

PRELIMINARY REPORT

The Material Elements of War Crimes and Ascertaining the Mens Rea

THE ROYAL COMMISSION OF INQUIRY:

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

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PRELIMINARY REPORT:

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This preliminary report of the Royal Commission of Inquiry (“Royal Commission”) on the elements of specific war crimes recognized under customary international law committed in the Hawaiian Kingdom addresses the material elements of war crimes and ascertaining the *mens rea* or culpability of the accused.

The Royal Commission recognizes that persons may be criminally responsible and liable for the punishment of war crimes only if the material elements are committed with intent and knowledge. While war crimes have no statute of limitations, the Royal Commission will not enquire into alleged war crimes committed 80 years prior due to human longevity. As stated by the International Military Tribunal, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹

In a letter dated 28 May 2019, I requested of Professor William Schabas, who is a recognized expert in international criminal law, “a legal opinion addressing the applicable international law, main facts and their related assessment, allegations of war crimes, and defining the material elements of the war crimes in order to identify *mens rea* and *actus reus*.”² This request was made pursuant to Article 3 of the Council of Regency’s Proclamation establishing the Royal Commission, which provides, “[t]he composition of the Royal Commission shall be decided by the head and shall be comprised of recognized experts in various fields.”³

Professor Schabas provided his legal opinion to me on 25 July 2019,⁴ which has been reproduced in chapter 4 of *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*.⁵ He identified the following war crimes under customary international law, which allows the criminal courts of all States to prosecute under universal jurisdiction irrespective of whether they are a State party to a treaty or not, and their requisite material and mental elements:

¹ *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

² Sai to Schabas, Re Application of International Humanitarian Law to the Prolonged Occupation of the Hawaiian Kingdom (28 May 2019) (online at [https://hawaiiankingdom.org/pdf/RCI_Ltr_to_Schabas_\(5.28.19\).pdf](https://hawaiiankingdom.org/pdf/RCI_Ltr_to_Schabas_(5.28.19).pdf)).

³ David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 9 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁴ William Schabas, *Legal opinion on war crimes related to the United States occupation of the Hawaiian Kingdom since 17 January 1893* (25 July 2019) (online at https://hawaiiankingdom.org/pdf/Opinion_War-Crimes_Schabas_RCI.pdf).

⁵ 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* 152-169 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

Elements of the war crime of usurpation of sovereignty during occupation

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.⁶

Elements of the war crime of compulsory enlistment

1. The perpetrator recruited through coercion, including by means of pressure or propaganda, nationals of an occupied territory to serve in the forces of the occupying State.
2. The perpetrator was aware that the person recruited was a national of an occupied State, and the purpose of recruitment was service in an armed conflict.
3. The conduct took place in the context of, and was associated with, an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.⁷

Elements of the war crime of denationalization

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

⁶ *Id.*, 167.

⁷ *Id.*, 168.

4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.⁸

Elements of the war crime of pillage

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.⁹

Elements of the war crime of confiscation or destruction of property

1. The perpetrator confiscated or destroyed property in an occupied territory, be it that belonging to the State or individuals.
2. The confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
3. The perpetrator was aware that the owner of the property was the State or an individual and that the act of confiscation or destruction was not justified by military purposes of the occupation or by the public interest.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.¹⁰

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

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

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.¹¹

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

1. The perpetrator deported or forcibly transferred, in a way not permitted under international law, one or more persons in the occupied State to another State or location, including the occupying State, or to another location within the occupied territory, by expulsion or coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.¹²

Elements of the war crime of transferring populations into an occupied territory

1. The perpetrator transferred, directly or indirectly, parts of the population of the occupying State into the occupied territory.
2. The conduct took place in the context of, and was associated, with an occupation resulting from international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.¹³

With respect to the last two elements listed for each crime:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;

¹¹ *Id.*, 169.

¹² *Id.*

¹³ *Id.*

3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”¹⁴

The elements of each of the war crimes identified by Professor Schabas describe the material scope of application as well as the accompanying mental elements. The first common element states that “[t]he conduct took place in the context of and was associated with an occupation resulting from international armed conflict.” This is to discern the conduct of war crimes from the conduct of ordinary crimes. As stated by the Appeals Chamber of the ICTY, “international humanitarian law applies from the initiation of...armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”¹⁵

The second common element provides that “[t]he perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.” In order to meet this particular element of awareness, which in a normal situation would be obvious, requires further explanation given the unique situation of the American occupation and the devastating effect of the war crime of denationalization had upon the population of the Hawaiian Kingdom since the beginning of the twentieth century. This denationalization through *Americanization* led to the false belief that the Hawaiian Islands were not under a prolonged American occupation since 17 January 1893, but rather had become an incorporated territory of the United States in 1898 during the Spanish-American War. Chapter 2 of *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* provides a comprehensive and historical narrative that rectifies this false information.¹⁶

In 1906, the United States, as the occupying State, implemented a policy of *Americanization* through its proxy the Territory of Hawai‘i, which was the successor of its puppet government called the provisional government who later changed its name to the so-called Republic of Hawai‘i.¹⁷ Called *Programme for Patriotic Exercises*, the purpose of this policy was to obliterate the national consciousness of the Hawaiian Kingdom in the minds of school children throughout the islands in order to conceal the occupation in the minds of future generations. The purpose of this policy was to inculcate the children into believing they were nationals of the United States and to speak in the American English language. If the children spoke in the national language of Hawaiian, they were severely punished. Within three generations, the national consciousness and history of the Hawaiian Kingdom had become obliterated and awareness of the American

¹⁴ *Id.*, 167.

¹⁵ *Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Decision on the defense motion for interlocutory appeal on jurisdiction, 2 Oct. 1995, IT-94-1-AR72, para. 70.

¹⁶ David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 97-121 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

¹⁷ *Id.*, 114.

occupation was erased. However, due to the decision of the Council of Regency, after returning from arbitral proceedings at the Permanent Court of Arbitration in December of 2000, to counter the effects of denationalization through academic research, publications and classroom instruction at the University of Hawai'i at Manoa, the awareness of the American occupation soon became widespread.¹⁸

Given most situations where “the existence of the armed conflict and subsequent occupation” would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness “of factual circumstances that established the existence of the armed conflict and subsequent occupation.” In light of the effects of *Americanization* through denationalization, a change in awareness of the United States occupation by the accused must be evidence based.

The element of awareness is not an outcome of a moral or legal conclusion on the part of the accused because there is “no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international,” nor is there a “requirement for awareness by the perpetrator of the facts that established the character of the conflict as international.” As the International Criminal Court’s Pre-Trial Chamber stated, “it is not necessary for the perpetrator to have made the necessary value judgment to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.”¹⁹ While there is, however, “only a requirement for the awareness of the factual circumstances,” the Royal Commission will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai'i and its Counties, because in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.²⁰

¹⁸ 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* 29-33 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

¹⁹ *Prosecutor v. Germain Katanga et al.*, ICC Pre-Trial Chamber, Decision on the confirmation of charges, 30 Sep. 2008, ICC-01/04-01/07, para. 305.

²⁰ *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii*, 107 Stat. 1510 (Public Law 103-150—Nov. 23, 1993) (online at https://hawaiiankingdom.org/pdf/1993_Apology_Resolution.pdf). See also Annexure 2, Arbitral Award, *Larsen v. Hawaiian Kingdom*, 119 *Int'l L. Reports* 566, 610-615 (2001).

For the purpose of determining the severity of culpable mental states—*mens rea*, the Royal Commission adopts Professor Mohamed Badar’s recommendations of *dolus directus* of the first degree, *dolus directus* of the second degree, and *dolus eventualis*.²¹ According to Professor Badar:

[...] *Dolus directus* of the first degree

[T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result. *Dolus directus* of the first degree is also defined as a ‘purpose-bound will’. It is irrelevant in this type of intent whether the intended result is the defendant’s final goal or just a necessary interim goal in order to achieve the final one.

[...] *Dolus directus* of the second degree

In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator’s primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.

[...] *Dolus eventualis*

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as examination as a crime against humanity. A recent decision by the ICC provides further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject

²¹ Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535-537 (2013).

matter jurisdiction of the International Criminal Court. According to the Lubanga Pre-Trial Chamber, *dolus eventualis* encompasses,

Situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.

Dolus eventualis must be distinguished from the common law notion of recklessness. The former requires not only that the perpetrator is aware of the risk, but that he accepts the possibility of its occurrence (volitive element). Unlike *dolus eventualis*, recklessness requires an affirmative aversion to the harmful side effect. This position is supported by a recent judgment of the Yugoslavia Tribunal in which the Orić Trial Chamber agreed with the defense submission that intent does not include recklessness.

Dolus eventualis, as perceived by Fletcher, is defined as ‘a particular subjective posture toward the result. The tests... vary; the possibilities include everything from being indifferent to the result, to “being reconciled” with the result as a possible cost of attaining one’s goal’. However, the present author is of the opinion that in the sphere of international criminal law *dolus eventualis* must be interpreted as a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence. This element of acceptance brings *dolus eventualis* within the contour of intention in its broader sense and ruled out the common law recklessness as a culpable mental state under Article 30 of the ICC Statute.²²

The Royal Commission will confine its inquiry into the aforementioned war crimes together with the requisite material elements in order to categorize the mental element of *mens rea* as either *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*.



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²² *Id.*