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/

28 March 2024

Mr. David Nanopoulos
Chief, Treaty Section
Office of Legal Affairs
United Nations Headquarters
Room No. DC2-0520
New York, NY 10017

Re: The preclusion of the *any State* formula to the Hawaiian Kingdom's Instrument of Accession to the Rome Statute dated 28 November 2012

Dear Mr. Nanopoulos:

In your email to me dated 27 March 2024 you wrote, "[p]lease note that the Secretary-General, in discharging his functions as depository of a convention with an 'all States' clause, must follow the practice of the General Assembly in implementing such a clause. Absent such a decision, the deposit of the instrument submitted will remain pending." That instrument you referred to was the Hawaiian Kingdom's instrument of accession to the Rome Statute, dated 28 November 2012, which I provided in my email to you dated the same day.

I am aware of the practice by the Secretary-General regarding the *any State* formula. This practice applies only to areas of the world where the status of an entity as a State is not clear, and in such a case, the Secretary General must be given explicit directives by the General Assembly.[1] On this subject, the Secretary-General stated:

> In conclusion, I must therefore state that if the "any State" formula were to be adopted, I would be able to implement it only if the General Assembly provided me with the complete list of the States coming within that formula, other than those which are Members of the United Nations or the specialized agencies, or parties to the Statute of the International Court of Justice.[2]

[1] Official Records, United Nations General Assembly, eighteenth session, 1258th Plenary Meeting, 18 November 1963, para 100.
[2] *Id*., para. 101.

This practice arose because of the era of decolonization and does not apply to the practice of the Secretary-General regarding continuity or discontinuity of an established State as a subject of international law. The applicable practice to the Hawaiian situation would be the one taken by the Secretary-General regarding the claim that the Federal Republic of Yugoslavia (Montenegro/Serbia) was the same legal personality as the former Yugoslavia—Socialist Federal Republic of Yugoslavia for the purpose of multilateral treaty obligations regarding the former Yugoslavia. According to the Handbook on *Final Clauses of Multilateral Treaties*:

> The Legal Counsel took the view in this regard that the Secretary-General was not in a position, as depository, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to the contrary either by a competent organ of the United Nations directing him in the exercise of this depository functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depository functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise.[3]

The Secretary-General's decision, to recognize the Federal Republic of Yugoslavia (Montenegro/Serbia) as a successor State to the former Yugoslavia and not the continued legal personality of the former Yugoslavia, was based on a decision 'by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise.' That competent organ was the Arbitration Commission of the Conference on Yugoslavia, which was also known as the Badinter Arbitration Committee. In Opinion No. 1, the Arbitration Committee concluded "that the Socialist Federal Republic of Yugoslavia is in the process of dissolution." This decision precluded the Federal Republic of Yugoslavia (Montenegro/Serbia) from claiming the continued legal personality of the former Yugoslavia. The former Yugoslavia had dissolved and was replaced by successor States. The Arbitration Committee was established by an Extraordinary Meeting of Foreign Ministers in Brussels on 27 August 1991.

The matter of the Hawaiian Kingdom's continuity or discontinuity was addressed 'by a competent treaty organ created by a treaty,' that being the Permanent Court of Arbitration ("PCA"). The PCA was established as a "competent treaty organ" by the Convention (I) for the Pacific Settlement of International Disputes that was concluded at The Hague on 29 July 1899 ("1899 PCA Convention"), and by the Convention (I) for the Pacific Settlement of International Disputes that was concluded at The Hague on 18 October 1907 ("1907 PCA Convention").

On 8 November 1999, arbitral proceedings were initiated in *Larsen v. Hawaiian Kingdom*, where I served as lead Agent for the Hawaiian Kingdom. Before the arbitral tribunal was established on 9 June 2000, I was in communication with the Legal Counsel of the PCA

[3] United Nations, *Handbook—Final Clauses of Multilateral Treaties* 17-18 (2003).

regarding the Hawaiian Kingdom's status as a State in continuity. Unlike the Arbitration Committee's determination 'that the Socialist Federal Republic of Yugoslavia is in the process of dissolution,' the continuity of the Hawaiian State was acknowledged, and the PCA Secretary General, Tjaco T. van den Hout, recognized the continued existence of the Hawaiian Kingdom as a non-Contracting State to the 1899 PCA Convention and the 1907 PCA Convention.[4]

The PCA's 101st Annual Report for 2001 stated that the *Larsen v. Hawaiian Kingdom* arbitral tribunal was established "[p]ursuant to article 47 of the 1907 Convention (art. 26 of the 1899 Convention)."[5] Article 26 of the 1899 PCA Convention and Article 47 of the 1907 PCA Convention provides access to the PCA's jurisdiction for non-Contracting States. 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."[6] This brought the dispute under the auspices of the PCA. The PCA Secretary General also recognized the Council of Regency as the Hawaiian Kingdom's government.

The Council of Regency was not claiming to be a new State but rather it claimed the legal personality of the continued existence of the Hawaiian Kingdom since the nineteenth century despite the Government of the Hawaiian Kingdom being unlawfully overthrown by the United States on 17 January 1893. This illegality of the overthrow was acknowledged by President Grover Cleveland in his message to the United States Congress on 18 December 1893.[7] In his message, President Cleveland concluded:

> The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.
>
> But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.
>
> But for the landing of United States forces upon the false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.
>
> But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would never

[4] 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)."
[5] *Id*.
[6] 36 Stat. 2199, 2224 (1907).
[7] *Larsen v. Hawaiian Kingdom*, Annexure 1—President Cleveland's message to the Senate and House of Representatives dated 18 December 1893, 119 *Int'l L. Rep.* 598 (2001).

> have proclaimed the provisional government from the steps of the Government building.
>
> And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.[8]

Because international law provides for the presumption of State continuity in the absence of its government, the burden of proof shifts as to what must be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[9] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[10] Addressing the presumption of the German State's continued existence, despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence. The very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty. A similar case, recognized by the customary law for a very long time, is that of the belligerent occupation of enemy territory in time of war. The important features of 'sovereignty' in such cases are the continued legal existence of a legal personality and the attribution of territory to that legal person and not to holders for the time being.[11]

Therefore, "[i]f one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[12] Evidence of 'a valid demonstration of legal title, or sovereignty, on the part of the United States' would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States.

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[8] *Id*., 607-608. President Grover Cleveland's message to the Congress also constitutes evidence of acceptance as law (*opinio juris*). See *Yearbook of the International Law Commission*, Conclusion 10. Forms of evidence of acceptance as law (*opinio juris*) 104, commentary n. 5.
[9] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[10] *Id*.
[11] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).
[12] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[13] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[14] There is no treaty of peace where the Hawaiian Kingdom ceded its sovereignty and territory to the United States.

One of the four sources of international law is customary international law, which is a general practice by an international actor and accompanied by *opinio juris*. *Opinio juris* takes place when acts or omissions by States occur following a belief that these States are obligated, as a matter of law, to take action or to refrain from acting in a particular way. According to the International Court of Justice, for a rule of customary international law to exist, there needs to be "two conditions [that] must be fulfilled."[15] First, where there is a "'settled practice' together with *opinio juris*,"[16] and second, where the practice is accepted as law by States. This acceptance can be achieved by the silence or omission of the concerned States regarding this practice. In the *Nicaragua* case, the International Court of Justice explained:

> [F]or a new customary rule to be formed, not only must the acts concerned "amount to a settled practice," but they must be accompanied by *opinio juris sive neccessitatis*. Either the States taking such action or other States in a position to react to it, must behave so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief […] the subjective element, is implicit in the very notion of *opinio juris sive neccessitatis*.[17]

The relevant rule of customary international law applicable to the Hawaiian Kingdom, which is not a new customary rule, is the presumption of continuity of the State, despite the military overthrow of its government.

This practice or action, taken by the PCA Secretary General, recognizing the continued existence of the Hawaiian Kingdom as a State and the Council of Regency as its Government, was uncontested at the time of the arbitral proceedings by all the Contracting States to both the 1899 PCA Convention and the 1907 PCA Convention. This serves as evidence of their acceptance of the continuity of Hawaiian Statehood and not that the Hawaiian Kingdom is a new State. The acceptance by these States of the PCA's recognition of continuity, to include the United States, as opposed to discontinuity of the Hawaiian State, established a normative character of *opinio juris* supporting the existence of the rule of customary international law sanctioning the presumption of State continuity of a State. The behavior of these States is such "that their conduct is evidence of a belief that the

[13] 9 Stat. 922 (1848).
[14] 30 Stat. 1754 (1898).
[15] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at p. 44, para. 77.
[16] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at pp. 122-123, para. 55; see also, for example, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, at pp. 29-30, para. 27; and *North Sea Continental Shelf*, p. 44, para. 77.
[17] *Military and Paramilitary Activities (Nicaragua/United States of America)*, Judgment, I.C.J Reports 1986, p. 14, at pp. 108-109, para. 207.

practice is rendered obligatory by the existence of a rule of law requiring it,"[18] as regards the international legal rule of the presumption of State continuity despite the persistence of a status of military occupation. The significance of the *Larsen* case, under international law, cannot be underestimated.

The presumption of continuity also preserves the legal status of the Hawaiian Kingdom as a Contracting State to its treaties of amity with Austria-Hungary on 18 June 1875;[19] Belgium on 4 October 1862;[20] Bremen on 7 August 1851;[21] Denmark on 19 October 1846;[22] France on 29 October 1857;[23] Germany on 25 March 1879;[24] Hamburg on 8 January 1848;[25] Italy on 22 July 1863;[26] Japan on 19 August 1871;[27] the Netherlands-Luxembourg on 16 October 1862;[28] Portugal on 5 May 1882;[29] Russia on 19 June 1869;[30] Spain on 29 October 1863;[31] Sweden-Norway on 1 July 1852;[32] Switzerland on 20 July 1864;[33] Great Britain on 10 July 1851;[34] and the United States on 20 December 1849.[35]

The Hawaiian Kingdom also became a full member of the Universal Postal Union ("UPU") on 1 January 1882, and became a Contracting State to the Universal Postal Union multilateral Additional Act of Lisbon to the Convention of the 1st of June, 1878, dated 21 March 1885.[36] While the Hawaiian Kingdom is not a Member State of the United Nations, it has been a Member State of the UPU since 1882. The UPU became a specialized agency of the United Nations on 1 July 1948. Despite its non-participation as a Member State of the UPU since 1893, due to the unlawful overthrow of its government by the United States and the prolonged occupation, the Hawaiian Kingdom remains a Member State because it has not withdrawn its membership. As such, the *any State* formula is precluded from

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[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 97, para. 183.
[19] "Treaty with Austria-Hungary," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-240 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[20] *Id.*, "Treaty with Belgium," 241-246.
[21] *Id.*, "Treaty with Bremen," 247-248.
[22] *Id.*, "Treaty with Denmark," 255-256.
[23] *Id.*, "Treaty with France,"257-264.
[24] *Id.*, "Treaty with Germany," 265-272.
[25] *Id.*, "Treaty with Hamburg," 273-274.
[26] *Id.*, "Treaty with Italy," 275-280.
[27] *Id.*, "Treaty with Japan," 281-282.
[28] *Id.*, "Treaty with the Netherlands & Luxembourg," 283-284.
[29] *Id.*, "Treaty with Portugal," 285-286.
[30] *Id.*, "Treaty with Russia," 287.
[31] *Id.*, "Treaty with Spain," 290-295.
[32] *Id.*, "Treaty with Sweden and Norway," 296-300.
[33] *Id.*, "Treaty with Switzerland," 301-304.
[34] *Id.*, "Treaty with Britain," 249-254.
[35] *Id.*, "Treaty with the United States of America," 305-310.
[36] Universal Postal Union, Additional Act of Lisbon to the Convention of the 1st of June 1878 (21 March 1885) (online at https://hawaiiankingdom.org/pdf/Postal_Union_Treaty.pdf).

applying to the Hawaiian Kingdom because it is a Member State of the UPU.[37] Therefore, the Hawaiian Kingdom could become a Contracting State to multilateral treaties that apply the *Vienna* formula, and not the *any State* formula.

Furthermore, the presumption of continuity precludes the United States from exercising any authority, not authorized under international law, in the territory of the Hawaiian Kingdom. As the Permanent Court of International Justice in the *Lotus* case (France v. Turkey), stated, "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention (treaty)."[38] According to Judge Crawford, derogation of this principle will not be presumed.[39]

The Hawaiian Kingdom as an Independent State

The Hawaiian Kingdom's existence as a sovereign and independent State predates the establishment of the League of Nations in 1920 and its successor, the United Nations, in 1945. To quote the *dictum* of the arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[40] By 1893, the Hawaiian Kingdom maintained diplomatic representatives and consulates accredited to foreign States. Hawaiian Legations were established in Washington, D.C., London, Paris, Lima, Valparaiso, and Tokyo, while Foreign Legations, established in the Hawaiian Kingdom, were from the United States, Portugal, Great Britain, France, and Japan. There were two Hawaiian consulates in Mexico; one in Guatemala; two in Peru; one in Chile; one in Uruguay; thirty-three in Great Britain and her colonies; five in France and her colonies; five in Germany; one in Austria; ten in Spain and her colonies; five in Portugal and her colonies; three in Italy; two in the Netherlands; four in Belgium; four in Sweden and Norway; one in Denmark; and one in Japan.[41] Foreign Consulates in the Hawaiian Kingdom were from the United States, Italy, Chile, Germany, Sweden and Norway, Denmark, Peru, Belgium, the Netherlands, Spain, Austria and Hungary, Russia, Great Britain, Mexico, Japan, and China.[42]

On 16 January 1893, a detachment of United States Marines invaded, without cause, the Hawaiian Kingdom, which led to the overthrow of the Hawaiian Kingdom Government the following day. After completing a presidential investigation into the overthrow, U.S. President Grover Cleveland acknowledged that the invasion and overthrow was not only

[37] Official Records, United Nations General Assembly, eighteenth session, 1258th Plenary Meeting, 18 November 1963, para 101.
[38] *Lotus* (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).
[39] James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).
[40] Larsen v. Hawaiian Kingdom, 119 *Int'l L. Rep.* 566, 581 (2001).
[41] "Hawaiian Register and Directory for 1893," in Thomas Thrum, ed., *Hawaiian Almanac and Annual for 1893* 140-141 (1892).
[42] *Id.*

unlawful under international law but were acts of war. President Cleveland entered into an executive agreement, by exchange of notes, with Queen Lili'uokalani, on 18 December 1893, for her restoration to the throne as the Hawaiian Kingdom's constitutional Executive Monarch.[43] Political wrangling in the Congress, however, prevented President Cleveland from restoring the Queen.

Five years later on 7 July 1898, at the height of the Spanish-American War, in violation of international law, the United States unilaterally annexed the Hawaiian Islands and has been imposing American municipal laws over Hawaiian territory ever since. This is the war crime of usurpation of sovereignty under particular customary international law.[44] Despite the overthrow of the Hawaiian Kingdom government and the unlawful imposition of American laws over Hawaiian territory, which is now at 131 years, the Hawaiian Kingdom as a State continued to exist under belligerent occupation.

United States' Unlawful Annexation of the Hawaiian Islands

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[45] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[46] International law does not permit annexation of territory of another state.[47]

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the

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[43] David Keanu Sai, *Ua Mau Ke Ea—Sovereignty Endures: An Overview of the Political and Legal History of the Hawaiian Islands* 75-80 (2011); see also David Keanu Sai, "A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today," 10 *J. L. & Soc. Challenges* 68, 119-125 (2008) (online at https://www2.hawaii.edu/~anu/pdf/10JLSocChallenges68.pdf). .

[44] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157 (2020).

[45] 30 Stat. 750 (1898).

[46] There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

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

territorial sea from a three-mile limit to twelve.[48] The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[49] As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[50] and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[51] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[52] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into whether this extension could be accomplished by a presidential proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited to three miles. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[53] The OLC legal opinion and the decision by the Supreme Court also constitute evidence of acceptance as law (*opinio juris*).[54]

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the "constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. […] Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[55] Professor Willoughby concluded that the "incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is […] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[56]

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[48] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).
[49] *Id*., 242.
[50] *Id*.
[51] *Id*.
[52] *Id*., 262.
[53] *The Apollon*, 22 U.S. 362, 370 (1824).
[54] *Yearbook of the International Law Commission*, Conclusion 10. Forms of evidence of acceptance as law (*opinio juris*) 104, commentary n. 5.
[55] Kmiec, 252.
[56] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

Prolonged Occupation and Effective Control by the Occupant

The principle of effectiveness is at the core of international law because it is a decisive element when determining territorial sovereignty claims by a State. The principle asserts that "whenever an authority exercises effective control over territory it may be recognized as the government of that territory."[57] As the arbitral tribunal at the Permanent Court of Arbitration in the *Eritrea—Yemen* case stated that the "modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions on a continuous and peaceful basis."[58] In the nineteenth century, the international community of States explicitly recognized that the Hawaiian Kingdom exercised effective control of its territory.

However, when the United States overthrew the Hawaiian government, by an act of war, its status became that of an occupant and not the successor to the Hawaiian government. In this case, effective control by the occupant triggers the law of occupation, which has since been codified under the 1907 Hague Regulations. Article 42 of the 1907 Hague Regulations states that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Under the law of occupation, effective control of territory by the occupant State is not a display of sovereignty but rather a requisite act that triggers Article 43. This means the occupant is obligated to temporarily administer the laws of the occupied State until the occupation comes to an end by a treaty of peace. Article 43 states that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

In an occupied State, there exists two legal orders, that of the occupant and that of the occupied State. Professor Marek explains that in "the first place: of these two legal orders, that of the occupied State is regular and 'normal,' while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is […] strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness."[59] Therefore, military occupation "is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."[60]

International humanitarian law is silent on a prolonged occupation because the authors of the 1907 Hague Regulations viewed occupations to be temporary and not long term. According to Professor Scobbie, "[t]he fundamental postulate of the regime of belligerent

[57] Anne Schuit, "Recognition of Governments in International Law and the Recent Conflict in Libya," 14 *Int'l Comm. L. Rev.* 381, 389 (2012).
[58] Eritrea–Yemen arbitration, *Award of the Arbitral Tribunal in the first Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, Permanent Court of Arbitration, para. 239 (9 Oct. 1998) (online at https://pcacases.com/web/sendAttach/517).
[59] Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (1968).
[60] *Id*.

occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory."[61] The effective military control of occupied territory "can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation."[62] According to Professor Benvenisti:

> From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes on the occupant. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status; instead, it is bound to respect and maintain the political and other institutions that exist in that territory for the duration of the occupation. The law authorizes the occupant to safeguard its interests while administering the occupied area, but also imposes obligations on the occupant to protect life and property of the inhabitants and to respect the sovereign interests of the ousted government.[63]

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At meetings of experts on the law occupation convened by the International Committee of the Red Cross, the experts "pointed out that the norms of occupation law, in particular Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, had originally been designed to regulate short-term occupations. However, the [experts] agreed that [international humanitarian law] did not set any limits to the time span of an occupation. It was therefore recognized that nothing under [international humanitarian law] would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances."[64] They also concluded that since a prolonged occupation "could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation," they "emphasized the need to interpret occupation law flexibly when an occupation persisted."[65] The prolonged occupation of the Hawaiian Kingdom is, in fact, that case, where drastic unlawful "transformations and changes in the occupied territory" occurred.

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

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."[66] In 1997, the Hawaiian government, in similar fashion to governments established in exile during the Second World War, was restored *in situ* by a Regency under Hawaiian constitutional law and by the doctrine of necessity.[67] Through 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.[68]

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 Executive 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 obtain 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,[69] was also a 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.[70] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the 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

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[66] 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).
[67] 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) (online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).
[68] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).
[69] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[70] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).

issue of recognition or acceptance arises; continued recognition is assumed."[71] 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 [sic], 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.[72]

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 the war crime of denationalization of the population, 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. 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."[73] 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."[74]

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[71] *Restatement (Third) of Foreign Relations Law of the United States*, §203, comment c (1987).
[72] F.E. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l L.* 568-595, 569 (1942).
[73] Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom*, 324.
[74] *Id.*, 325.

On 8 November 1999, arbitral proceedings were instituted at the PCA in *Larsen v. Hawaiian Kingdom*, case no. 1999-01, where I served as lead agent for the Hawaiian Kingdom. 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. 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 PCA Convention as noted in the PCA Annual Reports of 2001 through 2011.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the rules of international law, that apply to established States, must be considered. 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.'"[75]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, among other consequences, there could be no arbitral tribunal to be established by the PCA. On the contrary, on 9 June 2000, after confirming the existence of the Hawaiian State and its government, the Council of Regency, the PCA did form an arbitral tribunal pursuant to Article 47 of the 1907 PCA Convention. 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."[76] 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."[77]

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

[75] *Id*., 322.
[76] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[77] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

> 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.[78]

It should also be noted that the PCA acknowledged the Hawaiian Kingdom as a treaty partner with the United States to the 1849 Treaty of Friendship, Commerce and Navigation,[79] which was at the center of the dispute.[80] Furthermore, the United States, through its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the arbitration's records and pleadings. Prior to the formation of the arbitral tribunal, Phyllis Hamilton, the PCA's Secretary General, brokered this agreement.[81]

Since the *Larsen* case, the Hawaiian Kingdom's Council of Regency took deliberate and incremental steps, under international law, to assure that all Member States of the United Nations would recognize the Hawaiian Kingdom's continued existence as an independent State despite the prolonged occupation by the United States. The Council of Regency's strategic plan in addressing the prolonged occupation entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.[82] Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international law. Phase III occurs when the American occupation comes to an end by a treaty of peace. After the PCA verified the continued existence of Hawaiian Statehood,[83] Phase II was initiated at the oral hearings held at the Peace Palace on 7, 8, and 11 December 2000.[84]

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[78] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[79] 9 Stat. 977 (1849).
[80] Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States provides that "each of the two contracting parties engages that the citizens or subjects pf 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." The imposition of American municipal laws is not only a violation of international humanitarian law but also a violation of Article VIII of the 1849 treaty.
[81] Sai, The Royal Commission of Inquiry, 25-26.
[82] Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).
[83] David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022) (online at https://www2.hawaii.edu/~anu/pdf/Backstory_Larsen_case_Sai_(HJLP)_Vol_4.pdf).
[84] See mini-documentary "The Permanent Court of Arbitration, The Hague Netherlands—Lance Paul Larsen vs. The Hawaiian Kingdom (1999-2001)" (online at https://www.youtube.com/watch?v=tmpXy2okJIg&t=785s).

Exposure of the Continuity of Hawaiian Statehood

After returning from The Hague, implementation of phase II continued at the University of Hawai‘i at Mānoa when the author entered the political science graduate program in 2001. In 2004, I received a master's degree specializing in international relations and public law and in 2008, a Ph.D. on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles in law journals, and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,[85] to *Nation Within—The History of the American Occupation of Hawai'i*.[86] Coffman explained the change in his note on the second edition:

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for […] the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai‘i, the might of the United States does not make it right.[87]

On 25 February 2018, as a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas, sent a communication from Geneva to Judges Gary W.B. Chang and Jeannette H. Castagnetti, and members of the judiciary of the State of Hawai‘i. Dr. deZayas stated:

> I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied

[85] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).
[86] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.
[87] *Id*., xvi.

> state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).[88]

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States to immediately comply with international humanitarian law in its prolonged and illegal occupation of the Hawaiian Islands.[89] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."[90]

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization ("NGO") of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and is accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[91] In its resolution, the IADL also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), which is also an NGO with consultative status to the United Nations ECOSOC and is accredited as an observer in the Human Rights Council's sessions, sent a joint letter, dated 3 March 2022, to the Ambassadors of the Member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[92] In its joint letter, they state:

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[88] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

[89] Resolution of the National Lawyers Guild Against the Illegal Occupation of the Hawaiian Islands (2019) (online at https://www.nlg.org/wp-content/uploads/2019/08/Hawaiian-Subcommittee-Resolution-Final.pdf).

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

[91] International Association of Democratic Lawyers, *IADL Resolution on the US Occupation of the Hawaiian Kingdom* (7 February 2021) (online at https://iadllaw.org/2021/03/iadl-resolution-on-the-us-occupation-of-the-hawaiian-kingdom/).

[92] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

> The IADL and the AAJ fully supports the National Lawyers Guild's 2019 resolution that "calls upon the United States of America immediately to begin to comply with international humanitarian law in its prolonged and illegal occupation of the Hawaiian Islands." Together with the National Lawyers Guild (NLG):
>
> - IADL and the AAJ strongly condemns the prolonged and illegal occupation of the Hawaiian Islands.
> - IADL and the AAJ also condemns the unlawful presence and maintenance of the United States Indo-Pacific Command with its 118 military sites throughout the Hawaiian Islands.
> - IADL and the AAJ calls for the United States to immediately comply with international humanitarian law and begin to administer the laws of the Hawaiian Kingdom as the occupied State.
> - IADL and the AAJ calls on the legal and human rights community to view the United States presence in the Hawaiian Islands through the prism of international law and to roundly condemn it as an illegal occupation under international law.
> - IADL and the AAJ supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State.
> - IADL and the AAJ calls on all United Nations member States and non-member States to not recognize as lawful a situation created by a serious violation of international law, and to not render aid or assistance in maintaining the unlawful situation. As an internationally wrongful act, all States shall cooperate to ensure the United States complies with international humanitarian law and consequently bring to an end the unlawful occupation of the Hawaiian Islands.

None of the Ambassadors of the Member States of the United Nations objected to the IADL-AAJ joint letter notifying them of the continued existence of the Hawaiian Kingdom, the Council of Regency, and the prolonged American occupation. While the conduct of NGOs "does not contribute to the formation, or expression, of rules of customary international law,"[93] their conduct "may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations."[94]

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

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister

[93] United Nations, *Yearbook of the International Law Commission*, vol. II, Part Two, Conclusion 4. Requirement of practice 98, commentary n. 8 (2018).
[94] *Id*.

> of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.
>
> The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.
>
> For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

None of the 47 member States of the HRC, which included the United States, protested, or objected to the oral statement of the continuity of the Hawaiian Kingdom, the arbitral proceedings at the PCA, and war crimes being committed in the Hawaiian Kingdom by the United States. While the oral statement was given on behalf of the IADL and the AAJ, it was given in my capacity as Minister of Foreign Affairs *ad interim* of the Hawaiian Kingdom. Therefore, statements by a State are recognized as a general practice, and by their silence, these 47 States, to include the United States, accepted the Hawaiian Kingdom's continued existence as an occupied State and that war crimes and human right violations are taking place throughout the Hawaiian Islands.[95]

120 Member States of the United Nations accept as law (opinio juris) the continued existence of the Hawaiian Kingdom and the Council of Regency as its Government

When States recognize the independence of other States, as being independent, it is no longer a political fact but rather becomes a juridical fact. This could lead to a juridical act by a State, or an international organization, *e.g.* the PCA. Concerning the juridical act taken by the PCA, in *Larsen v. Hawaiian Kingdom*, Professor Lenzerini explains:

> At the time of the establishment of the Larsen arbitral tribunal by the PCA, the latter had 88 contracting parties. One may safely assume that the PCA's juridical act consisting in the recognition of the juridical fact of the Hawaiian Kingdom as a State, through the institution of the *Larsen* arbitration, reflected a view shared by all such parties, on account of the fact that the decision of the International Bureau of the PCA was not followed by any complaints by any of them. In particular, it is

[95] Argentina, Armenia, Benin, Plurinational State of Bolivia, Brazil, Cameroon, China, Cuba, Côte d'Ivoire, Eritrea, Finland, France, Gambia, Germany, Honduras, India, Indonesia, Japan, Kazakhstan, Libya, Lithuania, Luxembourg, Malawi, Malaysia, Marshall Islands, Mauritania, Mexico, Montenegro, Namibia, Nepal, Netherlands, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Senegal, Somalia, Sudan, Swiss Confederation, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Arab Emirates, United States of America, Uzbekistan, and Venezuela.

> especially meaningful that there was "no evidence that the United States, being a Contracting State [indirectly concerned by the Larsen arbitration], protested the International Bureau's recognition of the Hawaiian Kingdom as a State in accordance with Article 47." On the contrary, the United States appeared to provide its acquiescence to the establishment of the arbitration, as it entered into an agreement with the Council of Regency of the Hawaiian Kingdom to access all records and pleadings of the dispute.
>
> Under international law, the juridical act of the PCA recognizing the juridical fact of the Hawaiian Kingdom as a State may reasonably be considered as an important manifestation of—contextually—State practice and opinio juris, in support of the assumption according to the which the Hawaiian Kingdom is actually—as has never ceased to be—a sovereign and independent State pursuant to customary international law. As noted a few lines above, it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau. In fact, in international law, acquiescence "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State [or an international institution] would be called for." The case in discussion is evidently a situation in the context of which, in the event that any of the PCA contracting parties would have disagreed with the recognition of the continued existence of the Hawaiian Kingdom as a State by the International Bureau through its juridical act, an explicit reaction would have been necessary. Since they "did not do so […] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*."[96]

If the United States objected to the PCA's juridical act of recognizing the Hawaiian Kingdom as a State, it could have filed a declaration as it did when it objected to the Dutch Minister of Foreign Affairs' receiving of Palestine's instrument of accession to the 1907 PCA Convention on 29 December 2015. Palestine was seeking to become a Contracting State to the 1907 PCA Convention and submitted its accession to the Dutch government on 30 October 2015. In its declaration, which the Dutch Foreign Ministry translated into French, the United States explicitly stated, *inter alia*, that "the government of the United States considers that 'the State of Palestine' does not answer to the definition of a sovereign State and does not recognize it as such (translation)."[97]

The State of Palestine is a new State whose independence is not yet well-established, whereas the Hawaiian Kingdom is a State in continuity since the nineteenth century where it was universally recognized as a member of the community of States. The United States made no such declaration against the PCA's conclusion that the Hawaiian Kingdom is a

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[96] Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration*, (5 Dec. 2021), filed in the U.S. District Court for the District of Hawai'i, *Hawaiian Kingdom v. Biden et al*., case no. 1:21-cv-00243-LEK-RT, document no. 174-2, p. 4 (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).

[97] Ministry of Foreign Affairs of the Kingdom of the Netherlands, *Notification of the Declaration of the United States translated into French* (January 29, 2016) (online at https://repository.overheid.nl/frbr/vd/003316/1/pdf/003316_Notificaties_11.pdf).

non-Contracting State to the 1899 PCA Convention and the 1907 PCA Convention. Palestine finally achieved the legal status of a Contracting State to the 1907 PCA Convention by vote of the PCA's Administrative Council on 9 and 14 March 2016 that took note of Palestine's instrument of accession of 29 December 2015.

When the arbitral proceedings came to a close in 2001, there were 95 Contracting States to the 1907 PCA Convention[98] and those States, that have diplomatic representatives accredited to the Netherlands, sit on the PCA's Administrative Council. None of these States, including the United States, objected to the practice by the PCA Secretary General of recognizing the continuity of the Hawaiian Kingdom as a non-Contracting State to the 1899 PCA Convention and the 1907 PCA Convention, and of recognizing the Council of Regency as its government. Along with the practice of States that establish law (*opinio juris*) there is the practice of international organizations, in certain cases, that can also establish law (*opinio juris*). The action taken by the Secretary General applies "mutatis mutandis to the forms of evidence of acceptance of law (*opinio juris*) of international organizations."[99]

By virtue of Article 47 of the 1907 PCA Convention, the Contracting States transferred exclusive competence to the Secretariat to determine whether an entity is a State for jurisdictional purposes of the PCA. To arrive at this determination, the Secretariat has Legal Counsel that provides legal advice to the PCA Secretary General on matters of whether an entity is a State. According to the International Law Commission, the "[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided [that these] States were in a position to react and the circumstances called for some reaction."[100] Consequently, the silence and acquiescence of these States is evidence of their acceptance as law (*opinio juris*) of the PCA Secretary General's practice of recognizing the continuity of Hawaiian Statehood.

Since 2001, an additional 27 States have become parties to the 1907 PCA Convention for a total of 122 Contracting States, none of which objected to the PCA Secretary General's recognition of the continuity of the Hawaiian Kingdom and the Council of Regency as its government. Therefore, the silence and acquiescence by these 27 States, together with the aforementioned 95 States, constitutes evidence of their acceptance of the Secretary General's practice. With the exception of Kosovo and Palestine, 120 of these States are also Member States of the United Nations and have thus acquiesced with the PCA Secretary General's recognition of the continuity of Hawaiian Statehood.[101]

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[98] Permanent Court of Arbitration, 101st Annual Report, para. 89 (2001).
[99] *Yearbook of the International Law Commission*, Conclusion 10. Forms of evidence of acceptance as law (opinio juris) 104, commentary n. 7.
[100] *Id*., 103, Conclusion 10, sec. 3.
[101] Albania, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chile, Democratic Republic of China, Colombia, Democratic Republic of the Congo, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Republic of Korea, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg,

Hawaiian Kingdom's Note Verbale to All Member States of the United Nations

On 11 October 2021, the Hawaiian Kingdom's Ministry of Foreign Affairs sent a *note verbale* no. 2021-1-HI to all the Member States of the United Nations. A *note verbale* is a diplomatic communication. The *note verbale* stated:

> The Foreign Ministry of the Hawaiian Kingdom presents its compliments to all the Diplomatic Missions accredited to the United Nations in New York City and has the honor to inform the latter that the Government of the Hawaiian Kingdom notifies all Member States of the United Nations that they have and continue to commit internationally wrongful acts against the Hawaiian Kingdom by continuing to recognize as lawful the United States presence in the Hawaiian Islands, and not as a belligerent State that has not complied with international humanitarian law since 16 January 1893 when it unlawfully committed acts of war in the invasion and subsequent overthrow of the Government of the Hawaiian Kingdom. In addition to violating international humanitarian law, the Member States of Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russia, Spain, Switzerland, Sweden, and the United States of America are in violation of their treaties with the Hawaiian Kingdom. The Government of the Hawaiian Kingdom calls upon the United States of America to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Kingdom since 17 January 1893.
>
> This Note Verbale serves as a notice of claim by an injured State, pursuant to Article 43 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), invoking the responsibility of all Member States of the United Nations who are responsible for the internationally wrongful act of recognizing the United States of America's presence in the Hawaiian Kingdom as lawful to cease that act pursuant Article 30(a), and to offer appropriate assurances and guarantees of non-repetition pursuant to Article 30(b). The form of reparation under Article 31 shall take place in accordance with the provisions of Part Two—Content of the International Responsibility of a State(s).
>
> The Hawaiian Foreign Ministry wishes to point out that the Contracting States to the 1907 Hague Convention for the Pacific Settlement of International Disputes, who are also member States of the United Nations, with the exception of Palestine and Kosovo, were aware of the Larsen v. Hawaiian Kingdom arbitral proceedings instituted on 8 November 1999, PCA Case no. 1999-01, whereby the Hawaiian Kingdom was acknowledged as a non-Contracting State to the 1907 Convention pursuant to Article 47, and the Council of Regency as its restored government. At the center of the dispute was the unlawful imposition of American municipal laws in violation of international humanitarian law.

Madagascar, Malaysia, Malta, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, North Macedonia, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Democratic Republic of São Tomé and Príncipe, Saudi Arabia, Senegal, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Thailand, Togo, Türkiye, Uganda, Ukraine, United Arab Emirates, United States of America, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, Viet Nam, Zambia, and Zimbabwe.

> As regards the factual circumstances of the United States of America's invasion of the Hawaiian Kingdom, an internationally recognized State since the nineteenth century, the unlawful overthrow of the Government of the Hawaiian Kingdom, and the prolonged belligerent occupation of the Hawaiian Kingdom since 17 January 1893, the Hawaiian Foreign Ministry directs the attention of the Diplomatic Missions to the Royal Commission of Inquiry's publication—Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom (2020). The ebook can be downloaded online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf. Authors include H.E. Dr. David Keanu Sai, Ph.D., Hawaiian Minister of Foreign Affairs ad interim, Professor Matthew Craven, University of London, SOAS, Professor William Schabas, Middlesex University London, and Professor Federico Lenzerini, University of Sienna, Italy. Reports of the Royal Commission of Inquiry and treaties can be accessed online at https://hawaiiankingdom.org/royal-commission.shtml.
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> The Hawaiian Foreign Ministry avails itself of this opportunity to renew to the Diplomatic Missions accredited to the United Nations the assurances of its highest consideration.[102]

None of the Ambassadors of the Member States of the United Nations objected to the Hawaiian Kingdom's *note verbale*. Diplomatic acts and correspondences constitute forms of State practice.[103] Therefore, the silence and acquiescence by all 193 Member States of the United Nations constitutes evidence of their acceptance of the continuity of the Hawaiian Kingdom and the Council of Regency as its government giving notice of claim as an injured State.

Succession of States in respect of Treaties with the Hawaiian Kingdom

The States that have accepted the Hawaiian Kingdom's continued existence as an occupied State and the Council of Regency as its government are all 193 Member States of the United Nations. Of these States, Austria, Belgium, Denmark, France, Germany, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Russian Federation, Spain, Sweden, Swiss Confederation, United States of America, and the United Kingdom of Great Britain and Northern Ireland are treaty partners with the Hawaiian Kingdom.

The successor States of these treaty partners were not aware, at the time of their independence, that the Hawaiian Kingdom continued to exist as a State, therefore, neither the newly independent State nor the Hawaiian Kingdom could declare "within a reasonable time after the attaining of independence, that the treaty is regarded as no longer in force between them."[104] Until there is clarification of the successor States intentions, as to a common understanding with the Hawaiian Kingdom regarding the continuance in force of

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[102] Hawaiian Kingdom's *Note Verbale* to Member States of the United Nations (11 Oct. 2021) (online at https://hawaiiankingdom.org/pdf/Note_Verbale_No._2021-1-HI_from%20_Hawn_Ministry_of_Foreign_Affairs_to_UN_Members.pdf).
[103] *Yearbook of the International Law Commission*, 98, Conclusion 6. Forms of practice, sec. 3.
[104] *Second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur*, Document A/CN.4/214 and ADD.1* AND 2, p. 48 (1969).

the Hawaiian treaty with their predecessor State, the Hawaiian Kingdom will presume the continuance in force of its treaties with the successor States.

This position taken by the Hawaiian Kingdom is consistent with the 1978 Vienna Convention on Succession of States in respect of Treaties. Article 24 states:

> 1. A bilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:
>   a. they expressly so agree; or
>   b. by reason of their conduct they are to be considered as having agreed.
> 2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Because the successor States, at the time of their independence were unaware of the existence of the Hawaiian Kingdom and its treaties with their predecessor States, Article 24(1)(a) and (b) could not arise. Therefore, in the absence of an express agreement or an agreement by conduct, it will be presumed that the treaties continue in force with the successor States of the Hawaiian Kingdom treaty partners.

Conclusion

In light of the aforementioned information, it is clear that the *any State* formula is precluded from applying to the Hawaiian Kingdom as a Contracting State to the Rome Statute because it has been a Member State of the UPU since 1882. Furthermore, the United Nations is precluded from interfering with the sovereign rights of the Hawaiian Kingdom to accede to multilateral treaties of its choosing. It has now been 12 years since 10 December 2012 that the Secretariat of the United Nations received the Hawaiian Kingdom's instrument of accession to the Rome Statute. Therefore, without further delay, my Government renews its request for the Secretary-General to provide, to the International Criminal Court, a depository notification of accession to the Rome Statute by the Hawaiian Kingdom, dated 28 November 2012.

With sentiments of the highest regard,

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