability for the war crime by omission. To follow the latter, you will not incur criminal culpability. As you are aware, soldiers must obey an order from a superior, but if complying with that order would require the commission of a war crime, then the order is not lawful, and it, therefore, must be disobeyed. The question to be asked of the Attorney General is whether the State of Hawai'i is within a foreign State's territory or whether it is within the territory of the United States. If the Hawaiian Islands is within the territory of the United States, then the Attorney General's instruction can be considered a lawful order, but if the Hawaiian Islands constitute the territory of the Hawaiian Kingdom, an occupied State, then the order is unlawful, and must be disobeyed.
>
> Because you have been made aware, and acknowledged on July 27, 2023, that the Hawaiian Kingdom continues to exist as a matter of international law, you must question the Attorney General's instruction to you. Just as I recommended to you, when we first met at the Grand Naniloa Hotel in Hilo on April 13, 2023, to have your Staff Judge Advocate refute the information I provided you regarding the presumed existence of the Hawaiian Kingdom as

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> an occupied State under international law, I would strongly recommend you request the Attorney General to do the same.

The letter concluded, "[y]ou have until July 31, 2024, to either make a command decision to delegate your authority to BG Logan and retire, or should you refuse to delegate your authority, then you will be the subject of a war criminal report for the war crime by omission. Your refusal will meet the requisite element of 'willfulness' for the war crime by omission."

As of 1200 hours, on 31 July 2024, MG Hara did not delegate full authority and title to BG Logan. As such, MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission.

Guilty of the War Crime by Omission

Since acknowledging the Hawaiian Kingdom's continued existence as a State on 27 July 2023, MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. MG Hara, in his official capacity as the senior member of the State of Hawai'i Department of Defense, has met the requisite elements for the war crime by omission through willfully disobeying an Army regulation and willfully derelict in his duty to establish a military government and is guilty of the war crime by omission. These offenses do not have the requisite element of *mens rea*.

The term "guilty," as used in the RCI war criminal reports, is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[79] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to have committed the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[80] According U.S. military law, MG Hara is accountable by court-martial or nonjudicial punishment under Article 15, UCMJ. Under international criminal law, MG Hara is subject to prosecution for the war crime by omission by a competent court or tribunal.

Elements for failure to obey a regulation:

a) That there was in effect a certain lawful general order or regulation (U.S. Department of Defense Directive 5100.01 and Para. 3, Army Field Manual 27-5);
b) That MG Hara had a duty to obey it; and
c) That MG Hara violated or failed to obey the order or regulation.

[79] Black's Law 708 (6th ed. 1990).
[80] *Id*.

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Elements for dereliction in the performance of duties:

a) That MG Hara had certain duties (U.S. Department of Defense Directive 5100.01 and Para. 3, Army Field Manual 27-5);
b) That MG Hara knew or reasonably should have known of the duties; and
c) That MG Hara was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

MG Hara has no claim to immunity from criminal jurisdiction and is subject to prosecution by foreign States under universal jurisdiction, if he is not prosecuted by the territorial State where the war crime had been committed, whether by a military government in the occupied State or by the government of the territorial State after the occupation comes to an end by a treaty of peace.

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

31 July 2024

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