H.E. DAVID KEANU SAI, PH.D.
Minister of Foreign Affairs *ad interim*
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/

29 October 2023

Brigadier General Lance Okamura
Director, Strategic Engagement,
Joint Task Force-Red Hill
Indo-Pacific Command

Re: Termination of the 1884 Supplemental Convention, also known as the Pearl Harbor Convention

Dear Brigadier General Okamura:

First, allow me to introduce myself. My name is Dr. David Keanu Sai, Ph.D., and I have been serving as the Hawaiian Kingdom's Minister of Foreign Affairs *ad interim* since 11 November 2019 after His Excellency Peter Umialiloa Sai, Minister of Foreign Affairs, died.[1] I also serve as Chairman of the Council of Regency, Minister of the Interior and Head of the Royal Commission of Inquiry. From 1999 to 2001 I also served as lead Agent for the Hawaiian Kingdom in arbitral proceedings—*Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration, PCA case no. 1999-01.[2] His Excellency Peter Umialiloa Sai served as First Deputy Agent. I am also a graduate of the Kamehameha Schools Kapālama, like yourself, KS'82.

The purpose of this letter is intended to acquaint you with information of the factual circumstances that has led to the termination of the 1884 Supplemental Convention (Pearl Harbor Supplemental Convention), which provided exclusive access for the United States to Pearl Harbor since 1887 under international law. The termination of the Pearl Harbor Supplemental Convention shall take place by 5:47am ET on 26 October 2024.

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

The 1875 Commercial Reciprocity Treaty,[3] and the Pearl Harbor Supplemental Convention,[4] between the Hawaiian Kingdom and the United States is what established the U.S. military presence in the Hawaiian Islands. The Pearl Harbor Supplemental Convention extended the duration of the 1875 Commercial Reciprocity Treaty an additional seven years until 1894. As a condition for the extension of the commercial treaty, the United States sought exclusive access to Pearl Harbor. Article II of the Pearl Harbor Supplemental Convention provides:

> His Majesty the King of the Hawaiian Islands grants to the Government of the United States the exclusive right to enter the harbor of Pearl River, in the Island of Oahu, and to establish and maintain there a coaling and repair station for the use of vessels of the United States, and to that end the United States may improve the entrance to said harbor and do all other things needful to the purpose aforesaid.

On 26 September 1887, King Kalākaua and his Cabinet Council concluded to add a note to the Pearl Harbor Convention before its ratification. According to the Cabinet Council minutes:

> The subject of discussion was the [U.S.] Senate amendment to the Reciprocity Treaty and after lengthy consideration it was decided that the Minister of Foreign Affairs should advise the Minister of Resident at Washington that His Majesty gave his consent to the amendment on the condition that the Secretary of State should accept a note explaining that the Hawaiian Government's understanding of the amendment was that Hawaiian Sovereignty and jurisdiction were not impaired that the Hawaiian Government was not bound to furnish land for any purpose and that the privilege to be granted should be coterminous with the Treaty."[5]

The Pearl Harbor Convention came into effect on 9 November 1887 after ratifications were exchanged in the city of Washington and would last for seven years and further until "either of the High Contracting Parties shall give notice to the other of its wish to terminate the same,"[6] where termination would commence twelve months after the notification is received by the other High Contracting Party. Although the Hawaiian government was unlawfully overthrown by the United States on 17 January 1893, the Hawaiian Kingdom as a State under international law continued to exist.

[3] 19 Stat. 625 (1875), Appendix 1.
[4] 25 Stat. 1399 (1884), Appendix 2.
[5] Hawaiian Kingdom, *Cabinet Council Minutes* 384, 26 Sep. 1887 (1874-1891).
[6] 25 Stat. 1399.

According to Professor Rim, the State continues "to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain."[7] In 1997, the Hawaiian government was restored *in situ* by a Regency under Hawaiian constitutional law and the doctrine of necessity in similar fashion to governments established in exile during the Second World War.[8] By virtue of this process, the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[9]

Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. While the last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917, the office of the Monarch remained vacant under Hawaiian constitutional law. There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,[10] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997.

The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[11] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the

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[7] 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).
[8] David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317-333 (2021), Appendix 3.
[9] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).
[10] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[11] M.J. Peterson, Recognition of Governments: Legal Doctrines and State Practice, 1815-1995 26 (1997).

Hawaiian Kingdom. According to United States foreign relations law, "[w]here a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[12]

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

> As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821, as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to their decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.[13]

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

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

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[12] *Restatement (Third)*, §203, comment c.
[13] F.E. Oppenheimer, "Governments and Authorities in Exile," 36 *American Journal of International Law* 568-595, 569 (1942).

According to Professor Lenzerini, based on the *doctrine of necessity*, "the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[14] He also concluded that the Regency "has the authority to represent the Hawaiian Kingdom as a State, which has been under a belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level."[15]

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[16] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes.[17] Article 47 states, "[t]he jurisdiction of the Permanent Court, may within the conditions laid down in the regulations, be extended to disputes between non-Contracting [States] or between Contracting [States] and non-Contracting [States], if the parties are agreed on recourse to this Tribunal."[18] This brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[19]

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 on 9 June 2000 after confirming the existence of the Hawaiian State and its government, the Council of

[14] Lenzerini, 324.
[15] *Id.*, 325.
[16] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[17] Permanent Court of Arbitration, *101st Annual Report*, Annex 2, p. 44, fn. 1 (2001) (online at https://docs.pca-cpa.org/2015/12/PCA-annual-report-2001.pdf).
[18] 36 Stat. 2199, 2224 (1907).
[19] Lenzerini, 322.

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."[20] As Professor Talmon states, the "government, consequently, possesses the *jus repraesentationis omnimodae*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile."[21]

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).[22]

It should also be noted that PCA also acknowledged the Hawaiian Kingdom to be a treaty partner with the United States to the 1849 Treaty of Friendship, Commerce and Navigation,[23] which the United States did not dispute. Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.[24]

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[20] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[21] Stefan Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile 115 (1998).
[22] *Id*.
[23] 9 Stat. 977 (1849), Appendix 4.
[24] Sai, The Royal Commission of Inquiry, 25-26.

Notice of Terminating the 1875 Commercial Reciprocity Treaty
And the Pearl Harbor Supplemental Convention

On 20 October 2023, the Hawaiian Kingdom, by its Council of Regency, proclaimed the termination of the 1875 Commercial Reciprocity Treaty and the Pearl Harbor Supplemental Convention in accordance with Article I of the said Pearl Harbor Supplemental Convention.[25] The following day, a notice of termination was sent, by courier United States Postal Service, to Secretary of State Antony J. Blinken. The notice of termination was received by the United States Department of State at 5:47am ET on 26 October 2023, which consequently triggered the tolling of twelve months after which the said Treaty and the Pearl Harbor Supplemental Convention would terminate, which is by 5:47am ET 26 October 2024.[26]

The reasoning behind the notice of termination was that the United States exploited and expanded its use of Pearl Harbor by establishing military bases and facilities throughout the Hawaiian Islands under the Indo-Pacific Command of the U.S. Department of Defense, thereby violating the Hawaiian Kingdom's note to the Pearl Harbor Convention "that the privilege to be granted should be coterminous with the Treaty." The expansion of military bases and facilities also constitute violations of Article 1 of the 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Although the Hawaiian Kingdom is not a Contracting State to the 1907 Hague Convention (V), it is mere codification of nineteenth century customary international law. On 7 April 1855, King Kamehameha IV proclaimed the foreign policy of the Kingdom:

> My policy, as regards all foreign nations, being that of peace, impartiality and neutrality, in the spirit of the Proclamation by the late King, of the 16th May last, and of the Resolutions of the Privy Council of the 15th June and 17th July, I have given to the President of the United States, at his request, my solemn adhesion to the rule, and to the principles establishing the rights of neutrals during war, contained in the Convention between his Majesty the Emperor of all the Russias and the United States, concluded in Washington on the 22nd July last.[27]

This policy of neutrality remained unchanged throughout the nineteenth century. Furthermore, the policy of neutrality by the Hawaiian Kingdom as a Neutral Power were inserted as treaty provisions in the Hawaiian-Swedish/Norwegian Treaty of 1852, the Hawaiian-Spanish Treaty of 1863, and the Hawaiian-German Treaty of 1879. In its treaty

[25] Proclamation Terminating the 1875 Commercial Reciprocity Treaty and its 1884 Supplemental Convention, Appendix 5.
[26] Sai to Blinken (21 Oct. 2023), with signed receipt (24 Oct. 2023), Appendix 6.
[27] Robert C. Lydecker, *Roster Legislatures of Hawaii—1841-1918* 57 (1918).

with Sweden/Norway, Article XV states, "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."

As a result of the termination of the treaty and its convention, all United States military forces in the Hawaiian Islands will be withdrawn in twelve months from 26 October 2023. On the withdrawal, the Council of Regency proclaimed:

> And, We do require that when the United States has received this notice of termination, it shall, prior to the expiration of twelve months in accordance with Article I of the 1884 Supplemental Convention, remove all movable property at its military facilities throughout the Hawaiian Islands, including unexploded munitions, and fuel, with the exception of real property attached to the land or erected on it, including man-made objects, such as buildings, homes, structures, roads, sewers, and fences, to include on other properties that have been or are currently under its supervision and command.

Not all military forces in the Hawaiian Islands are affected by the notice of termination. There are two military forces present within the Hawaiian Kingdom today. That of the United States Federal government called Title 10 United States Code ("USC") armed forces,[28] and that of the State of Hawai'i National Guard called Title 32 USC armed forces.[29] Title 10 troops are purely American in origin while the Title 32 troops are Hawaiian in origin, and, therefore, remain in the Hawaiian Islands to be called by its original designation—the Royal Guard.

Military Forces of the Hawaiian Kingdom

In 1845, the Hawaiian Kingdom organized its military under the command of the Governors of the several islands of Hawai'i, Maui, O'ahu and Kaua'i but subordinate to the Monarch. According to the statute, "male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective islands where they have their most usual domicil, whenever so required by proclamation of the governor thereof."[30] Those exempt from military duty included ministers of religion of every denomination, teachers, members of the Privy Council of State, executive department

[28] Title 10 of the United States Code outlines the role of the armed forces of the United States federal government.
[29] Title 32 of the United States Code outlines the role of the Army and Air National Guard of the States and Territories of the United States.
[30] "Statute Laws of His Majesty Kamehameha III," *Hawaiian Kingdom*, Vol. I 69 (1846).

heads, members of the House of Nobles and Representatives when in session, judges, sheriffs, notaries public, registers of wills and conveyances, collectors of customs, poundmasters and constables.[31]

In 1847, the *Polynesian* newspaper, a government newspaper, reported the standing army comprised of 682 of all ranks: the "corps which musters at the fort, including officers, 286; corps of King's Guards, including officers, 363; stationed at the battery, on Punch Bowl Hill, 33."[32] On 17 December 1852, King Kamehameha III, in Privy Council, established the First Hawaiian Cavalry, commanded by Captain Henry Sea.[33]

In 1886, the Legislature enacted *An Act to Organize the Military Forces of the Kingdom*, "for the purpose of more complete military organization in any case requiring recourse to arms and to maintain and provide a sufficient force for the internal security and good order of the Kingdom, and being also in pursuance of Article 26th of the Constitution."[34] The Act of 1886 established "a regular Military and Naval force, not to exceed two hundred and fifty men, rank and file," and the "term of enlistment shall be for five years, which term may be extended from time to time by re-enlistment."[35] This military force was headed by a Lieutenant General as Commander-in-Chief and the supreme command under the Executive Monarch as Generalissimo.[36] This military force was renamed the King's Royal Guard in 1890,[37] and the Executive Monarch was thereafter called the "Commander-in-Chief of all the Military Forces"[38] and not Generalissimo. While the King's Royal Guard was the only active military component of the kingdom,[39] there was a reserve force capable of being called to active duty. As previously stated, the statute provides that "[a]ll male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective islands where they have their most usual domicil, whenever so required by proclamation from the governor thereof."[40]

Upon ascending to the Throne on 29 January 1891, Queen Lili'uokalani, as the Executive Monarch, succeeded her predecessor King David Kalākaua as Commander-in-Chief of the Royal Guard. The command structure of the Royal Guard consisted of a Captain and two Lieutenants. These officers were authorized "to make, alter and revoke all regulations not

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[31] *Id*., 70.
[32] "Military," *Polynesian* 138 (9 Jan. 1847).
[33] "First Hawaiian Cavalry," *Polynesian* 130 (25 Dec. 1852).
[34] An Act to Organize the Military Forces of the Kingdom, Laws of His Majesty Kalakaua I 37 (1886).
[35] *Id*.
[36] *Id*., 38.
[37] *An Act to Provide for a Military Force to be Designated as the "King's Royal Guard,"* Laws of His Majesty Kalakaua I 107 (1890).
[38] *Id*.
[39] *Id*., 108.
[40] Section 3, *Appendix to the Civil Code*, Compiled Laws 493 (1884).

repugnant to the provisions of [the Act of 1890], concerning enlistment, discipline, exercises, accoutrements, arms and clothing and to make such other rules and orders as may be necessary to carry into effect the provisions of [the Act of 1890], and to provide and prescribe penalties for any violations of such regulations not extending to deprivation of life or limb, or the infliction of corporeal punishment."[41] All rules, regulations or orders required the approval of the Executive Monarch and was to be countersigned by the Minister of Foreign Affairs.[42]

On 17 January 1893, a small group of insurgents, with the protection of United States troops, declared the establishment of a provisional government whereby all "officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named persons: Queen Liliuokalani, Charles B. Wilson, Marshal, Samuel Parker, Minister of Foreign Affairs, W.H. Cornwell, Minister of Finance, John F. Colburn, Minister of the Interior, [and] Arthur P. Peterson, Attorney General, who are hereby removed from office."[43] The insurgency further stated that all "Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils."[44] The insurgency unlawfully seized control of the Hawaiian Kingdom civilian government.

The military force of the provisional government was not an organized unit or militia but rather armed insurgents under the command of John Harris Soper. Soper attended a meeting of the leadership of the insurgents calling themselves the Committee of Safety in the evening of 16 January 1893, where he was asked to command the armed wing of the insurgency. Although Soper served as Marshal of the Hawaiian Kingdom under King Kalākaua, on 17 June 1893 he admitted in an interview with U.S. Special Commissioner James Blount, who was investigating the overthrow of the Hawaiian Kingdom government by direction of U.S. President Grover Cleveland, that he "was not a trained military man, and was rather adverse to accepting the position [he] was not especially trained for, under the circumstances, and that [he] would give them an answer on the following day; that is, in the morning."[45] Soper told Special Commissioner Blount that he accepted the offer after learning that "Judge Sanford Dole [agreed] to accept the position as the head of the [provisional] Government."[46] The insurgency renamed the Hawaiian Kingdom's Royal Guard to the National Guard by *An Act to Authorize the Formation of a National Guard*

[41] *Id*., 107.
[42] *Id*.
[43] *Proclamation*, Laws of the Provisional Government of the Hawaiian Islands vii (1893).
[44] *Id*., viii.
[45] Executive Documents, 972.
[46] *Id*.

on 27 January 1893.[47] Soper was thereafter commissioned as Colonel to command the National Guard and was called the Adjutant General.

On 17 January 1893, Queen Lili‘uokalani conditionally surrendered to the United States and not the insurgency, thereby transferring effective control of Hawaiian territory to the United States.[48] Under customary international law, a State’s effective control of another State’s territory by an act of war triggers the Occupying State’s military to establish a military government to provisionally administer the laws of the Occupied State. This rule was later codified under Articles 42 and 43 of the 1899 Hague Regulations, which was superseded by Articles 42 and 43 of the 1907 Hague Regulations. When Special Commissioner Blount ordered U.S. troops to return to the *U.S.S. Boston* on 1 April 1893,[49] effective control of Hawaiian territory was left with the insurgency calling itself the provisional government.

Special Commissioner Blount submitted his final report on 17 July 1893 to U.S. Secretary of State Walter Gresham.[50] Secretary of State Gresham submitted his report to President Cleveland on 18 October 1893,[51] and President Cleveland notified the Congress of his findings and conclusions on 18 December 1893.[52] In his message to the Congress, he stated:

> When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It 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 is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister’s recognition of the provisional government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen’s troops were quartered), though the same had been demanded of the Queen’s officer’s in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had

[47] *An Act to Authorize the Formation of a National Guard,* Laws of the Provisional Government of the Hawaiian Islands 8 (1893).
[48] Executive Documents, 586.
[49] *Id*., 597.
[50] *Id*., 567.
[51] *Id*., 459.
[52] *Id*., 445.

possession of the palace, of the barracks, and of the police station, and 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, while the Committee of Safety, by actual search, had discovered that there but very few arms in Honolulu that were not in the service of the Government. In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Accordingly, some hours after the recognition of the provisional government by the United States Minister, the palace, the barracks, and the police station, with all the military resources of the country, were delivered up by the Queen upon the representation made to her that her cause would thereafter be reviewed at Washington, and while protesting that she surrendered to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support the provisional government, and that she yielded her authority to prevent collision of armed forces and loss of life and only until such time as the United States, upon the facts being presented to it, should undo the action of its representative and reinstate her in the authority she claimed as the constitutional sovereign of the Hawaiian Islands.

This protest was delivered to the chief of the provisional government, who endorsed thereon his acknowledgment of its receipt. The terms of the protest were read without dissent by those assuming to constitute the provisional government, who were certainly charged with the knowledge that the Queen instead of finally abandoning her power had appealed to the justice of the United States for reinstatement in her authority; and yet the provisional government with this unanswered protest in its hand hastened to negotiate with the United States for the permanent banishment of the Queen from power and for sale of her kingdom.

Our country was in danger of occupying the position of having actually set up a temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. We

> are not without a precedent showing how scrupulously we avoided such accusation in former days. After the people of Texas had declared their independence of Mexico they resolved that on the acknowledgment of their independence by the United States they would seek admission into the Union. Several months after the battle of San Jacinto, by which Texan independence was practically assured and established, President Jackson declined to recognize it, alleging as one of his reasons that in the circumstances it became us "to beware of a too early movement, as it might subject us, however unjustly, to the imputation of seeking to establish the claim of our neighbors to a territory with a view to its subsequent acquisition by ourselves." This is in marked contrast with the hasty recognition of a government openly and concededly set up for the purpose of tendering to us territorial annexation.
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> I believe that a candid and thorough examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States.[53]

Under international law, the provisional government was an armed force of the United States in effective control of Hawaiian territory since 1 April 1893, after the departure of U.S. troops. As an armed proxy of the United States, they were actually obliged to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty was negotiated and agreed upon between the United States and the Hawaiian Kingdom. As a matter of fact and law, it would have been Soper's duty to head the military government as its military governor after President Cleveland completed his investigation of the overthrow of the Hawaiian Kingdom government and notified the Congress on 18 December 1893. A Military Government was not established under international law but rather the insurgency maintained the facade that they were a *de jure* government.

The insurgency changed its name to the Republic of Hawai'i on 4 July 1894. Under *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard* of 13 August 1895, the National Guard was reorganized and commanded by the Adjutant General that headed a regiment comprised of battalions with companies.[54]

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[53] *Id*., 453.

[54] An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard, Laws of the Republic of Hawaii 29 (1895).

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on 30 April 1900,[55] the Act of 1895 continued to be in force. Under section 6 of the Act of 1900, "the laws not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." Soper continued to command the National Guard as Adjutant General until 2 April 1907, when he retired. The Hawai'i National Guard continued to stay in force under *An Act To provide for the admission of the State of Hawaii into the Union* enacted by the U.S. Congress on 18 March 1959.[56] While the State of Hawai'i National Guard is referred to today as Title 32 USC troops, they are in fact and by law the Royal Guard by Hawaiian statute.

Military Forces of the United States

The military force of the United States has a direct link to the 1875 Treaty of Reciprocity between the Hawaiian Kingdom and the United States. Under the commercial treaty, certain products of the Hawaiian Kingdom could enter the American market duty free and certain products of the United States can enter the Hawaiian market duty free. Out of this trade agreement, Hawaiian sugar became a lucrative product, which became a threat to American sugar especially due to the high cost of producing sugar in the aftermath of the Civil War. The treaty was to last for seven years, and further until one of the High Contracting Parties shall give notice to the other of its intention to terminate.

Both the Hawaiian Kingdom and the United States wanted to extend the commercial treaty, but on 19 July 1884, the U.S. Senate Committee on Foreign Relations reported two resolutions: (1) that the Senate advise and consent to the extension of the reciprocity convention for a further definite period of seven years; and (2) "That in the opinion of the Senate it is advisable that the President secure, by negotiation with the Government of Hawaii, the privilege of establishing permanently a proper naval station for the United States in the vicinity of Honolulu, and also a revision and further extension of the schedule of articles to be admitted free of duty from the United States into the Hawaiian Kingdom."[57]

On 6 December 1884, the Pearl Harbor Supplemental Convention was signed by Henry A.P. Carter for the Hawaiian Kingdom and Frederick T. Frelinghuysen for the United States at the city of Washington. There was no provision for a permanent naval station, but rather to maintain a "coaling and repair station for the use of vessels of the United States," and it was specified that the term of the Supplemental Convention was seven years from the date when ratifications were exchanged. The United States Senate advised ratification

[55] An Act To provide a government for the Territory of Hawaii, 31 Stat. 141 (1900).
[56] An Act To provide for the admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).
[57] Ralph S. Kuykendall, The Hawaiian Kingdom: 1874-1893—The Kalakaua Dynasty, vol. III, 383 (1967).

on 20 January 1887, but the Hawaiian Kingdom was unable to ratify because of opposition in the Legislative Assembly.

While the U.S. Senate advised ratification, the Hawaiian Legislative had not. In the 1886 legislative session, Representative J.L. Kaulukou "said it was the duty of the Nobles and Representatives to jealously guard the independence of the kingdom, as recognized by Great Britain, France and the United States. If they could not retain a treaty without the cession of Pearl Harbor, they had better do without a treaty."[58] The legislature's opposition to the United States' exclusive access to Pearl Harbor triggered a chain of events in the Hawaiian Kingdom that led to the revolution of 1887. Driven by fear that Hawaiian sugar interests would no longer reap the benefit of duty-free sugar entering the American market, a takeover of the Executive Monarch and the Legislature was initiated to ratify the Pearl Harbor Supplemental Convention.

During the summer of 1887, while the Legislature remained out of session, a minority of Hawaiian subjects of the Hawaiian Kingdom and foreign nationals met to organize a takeover of the political rights of the native population who held the majority of the Legislature Assembly. The driving motivation for these revolutionaries was their perverted and unfounded belief that the "native [was] unfit for government and his power must be curtailed."[59] A local volunteer militia, whose members were predominantly United States citizens, called themselves the Hawaiian League, and held a meeting on 30 June 1887 in Honolulu at the Armory building of the Honolulu Rifles. Before this meeting, large caches of arms were brought in by the League from San Francisco and dispersed amongst its members.[60]

The group made certain demands on King Kalākaua and called for an immediate change of the King's cabinet ministers. Under threat of violence, the King reluctantly agreed on 1 July 1887 to have this group form a new cabinet ministry made up of League members. The purpose of the League was to seize control of the government for their economic gain, and to neutralize the power of the native vote. On that same day the new cabinet comprised of William L. Green as Minister of Finance, Godfrey Brown as Minister of Foreign Affairs, Lorrin A. Thurston as Minister of the Interior, and Clarence W. Ashford as Attorney General, took "an oath to support the Constitution and Laws, and faithfully and impartially to discharge the duties of [their] office."[61] Under strict secrecy and unbeknownst to Kalākaua, the new ministry also invited two members of the Supreme Court, Chief Justice Albert F. Judd and Associate Justice Edward Preston, "to assist in the preparation of a new

[58] *Id*., 392.
[59] Executive Documents, 574.
[60] *Id*., 579.
[61] Hawaiian Civil Code, Compiled Laws §31 (1884).

constitution,"[62] which now implicated the two highest ranking judicial officers in the revolution.

Hawaiian constitutional law provided that any proposed change to the constitution must be submitted to the "Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof"[63] it would be deferred to the next Legislative session for action. Once the next legislature convened, and the proposed amendment or amendments have been "agreed to by two-thirds of all members of the Legislative Assembly, and be approved by the King, such amendment or amendments shall become part of the Constitution of this country."[64] As a minority, these individuals had no intent of submitting their draft constitution to the legislature, which was not scheduled to reconvene until 1888. Instead, they embarked on a criminal path of treason.

The draft constitution was completed in just five days. The King was forced to sign on 6 July and, thereafter, what came to be known as the Bayonet Constitution illegally replaced the former constitution and was declared to be the new law of the land. The King's sister and heir-apparent, Lili'uokalani, discovered later that her brother had signed the constitution "because he had every assurance, short of actual demonstration, that the conspirators were ripe for revolution, and had taken measures to have him assassinated if he refused."[65] Gulick, who served as Minister of the Interior from 1883 to 1886, also concluded:

> The ready acquiescence of the King to their demands seriously disconcerted the conspirators, as they had hoped that his refusal would have given them an excuse for deposing him, and a show of resistance a justification for assassinating him. Then everything would have been plain sailing for their little oligarchy, with a sham republican constitution.[66]

This so-called constitution has since been known as the *bayonet* constitution and was never submitted to the Legislative Assembly or to a popular vote of the people. It was drafted by a select group of twenty-one individuals[67] that effectively placed control of the Legislature

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[62] Merze Tate, *The United States and the Hawaiian Kingdom: A Political History* 91 (1980).
[63] 1864 Constitution, as amended, Article 80.
[64] *Id*.
[65] Liliuokalani, *Hawaii's Story by Hawaii's Queen* 181 (1964).
[66] Executive Documents, 760.
[67] In the William O. Smith Collection at the Hawaiian Archives there is a near finished version of the 1887 draft with the following endorsement on the back that read: "Persons chiefly engaged in drawing up the constitution were—L.A. Thurston, Jonathan Austin, S.B. Dole, W.A. Kinney, W.O. Smith, Cecil Brown, Rev. [W.B.] Olelson, N.B. Emerson, J.A. Kennedy, [John A.] McCandless, Geo. N. Wilcox, A.S. Wilcox, H. Waterhouse, F. Wundenberg, E.G. Hitchcock, W.E. Rowell, Dr. [S.G.] Tucker, C.W. Ashford." Added to this group of individuals were Chief Justice A.F. Judd and Associate Justice Edward Preston.

and Cabinet in the hands of individuals who held foreign allegiances. Special Commissioner Blount reported:

> For the first time in the history of the country the number of nobles is made equal to the number of representatives. This furnished a veto power over the representatives of the popular vote to the nobles, who were selected by persons mostly holding foreign allegiance, and not subjects of the Kingdom. The election of a single representative by the foreign element gave to it the legislature.[68]

On 26 September 1887, the Cabinet Council that was forced upon King Kalākaua under the Bayonet Constitution stated that the King agreed to ratify the Pearl Harbor Convention. However, the King told British Commissioner James Wodehouse "that He most unwillingly agreed to sanction the 'Pearl Harbour' policy at the urgent desire of His Ministers on the evening of the 26th of September."[69] Nevertheless, on 20 October 1887, the Cabinet Council coerced King Kalākaua to sign the ratification of the Pearl Harbor Supplemental Convention. President Cleveland signed the ratification on 7 November 1887, and the ratifications were exchanged at the city of Washington on 9 November 1887, that began the term of seven years to 1894, and further unless one of the Contracting Parties gives notice to the other of its intention to terminate.

Prior to the American invasion of Honolulu on 16 January 1893, the United States did not take any steps to establish a coaling station at Pearl Harbor. After the unlawful overthrow of the government of the Hawaiian Kingdom on 17 January 1893, U.S. Special Commissioner James Blount ordered United States forces to return back onto the USS Boston that was docked in Honolulu Harbor on 1 April 1893. For the next five years effective control of Hawaiian territory was in the hands of the insurgents calling themselves the so-called Republic of Hawai'i.

When the United States unilaterally annexed the Hawaiian Islands in violation of international law on 7 July 1898, it initiated the establishment of the United States Army Pacific, United States Marine Forces Pacific, United States Pacific Fleet, and the United States Pacific Air Forces. The United States Army Pacific was established in the Hawaiian Islands in 1898 during the Spanish-American War, headquartered at its first military base called Camp McKinley on the Island of O'ahu, and later headquartered at Fort Shafter on the Island of O'ahu in 1921. In 1908, the Congress allocated funds to establish a Naval Station at Pearl Harbor.[70]

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[68] Executive Documents, 579.
[69] Wodehouse to FO, no. 34, 18 Nov. 1887, BPRO, FO 58/220, Hawai'i Archives.
[70] 35 Stat. 127, 141 (1908).

In April 1942, the United States military forces in the Hawaiian Islands were organized into two commands for the Army under United States Army Forces Pacific and for the Navy as Commander-in-Chief, Pacific Fleet, and Pacific Oceans Areas Commander-in-Chief. This command structure of the Army and Navy in the Hawaiian Islands during the Second World War was transformed into the United States Pacific Command on 1 January 1947, which is presently called the Indo-Pacific Command, whose headquarters is at Camp H.M. Smith on the Island of Oʻahu. In September 1947, the United States Air Force separated from the United States Army as a separate branch of the armed forces with its base headquartered at Hickam Air Force Base on the Island of Oʻahu, and later, in 2010, merged to become an element of Joint Base Pearl Harbor-Hickam with the Navy.

The Indo-Pacific Command has four component commands stationed in the territory of the Hawaiian Kingdom—United States Army Pacific, whose headquarters is at Fort Shafter on the Island of Oʻahu, United States Marine Forces Pacific, whose headquarters is at Camp H.M Smith on the Island of Oʻahu, United States Pacific Fleet, whose headquarters is at Naval Station Pearl Harbor on the Island of Oʻahu, and United States Pacific Air Forces, whose headquarters is at Hickam Air Force Base/Joint Base Pearl Harbor-Hickam on the Island of Oʻahu.

There is no legal basis for the presence of Title 10 USC military forces in the Hawaiian Islands by virtue of Congressional legislation because municipal laws have no extraterritorial effect. Since Congressional legislation is limited in operation to the territory of the United States, it cannot unilaterally establish military installations in the territory of a foreign State without the State's consent through a treaty or convention.[71] According to traditional international law, the concept of jurisdiction is linked to the State territory. As the Permanent Court of International Justice in the *Lotus* case stated:

> [T]he 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 […] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[72]

[71] See *The Apollon*, 22 U.S. 362, 370 (1824); and *United States v. Curtiss Wright Export Corp.,* 299 U.S. 304, 318 (1936).
[72] *S.S. "Lotus",* Judgment*,* Series A, No. 70, 18 (7 Sep. 1927). Generally, on this issue see Arthur Lenhoff, "International Law and Rules on International Jurisdiction," 50 *Cornell Law Quarterly* 5 (1964).

The presence of all Title 10 USC military forces throughout the Hawaiian Islands has a direct nexus to the Pearl Harbor Supplemental Convention that granted the United States exclusive access to Pearl Harbor. Notwithstanding the nefarious nature of the Hawaiian Kingdom's ratification of the Pearl Harbor Supplemental Convention, as previously stated, it was a valid treaty under international law up until the Hawaiian Kingdom's notice of intention to terminate was received by the U.S. Department of State at 5:47am ET on 26 October 2023. As a consequence of the termination of the 1875 Commercial Reciprocity Treaty and the Pearl Harbor Supplemental Convention between the Hawaiian Kingdom and the United States, all Title 10 USC military forces shall have to be withdrawn from the Hawaiian Islands no later than twelve months from 26 October 2023. The military forces that remain is the Hawaiian Kingdom's Royal Guard that is referred to today as the Hawai'i Army and Air National Guard.

With sentiments of the highest regard,

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

enclosures

Appendix 1

Convention between the United States of America and His Majesty the King of the Hawaiian Islands. Commercial Reciprocity. Concluded January 30, 1875; Ratification advised by Senate March 18, 1875; Ratified by President May 31, 1875; Ratified by King of Hawaiian Islands April 17, 1875; Ratifications exchanged at Washington June 3, 1875; Proclaimed June 3, 1875

Jan. 30, 1875.

Post, p. 666.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Preamble.

Whereas a Convention between the United States of America and His Majesty the King of the Hawaiian Islands, on the subject of Commercial Reciprocity, was concluded and signed by their respective Plenipotentiaries, at the city of Washington, on the thirtieth day of January, one thousand eight hundred and seventy-five, which convention, as amended by the contracting parties, is word for word as follows:

Contracting parties.

The United States of America and His Majesty the King of the Hawaiian Islands, equally animated by the desire to strengthen and perpetuate the friendly relations which have heretofore uniformly existed between them, and to consolidate their commercial intercourse, have resolved to enter into a Convention for Commercial Reciprocity. For this purpose, the President of the United States has conferred full powers on Hamilton Fish, Secretary of State, and His Majesty the King of the Hawaiian Islands has conferred like powers on Honorable Elisha H. Allen, Chief Justice of the Supreme Court, Chancellor of the Kingdom, Member of the Privy Council of State, His Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America, and Honorable Henry A. P. Carter, Member of the Privy Council of State, His Majesty's Special Commissioner to the United States of America.

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due form, have agreed to the following articles.

ARTICLE I.

Hawaiian products to be admitted free of duty

For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands in the next succeeding article of this convention and as an equivalent therefor, the United States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty.

SCHEDULE.

Schedule.

Arrow-root; castor oil; bananas; nuts, vegetables, dried and undried, preserved and unpreserved; hides and skins undressed; rice; pulu; seeds, plants, shrubs or trees; muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands and now known in the markets of San Francisco and Portland as "Sandwich Island sugar;" syrups of sugar-cane, melado, and molasses; tallow.

ARTICLE II.

American products to be admitted free of duty.

For and in consideration of the rights and privileges granted by the United States of America in the preceding article of this convention, and as an equivalent therefor, His Majesty, the King of the Hawaiian Islands hereby agrees to admit all the articles named in the following schedule, the same being the growth, manufacture or produce of the United States of America, into all the ports of the Hawaiian Islands, free of duty.

SCHEDULE.

Schedule.

Agricultural implements; animals; beef, bacon, pork, ham and all fresh, smoked or preserved meats; boots and shoes; grain, flour, meal and bran, bread and breadstuffs, of all kinds; bricks, lime and cement; butter, cheese, lard, tallow, bullion; coal; cordage, naval stores including tar, pitch, resin, turpentine raw and rectified; copper and composition sheathing; nails and bolts; cotton and manufactures of cotton bleached, and unbleached, and whether or not colored, stained, painted or printed; eggs; fish and oysters, and all other creatures living in the water, and the products thereof; fruits, nuts, and vegetables, green, dried or undried, preserved or unpreserved; hardware; hides, furs, skins and pelts, dressed or undressed; hoop iron, and rivets, nails, spikes and bolts, tacks, brads or sprigs; ice; iron and steel and manufactures thereof; leather; lumber and timber of all kinds, round, hewed, sawed, and unmanufactured in whole or in part; doors, sashes and blinds; machinery of all kinds, engines and parts thereof; oats and hay; paper, stationery and books, and all manufactures of paper or of paper and wood; petroleum and all oils for lubricating or illuminating purposes; plants, shrubs, trees and seeds; rice; sugar, refined or unrefined; salt; soap; shooks, staves and headings; wool and manufactures of wool, other than ready made clothing; wagons and carts for the purposes of agriculture or of drayage; wood and manufactures of wood, or of wood and metal except furniture either upholstered or carved and carriages; textile manufactures, made of a combination of wool, cotton, silk or linen, or of any two or more of them other than when ready made clothing; harness and all manufactures of leather; starch; and tobacco, whether in leaf or manufactured.

ARTICLE III.

Evidence as to growth, manufacture, &c, how established.

The evidence that articles proposed to be admitted into the ports of the United States of America, or the ports of the Hawaiian Islands, free of duty, under the first and second articles of this convention, are the growth, manufacture or produce of the United States of America or of the Hawaiian Islands respectively shall be established under such rules and regulations and conditions for the protection of the revenue as the two Governments may from time to time respectively prescribe.

ARTICLE IV.

No export duty to be imposed on free articles.

No export duty or charges shall be imposed in the Hawaiian Islands or in the United States, upon any of the articles proposed to be admitted into the ports of the United States or the ports of the Hawaiian Islands free of duty, under the first and second articles of this convention.

No lease, &c., of Hawaiian ports, and no other nation to have same privileges as United States.

It is agreed, on the part of His Hawaiian Majesty, that, so long as this treaty shall remain in force, he will not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privilege or rights of use therein, to any other power, state or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States.

ARTICLE V.

The present convention shall take effect as soon as it shall have been approved and proclaimed by His Majesty the King of the Hawaiian Islands, and shall have been ratified and duly proclaimed on the part of the Government of the United States, but not until a law to carry it into operation shall have been passed by the Congress of the United States of America. Such assent having been given and the ratifications of the convention having been exchanged as provided in article VI, the convention shall remain in force for seven years, from the date at which it may come into operation; and further, until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of seven years, or at any time thereafter.

When to take effect.

Post, p. 668.

How long to remain in force.

ARTICLE VI.

The present convention shall be duly ratified, and the ratifications exchanged at Washington city, within eighteen months from the date hereof, or earlier if possible.

Exchange of ratifications.

In faith whereof the respective Plenipotentiaries of the high contracting parties have signed this present convention, and have affixed thereto their respective seals.

Signature.

Done in duplicate, at Washington, the thirtieth day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL] HAMILTON FISH.
[SEAL.] ELISHA H. ALLEN.
[SEAL.] HENRY A. P. CARTER.

And whereas the said convention, as amended, has been duly ratified on both parts, and the respective ratifications were exchanged in this city on this day:

Ratification.

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

Proclamation.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this third day of June, in the year of our Lord one thousand eight hundred and seventy-five, [SEAL.] and of the Independence of the United States the ninety-ninth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

March 8, 1875.

Treaty between the United States of America and His Majesty the King of the Belgians. Commerce and navigation. Concluded March 8, 1875; Ratification advised by Senate March 10, 1875; Ratified by the President March 16, 1875; Ratified by the King of the Belgians June 10, 1875; Ratifications exchanged at Brussels June 11, 1875; Proclaimed June 29, 1875.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Preamble.

Whereas a Treaty of Commerce and Navigation between the United States of America and His Majesty the King of the Belgians was concluded and signed at Washington by their respective Plenipotentiaries on the eighth day of March, eighteen hundred and seventy-five, the original of which treaty, being in the English and French languages, is word for word as follows:

Contracting parties.

The United States of America on the one part, and His Majesty the King of the Belgians on the other part, wishing to regulate in a formal manner their reciprocal relations of commerce and navigation, and further to strengthen, through the development of their interests, respectively, the bonds of friendship and good understanding so happily established between the governments and people of the two countries; and desiring with this view to conclude by common agreement, a treaty establishing conditions equally advantageous to the commerce and navigation of both States, have to that effect appointed as their Plenipotentiaries, namely: The President of the United States, Hamilton Fish, Secretary of State of the United States, and His Majesty the King of the Belgians Maurice Delfosse, Commander of the Order of Leopold, &c., &c., his Envoy Extraordinary and Minister Plenipotentiary in the United States; who, after having communicated to each other their full powers, ascertained to be in good and proper form, have agreed to and concluded the following articles:

Sa Majesté le Roi des Belges, d'une part, et les États-Unis d'Amérique, d'autre part, voulant régler d'une manière formelle les relations réciproques de commerce et de navigation, et fortifier de plus en plus, par le développement des intérêts respectifs, les liens d'amitié et de bonne intelligence si heureusement établis entre les deux gouvernements et les deux peuples; désirant, dans ce but, arrêter de commun accord un traité stipulant des conditions également avantageuses au commerce et à la navigation des deux états, ont à cet effet nommé pour leurs Plénipotentiaires, savoir: Sa Majesté le Roi des Belges, le Sieur Maurice Delfosse, Commandeur de l'Ordre de Léopold, &c., &c., son Envoyé Extraordinaire et Ministre Plénipotentiaire aux États-Unis, et le Président des États-Unis, Hamilton Fish, Secrétaire d'État des États-Unis; lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et dûe forme, ont arrêté et conclu les articles suivants:

ARTICLE I.

ARTICLE I.

Reciprocal freedom of commerce and navigation.

There shall be full and entire freedom of commerce and navigation between the inhabitants of the two

Il y aura pleine et entière liberté de commerce et de navigation entre les habitants des deux pays, et la

Appendix 2

Supplementary Convention between the United States of America and his Majesty the King of the Hawaiian Islands to limit the duration of the Convention respecting commercial reciprocity concluded January 30, 1875. Concluded December 6, 1884; ratification advised by the Senate, with amendments, January 20, 1887; ratified by the President November 7, 1887; ratified by the King of Hawaii, October 20, 1887; ratifications exchanged at Washington November 9, 1887; proclaimed November 9, 1887.

December 6, 1884.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Preamble.

Whereas a Convention between the United States of America and the Kingdom of the Hawaiian Islands, for the purpose of definitely limiting the duration of the Convention concerning Commercial Reciprocity concluded between the same High Contracting Parties on the thirtieth day of January 1875, was concluded and signed by their respective plenipotentiaries at the city of Washington, on the sixth day of December, in the year of our Lord, 1884, which Convention, as amended by the Senate of the United States and being in the English language, is word for word as follows:

Supplementary Convention to limit the duration of the Convention respecting commercial reciprocity between the United States of America and the Hawaiian Kingdom, concluded January 30, 1875.

Whereas a Convention was concluded between the United States of America, and His Majesty the King of the Hawaiian Islands, on the thirtieth day of January 1875, concerning commercial reciprocity, which by the fifth article thereof, was to continue in force for seven years from the date after it was to come into operation, and further, until the expiration of twelve months after either of the High Contracting Parties should give notice to the other of its wish to terminate the same; and

Whereas, the High Contracting Parties consider that the increase and consolidation of their mutual commercial interests would be better promoted by the definite limitation of the duration of the said Convention;

Plenipotentiaries.

Therefore, the President of the United States of America, and His Majesty the King of the Hawaiian Islands, have appointed: The President of the United States of America, Frederick T. Frelinghuysen, Secretary of State; and His Majesty the King of the Hawaiian Islands, Henry A. P. Carter, accredited to the Government of the United States as His Majesty's Envoy Extraordinary and Minister Plenipotentiary; who, having exchanged their respective powers, which were found sufficient and in due form, have agreed upon the following articles:

ARTICLE I.

Duration of reciprocity convention extended.

The High Contracting Parties agree, that the time fixed for the duration of the said Convention, shall be definitely extended for a term of seven years from the date of the exchange of ratifications

hereof, and further, until the expiration of twelve months after either of the High Contracting Parties shall give notice to the other of its wish to terminate the same, each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said term of seven years or at any time thereafter.

ARTICLE II.

Coaling and repair station at Pearl River.

His Majesty the King of the Hawaiian Islands grants to the Government of the United States the exclusive right to enter the harbor of Pearl River, in the Island of Oahu, and to establish and maintain there a coaling and repair station for the use of vessels of the United States, and to that end the United States may improve the entrance to said harbor and do all other things needful to the purpose aforesaid.

ARTICLE III.

Ratification.

The present Convention shall be ratified and the ratifications exchanged at Washington, as soon as possible.

In witness whereof, the respective Plenipotentiaries have signed the present Convention in duplicate, and have hereunto affixed their respective seals.

Done at the city of Washington the 6th day of December in the year of our Lord 1884.

Signatures.

FREDK. T. FRELINGHUYSEN. [SEAL.]
HENRY A. P. CARTER. [SEAL.]

And whereas the said Convention, as amended, has been duly ratified on both parts, and the respective ratifications of the same have been exchanged.

Proclamation.

Now, therefore, be it known that I, Grover Cleveland, President of the United States of America, have caused the said Convention to be made public to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this ninth day of November in the year of our Lord one thousand eight hundred and [SEAL.] eighty-seven and of the Independence of the United States the one hundred and twelfth.

GROVER CLEVELAND.

By the President:
T. F. BAYARD,
Secretary of State.

Appendix 3

LEGAL OPINION ON THE AUTHORITY OF THE COUNCIL OF REGENCY OF THE HAWAIIAN KINGDOM[†]

Professor Federico Lenzerini[*]

Editor's Note: In light of the severity of the mandate of the Royal Commission, established by the Hawaiian Council of Regency on 17 April

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[†] This legal opinion is reproduced with permission from Dr. David Keanu Sai, Head of the Royal Commission of Inquiry. There has been no change in the citation format from its original print except where needed.

[*] The author is a professor of international law at the University of Siena, Italy, department of political and international sciences. He is also a professor at the L.L.M. Program in Intercultural Human Rights of the St. Thomas University School of Law, Miami, U.S.A., and professor of the Tulane-Siena Summer School on International Law, Cultural Heritage and the Arts. He is a UNESCO consultant and Rapporteur of the Committee on the Rights of Indigenous Peoples of the International Law Association and is currently the Rapporteur of the Committee on implementation of the Rights of Indigenous Peoples of the same Association. He is a member of the editorial boards of the *Italian Yearbook of International Law*, of the *Intercultural Human Rights Law Review* and of the *Cultural Heritage Law and Policy* series. Professor Lenzerini received his Doctor of Law degree from the University of Siena, Italy, and his Ph.D. degree in international law from the University of Bari, Italy. For further information see <https://docenti.unisi.it/it/lenzerini> The author can be contacted at federico.lenzerini@unisi.it.

2019, to investigate war crimes and human rights violations committed within the territorial jurisdiction of the Hawaiian Kingdom, the "authority" of the Council of Regency to appoint the Royal Commission is fundamental and, therefore, necessary to address within the rules of international humanitarian law, which is a component of international law. As explained by the United States Supreme Court in 1900 regarding international law and the works of jurists and commentators:

> *International 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. 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.*[1]

According to the Statute of the International Court of Justice, "the teachings of the most highly qualified publicists of the various nations, [are] subsidiary means for the determination of rules of law."[2] *Furthermore, Restatement Third—Foreign Relations Law of the United States, recognizes that "writings of scholars"*[3] *are a source of international law in determining, in this case, whether the Council of Regency has been established in conformity with the rules of international humanitarian law. The writing of scholars, "whether a rule has become international law," are not prescriptive but rather descriptive "of what the law really is."*

I. INTRODUCTION

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.

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[1] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[2] Article 38(1), Statute of the International Court of Justice.

[3] §103(2)(c), *Restatement of the Law (Third)—The Foreign Relations Law of the United States* (1987).

II. 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."[4] 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[5]: 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, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States".[6]

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

[5] 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.

[6] 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).

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".[7]

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".[8]

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

[8] 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

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".[9] 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"]".[10] In this regard, as previously specified, this 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".[11] It follows that "'precarious' as it is, the sovereignty of the displaced sovereign over the occupied territory is not terminated" by belligerent occupation.[12] 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",[13] 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".[14] Such a conclusion corresponds to "a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts".[15]

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

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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").

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

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

[11] Ibid.

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

[13] 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").

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

[15] 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.

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".[16] 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.[17] 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.[18] In fact, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[19] since "illegal occupation cannot of itself terminate statehood".[20] 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 that case, the Hawaiian Kingdom was actually qualified as a "State", while the Claimant—Lance Paul Larsen—as a "Private entity."[21]

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[16] 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).

[17] 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).

[18] 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.

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

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

[21] See <https://pcacases.com/web/view/35> (accessed on 16 May 2020).

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,[22] 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".[23] 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".[24] 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

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[22] 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).

[23] 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.

[24] See <https://www.lexico.com/en/definition/regency> (accessed on 17 May 2020).

minority, absence, insanity, or other disability of the king".[25] 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 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.

[25] See <https://thelawdictionary.org/regency/> (accessed on 17 May 2020).

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.

III. 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".[26] 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";[27] the Arbitral Tribunal

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

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

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".[28] Indeed, as noted by the eminent jurist Robert Y. Jennings in an influential article published in 1946,[29] 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".[30] 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".[31] 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".[32] 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".[33] The Swiss Federal Tribunal has even held that "[e]nactments by the [exiled government] are constitutionally laws of the [country] and applied *ab*

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

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

[30] 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.

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

[32] 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.

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

initio to the territory occupied [...] even though they could not be effectively implemented until the liberation".[34] 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 to in the previous paragraph,[35] 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".[36] 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".[37] 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".[38] 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

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

[35] 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.

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

[37] Ibid., at 106.

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

before) in the occupied territory as far as is practically possible",[39] 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,[40] 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".

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

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

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

population, requiring the occupant to give effect to it.[41] 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),[42] 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".[43] 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.[44] 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

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

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

[43] 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.

[44] 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.

power cannot be considered "absolutely prevented"[45] 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, 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.

III. 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".[46] 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".[47] 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.[48]. On the contrary, the consent, "for the

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

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

[47] See Spoerri, "The Law of Occupation", supra n. 29, at 190.

[48] See *supra*, para. 6.

purposes of occupation law, [...] [must] be genuine, valid and explicit".[49] 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".[50]

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. 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".[51] 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".[52]

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[49] See Spoerri, "The Law of Occupation", supra n. 29, at 190.

[50] See United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 586.

[51] 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.

[52] Ibid., at footnote 7.

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".[53] 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".[54]

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.[55] 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

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

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

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

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 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

Appendix 4

TREATY WITH THE HAWAIIAN ISLANDS, DEC. 20, 1849.

Dec. 20, 1849.

Ratifications exchanged at Honolulu Aug. 24, 1850.

Proclamation made Nov. 9, 1850.

Preamble.

WHEREAS a treaty of friendship, commerce, and navigation, between the United States of America and his Majesty the King of the Hawaiian Islands, was concluded and signed at Washington, on the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-nine, the original of which treaty is, word for word, as follows:—

The United States of America and his Majesty the King of the Hawaiian Islands, equally animated with the desire of maintaining the relations of good understanding which have hitherto so happily subsisted between their respective states, and consolidating the commercial intercourse between them, have agreed to enter into negotiations for the conclusion of a treaty of friendship, commerce, and navigation, for which purpose they have appointed plenipotentiaries, that is to say: The President of the United States of America, John M. Clayton, Secretary of State of the United States; and his Majesty the King of the Hawaiian Islands, James Jackson Jarves, accredited as his special commissioner to the government of the United States; who, after having exchanged their full powers, found in good and due form, have concluded and signed the following articles:—

ARTICLE I.

Peace and amity.

There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors.

ARTICLE II.

Reciprocal freedom of trade.

There shall be reciprocal liberty of commerce and navigation between the United States of America and the Hawaiian Islands. No duty of customs, or other impost, shall be charged upon any goods, the produce or manufacture of one country, upon importation from such country into the other, other or higher than the duty of impost charged upon goods of the same kind, the produce or manufacture of, or imported from, any other country; and the United States of America and his Majesty the King of the Hawaiian Islands do hereby engage, that the subjects or citizens of any other state shall not enjoy any favor, privilege, or immunity, whatever, in matters of commerce and navigation, which shall not also, at the same time, be extended to the subjects or citizens of the other contracting party, gratuitously, if the concession in favor of that other state shall have been gratuitous, and in return for a compensation, as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

"Most-favored nation" stipulation.

ARTICLE III.

Same subject

All articles, the produce or manufacture of either country, which can legally be imported into either country from the other, in ships of that other country, and thence coming, shall, when so imported, be subject to the same duties, and enjoy the same privileges, whether imported in ships of the one country, or in ships of the other; and in like manner, all goods which can legally be exported or re-exported

from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, and be entitled to the same privileges, drawbacks, bounties, and allowances, whether exported in ships of the one country, or in ships of the other; and all goods and articles, of whatever description, not being of the produce or manufacture of the United States, which can be legally imported into the Sandwich Islands, shall, when so imported in vessels of the United States, pay no other or higher duties, imposts, or charges, than shall be payable upon the like goods and articles, when imported in the vessels of the most favored foreign nation, other than the nation of which the said goods and articles are the produce or manufacture.

ARTICLE IV.

Tonnage &c. duties.

No duties of tonnage, harbor, lighthouses, pilotage, quarantine, or other similar duties, of whatever nature, or under whatever denomination, shall be imposed in either country upon the vessels of the other, in respect of voyages between the United States of America and the Hawaiian Islands, if laden, or in respect of any voyage, if in ballast, which shall not be equally imposed in the like cases on national vessels.

ARTICLE V.

Provisions of this treaty not to extend to coasting trade.

It is hereby declared, that the stipulations of the present treaty are not to be understood as applying to the navigation and carrying trade between one port and another, situated in the states of either contracting party, such navigation and trade being reserved exclusively to national vessels.

ARTICLE VI.

Privileges of steam vessels carrying mails.

Steam vessels of the United States which may be employed by the government of the said States, in the carrying of their public mails across the Pacific Ocean, or from one port in that ocean to another, shall have free access to the ports of the Sandwich Islands, with the privilege of stopping therein to refit, to refresh, to land passengers and their baggage, and for the transaction of any business pertaining to the public mail service of the United States, and shall be subject in such ports to no duties of tonnage, harbor, lighthouses, quarantine, or other similar duties of whatever nature or under whatever denomination.

ARTICLE VII.

Privileges of whale ships.

The whale ships of the United States shall have access to the ports of Hilo, Kealakekua, and Hanalei, in the Sandwich Islands, for the purposes of refitment and refreshment, as well as to the ports of Honolulu and Lahaina, which only are ports of entry for all merchant vessels; and in all the above-named ports, they shall be permitted to trade or barter their supplies or goods, excepting spirituous liquors, to the amount of two hundred dollars *ad valorem* for each vessel, without paying any charge for tonnage or harbor dues of any description, or any duties or imposts whatever upon the goods or articles so traded or bartered. They shall also be permitted, with the like exemption from all charges for tonnage and harbor dues, further to trade or barter, with the same exception as to spirituous liquors, to the additional amount of one thousand dollars *ad valorem*, for each vessel, paying upon the additional goods and articles so traded and bartered, no other or higher duties than are payable on like goods and articles, when imported in the vessels and by the citizens or subjects of the most favored foreign nation. They shall also be permitted to pass from port to port of the Sandwich Islands, for the purpose of procuring refreshments, but they

shall not discharge their seamen or land their passengers in the said Islands, except at Lahaina and Honolulu; and in all the ports named in this article, the whale ships of the United States shall enjoy, in all respects whatsoever, all the rights, privileges, and immunities, which are enjoyed by, or shall be granted to, the whale ships of the most favored foreign nation. The like privilege of frequenting the three ports of the Sandwich Islands, above named in this article, not being ports of entry for merchant vessels, is also guaranteed to all the public armed vessels of the United States. But nothing in this article shall be construed as authorizing any vessel of the United States, having on board any disease usually regarded as requiring quarantine, to enter, during the continuance of such disease on board, any port of the Sandwich Islands, other than Lahaina or Honolulu.

Article VIII.

The contracting parties engage, in regard to the personal privileges, that the citizens of the United States of America shall enjoy in the dominions of his Majesty the King of the Hawaiian Islands, and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments, such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective states. The citizens or subjects of the contracting parties shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater than those which are paid, or may hereafter be paid, by the subjects or citizens of the most favored nations, in the respective states of the high contracting parties. They shall be exempt from all military service, whether by land or by sea; from forced loans; and from every extraordinary contribution not general and by law established. Their dwellings, warehouses, and all premises appertaining thereto, destined for the purposes of commerce or residence, shall be respected. No arbitrary search of, or visit to, their houses, and no arbitrary examination or inspection whatever of the books, papers, or accounts of their trade, shall be made; but such measures shall be executed only in conformity with the legal sentence of a competent tribunal; and

Privileges of citizens of U. S. in Hawaiian Islands, and *vice versa*.

Travel.

Trade.

Heirship.

Real estate.

Taxes.

Military service.

Right of search of tenements.

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.

ARTICLE IX.

Trade in either country with citizens of the country.

The citizens and subjects of each of the two contracting parties shall be free in the states of the other to manage their own affairs themselves, or to commit those affairs to the management of any persons whom they may appoint as their broker, factor, or agent; nor shall the citizens and subjects of the two contracting parties be restrained in their choice of persons to act in such capacities; nor shall they be called upon to pay any salary or remuneration to any person whom they shall not choose to employ.

Absolute freedom shall be given in all cases to the buyer and seller to bargain together, and to fix the price of any goods or merchandise imported into, or to be exported from, the states and dominions of the two contracting parties, save and except generally such cases wherein the laws and usages of the country may require the intervention of any special agents in the states and dominions of the contracting parties. But nothing contained in this or any other article of the present treaty shall be construed to authorize the sale of spirituous liquors to the natives of the Sandwich Islands, farther than such sale may be allowed by the Hawaiian laws.

ARTICLE X.

Consuls, &c.

Each of the two contracting parties may have, in the ports of the other, consuls, vice-consuls, and commercial agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nations; but if any such consuls shall exercise commerce, they shall be subject to the same laws and usages to which the private individuals of their nation are subject in the same place.

Deserters from vessels.

The said consuls, vice-consuls, and commercial agents, are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges, and officers, and shall, in writing, demand the said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice-consuls, or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessel to which they belonged, or sent back to their own country by a vessel of the same nation, or any other vessel whatsoever. The agents, owners, or masters of vessels on account of whom the deserters have been apprehended, upon requisition of the local authorities, shall be required to take or send away such deserters from the states and dominions of the contracting parties, or give such security for their good conduct as the law may require. But if not sent back nor reclaimed within six months from the day of their arrest, or if all the expenses of such imprisonment are not defrayed by the party causing such arrest and imprisonment, they shall be set at liberty, and shall not be again arrested for the same cause. However, if the deserters should

be found to have committed any crime or offence, their surrender may be delayed until the tribunal before which their case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into effect.

ARTICLE XI.

Liberty of conscience.

It is agreed that perfect and entire liberty of conscience shall be enjoyed by the citizens and subjects of both the contracting parties, in the countries of the one and the other, without their being liable to be disturbed or molested on account of their religious belief. But nothing contained in this article shall be construed to interfere with the exclusive right of the Hawaiian government to regulate for itself the schools which it may establish or support within its jurisdiction.

Proviso as to schools.

ARTICLE XII.

Wrecks.

If any ships of war or other vessels be wrecked on the coasts of the states or territories of either of the contracting parties, such ships or vessels, or any parts thereof, and all furniture and appurtenances belonging thereunto, and all goods and merchandise which shall be saved therefrom, or the produce thereof, if sold, shall be faithfully restored with the least possible delay to the proprietors, upon being claimed by them, or by their duly authorized factors; and if there are no such proprietors or factors on the spot, then the said goods and merchandise, or the proceeds thereof, as well as all the papers found on board such wrecked ships or vessels, shall be delivered to the American or Hawaiian consul, or vice-consul, in whose district the wreck may have taken place; and such consul, vice-consul, proprietors, or factors, shall pay only the expenses incurred in the preservation of the property, together with the rate of salvage and expenses of quarantine which would have been payable in the like case of a wreck of a national vessel; and the goods and merchandise saved from the wreck shall not be subject to duties unless entered for consumption, it being understood that in case of any legal claim upon such wreck, goods, or merchandise, the same shall be referred for decision to the competent tribunals of the country.

ARTICLE XIII.

Vessels driven into port by stress of weather.

The vessels of either of the two contracting parties which may be forced by stress of weather or other cause into one of the ports of the other, shall be exempt from all duties of port or navigation paid for the benefit of the state, if the motives which led to their seeking refuge be real and evident, and if no cargo be discharged or taken on board, save such as may relate to the subsistence of the crew, or be necessary for the repair of the vessels, and if they do not stay in port beyond the time necessary, keeping in view the cause which led to their seeking refuge.

ARTICLE XIV.

Extradition of criminals.

The contracting parties mutually agree to surrender, upon official requisition, to the authorities of each, all persons who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other, provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed; and the respective judges and other magistrates of the two governments shall have authority, upon complaint made under oath, to

issue a warrant for the apprehension of the person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ARTICLE XV.

Mail arrangements.

So soon as steam or other mail packets under the flag of either of the contracting parties shall have commenced running between their respective ports of entry, the contracting parties agree to receive at the post-offices of those ports all mailable matter, and to forward it as directed, the destination being to some regular post-office of either country, charging thereupon the regular postal rates as established by law in the territories of either party receiving said mailable matter, in addition to the original postage of the office whence the mail was sent. Mails for the United States shall be made up at regular intervals at the Hawaiian post-office, and despatched to ports of the United States; the postmasters at which ports shall open the same, and forward the enclosed matter as directed, crediting the Hawaiian government with their postages as established by law, and stamped upon each manuscript or printed sheet.

All mailable matter destined for the Hawaiian Islands shall be received at the several post-offices in the United States, and forwarded to San Francisco, or other ports on the Pacific coast of the United States, whence the postmasters shall despatch it by the regular mail packets to Honolulu, the Hawaiian government agreeing on their part to receive and collect for and credit the post-office department of the United States with the United States' rates charged thereupon. It shall be optional to prepay the postage on letters in either country, but postage on printed sheets and newspapers shall in all cases be prepaid. The respective post-office departments of the contracting parties shall in their accounts, which are to be adjusted annually, be credited with all dead letters returned.

ARTICLE XVI.

Continuance of this treaty.

The present treaty shall be in force from the date of the exchange of the ratifications, for the term of ten years, and further, until the end of twelve months after either of the contracting parties shall have given notice to the other of its intention to terminate the same, each of the said contracting parties reserving to itself the right of giving such notice at the end of the said term of ten years, or at any subsequent term.

Any citizen or subject of either party infringing the articles of this treaty shall be held responsible for the same, and the harmony and good correspondence between the two governments shall not be interrupted thereby, each party engaging in no way to protect the offender, or sanction such violation.

ARTICLE XVII.

Ratification.

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of the said States, and by his Majesty the King of the Hawaiian Islands, by and with the advice of his Privy Council of State, and the

ratification shall be exchanged at Honolulu within eighteen months from the date of its signature, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the same in triplicate, and have thereto affixed their seals.

Done at Washington, in the English language, the twentieth day of December, in the year one thousand eight hundred and forty-nine. Date.

JOHN M. CLAYTON, [SEAL.]
JAMES JACKSON JARVES. [SEAL.]

Appendix 5

Proclamation

Whereas, by the advice and approval of the Legislature of Our Kingdom, We did enter into a Convention with the United States of America on the subject of Commercial Reciprocity, which said Convention was concluded and signed by duly authorized Plenipotentiaries representing the Hawaiian Kingdom and the United States of America, at the City of Washington, on the 30th day of January, 1875; and

Whereas, a Supplementary Convention to limit the duration of the Convention respecting commercial reciprocity and to grant to the Government of the United States the exclusive right to enter the harbor of Pearl River, in the Island of O'ahu, and to establish and maintain there a coaling and repair station for the use of vessels of the United States, and to that end the United States may improve the entrance to said harbor and do all other things needful to the purpose aforesaid, was concluded and signed by duly authorized Plenipotentiaries representing the Hawaiian Kingdom and the United States of America, at the City of Washington, on the 6th day of December, 1884; and

Whereas, the Supplementary Convention was ratified by both High Contracting Parties, and the respective ratifications of the same have been exchanged at the City of Washington, on the 9th day of November, 1887; and

Whereas, the Supplemental Convention to the 1875 Treaty of Commercial Reciprocity extended the duration of both instruments for a term of seven years from the date of the exchange of ratifications in 1887, and further, until the expiration of twelve months after either of the High Contracting Parties shall give notice to the other of its wish to terminate the same, each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said term of seven years or at any time thereafter; and

Whereas, the United States in its unlawful and prolonged military occupation of the Hawaiian Kingdom since the 17th day of January, 1893, has exploited its use of Pearl Harbor by establishing military facilities throughout the Hawaiian Islands in violation of Article 1 of the 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; and

Whereas, the Hawaiian Kingdom is a Neutral Power by treaty provisions in the Hawaiian-Swedish/Norwegian Treaty of 1852, the Hawaiian-Spanish Treaty of 1863, and the Hawaiian-German Treaty of 1879; and

Whereas, the United States Army Pacific was established in the Hawaiian Islands in 1898 during the Spanish-American War headquartered at its first military base called Camp McKinley on the Island of O'ahu, and later headquartered at Fort Shafter on the Island of O'ahu in 1921; and

Whereas, in April 1942, the United States military forces in the Hawaiian Islands were organized into two commands for the Army under United States Army Forces Pacific and for the Navy as Commander-in-Chief, Pacific Fleet, and Pacific Oceans Areas Commander-in-Chief; and

Whereas, the United States command structure of the Army and Navy in the Hawaiian Islands during the Second World War since 1942 was transformed into the United States Pacific Command on the 1st day of January, 1947, which is presently called the Indo-Pacific Command whose headquarters is at Camp H.M. Smith on the Island of O'ahu; and

Whereas, the United States Air Force separated from the United States Army as a separate branch of the armed forces in September 1947 with its base headquartered at Hickam Air Force Base, Island of O'ahu, and later merged in 2010 to become an element of Joint Base Pearl Harbor-Hickam with the Navy; and

Whereas, the Indo-Pacific Command has four component commands stationed in the territory of the Hawaiian Kingdom—United States Army Pacific whose headquarters is at Fort Shafter on the Island of O'ahu, United States Marine Forces Pacific whose headquarters is at Camp H.M Smith on the Island of O'ahu, United States Pacific Fleet whose headquarters is at Naval Station Pearl Harbor on the Island of O'ahu, and United States Pacific Air Forces whose headquarters is at Hickam Air Force Base/Joint Base Pearl Harbor-Hickam on the Island of O'ahu; and

Whereas, the presence of all United States military forces throughout the Hawaiian Islands have a direct nexus to the 1884 Supplemental Convention granting the United States exclusive access to Pearl Harbor:

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 give notice terminating the 1875 Reciprocity Treaty and its 1884 Supplemental Convention as provided for under Article I of the said Supplemental Convention, which will take effect twelve months from the date the United States has received this notice of termination;

And, We do require that when the United States has received this notice of termination, it shall, prior to the expiration of twelve months in accordance with Article I of the 1884 Supplemental Convention, remove all movable property at its military facilities throughout the Hawaiian Islands, including unexploded munitions, and fuel, with the exception of real property attached to the land or erected on it, including man-made objects, such as buildings, homes, structures, roads, sewers, and fences, to include on other properties that have been or are currently under its supervision and command.

In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 20th day of October A.D. 2023.

David Keanu Sai, Ph.D.
Chairman of the *acting* Council of Regency
Acting Minister of the Interior

Acting Minister of Foreign Affairs ad interim

Kau'i P. Sai-Dudoit,
Acting Minister of Finance

Dexter Ke'eaumoku Ka'iama, *Esq.*,
Acting Attorney General

And Whereas the said Notice of Termination of the 1875 Reciprocity Treaty and its 1884 Supplemental Convention as provided for under Article I of the said Supplemental Convention, has been received by the U.S. Department of State, by courier, U.S. Postal Service, on the 26th day of October, 2023, at 5:47am in Washington, DC.

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, have caused the said Notice of Termination to be made public to the end that the same may be observed and fulfilled in good faith by the United States and its military forces in the Hawaiian Kingdom.

In Witness Whereof, We have hereunto set our hand, and caused the Great Seal of the Kingdom to be affixed this 26th day of October A.D. 2023.

David Keanu Sai, Ph.D.
Chairman of the *acting* Council of Regency
Acting Minister of the Interior
Acting Minister of Foreign Affairs ad interim

Kau'i P. Sai-Dudoit,
Acting Minister of Finance

Dexter Ke'eaumoku Ka'iama, *Esq.*,
Acting Attorney General

Appendix 6

H.E. DAVID KEANU SAI, PH.D.
Minister of Foreign Affairs *ad interim*
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/

21 October 2023

The Honorable Antony J. Blinken
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

U.S. Postal Service Priority Mail Express tracking no. EE 402 827 679 US

Re: Notice of Termination of the 1875 Reciprocity Treaty and its 1884 Supplemental Convention granting exclusive right for the United States to enter Pearl Harbor

Dear Secretary Blinken:

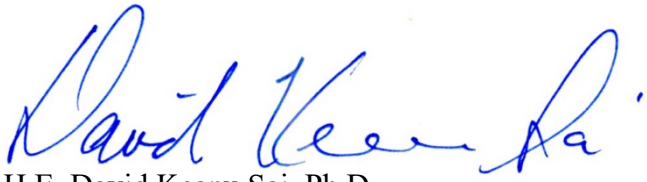
I have the honor to refer to Article I of the 1884 Supplemental Convention (25 Stat. 1399) that extended the duration of the 1875 Commercial Reciprocity Treaty (19 Stat. 625) between our two countries for an additional term of seven years from the date when ratifications were exchanged by our Plenipotentiaries at Washington, D.C., on 9 November 1887, and further, "until the expiration of twelve months after either of the High Contracting Parties shall give notice to the other of its wish to terminate the same, each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said term of seven years or at any time thereafter."

Please find enclosed a Proclamation by the *acting* Council of Regency dated 20 October 2023 terminating the 1875 Commercial Reciprocity Treaty and its 1884 Supplemental Convention that granted "to the Government of the United States the exclusive right to enter the harbor of Pearl River, in the Island of O'ahu." Upon receipt of this notice of termination, the United States shall, prior to the expiration of twelve months in accordance with Article I of the 1884 Supplemental Convention, remove all movable property at its military facilities throughout the Hawaiian Islands, including unexploded munitions, and

fuel, with the exception of real property attached to the land or erected on it, including man-made objects, such as buildings, homes, structures, roads, sewers, and fences, to include on other properties that have been or are currently under its supervision and command.

I have taken the liberty of also enclosing the *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom* by Professor Federico Lenzerini, and a copy of the *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020).

With sentiments of the highest regard,



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

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