WAR CRIMINAL REPORT NO. 24-0002

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

THE ROYAL COMMISSION OF INQUIRY:

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

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HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 24-0002

GUILTY OF WAR CRIME: Brigadier General STEPHEN F. LOGAN as the Deputy Adjutant General of the State of Hawai‘i

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

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

INTRODUCTION

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

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 ("1907

[1] See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.
[2] Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).
[3] Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf); see also Proclamation of the Council of Regency of 17 April 2019 establishing the Royal Commission of Inquiry (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

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

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

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[7] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was […] an act of war,"[8] which coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "[n]ow, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its

[4] The Royal Commission of Inquiry's governing law as to war crimes under customary international law is drawn from Professor William Schabas' legal opinion on war crimes. See William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[5] Dietrich Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols," *Recueil des cours, Hague Academy of International La*w 131 (1979).
[6] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[7] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 451 (1895) ("Executive Documents") (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).
[8] *Id*.

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

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

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

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

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

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

[9] *Id*., 586.

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

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

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

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

[10] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I: Rules, 568-603 (2005).
[11] See ICRC concerning the identification of rules of customary international humanitarian law (online at https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf; and https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf).

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

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

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

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

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

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

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

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

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

Temporal issues

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

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

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

acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is no one alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary international law.[20] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[21] In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that "under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials."[22]

The Duty of the Occupant to Establish a Military Government

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

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

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

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

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

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

The law of occupation does not give the occupant unlimited power over the inhabitants of the occupied State. As President McKinley interpreted, this customary law of occupation that predates the 1899 and 1907 Hague Regulations during the Spanish-American War, the inhabitants of occupied territory "are entitled to security in their persons and property and in all their private rights and relations,"[29] and it is the duty of the commander of the occupant "to protect them in their homes, in their employments, and in their personal and religious beliefs."[30] Furthermore, "the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force"[31] and are "to be administered by the ordinary tribunals, substantially as they were before the occupation."[32]

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

The United States' practice under the law of occupation, confirms that sovereignty remains in the occupied State, because, according to Army regulations, "military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty"[33] through effective control of the territory of the occupied State.

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

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

Under Article 43, the authority to establish a military government is with the occupant that is physically on the ground—colloquially referred to in the Army as "boots on the ground." Professor Eyal Benvenisti explains that "[t]his is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the 'occupying State' as the authority in power, but the delegates preferred to change the reference to 'the occupant.' This insistence on the distinct character of the occupation administration should also be kept in practice."[36] This authority is triggered by Article 42, which states that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Only an "occupant," which is the "army," can establish a

[33] Department of the Army, Field Manual 27-10, *The Law of Land Warfare,* para. 358 (1956).
[34] William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).
[35] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* 22 (1975).
[36] Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).

military government. Under international law, the occupant is an agent of the occupying State, and the responsibility for the acts of the former is attributed to the latter.

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

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

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

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

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

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

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

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

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

The reasoning for the centralized control of authority is so that the military government can effectively respond to situations that are fluid in nature. Under the law of occupation, this authority by the occupant, according to Lenzerini, is to be shared with the Council of Regency, being the government of the occupied State.[45] As the last word concerning any acts relating to the administration of the occupied territory is with the occupant, “occupation law would allow for a vertical, but not a horizontal, sharing of authority [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory.”[46]

War Crime of Usurpation of Sovereignty during Military Occupation

The war crime of *usurpation of sovereignty during military occupation* appears on the list issued by the Commission on Responsibilities. The Commission did not indicate the source of this crime in treaty law. It would appear to be Article 43 of the Hague Regulations: “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the Bolshevist hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria

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

in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[47]

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

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

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

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

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

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

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

Territorial Sovereignty of a State

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[55] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force

[51] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).
[52] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[53] Commission of Responsibilities, Annex II, 58-79.
[54] Treaty of Versailles (1919), preamble.
[55] *United States v. Curtiss Wright Export Corp*., 299 U.S. 304, 318 (1936).

to control the sovereignty or rights of any other nation within its own jurisdiction."[56] The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied territories.[57] Furthermore, under international law, the Permanent Court of International Justice stated:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[58]

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

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[59]

Usurpation of sovereignty during military occupation came before the Permanent Court of Arbitration ("PCA") in 1999. In *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration convened an arbitral tribunal to resolve a dispute where Larsen, the claimant, alleged that the Government of the Hawaiian Kingdom, by its Council of Regency, the respondent, was liable "for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom."[60] The PCA accepted the case as a dispute between a "State" and a "private party" and hence acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA

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[56] *The Apollon*, 22 U.S. 362, 370 (1824).
[57] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[58] *Lotus* case (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).
[59] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[60] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom,* PCA Case no. 1999-01 (https://pca-cpa.org/en/cases/35/). Regarding the Permanent Court of Arbitration's institutional jurisdiction in acknowledging the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 PCA Convention, see David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)," 4 *Hawaiian Journal of Law and Politics* 133 (2022).

annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "[p]ursuant to article 47 of the 1907 Convention."[61] According to Bederman and Hilbert:

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

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

In the Hawaiian situation, the *usurpation of sovereignty during military occupation* would have been total since the beginning of the twentieth century. The RCI sees *usurpation of sovereignty* as a continuing offence, committed as long as the factual situation, determined by *usurpation of sovereignty* itself, persists. Alternatively, a plausible understanding of the crime is it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is "characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred." Therefore, it is not "an 'instantaneous' act or event; the additional distinctive element

[61] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.
[62] David J. Bederman and Kurt R. Hilbert, "Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii," 95 *American Journal of International Law* 927-933, 928 (2001).
[63] David Keanu Sai, "Royal Commission of Inquiry," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 25-26 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[64] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports, 596.

of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation."[65]

As an ongoing crime, the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures, by the occupying power, that go beyond those required by what is necessary for military purposes of the occupation. For example, the occupying Power is, therefore, entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation.[66] The occupying Power is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights law.

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

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

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

While the UCMJ does not delineate the war crime by omission, it does provide elements for the offenses of failure to obey a regulation and dereliction of duty that would constitute the war crime by omission. According to Corn and VanLandingham:

> While the statutory enumeration of military criminal offenses found in the Uniform Code of Military Justice (UCMJ) provides general authority to prosecutors to charge serious violations of the laws and customs of war, it does not delineate any specific war crimes—and hence none are ever charged. Without specified war crime offenses, the U.S. military turns to what are often referred to as "common law crimes"—ordinary, non-war-related crimes such as murder, assault, battery, arson, theft offenses, and rape—to prosecute service members for what are more logically understood and characterized as war crimes.

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

> In the U.S. military system, the same generic murder offense used to convict a service member of murdering his or her spouse in downtown Los Angeles is used to prosecute a service member for killing a prisoner of war in U.S. custody in Iraq.[68]

The war crime by omission has a direct link to the offenses of failure to obey a regulation and willful dereliction of duty, which, in this case, is the establishment of a military government. Para. 3, Army Field Manual 27-5, that states the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority." The willful failure to follow this Army regulation in performing this duty has led to the continuing commission of the war crime of usurpation of sovereignty, which, by its nature, has set in motion "secondary" war crimes, *e.g.* deprivation of a fair and regular trial, destruction of property, unlawful confinement, *etc.* The failure or omission to establish a military government is a failure to obey a regulation and willful dereliction of duty.

Elements and Punishment for Failure to Obey a Regulation

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

Elements and Punishment for Dereliction in the Performance of Duties

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

The War Crime by Omission for Failure to Stop or Prevent War Crimes

In July 2020, the U.S. Army updated Army Regulation 600-20, *Army Command Policy*. In this new version, paragraph 4-24—*Command responsibility under the law of war* was added, which states:

[68] Geoffrey S. Corn and Rachel E. VanLandingham, "Strengthening American War Crimes Accountability," 70 *American University Law Review* 309, 316 (2020).

> Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control. These measures include requirements to train their Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated.

The U.S. Department of Defense Military Commission Instruction No. 2 states that a "person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility," and provides the following elements:

> (1) The accused had command and control, or effective authority and control, over one or more subordinates;
> (2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;
> (3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; and
> (4) The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.[69]

These four elements are the same under customary international law. According to an authoritative study of customary international law by the International Committee of the Red Cross:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[70]

The U.S. Army updated Army Regulation 600-20, Army Command Policy, which states under the heading of Command responsibility under the law of war:

[69] Department of Defense, "Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission," April 30, 2003 (online at https://www.mc.mil/Portals/0/milcominstno2.pdf).
[70] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I: rules, Rule 153, 558 (2005).

> 4-24. Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish.

The superior-subordinate relationship is clear under the law of occupation because the military governor is the superior officer over all military forces and civilians in the occupied State. According to Major William Parks, when referring to Japanese General Tomoyuki Yamashita during the Second World War, "[a]s military governor, all trust, care, and confidence of the population were reposed in him. This was in addition to his duties and responsibilities as a military commander."[71] Although the senior commander of the State of Hawai'i Army National Guard has failed to perform his duty of establishing a military government, and, thereby becoming a military governor, it does not relieve him of his duties as a theater commander to protect the civilian population from war crimes. Consequently, if commanders 'know or should have known' that war crimes are being committed and 'take no action to prevent, stop, or punish,' they could be held criminally liable for the war crime by omission.

The continuity of Hawaiian Statehood is a matter of customary international law, and is evidenced by two legal opinions, one by Professor Matthew Craven[72] and the other by Professor Federico Lenzerini.[73] Furthermore, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law as evidenced by the legal opinion of Professor William Schabas.[74] These writings are considered from "the most highly qualified publicists," and as such, a source of customary international law. Thus, under customary international law, the Hawaiian Kingdom continues to exist and that war crimes are being committed throughout its territory.

Article 38 of the Statute of the International Court of Justice identifies five sources of international law: (a) treaties between States; (b) customary international law derived from the practice of States; (c) general principles of law recognized by civilized nations; and, as subsidiary means for the determination of rules of international law; (d) judicial decisions; and (e) the writings of "the most highly qualified publicists." These writings by Professors Craven, Lenzerini, and Schabas are from "the most highly qualified publicists," and are, therefore, a source of customary international law.

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[71] Major William H. Parks, "Command Responsibility for War Crimes," 62 *Military Law Review* 1, 38 (1973).
[72] Matthew Craven, "Continuity of the Hawaiian Kingdom," 1 *Hawaiian Journal of Law and Politics* 508 (2004) (online at https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf).
[73] Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom," 3 *Hawaiian Journal of Law and Politics* 317 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).
[74] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Hawaiian Journal of Law and Politics* 334 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).

According to Professor Malcom Shaw, "[b]ecause of the lack of supreme authorities and institutions in the international legal order, the responsibility is all the greater upon publicists of the various nations to inject an element of coherence and order into the subject as well as to question the direction and purposes of the rules."[75] Therefore, "academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules."[76] In the *Paquette Habana* case, the U.S. Supreme Court explained:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is* (emphasis added).[77]

As a source of international law, the legal opinions establish a legal foundation, under customary international law, that the Hawaiian Kingdom continues to exist as a State, and that war crimes are being committed throughout the territory of the Hawaiian Kingdom by the unlawful imposition of American municipal laws and administrative measures, which is the war crime of usurpation of sovereignty during military occupation.

Elements and Punishment for Failure to Stop or Prevent War Crimes

The legal doctrine of command responsibility provides three elements of the offense for failure to stop or prevent war crimes: (1) there must be a superior-subordinate relationship; (2) the superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and (3) the superior failed to take the necessary and reasonable measures to stop or prevent the war crime or to punish the perpetrator.

APPLICATION

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international

[75] Malcolm N. Shaw QC, *International Law*, 6th ed., 113 (2008).
[76] *Id*., 71.
[77] *The Paquette Habana*, 175. U.S., 677, 700 (1900).

law. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation. In phase II, the Council of Regency will invoke paragraph 495, U.S. Army Field Manual 27-10, which states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of […] [p]ublication of the facts, with a view to influencing public opinion against the offending belligerent."

Implementation of phase II was initiated at the University of Hawai'i at Mānoa, when the undersigned entered the political science graduate program, where he received a master's degree, specializing in international relations and public law, in 2004, and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,[78] to *Nation Within—The History of the American Occupation of Hawai'i*.[79] 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.[80]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva, dated 25 February 2018, to Judge Gary W.B. Chang, Judge

[78] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).
[79] 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.
[80] *Id*., xvi.

Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i.[81] Dr. deZayas stated:

> As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, The United Nations Human Rights Committee Case Law 1977-2008, and currently serving as the UN Independent Expert on the promotion of a democratic and equitable international order, I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[82] 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."[83]

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

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights

[81] 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).
[82] 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).
[83] 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/).

> are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai'i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and is accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[84] In its resolution, the IADL "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of 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") —who is also a non-governmental organization with consultative status with the United Nations ECOSOC and is accredited as an observer in the Human Rights Council's sessions, sent a joint letter, dated 3 March 2022, to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[85] In its joint letter, the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

[84] 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/).
[85] 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/).

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

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

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

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

In this meeting, the undesigned specifically stated to MG Hara that the failure to establish a military government is a war crime by omission. The undersigned then recommended to MG Hara that he should task his Staff Judge Advocate, Lieutenant Colonel Lloyd Phelps (“LTC Phelps”),

to do his due diligence regarding the information provided him from this meeting. LTC Phelps' task would then be to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. The undersigned provided three weeks from the date of the letter, 1 June 2023, to complete his due diligence. Both MG Hara and the undersigned agreed that we would communicate with each other through an interlocutor, we both know, John "Doza" Enos.

On 6 June 2023, the undersigned was made aware by the interlocutor that MG Hara stated that Phelps had made strides in his assigned task but still needed to complete his findings. The undersigned extended the timeline to 20 June, as evidenced in my letter to MG Hara dated 30 June 2023, attached herein as Enclosure 2. Starting in July, communications to MG Hara would be done by the undersigned as Chair of the Council of Regency. In a letter to MG Hara dated 7 July 2023, attached herein as Enclosure 3, the undersigned stated:

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

Since he was unable to provide rebuttable evidence refuting the presumption of continuity of the Hawaiian Kingdom, the undersigned conveyed to MG Hara, through the interlocutor, that he had until 31 July 2023 to make a command decision regarding the establishment of a military government. On 11 July 2023, the undersigned conveyed to MG Hara that "[a]s the resident expert here in these islands on international law, Hawaiian constitutional law, and administrative law, it is my duty to offer my assistance to you as you complete your command estimate in the spirit of cooperation, as the law of occupation allows, provided you 'bear the ultimate and overall responsibility for the occupied territory,'" attached herein as Enclosure 4.

In a letter dated 24 July 2023, MG Hara was made aware of the significance of 31 July, which is a national holiday in the Hawaiian Kingdom, where the British occupation of the Hawaiian Islands came to an end in 1843, attached herein as Enclosure 5. In a letter dated 1 August 2023, the undersigned stated that he was told by the interlocutor that MG Hara acknowledged, in a meeting with the interlocutor on 27 July 2023, that the Hawaiian Kingdom continues to exist. This satisfied the 31 July suspense date, attached herein as Enclosure 6. LTC Phelps was unable to provide

rebuttable evidence as to the presumption of the continuity of the Hawaiian State and MG Hara's acknowledgement affirms that position.

As Judge James Crawford explains, "[t]here is a presumption that the State continues to exist, with its right and obligations […] despite a period in which there is […] no effective government."[86] Judge Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State."[87] "If 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 sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[88]

In the last letter from the undersigned to MG Hara, dated 21 August 2023, attached herein as Enclosure 7, MG Hara was made aware of the Council of Regency's meeting on 14 August 2023, where an "Operational Plan for Transitioning the State of Hawai'i into a Military Government" was approved, which was enclosed in that letter. MG Hara was urgently called upon to establish a military government in light of the Lahaina brushfire. The letter stated:

> The insurgents, who were not held to account for their treasonous actions in 1893, were allowed by the United States to control and exploit the resources of the Hawaiian Kingdom and its inhabitants after the Hawaiian government was unlawfully overthrown by United States troops. Some of these insurgents came to be known as the Big Five, a collection of five self-serving large businesses, that wielded considerable political and economic power after 1893. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Company, American Factors (now Amfac), and Theo H. Davies & Company. One of the Big Five, Amfac, acquired an interest in Pioneer Mill Company in 1918, and in 1960 became a wholly owned subsidiary of Amfac. Pioneer Mill Company operated in West Maui with its headquarters in Lahaina. In 1885, Pioneer Mill Company was cultivating 600 of the 900 acres owned by the company and by 1910, 8,000 acres were devoted to growing sugar cane. In 1931, the Olowalu Company was purchased by Pioneer Mill Company, adding 1,200 acres of sugar cane land to the plantation. By 1935, over 10,000 acres, half-owned and half leased, were producing sugar cane for Pioneer Mill. To maintain its plantations, water was diverted, and certain lands of west Maui became dry.
>
> The Lahaina wildfire's tragic outcome also draws attention to the exploitation of the resources of west Maui and its inhabitants—water and land. West Maui Land Company,

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

> Inc., became the successor to Pioneer Mill and its subsidiary the Launiupoko Irrigation Company. When the sugar plantation closed in 1999, it was replaced with real estate development and water management. Instead of diverting water to the sugar plantation, it began to divert water to big corporations, hotels, golf courses, and luxury subdivisions. As reported by Hawai'i Public Radio, "Lahaina was formerly the 'Venice of the Pacific,' an area famed for its lush environment, natural and cultural resources, and its abundant water resources in particular." Lahaina became a deadly victim of water diversion and exploitation. It should be noted that Lahaina is but a microcosm of the exploitation of the resources of the Hawaiian Kingdom and its inhabitants throughout the Hawaiian Islands for the past century to benefit the American economy in violation of the law of occupation.
>
> Considering the devastation and tragedy of the Lahaina wildfire, your duty is only amplified and made much more urgent. It has been reported that the west Maui community, to their detriment, are frustrated with the lack of centralized control by departments and agencies of the federal government, the State of Hawai'i, and the County of Maui. The law of occupation will not change the support of these departments and agencies, but rather only change the dynamics of leadership under the centralized control by yourself as the military governor. The operational plan provides a comprehensive process of transition with essential tasks and implied tasks to be carried out.
>
> The establishment of a military government would also put an end to land developers approaching victims of the fire who lost their homes to purchase their property. While land titles were incapable of being conveyed after January 17, 1893, for want of a lawful government and its notaries public, titles are capable of being remedied under Hawaiian Kingdom law and economic relief by title insurance policies. It is unfortunate that the tragedy of Lahaina has become an urgency for the State of Hawai'i to begin to comply with the law of occupation and establish a military government. To not do so is a war crime of omission.
>
> Given the severity of the situation in Maui and the time factor for aid to the victims, the Council of Regency respectfully calls upon you to schedule a meeting to go over its proposed operational plan and its execution.

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

All authority of the State of Hawai'i, by virtue of American municipal laws, gives rise to war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of

Hawai‘i is invalid because it never legally existed in the first place—*ex injuria jus non oritur* (law does not arise from injustice). What remains valid, however, is the authority of the State of Hawai‘i Department of Defense, which is its Army and Air National Guard. The authority of both these branches of the military continues as members of the United States Armed Forces that are situated in the occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the Army of the United States.

On 24 May 2024, MG Hara publicly announced that he will resign and retire as the Adjutant General on 1 October 2024, and retire from the Army on 1 November 2024, attached herein as Enclosure 8. Notwithstanding this announcement, MG Hara is still the theater commander and must delegate complete authority and title to BG Logan to establish a military government. His public announcement is evidence of willful disobeying an Army regulation and dereliction of duty, which constitutes the war crime by omission.

The RCI had been made aware that MG Hara previously informed a former Adjutant General that State of Hawai‘i Attorney General Anne E. Lopez instructed him and Deputy Adjutant General BG Logan to ignore the efforts calling upon MG Hara to perform his military duty of transforming the State of Hawai‘i into a military government. This prompted the undersigned to send a letter, dated 1 July 2024, to MG Hara, attached herein as Enclosure 9. The RCI stated:

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

> military government (June 22, 2024), and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).

On 3 July 2024, the RCI sent another letter to MG Hara to provide him a legal basis for disobeying Attorney General Lopez's instructions, attached herein as Enclosure 10. The letter stated:

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

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

On 13 July 2024, the RCI apprised MG Hara of the consequences for not delegating complete authority and title to BG Logan to establish a military government, that the RCI was aware of a letter dated 29 May 2024 from thirty-seven police officers, both active and retired, calling upon him to perform his duty, and that the RCI provided copies of two recent law articles, by the Head and Deputy Head of the RCI, that were published in volume 6(2) of the *International Review of Contemporary Law* in June of 2024, attached herein as Enclosure 11.

The final letter the RCI sent to MG Hara was on 26 July 2024, apprising him that should he fail to perform his duty it will have a cascading effect for the Hawai'i Army National Guard and its

component commands of the 29th Infantry Brigade, the 103rd Troop Command, and the 298th Regiment, Regional Training Institute, attached herein as Enclosure 12. The RCI stated:

> If you are derelict in the performance of your duties, by not delegating authority to BG Logan, then you would be the subject of a war criminal report by the Royal Commission of Inquiry (RCI) for the war crime by omission. From the date of the publication of your war criminal report on the RCI's website, BG Logan will have one week to transform the State of Hawai'i into a military government.
>
> If BG Logan is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of BG Logan's war criminal report on the RCI's website, Colonel David Hatcher II, Commander of the 29th Infantry Brigade, who is next in the chain of command below BG Logan, will have one week to transform the State of Hawai'i into a military government.
>
> The chain of command, or what is called the order of battle, for the 29th Infantry Brigade for units in the Hawaiian Islands, is first, the 1st Squadron, 299th Cavalry Regiment, second, the 1st Battalion, 487th Field Artillery Regiment, third, the 29th Brigade Support Battalion, and fourth, the 227th Brigade Engineer Battalion. The 29th Infantry Brigade has units stationed in Alaska and Guam but since they are outside the Hawaiian territory, they do not have the military duty, as an occupant, to establish a military government in the Hawaiian Islands.
>
> If Colonel Hatcher is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of Colonel Hatcher's war criminal report on the RCI's website, Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.
>
> If LTC Werner is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Werner's war criminal report on the RCI's website, Lieutenant Colonel Bingham L. Tuisamatatele, Jr., Commander of 1st Battalion, 487th Field Artillery Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.
>
> If LTC Tuisamatatele is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Tuisamatatele's war criminal report on the RCI's website, Lieutenant Colonel Joshua A. Jacobs, Commander of 29th Brigade

> Support Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.
>
> If LTC Jacobs is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Jacobs's war criminal report on the RCI's website, Lieutenant Colonel Dale R. Balsis, Commander of 227th Brigade Engineer Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.
>
> Should LTC Balsis be derelict in the performance of his duties to establish a military government and be the subject of a war criminal report for the war crime by omission, that will be published on the RCI's website, the sequence of events will then loop to the Executive Officers. First, with the 29th Infantry Brigade, second, with the 1st Squadron, 299th Cavalry Regiment, third, with the 1st Battalion, 487th Field Artillery Regiment, fourth with the 29th Brigade Support Battalion, and fifth with the 227th Brigade Engineer Battalion.
>
> This looping, within the 29th Infantry Brigade's component commands, will cover all commissioned officers to include Majors, Captains, First Lieutenants and Second Lieutenants. After the commissioned officers have been exhausted in the 29th Infantry Brigade, the chain of command of commissioned officers of the 103rd Troop Command and its component commands will begin, followed by the chain of command of commissioned officers of the 298th Regiment, Regional Training Institute, and its component commands.
>
> This sequence of events will continue by rank down the chain of command of the entire Hawai‘i Army National Guard until there is someone who sees the "writing on the wall" that he/she either performs their military duty or becomes a war criminal subject to prosecution.

As of 1200 hours, on 31 July 2024, MG Hara did not delegate full authority and title to BG Logan. As such, MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. MG Hara was the subject of War Criminal Report no. 24-0001 that was published on the RCI's website on 5 August 2024.[89]

After War Criminal Report no. 24-0001 was published, the RCI notified BG Logan of the consequences upon him after MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 13. The RCI stated:

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[89] Royal Commission of Inquiry, War Criminal Report no. 24-0001—*Omission for willful failure to establish a military government—Kenneth Hara* (August 5, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).

> Consequently, as the Deputy Adjutant General and Commander of the Army National Guard, you are now the theater commander. You should assume the chain of command, as the theater commander of the occupied State of Hawaiian Kingdom, and perform your duty of establishing a military government by 12 noon on August 12, 2024. If you are derelict in the performance of your duty to establish a military government, then you would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of your war criminal report on the RCI's website, Colonel Wesley K. Kawakami, Commander of the 29th Infantry Brigade, who is next in the chain of command below you, shall assume command of the Army National Guard. Colonel Kawakami will have one week to transform the State of Hawai'i into a military government.

The following day, on 6 August 2024, the RCI notified the Commander of the 29th Infantry Brigade, next in the chain of command under BG Logan, and the Commanders of its component units, 1st Squadron, 299th Cavalry Regiment, 1st Battalion, 487th Field Artillery Regiment, and the 227th Brigade Engineer Battalion, of the circumstances for the Army National Guard to establish a military government of Hawai'i, attached herein as Enclosure 14. The RCI stated:

> As a war criminal, subject to prosecution by a competent tribunal, and where there is no statute of limitations, MG Hara is unfit to serve as Commander of the Hawai'i National Guard. As such, Brigadier General Stephen Logan, as the Deputy Adjutant General and Commander of the Army National Guard, must assume the chain of command, and he has until 1200 hours on August 12, 2024, to transform the State of Hawai'i into a military government. To escape criminal culpability, BG Logan must demand a legal opinion from the Attorney General or from LTC Phelps that shows, with irrefutable evidence and law, that the Hawaiian Kingdom ceases to exist a State under international law.
>
> If BG Logan does not obtain a legal opinion, and fails to perform his military duty, he will then be the subject of a war criminal report by the RCI for the war crime by omission. After the publication of this war criminal report, Colonel Wesley K. Kawakami, Commander, 29th Infantry Brigade, will assume the chain of command and demand a similar legal opinion. If Colonel Kawakami receives no such legal opinion, he will have one week to perform his duty as the theater commander.
>
> To speak to the severity of the situation, I am enclosing a letter to MG Hara, dated May 29, 2024, from police officers, both active and retired, from across the islands, that called upon him to perform his duties because "This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws." These police officers also stated:
>
> > We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstance, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a

> close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an acting capacity that is allowed under Hawaiian law.

As senior Commanders in the chain of command of the Army National Guard, I implore you all to take this matter seriously and to demand, from the Attorney General or the JAG, a legal opinion that concludes there is no duty on you to establish a military government because the Hawaiian Kingdom does not continue to exist, and that this is the territory of the United States and the State of Hawai‘i under international law. With the legal opinion in hand, there is no duty to perform. Without it, there is the military duty to perform, and failure to perform would constitute the war crime by omission.

To further urge BG Logan perform his military duty by 12 noon on 12 August 2024, the RCI notified him, on 7 August 2024, attached herein as Enclosure 15, stating:

As you are aware, yesterday, I notified the Commander of the 29th Infantry Brigade and the Commanders of its component battalions apprising them as to the circumstances of their possible implication, of performing the duty to establish a military government of Hawai‘i, should you fail to perform your duty. I closed the letter with:

> As senior Commanders in the chain of command of the Army National Guard, I implore you all to take this matter seriously and to demand, from the Attorney General or the JAG, a legal opinion that concludes there is no duty on you to establish a military government because the Hawaiian Kingdom does not continue to exist, and that this is the territory of the United States and the State of Hawai‘i under international law. With the legal opinion in hand, there is no duty to perform. Without it, there is the military duty to perform, and failure to perform would constitute the war crime by omission.

The demand for a legal opinion, by you, of the Attorney General, Anne E. Lopez, or of the JAG, LTC Lloyd Phelps, is not outside your duties as a military officer. Your duty is to adhere to the rule of law. According to section 4-106, FM 3-07:

> The rule of law is fundamental to peace and stability. A safe and secure environment maintained by a civilian law enforcement system must exist and operate in accordance with internationally recognized standards and with respect for internationally recognized human rights and freedoms. Civilian organizations are responsible for civil law and order. However, Army forces may need to provide limited support.

According to the *Handbook for Military Support to Rule of Law and Security Sector Reform* (2016), the most frequently used definition of the rule of law “in the US government is one put forth by the UN.”

United Nations Definition of the Rule of Law

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

Demanding a legal opinion that refutes, with irrefutable evidence and law, the continued existence of the Hawaiian Kingdom as a State, under international law, is not a political act but rather an act to 'ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.' Under international law, legal title to territory is State sovereignty and it is a jurisdictional matter. As the Permanent Court of International Justice, in the *Lotus* case, stated:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [treaty].

In other words, without a treaty, where the Hawaiian Kingdom ceded its sovereignty to the United States, the United States and the State of Hawai'i have no sovereignty over the Hawaiian Islands. However, if the Attorney General is confident, that the State of Hawai'i is lawfully the 50th state of the United States, she would have no problem providing you a legal opinion that the Hawaiian Kingdom ceases to exist under international law. To have instructed you, and Major General Hara, to simply ignore the call to perform a military duty, the Attorney General revealed that she has no legal basis for her instruction to you. To quote Secretary of State Walter Gresham regarding the status of the provisional government, he stated to President Grover Cleveland:

> The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act.

> The same can be said of the Attorney General, whose office is a direct successor of the lawless provisional government. An Attorney General, conscious of her lawful status, does not thus act.
>
> The call upon you, to perform your military duty, is not an attack on you and on the men and women you command in the Hawai‘i National Guard. It is a call upon you because of the respect the I have, as a former Army Field Artillery officer, of your position as the United States theater commander in the occupied State of the Hawaiian Kingdom.
>
> I recommend that you view a recent podcast I did with Kamaka Dias' *Keep It Aloha* (https://www.youtube.com/watch?v=PvEdNx2dynE) where I share my history and my time as a military officer, and how I got to where I am as a member of the Council of Regency. Since the podcast was posted on August 1, 2024, it has received over 6,700 views. I also recommend that you watch my presentation to the Maui County Council (https://www.youtube.com/watch?v=Hh4iVT77MG8&t=8s) on March 6, 2024, where I explain the legal basis of the American occupation and the duty of the Adjutant General to transform the State of Hawai‘i into a military government. Since the Kamehameha Schools' Kanaeokana posted the video on April 1, 2024, it has received over 16,000 views. I recommend that you also watch an award-winning documentary on the Council of Regency that premiered in 2019 at the California Film Festival (https://www.youtube.com/watch?v=CF6CaLAMh98). Since the video was posted on August 13, 2019, it has received over 42,000 views.
>
> Since my meeting with MG Hara on April 17, 2023, I have given him the latitude and time to do his due diligence with his JAG, LTC Phelps, who acknowledged that Hawai‘i is an occupied State. For MG Hara to simply ignore my calls on him to perform his duty is a sign of disrespect to a government official of the Hawaiian Kingdom whose conduct and action are in accordance with the rule of law. I implore you to not follow the same course MG Hara took, which led him to committing the war crime by omission.
>
> You have until 12 noon on August 12, 2024, to perform your duty, of establishing a military government for Hawai‘i, in accordance with the Law of Armed Conflict—international humanitarian law, U.S. Department of Defense Directive 5100.01, and Army Regulations—FM 27-5 and FM 27-10. The eyes of Hawai‘i and the world are upon you.

In a letter to BG Logan, dated August 10, 2024, the RCI provided two legal opinions for him to provide to the Attorney General to refute, attached herein as Enclosure 16. The two legal opinions were on the subject of the continuity of the Hawaiian Kingdom and was authored by Professor Craven, from the University of London, SOAS, Department of Law, and by Professor Federico Lenzerini, from the University of Siena, Italy, Department of Political and International Sciences.

The RCI sent its final letter to BG Logan, dated August 11, 2024, attached herein as Enclosure 17. In its last effort to get BG Logan to perform his military duty, the RCI stated:

> This is my last notification to you. According to Hawai‘i Revised Statutes §28-3, "The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department." While you are not the head of the Department of Defense, you are implicated by the conduct of the head, Major General Kenneth Hara, in the performance of a military duty. A legal opinion is "a statement of advice by an expert on a professional matter."
>
> The issue of the continuity of the Hawaiian Kingdom, as a State under international law, is not a novel legal issue for the State of Hawai‘i. It has been at the center of case law and precedence, regarding jurisdictional arguments that came before the courts of the State of Hawai‘i, since 1994. One year after the United States Congress passed the joint resolution apologizing for the United States overthrow of the Hawaiian Kingdom government in 1993, an appeal was heard by the State of Hawai‘i Intermediate Court of Appeals that centered on a claim that the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Lorenzo*, the appellate court stated:
>
> > Lorenzo appeals, arguing that the lower court erred in denying his pretrial motion (Motion) to dismiss the indictment. The essence of the Motion is that the [Hawaiian Kingdom] (Kingdom) was recognized as an independent sovereign nation by the United States in numerous bilateral treaties; the Kingdom was illegally overthrown in 1893 with the assistance of the United States; the Kingdom still exists as a sovereign nation; he is a citizen of the Kingdom; therefore, the courts of the State of Hawai‘i have no jurisdiction over him. Lorenzo makes the same argument on appeal. For the reasons set forth below, we conclude that the lower court correctly denied the Motion.
>
> While the appellate court affirmed the trial court's judgment, it admitted "the court's rationale is open to question in light of international law." By not applying international law, the court concluded that the trial court's decision was correct because Lorenzo "presented no factual (or legal) basis for concluding that the Kingdom [continues to exist] as a state in accordance with recognized attributes of a state's sovereign nature." Since 1994, the Lorenzo case has become a precedent case that served as the basis for denying defendants' motions to dismiss claims that the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Fergerstrom*, the appellate court stated, "[w]e affirm that relevant precedent [in *State of Hawai‘i v. Lorenzo*]," and that defendants have an evidentiary burden that shows the Hawaiian Kingdom continues to exist.
>
> The Supreme Court, in *State of Hawai‘i v. Armitage*, clarified the evidentiary burden that Lorenzo placed upon defendants. The court stated:
>
> > Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the Kingdom of Hawai‘i "exists as a state in accordance

> with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack jurisdiction over him or her.

Unlike Lorenzo, I provided you two legal opinions, by experts in international law, in my letter to you yesterday, August 10, 2024, that provided a factual and a legal basis for concluding that the Hawaiian Kingdom 'exists as a state in accordance with recognized attributes of a state's sovereign nature,' as called for by the State of Hawai'i Intermediate Court of Appeals and the Supreme Court. These legal opinions were authored by two professors of international law, Matthew Craven, from the University of London, SOAS, Department of Law, and Federico Lenzerini, from the University of Siena, Department of Political and International Sciences.

As a result, this situation places the burden on the State of Hawai'i Attorney General, Anne Lopez, to rebut these legal opinions pursuant to *State of Hawai'i v. Lorenzo* and *State of Hawai'i v. Armitage*. This would legally qualify her instruction to you to ignore the calls for performing your military duty to establish a military government.

There are two scenarios you face on this subject. The first scenario is to submit a formal letter to the Attorney General, with the approval of MG Hara as head of the Department of Defense, for a legal opinion that refutes the two legal opinions that opine that the Hawaiian Kingdom continues to exist as a State under international law. The second scenario is for MG Hara, himself, as head of the Department of Defense, to submit a similar formal letter to the Attorney General. Consequently, both scenarios will remove the element of *mens rea* of willful dereliction of duty by MG Hara, and the Royal Commission of Inquiry will also withdraw its War Criminal Report no. 24-0001.

I am making every effort to shield both you and MG Hara from committing the war crime by omission, and it boils down to a simple letter asking the right question. Should you decide to request a legal opinion of the Attorney General pursuant to §28-3, HRS, I have enclosed a sample letter to be sent to the Attorney General before 12 noon tomorrow.

If you or MG Hara have any questions, do not hesitate to contact me before 12 noon tomorrow. If I do not hear from you, by email or otherwise, that you submitted the request for a legal opinion before 12 noon tomorrow, I will assume that you did not make the request, and you will be the subject of a war criminal report for the war crime by omission.

As of 1200 hours, on 12 August 2024, BG Logan did not establish a military government. As such, BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission.

GUILTY OF THE WAR CRIME BY OMISSION

BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. BG Logan, in his official capacity as the senior member of the State of Hawai‘i Department of Defense, has met the requisite elements for the war crime by omission, through willfully disobeying an Army regulation and willfully derelict in his duty to establish a military government, and is, therefore, guilty of the war crime by omission. BG Logan is also guilty of the war crime by omission under command responsibility for war crimes committed on the civilian population. These offenses do not have the requisite element of *mens rea*.

The term "guilty," as used in the RCI war criminal reports, is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[90] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to have committed the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[91] According U.S. military law, BG Logan is accountable by court-martial or nonjudicial punishment under Article 15, UCMJ. Under international criminal law, BG Logan is subject to prosecution for the war crime by omission by a competent court or tribunal.

Elements for failure to obey a regulation:

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

Elements for dereliction in the performance of duties:

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

Elements of command responsibility for war crimes:

a) There must be a superior-subordinate relationship;

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

b) That BG Logan must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and
c) That BG Logan failed to take the necessary and reasonable measures to stop or prevent the war crime or to punish the perpetrator.

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

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

12 August 2024

Revised on 13 December 2024 to include command responsibility for war crimes.

enclosures

Enclosure “1”

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May 11, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Military Government of Hawai‘i

Dear Major General Hara:

This letter is to confirm our meeting held at the Grand Naniloa Hotel on April 13, 2023, at 1:30pm. I stated that I was the Chairman of the Hawaiian Kingdom Council of Regency and Head of the Royal Commission of Inquiry ("RCI") whose mandate is to investigate war crimes and human rights violations being committed in the Hawaiian Kingdom. I provided you copies of:

- The RCI's publication *Royal Commission of Inquiry* (2020);
- Council of Regency's memorandum on the formula to determine provisional laws (March 22, 2023);
- Council of Regency's memorandum on the role and function of the Military Government of Hawai‘i (April 7, 2023);
- Major Christopher Todd Burgess, *Monograph—US Army Doctrine and Belligerent Occupation* (May 26, 2004);
- Federico Lenzerini, Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom, 3 Haw. J.L. & Pol. 317 (2021);
- *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, PCA Case Repository (1999);
- *The Republic of Ecuador v. The United States of America*, Permanent Court of Arbitration, PCA Case Repository (2011);
- *Ilya Levitis (United States) v. The Kyrgyz Republic*, Permanent Court of

Arbitration, PCA Case Repository (2013);
- RCI War Criminal Report No. 22-0001;
- RCI War Criminal Report No. 22-0005; and
- RCI War Criminal Report No. 23-0001.

The subject of the meeting were the factual circumstances that established the existence of the United States military occupation of the Hawaiian Kingdom since January 17, 1893, and the omission by the United States to comply with customary international law by establishing a military government to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty had been entered into between the Hawaiian Kingdom and the United States of America. This customary international law was later codified under Article 43 of the 1899 Hague Convention, IV, and later superseded by Article 43 of the 1907 Hague Regulations. There is no peace treaty.

On November 28, 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.[1] The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.[2] By 1893, the Hawaiian Kingdom maintained over ninety Legations and Consulates throughout the world.

Driven by the desire to attain naval superiority in the Pacific, U.S. troops, without cause, invaded the Hawaiian Kingdom on January 16, 1893, and unlawfully overthrew its Hawaiian government and replaced it with their puppet the following day with the prospect of militarizing the islands. The State of Hawai‘i today is the successor to this puppet government. However, despite the unlawful overthrow of its government, the Hawaiian Kingdom as a State would continue to exist as a subject of international law and come under the regime of international humanitarian law and the law of occupation. The military occupation is now at 130 years.

According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[3] by the recognizing State, and that "recognition estops the State which has

[1] David Keanu Sai, "Hawaiian Constitutional Governance," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[2] International Treaties with the Hawaiian Kingdom (online at https://hawaiiankingdom.org/treaties.shtml).
[3] Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).

recognized the title from contesting its validity at any future time."[4] And the "duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be 'derecognized.'"[5]

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to 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,"[6] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[7] 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 [its independence and sovereignty] 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.[8]

"If 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."[9] 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. 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*[10]

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[4] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).
[5] Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.
[6] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[7] *Id*.
[8] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).
[9] 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).
[10] 9 Stat. 922 (1848).

and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[11]

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*.[12] 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*.[13] International law does not permit annexation of territory of another state.[14]

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 territorial sea from a three-mile limit to twelve.[15] 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."[16] 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,"[17] 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."[18] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution.

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[11] 30 Stat. 1754 (1898).
[12] 30 Stat. 750 (1898).
[13] 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.
[14] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
[15] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[16] *Id.*, 242.
[17] *Id*., 242.
[18] *Id*.

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."[19] 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 it being accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. 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."[20]

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."[21] Professor Willoughby also stated, 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."[22]

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands and within three generations the national consciousness of the Hawaiian Kingdom was obliterated.[23] Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals and nationals of countries of the world, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in 1997.[24] Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili'uokalani who died on November 11, 1917.

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[19] *Id.*, 262.
[20] *The Apollon*, 22 U.S. 362, 370 (1824).
[21] Kmiec, 252.
[22] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[23] 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* 114 (2020).
[24] 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).

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on July 6, 1844,[25] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997.

The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[26] Successors to King Kamehameha III were not established through "extra-legal changes," but rather under the constitution and laws of the Hawaiian Kingdom. "Where a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[27]

On November 8, 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[28] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes that brought the dispute under the auspices of the PCA. I served as lead agent for the Hawaiian Kingdom in this arbitration so I am very familiar with this case and the role of the PCA in verifying the Hawaiian Kingdom as a State before the arbitral tribunal was formed.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States. 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

[25] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
[26] M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
[27] *Restatement (Third)*, §203, comment c.
[28] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[29]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[30] 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."[31]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "private entity" in its case repository.[32] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).[33]

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This

[29] Lenzerini, 322.
[30] German Settlers in Poland, 1923, PCIJ, Series B, No. 6, 22.
[31] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).
[32] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[33] *Id*.

agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on June 9, 2000.[34]

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative policies of the Occupying State over the territory of the Occupied State.

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, "[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." Article 43 is the codification of customary international law that existed on January 17, 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[35]

[34] Sai, *The Royal Commission of Inquiry*, 25-26.
[35] *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this "rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[36] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, "there do not appear to have been any prosecutions for that crime by international criminal tribunals."[37] However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the International Law Commission, "[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[38] In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.

The RCI views *usurpation of sovereignty during military occupation* as a war crime under "particular" customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the Hawaiian situation, *usurpation of sovereignty during military occupation* serves as a source for the commission of secondary war crimes within the territory of an occupied State, *i.e. compulsory enlistment*, *denationalization*, *pillage*, *destruction of property*,

[36] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[37] William Schabas, "War Crimes Related to the 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* 156 (2020).
[38] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

deprivation of fair and regular trial, *deporting civilians of the occupied territory*, and *transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions or measures of the occupying State is addressed by Professor Eyal Benvenisti:

> The occupant may not surpass its limits under international law through extra-territorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[39]

In the situation of Hawai‘i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State’s proxies such as the State of Hawai‘i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai‘i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists’ accommodations collected by the State of Hawai‘i and the Counties.

The Counties have recently added 3% surcharges to the State of Hawai‘i’s 10.25% transient accommodations tax. Added with the State of Hawai‘i’s general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American

[39] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

duties on goods that are imported to the United States destined to Hawai‘i. These duty rates are collected by the United States according to the United States Tariff Act of 1930**,** as amended, and the Trade Agreements Act of 1979.

The Council of Regency's strategic plan entails three phases.[40] Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*,[41] Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the I entered the political science graduate program and received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since January 17, 1893. This prompted other master's theses, doctoral dissertations, peer and law review articles, 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*,[42] to *Nation Within—The History of the American Occupation of Hawai‘i*.[43] 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.

[40] Council of Regency's Strategic Plain (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).
[41] David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).
[42] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i* (1998).
[43] 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.

> 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.[44]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva, Switzerland, to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i dated February 25, 2018.[45] 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 state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[46] 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."[47]

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[44] *Id*., xvi.
[45] 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).
[46] 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).
[47] 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/).

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

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On February 7, 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 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.[48] 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."

[48] 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/).

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated March 3, 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[49] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

On March 22, 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 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 includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence "concerns a consent tacitly

[49] 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/).

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 would be called for."[50] Silence conveys consent. Since they "did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[51]

At the United Nations World Summit in 2005, the *Responsibility to Protect* was unanimously adopted.[52] The principle of the *Responsibility to Protect* has three pillars: (1) every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; (2) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; and (3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. In 2009, the General Assembly reaffirmed the three pillars of State's Responsibility to Protect their populations from war crimes and crimes against humanity.[53] And in 2021, the General Assembly passed a resolution on "The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity."[54] The third pillar, which may call into action State intervention, can become controversial.[55] The Council of Regency acknowledges its duty and responsibility under the first pillar.

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."[56] This "rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general."[57]

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[50] Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).
[51] See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.
[52] 2005 World Summit Outcome A/60/L.1
[53] G.A. Resolution 63/308 The responsibility to protect, A/63/308.
[54] G.A. Resolution 75/277 The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277.
[55] Marjorie Cohn, "The Responsibility to Protect – the Cases of Libya and Ivory Coast," *Truthout* (16 May 2011) (online at https://truthout.org/articles/the-responsibility-to-protect-the-cases-of-libya-and-ivory-coast/).
[56] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).
[57] *Id*., 608.

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by *Proclamation* on April 17, 2019,[58] established the RCI in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War "to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course."[59] Professor Federico Lenzerini from the University of Siena, Italy, serves as its Deputy Head.

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai'i, which includes President Joseph Biden Jr., Governor David Ige, Hawai'i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua'i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and subject to prosecution. All of the named perpetrators have met the requisite element of *mens rea*.[60] In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. "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."[61]

Professor Schabas states three elements of the war crime of *usurpation of sovereignty during military occupation* are:

1. The perpetrators 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 perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

With respect to the last two elements of war crimes, Professor Schabas explains:

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[58] Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).
[59] *Violation of the Laws and Customs of War,* 69 (1919).
[60] Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.
[61] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535 (2013).

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;
3. There is only a requirement for the awareness of the factual circumstance that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."[62]

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators' own pleadings and the rulings by the court in a United States federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT. The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves "State action or policy or the action or policies of an occupying State's proxies" and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.[63]

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. With the exception of the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the

[62] *Id*., 167.
[63] United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).

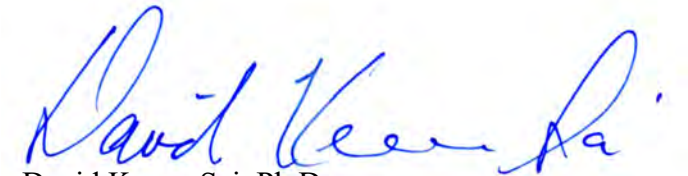
Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the State of Hawai'i complies with Article 43 of the 1907 Hague Regulations and administer the laws of the Occupied State—the Hawaiian Kingdom. The State of Hawai'i and not the Federal government is in effective control of the majority of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation being the longest occupation in the history of international relations and war crimes continue to be committed with impunity.

As you are aware, the State of Hawai'i Legislature met from January 18, 2023 to May 4, 2023, enacting American laws to be executed by Governor Josh Green. This war crime of *usurpation of sovereignty during military occupation* continues to be committed with impunity even after Attorney General Anne E. Lopez was notified that she and others were the subject of the RCI War Criminal Report No. 23-0001 and subject to prosecution, which you have in your possession.

In our meeting at the Grand Naniloa Hotel, I recommended that you have your Staff Judge Advocate do his due diligence regarding the information I provided you. His task would be to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. Considering the severity of the situation, I am allowing three weeks from this date for your Staff Judge Advocate to complete his due diligence by June 1, 2023. If an extension is required, we can discuss this subject further.

Sincerely,



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

cc: Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry

enclosures

Enclosure “1”

WAR CRIMINAL REPORT NO. 23-0001

The War Crime of Usurpation of Sovereignty during Occupation

THE ROYAL COMMISSION OF INQUIRY:

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

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

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

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 23-0001

GUILTY OF WAR CRIME: ANNE E. LOPEZ as Attorney General of the State of Hawai‘i
CRAIG Y. IHA as Deputy Attorney General of the State of Hawai‘i
RYAN K.P. KANAKA‘OLE as Deputy Attorney General of the State of Hawai‘i
ALYSSA-MARIE Y. KAU as Deputy Attorney General of the State of Hawai‘i
PETER KAHANA ALBINIO, JR. as Department of Hawaiian Home Lands Acting Administrator of the Land Management Division
JOSEPH KUALI‘I LINDSEY CAMARA as Department of Hawaiian Home Lands Property Development Agent

WAR CRIME COMMITTED: *Usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Island of Hawai‘i[1]

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry (“RCI”) on the war crime of *usurpation of sovereignty during military occupation* under “particular” customary international law addresses the actions and ommissions taken by Anne E. Lopez as Attorney General of the State of Hawai‘i, Craig Y. Iha as Deputy Attorney General of the State of Hawai‘i, Ryan K.P. Kanaka‘ole as Deputy Attorney General of the State of Hawai‘i, Alyssa-Marie Y. Kau as Deputy Attorney General of the State of Hawai‘i, Peter Kahana Albinio, Jr. as Department of Hawaiian Home Lands (“DHHL”) Acting Administrator of the Land Management Division, and Joseph Kuali‘i Lindsey Camara as DHHL’s Property Development Agent (collectively known as “Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara”) on the island of Hawai‘i.

This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,[2] that has been under a prolonged belligerent occupation by the United States

[1] See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.
[2] Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).

since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 ("1907 Hague Regulations"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 ("Fourth Geneva Convention").[4] All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are imposed upon an occupying power. Only the Fourth Geneva Convention contains provisions that can be described as penal or criminal, by which responsibility is imposed upon individuals. Article 147 of the Fourth Geneva Convention provides a list of *grave breaches*, that is, violations of the Convention that incur individual criminal responsibility and that are known colloquially as *war crimes*: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

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

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[3] Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf); see also Proclamation of the Council of Regency of 17 April 2019 establishing the Royal Commission of Inquiry (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

[4] The Royal Commission of Inquiry's governing law as to war crimes under particular customary international law is drawn from Professor William Schabas' legal opinion on war crimes. See William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

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

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

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[7] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[8] which coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States the following day. The Queen proclaimed, "[n]ow, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[9]

Military occupation stems from an international armed conflict under international humanitarian law and the law of occupation is triggered when the occupying State is in effective control of territory of the occupied State pursuant to Article 42 of the 1907 Hague Regulations. By virtue of the conditional surrender on the 17th, the United States came into effective control of Hawaiian territory pending a treaty of peace. There is no treaty of peace, and the occupation became prolonged.

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

> (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
> (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
> (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
> (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53,

[7] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 451 (1895) (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).
[8] *Id*.
[9] *Id*., 586.

subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
(e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

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

As previously noted, in addition to crimes listed in applicable treaties, war crimes are also prohibited by customary international law. Customary international law applies generally to States regardless of whether they have ratified relevant treaties. The customary law of war crimes is thus applicable to the situation in Hawai‘i. Many of the war crimes set out in the first Additional Protocol and in the Rome Statute codify pre-existing customary international law and are therefore applicable to the United States despite its failure to ratify the relevant treaties.

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

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

[10] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).
[11] See ICRC concerning the identification of rules of customary international humanitarian law (online at https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf; and https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf).

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over "violations of the laws or customs of war." Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in Security Council Resolution 827, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[12]

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

Evidence of recognition of crimes under general customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of "violations of the laws and customs of war" was developed by the

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

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

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

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

Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions of 1899 and 1907, although the preparatory work does not provide any precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was "not regarded as complete and exhaustive."[16] The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

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

Temporal issues

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

[16] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919 18 (1919) ("Commission of Responsibilities").
[17] Commission of Responsibilities, 17-18

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[18] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Since the RCI's establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary international law.[19] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[20] In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that "under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials."[21]

War Crime of Usurpation of Sovereignty during Military Occupation

The war crime of *usurpation of sovereignty during military occupation* appears on the list issued by the Commission on Responsibilities. The Commission did not indicate the source of this crime in treaty law. It would appear to be Article 43 of the Hague Regulations: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the

[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
[19] *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, 286 (1999).
[20] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).
[21] Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[22]

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that "[t]his rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[23] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[24] In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.[25]

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

> Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under

[22] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.
[23] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[24] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[25] Australia's War Crimes Act of 1845, *Annex—Australian Law Concerning Trials of War Criminals by Military Courts* (online at https://www.legal-tools.org/doc/45b4ed/pdf/).

> the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The Commentary to the Fourth Geneva Convention describes Article 64 as giving "a more precise and detailed form" to Article 43 of the Hague Regulations.[26]

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the International Law Commission, "[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[27] In the 1919 report of the Commission on Responsibilities, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting heads of state for the listed war crimes by conduct of omission.[28]

The RCI views *usurpation of sovereignty during military occupation* as a war crime under "particular" customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Thailand, Czech Republic, formerly known as Czechoslovakia, and Uruguay.[29]

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[30] The Court also concluded that "[t]he laws of no nation can justly

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[26] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).
[27] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[28] Commission of Responsibilities, Annex II, 58-79.
[29] Treaty of Versailles (1919), preamble.
[30] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[31] The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied Spanish territories. The Court restated General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. … Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[32]

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

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[33]

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

[31] *The Apollon*, 22 U.S. 362, 370 (1824).
[32] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[33] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

the territorial jurisdiction of the Hawaiian Kingdom."[34] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "Pursuant to article 47 of the 1907 Convention."[35] According to Bederman and Hilbert:

> At the center of the PCA proceeding was the argument that … the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawai'i [and its County of Hawai'i].[36]

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but their denial to participate hampered Larsen from maintaining his suit against the Hawaiian Kingdom.[37] The Tribunal explained that it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[38] Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the situation of the Hawaiian Kingdom, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. It might be argued that *usurpation of sovereignty* is a continuing offence, committed as long as the *usurpation of sovereignty* persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation

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[34] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom,* PCA Case no. 1999-01 (https://pca-cpa.org/en/cases/35/). Regarding the Permanent Court of Arbitration's institutional jurisdiction in acknowledging the Hawaiian Kingdom as a non-Contracting State pursuant to Article 47 of the 1907 PCA Convention, see David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)," 4 *Hawaiian Journal of Law and Politics* 133 (2022).

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

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

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

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

involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is "characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred." Therefore, it is not "an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation."[39]

The RCI views that it is an ongoing crime; the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power is therefore entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.[40] The occupying State is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

This report has examined the application of the international law on the war crime of *usurpation of sovereignty during military occupation* as a result the United States occupation of the Hawaiian Kingdom since 17 January 1893. It has identified the sources of this body of law in both treaty and custom, and described the two elements—*actus reus* and *mens rea*—with respect to the international crime of *usurpation of sovereignty during military occupation*.

The Elements of Crimes is one of the legal instruments applicable to the International Criminal Court. The initial draft of the Elements was prepared by the United States, which participated actively in negotiating the final text and joined the consensus when the text was finalized. This instrument provides a useful template for summarizing the *actus reus* and *mens rea* of international crimes.

It has been relied upon in producing the following summary of the crimes discussed in this report:

[39] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.
[40] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation*:

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;
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."

Elements of the *war crime of usurpation of sovereignty during military 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 a military occupation.
4. The perpetrator was aware of factual circumstances that established the existence of the military occupation.

Ascertaining the Mens Rea

The elements of war crimes describe their 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 [a military] occupation." 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."[41]

The second common element provides that the perpetrator must be aware of factual circumstances that established the existence of a military occupation. In order to meet this particular element of awareness, which in a normal situation would be obvious, further explanation is necessary 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

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

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.[42]

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.[43] 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 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.[44]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian Kingdom 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 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 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."[45] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this

[42] 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).
[43] *Id*., 114.
[44] Sai, "The Royal Commission of Inquiry," 29-33.
[45] *Prosecutor v. Germain Katanga et al.*, ICC Pre-Trial Chamber, Decision on the confirmation of charges, ICC-01/04-01/07, para. 305 (30 Sep. 2008).

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.[46]

For the purpose of determining the severity of culpable mental states—*mens rea*, the RCI adopts Professor Mohamed Badar's recommendations of *dolus directus* of the first degree, *dolus directus* of the second degree, and *dolus eventualis*.[47] 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*

[46] 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 International Law Reports 566, 610-615 (2001).

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

> *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 extermination 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 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 of 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 International Criminal Tribunal for the Former Yugoslavia 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.[48]

The RCI 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*.

APPLICATION

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels. Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international.

[48] *Id.*

Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*, Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the author of this report entered the Political Science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i*,[49] to *Nation Within—The History of the American Occupation of Hawai‘i*.[50] 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.[51]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i dated 25 February 2018.[52] Dr. deZayas stated:

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[49] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai‘i* (1998).
[50] 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.
[51] *Id*., xvi.
[52] 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).

> As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, The United Nations Human Rights Committee Case Law 1977-2008, and currently serving as the UN Independent Expert on the promotion of a democratic and equitable international order, I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[53] 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."[54]

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

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014

[53] 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).
[54] 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/).

> that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and 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.[55] 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"), who is also a non-governmental organization with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[56] In its joint letter, the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State."

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

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the

[55] 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/).
[56] 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/).

> 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.

Notwithstanding the aforementioned actions taken to seek compliance with international humanitarian law and the law of occupation, the United States, the State of Hawai‘i, and its Counties continue to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. Because all war crimes committed in Hawaiian territory stem from *usurpation of sovereignty during military occupation*, it is a war crime that triggers secondary war crimes.

In a letter dated 8 April 2022, William J. Aila, Jr., Chairman of the Hawaiian Homes Commission (“Chairman Aila”), being an agency of the State of Hawai‘i, notified Lawrence Costa, Jr., an aboriginal Hawaiian subject, that the DHHL “is aware that you have illegally accessed, entered and continue to occupy without authorization portions of [the ahupua‘a of Humu‘ula] of Hawaiian Home Lands on Hawai‘i Island for cattle grazing operations.”[57] Chairman Aila then demanded:

> 1. By no later than Friday, April 22, 2022, remove: a) all branded cattle registered under Reg#831 as referenced on page12 of Department of Agriculture, State of Hawaii, Hawaii Brand Book 2016-2020; b) all equipment, brought onto the properties; and
> 2. IMMEDIATELY CEASE AND DESIST from any unauthorized use of access to the subject properties.[58]

Chairman Aila’s authority, as Chairman of the Hawaiian Homes Commission, is based entirely on United States municipal laws that have been unlawfully imposed over Hawaiian territory, which constitutes the *actus reus* of the war crime of *usurpation of sovereignty during military occupation*. On 13 April 2022, Mr. Costa responded to Chairman Aila’s letter of 8 April 2022. Mr. Costa stated:

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[57] Department of Hawaiian Home Lands Letter to Lawrence Costa, Jr. (8 April 2022) (online at https://hawaiiankingdom.org/pdf/Aila_to_Costa_(4.8.2022).pdf).
[58] *Id*., 2.

> You claim in your letter that the Department of Hawaiian Home Lands (DHHL) "is the sole owner" of the ahupua'a of Humu'ula, and as "the landowner, DHHL holds exclusive rights to exercise its authority over the subject properties as governed under the Hawaiian Homes Commission Act of 1920, as amended; Hawaii Administrative Rules Title 10, as amended; and Hawaii Revised Statutes, Section 171, as amended." DHHL is not the owner of the ahupua'a of Humu'ula, which is a portion of Crown Lands. Also, your claim to ownership is through United States municipal laws and not Hawaiian Kingdom law. Despite the unlawful overthrow of my government on January 17, 1893, my country and its laws continue to exist under international law despite being belligerently occupied by the United States for over a century.
>
> Under Hawaiian Kingdom law, the Hawaiian Supreme Court stated, in *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 725 (1864), that Crown Lands "descend in fee, the inheritance being limited however to the successors to the throne." The Court also concluded that Crown Lands are not public lands but rather "private" lands. Under the *Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable* (1865), Crown Lands became "inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever." DHHL is not a successor to the Hawaiian Crown.
>
> The Council of Regency, established by proclamation on February 28, 1997, is the provisional successor to the Crown, and therefore is provisionally vested with the title to Crown Lands. The Permanent Court of Arbitration, The Hague, Netherlands, prior to forming the arbitration tribunal in *Larsen v. Hawaiian Kingdom*, acknowledged that the Hawaiian Kingdom continues to exist and that the Council of Regency is its government. In these proceedings, the United States also acknowledged the continuity of the Hawaiian Kingdom and the Council of Regency as its government.[59]

In his closing statement, Mr. Costa's stated, "[c]onsider my letter as evidence that you and your department have been made aware that your actions constitute the war crime of *usurpation of sovereignty*." In disregard of Mr. Costa's letter, Hawai'i Attorney General Lopez and Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau filed a complaint for ejectment against Mr. Costa on 4 January 2023 in the District Court of the Third Circuit, North and South Hilo Division of the State of Hawai'i.[60] Mr. Costa's letter to Chairman Aila was included in the complaint as Exhibit 13. Hawai'i Attorney General Lopez and Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau relied on information provided by DHHL's Acting Administrator Albinio and Property Development Agent Camara in their declarations attached to the complaint. Specifically, the complaint claims the District Court has jurisdiction under Hawai'i Revised Statutes §§604-5, 604-6 and 604-7(d) and that DHHL is responsible for administering the

[59] Lawrence Costa, Jr. Letter to Department of Hawaiian Home Lands (13 April 2022) (online at https://hawaiiankingdom.org/pdf/Costa_to_Aila_(4.13.22).pdf).
[60] *State of Hawai'i, Department of Hawaiian Home Lands, v. Lawrence Costa*, complaint for ejectment (4 January 2023) (online at https://hawaiiankingdom.org/pdf/State_v_Costa_Complaint_(1.4.23).pdf).

Hawaiian Homes Commission Act, 1920, all of which are municipal laws of the United States and not municipal laws of the Hawaiian Kingdom.

A hearing was held at the District Court on 22 February 2023, where Mr. Costa stated his answer to the complaint in open court, which was filed thereafter with the court clerk. He stated:

> For the record, I would like to read a brief statement regarding this matter. I have been ordered to appear here against my will by Anne Lopez, Craig Iha, Ryan Kanakaʻole, and Alyssa-Marie Kau from the State of Hawaiʻi Attorney General's office. I also invoke my rights as a protected person under 1949 Fourth Geneva Convention.
>
> On April 13, 2022, I sent a letter by certified mail to William Aila, Chairman of the Hawaiian Homes Commission, which is Exhibit 13 in the Complaint against me. In that letter I provided evidence that the Hawaiian Kingdom continues to exist and that the Department of Hawaiian Home Lands is not the owner of the ahupuaʻa of Humuʻula. I also referenced the federal lawsuit Hawaiian Kingdom v. Biden and others, which included the State of Hawaiʻi as a defendant, making Mr. Aila aware that he was committing the war crime of usurpation of sovereignty. This case was not dismissed by the court. Instead, the complaint was withdrawn by the Council of Regency representing the Hawaiian Kingdom because Governor David Ige and Holly Shikada and Amanda Weston of the Attorney General's are war criminals and the Council of Regency could not get any relief in their complaint from these individuals. I have here those war criminal reports by the Royal Commission of Inquiry that was also filed in the federal court that named Ige, Shikada and Weston as war criminals. If the Hawaiian Kingdom's filings were frivolous, then they and their attorney general would have been sanctioned under Rule 11 of the Federal Rules of Civil Procedure. They weren't.
>
> This court, like the federal court in Honolulu, is not a lawful court unless it transforms into an Article II occupation court. I have met the burden of State of Hawaiʻi versus Lorenzo that the Hawaiian Kingdom currently exists as a State under international law and if these proceedings continue this court is committing the war crime of depriving me, as a protected person, of a fair trial because this court does not have lawful jurisdiction. I also have here a war criminal report by the Royal Commission of Inquiry that identify Glenn Hara and Greg Nakamura of the Third Circuit as war criminals for depriving other individuals a fair trial. Also named as war criminals are the judges on the Supreme Court. If you can show me clear evidence that the Hawaiian Kingdom does not exist as a State under international law, I will submit to the court's jurisdiction. But if you don't and proceed anyway, I am making the record for your prosecution. There are no statutes of limitations for war crimes. Last year, Germany convicted a 97-year-old ex-secretary at a Nazi camp for war crimes.
>
> This is all I have to say.[61]

[61] Lawrence Costa, Jr.'s Answer to the State of Hawaiʻi Complaint for Ejectment (22 February 2023) (online at https://hawaiiankingdom.org/pdf/Costa_Answer_to_Complaint.pdf).

Mr. Costa's reference to *State of Hawai'i v. Lorenzo* is a precedent case since 1994 that placed the burden on defendants that are challenging the jurisdiction of State of Hawai'i courts to provide evidence of a "factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature."[62] The *Lorenzo* Court, however, did acknowledge that its "rationale is open to question in light of international law."[63] Whether or not the Hawaiian Kingdom "exists as a state in accordance with recognized attributes of a state's sovereign nature," it is international law that applies, not State of Hawai'i common law or United States municipal laws. Under international law, there is a presumption that the Hawaiian Kingdom continues to exist as a State, which shifts the burden from the defendant to provide evidence of the Kingdom's existence to the prosecution to provide evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. On 7 June 2022, the RCI published a Preliminary Report on the *Lorenzo* doctrine that can be accessed at its website.[64]

With utter disregard to Mr. Costa's challenge to the jurisdiction of the court, the Attorney General moved for summary judgment, and District Court Judge M. Kanani Laubach agreed. On 10 March 2023, the Attorney General filed its motion for summary judgment relying on information provided by Acting Administrator Albinio in a declaration attached to the motion.[65] The motion was granted. A proposed order granting plaintiff's motion for summary judgment was sent by mail to Mr. Costa by Hawai'i Deputy Attorney General Kau on 24 March 2023.[66]

This office received a letter from Lawrence Costa Jr. by certified mail 7019 0700 0001 3053 8992 dated 22 February 2023, enclosing his answer to the complaint for ejectment. After reviewing Mr. Costa's statement and his letter to Chairman Aila it was clear that Hawai'i Attorney General Lopez, Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were made aware that their action's constituted forethought of the war crime of *usurpation of sovereignty during military occupation*. In a letter from this office to Hawai'i Attorney General Lopez and Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau dated 15 March 2023, they were apprised of the mandate of the RCI and that this office did receive evidence of the war crime of *usurpation of sovereignty during military occupation* committed against Mr. Costa.[67]

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[62] *State of Hawai'i v. Lorenzo*, 77 Hawai'i 219, 221; 883 P.2d 641, 643 (Ct. App. 1994) (online at: https://hawaiiankingdom.org/pdf/State_of_HI_v.%20Lorenzo_77_Haw_219.pdf).
[63] *Id.*, 220; 642.
[64] Royal Commission of Inquiry, *Preliminary Report—The Lorenzo doctrine on the Continuity of the Hawaiian Kingdom as a State* (7 June 2022) (online at https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Lorenzo_Doctrine.pdf).
[65] Plaintiff's Motion for Summary Judgment (10 March 2023) (online at https://hawaiiankingdom.org/pdf/Motion_for_Summary_Judgment.pdf).
[66] Proposed Writ of Possession (24 March 2023) (online at https://hawaiiankingdom.org/pdf/Proposed_Writ_of_Possession_(3.24.23).pdf).
[67] Royal Commission of Inquiry Letter to State of Hawai'i Attorney General Lopez (15 March 2023) (online at https://hawaiiankingdom.org/pdf/RCI_Ltr_to_HI_AG_re_Costa(3.15.23).pdf).

The evidence that Acting Administrator Albinio and Property Development Agent Camara were made aware of the military occupation was by Mr. Costa's letter to Chairman Aila, which was attached to the complaint as Exhibit 13. In paragraph 19 of Acting Administrator Albinio's declaration attached to the complaint and motion for summary judgment, he stated, "[o]n April 13, 2022, Defendant [Costa] provided an 'Acknowledgment of Letter dated April 8, 2022,' to DHHL, in part, acknowledging receipt of its April 8, 2022 letter. A true and correct copy the letter, without enclosures, is attached hereto as Exhibit '13.'"

Neither by letter nor in pleadings that were filed in the District Court, Hawai'i Attorney General Lopez and Hawai'i Deputy Attorneys General Iha, Kanaka'ole, and Kau provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. As explained by Judge James Crawford, "[t]here is a presumption that the State continues to exist, with its rights and obligations … despite a period in which there is … no effective government."[68] Judge Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State."[69] "If 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 sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[70]

War crimes have a direct nexus to the continuity of the Hawaiian Kingdom as a State that is currently under a prolonged military occupation by the United States. As Professor Schabas explains, his legal opinion on war crimes related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893, "is premised on the assumption that the Hawaiian Kingdom was occupied by the United States in 1893 and that it remained so since that time. Reference has been made to the expert report produced by Prof. Matthew Craven dealing with the legal status of Hawai'i and the view that it has been and remains in a situation of belligerent occupation resulting in application of the relevant rules of international law, particularly those set out in the Hague Conventions of 1899 and 1907 and the fourth Geneva Convention of 1949."[71]

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[68] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[69] *Id*.
[70] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).
[71] William Schabas, "Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893," 3 *Hawaiian Journal of Law and Politics* 334, 335 (2021) (online at https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).

The exchange of letters and the filing of pleadings, by omission, in the District Court by Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara constitute evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is "clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom." At the time of their admissions to the date of this report, Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara have continued to proceed against Mr. Costa with impunity and satisfies the requisite element of criminal intent—*mens rea*. They were "aware of factual circumstances that established the existence of the military occupation."

Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, and Acting Administrator Albinio have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree. The term "guilty" is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[72] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[73]

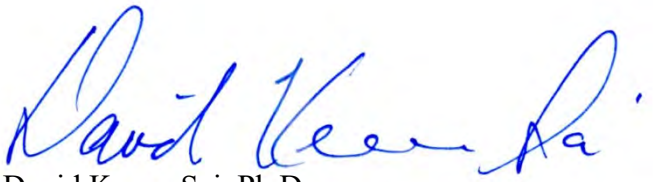
Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara have met the volitional element and the cognitive element of knowledge when they represented the State of Hawai‘i Department of Hawaiian Home Lands against Mr. Cost.

1. Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara 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. Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.

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

4. Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara were aware of factual circumstances that established the existence of the military occupation.

As neither Hawai‘i Attorney General Lopez, Hawai‘i Deputy Attorneys General Iha, Kanaka‘ole, and Kau, Acting Administrator Albinio, and Property Development Agent Camara are heads of State, they have no claim to immunity from criminal jurisdiction and are subject to prosecution by foreign States under universal jurisdiction, if they are not prosecuted by the territorial State where the war crime has been committed. The severity of the war crime of *usurpation of sovereignty during military occupation* has led to, among other war crimes, the obliteration of the national consciousness of the Hawaiian Kingdom called the war crime of *denationalization*. According to Professor Schabas, "the offense of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population."[74] The offense "would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide."[75]



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

29 March 2023

[74] Schabas, Royal Commission of Inquiry 161.
[75] *Id.*

Enclosure “2”

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June 30, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Rebuttable evidence as to the continuity of the Hawaiian State by the JAG

Dear Major General Hara:

On June 6, 2023, I was advised that LTC Phelps has made strides in his assigned task but still needs to complete his findings. This resulted in the extension of the timeline to June 20, which was thereafter conveyed to you.

As you are aware, the Permanent Court of Arbitration in 1999 confirmed the Hawaiian Kingdom currently exists as a State and a subject of international law when it accepted to resolve a dispute between Lance Larsen, a Hawaiian subject, and the Council of Regency representing the Hawaiian Kingdom—PCA Case No. 1999-01. At the center of the dispute was the imposition of American municipal laws, which is the war crime of usurpation of sovereignty during military occupation.

Under international law, there exists the principle of the presumption of continuity of an established State despite its government being overthrown by an act of war, which is what occurred on January 17, 1893. What this means is that the Hawaiian Kingdom as a State retained its rights and obligations under international law despite the absence of its government from 1893 to 1997 when the government was restored. In light of this rule of international law, LTC Phelps must provide you rebuttable evidence, *i.e.* treaty of cession between the Hawaiian Kingdom and the United States, that the Hawaiian Kingdom ceases to exist as a State. Without evidence rebutting the presumption, the Hawaiian Kingdom

continues to exist, which consequently renders void the lawful authority of the State of Hawai‘i being a product of American municipal laws that have no extra-territorial effect.

Having no lawful authority, the State of Hawai‘i, however, can exist as a governing body under international humanitarian law and the law of occupation, which you were made aware of in my meeting with you on April 13, 2023, on the grounds of the Naniloa Hotel in Hilo. And it is the duty and obligation of the Adjutant General of the State of Hawai‘i to comply with Army regulations—FM 27-5 and FM 27-10 to transform the State of Hawai‘i into a military government. To not comply and stop the war crime of usurpation of sovereignty during military occupation is a war crime by omission.

With a view to bringing compliance with international humanitarian law by the State of Hawai‘i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations, the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on June 3, 2019. The purpose of the proclamation was to begin the process of transformation for the protection of the civilian population.

The failure to transform the State of Hawai‘i into a military government is what prompted the filing of the federal lawsuit *Hawaiian Kingdom v. Biden et al*. on May 20, 2021. The defendants' defiance and admission to the war crime of usurpation of sovereignty during military occupation by the State of Hawai‘i and its Counties, except for the City and County of Honolulu, were the subjects of war criminal reports by the Royal Commission of Inquiry.

Furthermore, the severity of the situation and the rising public awareness of the American occupation is clearly stated in a letter emailed to me today from Police Sergeant/Detective Kamuela Mawae of the Maui Police Department, which I am enclosing for your review. Sergeant Mawae ended his letter with the following:

> A last concern, which is one of my main concerns, is the growing number of aboriginal and non-aboriginal Hawaiians who are becoming aware of Hawaii's legal status as an occupied state and are expressing their rights as protected people. There are more and more Hawaiians referring to international law and questioning the legitimacy of the State of Hawaii and U.S. law in the islands. This is extremely concerning to me as on one hand, I know the validity of their arguments, and I also know that current police officers do not have any training regarding international humanitarian law. As more and more Hawaiians become aware of the illegalities surrounding America's control over Hawaiian territory, clashes between Hawaiian nationals and local police departments will increase. Case in point is the telescope construction on Mauna Kea and Haleakala.

> I was assigned to work on the task force regarding the transportation of building supplies for the Daniel K. Inouye solar telescope several years ago. There was a large group of Hawaiian protesters blocking the roadway with several of them laying on the ground beneath the tires of large semi-trucks. Many of these protesters mentioned the illegalities of U.S. law in Hawaiian territory and none of our officers, to include the commanding officer on-scene, were familiar with international law.
>
> As a Hawaiian national and a police officer who is aware of the continuity of the Hawaiian Kingdom, it frustrates me to have to continue to deal with these American problems and laws knowing that they have no legal jurisdiction here in the islands.

As the law of occupation allows for authority to be shared by the Occupying Power and the government of the occupied State, I respectfully request to have a meeting with yourself and anyone else you feel should be present to discuss this matter and the remedial steps to be taken in accordance with international humanitarian law, the law of occupation, and Army regulations.

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

cc: Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry

enclosure

Enclosure “1”

30 June 2023

Council of Regency
David Keanu Sai, PH. D.
Chairman
Minister of Interior
Minister of Foreign Affairs *ad interim*
P.O. Box 4146
Hilo, HI 96720

Re: Law Enforcement and other concerns regarding the U.S. Occupied Hawaiian Kingdom

Dear Chairman of the Council of Regency,

My name is Kamuela Mawae and I am an active Police Sergeant/Detective with the Maui Police Department. My employee number is 13010. I have been employed by MPD since 2004 and feel that it is my privilege and kuleana to serve this community. Although I am a Police Officer, I am not representing the opinion/views of my Department. I am writing to you representing the views of a Hawaiian national of native descent who has been working as a police officer for the past 19 years.

I first truly learned about Hawaii's occupation by watching a three part youtube video of you conducting presentations regarding land titles in Hawaii to the Maui County Council in 2020. The consequence of watching that series was that it created a burning desire in my na'au to gain more knowledge regarding the factual circumstances of what occurred pre and post overthrow of the Hawaiian Kingdom government. Prior to this, I believed that the Hawaiian Kingdom was overthrown in 1893 and that the joint proclamation of annexation passed by both houses of congress and signed into law by U.S. President McKinley legally extinguished the sovereignty of the Hawaiian Kingdom.

Since that presentation, I've read multiple dissertations and research papers regarding Hawaii's occupation by scholars such as yourself, Dr. Willy Kauai, Dr. Ron Williams, Dr. Kalawaia Moore, and Donovan Preza. I've also completed an online course that was instructed by you and offered thru the University of Hawaii titled 'Introduction to the Hawaiian State.' This information gave me a clear understanding of Hawaii's political status as an Independent Nation State, however one under belligerent occupation by the United States of America.

The knowledge and understanding of Hawaii's occupation made me question my role as an MPD officer and the possibility of committing war crimes by enforcing U.S. domestic law within Hawaiian territory.

The question of possible criminal culpability caused me to bring this matter to the attention of the Maui SHOPO Chapter Board as well as the SHOPO State Board. On 06/02/2021, I submitted a letter to SHOPO bringing to their attention U.S. Federal Court case #1:21-cv-00243 (Hawaiian Kingdom vs. U.S. and the State of Hawai'i) which was originally filed on 05/20/2021. In my letter to SHOPO, I requested that they, thru their legal counsel, assure me that per international humanitarian law, that Hawai'i is not under occupation by the United States and further that I am not incurring criminal liability as a police officer by enforcing U.S. domestic law within the occupied territory of the Hawaiian Kingdom. Although I

requested a written response, I only received a verbal response basically telling me to disregard the lawsuit.

On May 12, 2022, upon my invitation, you conducted a PowerPoint presentation regarding Hawaii's occupation in person at the SHOPO Maui Chapter office to multiple MPD officers. That presentation moved me to submit a letter to MPD's Chief of Police John Pelletier informing him of the Federal lawsuit and requesting him to have Corporation Counsel assure myself and the rest of the officers in MPD that we were not violating international law by enforcing U.S. domestic law in the Hawaiian Kingdom.

On July 13, 2022, Chief Pelletier submitted a 'Request for Legal Services' that was assigned to Corporation Counsel lawyer Keola Whittaker. Chief Pelletier included my original letter and noted the following in the 'background data': "MPD requests research and a legal analysis on whether MPD is in violation of any federal and/or international by enforcing laws against the "Hawaiian Kingdom" as stated in the lawsuit." Just two days later on July 15, 2022, Whittaker responded with the following: "Thank you for forwarding this letter. We will keep it on file. There is no need for any MPD personell [sic] to respond to the request." Corporation Council's response is nonsensical as the request was from MPD for them (Corporation Council) to respond to the request by providing a legal analysis. Being that it only took two days for them to respond made me realize that they did not take this matter seriously. Attempts to have Chief Pelletier press Corporation Counsel to provide a legal analysis as originally requested went unanswered.

As a police officer, I have to not only deal complaints of criminal activity, but I'm also tasked with dealing with situations caused by today's plethora of social issues. Knowing that this is the U.S. occupied Hawaiian Kingdom, and that the United States of America currently has effective control over the government of these islands, I have come to the realization that all of today's social issues are American made and that the root of the problem is Americas failure to follow international humanitarian law.

There is no doubt in my mind that if Hawaiian nationals had effective control over the government, we would not have many of today's social problems, and if we did, it would not be at this scale.

Some of the social problems that I'd like to mention is the current population of Maui, public corruption, the amount of homelessness, current crime levels, and the cost of living to include the cost of housing.

The current population of Maui is estimated at 167,730. This number has increased throughout the years and was about 26,700 at the time of the illegal overthrow of the Hawaiian Kingdom government. The majority of today's population on Maui is un-deniably American. I believe there's a direct correlation between the increased population and the increased crime rate. Hawaii has become a safe haven for criminal activity and the consequences and penalties for criminal behavior are negligible.

Issues regarding public corruption to me, is expected as the very foundation of the State is built on lies, deception, and illegalities.

The homeless population here on Maui seems to have reached record highs with most of the homeless being Americans from virtually every State of America. Many of the homeless population on Maui have drug induced mental issues with portions of them having aggressive tendencies. Although this is strictly my opinion, a good portion of our criminal activity is committed by our homeless population who are dependent on drugs such as crystal methamphetamine and/or fentanyl.

The issue of Aboriginal Hawaiians leaving the island to places like Las Vegas because of the cost of living is another concern of mine and can be directly contributed to the increase in housing and cost of living that is caused by the American occupation. America currently allows foreigners, to include Americans, to "purchase" land that America does not have the right to sell. This has caused the average housing cost in Maui to reach nearly 1 million dollars. Aboriginal Hawaiians who cannot afford to live here are forced to move to America or to become homeless. Also, the American government applies "taxes" to Hawaii's population which we know is actually a form of pillaging. American taxes are also forced upon all visitors of the islands who are also victims of the American occupation.

There are also multiple environmental issues attributed to the American occupation such as the contamination of Red Hill, the contamination of Pu'uloa, the bombing of Kahoolawe, depleted uranium at their military training facilities such as Pohakuloa, chemical testing on vast portions of lands by companies such as Monsanto/Bayer, the diversion of streams and other waterways throughout the islands, the over fishing of Hawaiian waters to include inshore to the 3-mile mark, etc. As you know, this list can go on and on.

A last concern, which is one of my main concerns, is the growing number of aboriginal and non-aboriginal Hawaiians who are becoming aware of Hawaii's legal status as an occupied state and are expressing their rights as protected people. There are more and more Hawaiians referring to international law and questioning the legitimacy of the State of Hawaii and U.S. law in the islands. This is extremely concerning to me as on one hand, I know the validity of their arguments, and I also know that current police officers do not have any training regarding international humanitarian law. As more and more Hawaiians become aware of the illegalities surrounding America's control over Hawaiian territory, clashes between Hawaiian nationals and local police departments will increase. Case in point is the telescope construction on Mauna Kea and Haleakala.

I was assigned to work on the task force regarding the transportation of building supplies for the Daniel K. Inouye solar telescope several years ago. There was a large group of Hawaiian protesters blocking the roadway with several of them laying on the ground beneath the tires of large semi-trucks. Many of these protesters mentioned the illegalities of U.S. law in Hawaiian territory and none of our officers, to include the commanding officer on-scene, were familiar with international law.

As a Hawaiian national and a police officer who is aware of the continuity of the Hawaiian Kingdom, it frustrates me to have to continue to deal with these American problems and laws knowing that they have no legal jurisdiction here in the islands.

I hope and pray that the Council of Regency will be able to find justice and liberation for the Hawaiian Kingdom and its people.

Sincerely,

Kamuela Mawae

Enclosure “3”

H.E. DAVID KEANU SAI, PH.D.
Chairman of the Council of Regency
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July 7, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Army Mission of Military Government

Dear Major General Hara:

Because the law of occupation "allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory,"[1] I am communicating with you in my capacity as Chairman of the Council of Regency representing the occupied government and not as Head of the Royal Commission of Inquiry.

It has been conveyed to me that LTC Phelps has not provided you with rebuttable evidence that the Hawaiian Kingdom has ceased to exist as a State and subject of international law. Therefore, the Hawaiian Kingdom continues to exist as a State since the nineteenth century and its current legal status is that of an occupied State. As Professor Matthew Craven stated in his legal opinion regarding the principle of international law on the presumption of a State's continued existence despite the overthrow of its government by an act of war:

> If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other

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

> words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States.[2]

Professor Ian Brownlie applied this principle to the German State in 1945 after the destruction of the Nazi government by the Allied Forces of the United States, France, United Kingdom, and the Soviet Union. He states:

> 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 [its independence and sovereignty] 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.[3]

It was because of this principle of international law that the Permanent Court of Arbitration (PCA) in 1999 acknowledged the continuity of the Hawaiian Kingdom as a State in accordance with Article 47 of the 1907 Hague Convention, I, which was a prerequisite for the formation of the arbitral tribunal on June 9, 2000, in *Larsen v. Hawaiian Kingdom*. Article 47 provides access to its facilities and Secretariat to non-Contracting Powers to the 1907 PCA Convention that established the institution.[4] The Hawaiian Kingdom is a non-Contracting Power to the 1907 PCA Convention. At its website, the PCA clearly stated in its case description of *Larsen v. Hawaiian Kingdom* that the Hawaiian Kingdom is a "State" and the Council of Regency is the "Government of the Hawaiian Kingdom."[5]

As you are aware, I extended the time for LTC Phelps to complete his due diligence by June 20, 2023, in order to provide you evidence that the Hawaiian Kingdom no longer exists as a State under international law. It has been nearly three months since our meeting on April 13, 2023, at the Naniloa Hotel, and he has provided you no such evidence, which means the Hawaiian Kingdom's legal status as a State was not interrupted under international law. And since the authority of the State of Hawai'i stems from the 1959

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[2] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in *in David Keanu Sai (ed.), The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 126, 128 (2020).
[3] Ian Brownlie, *Principles of Public International Law* 109 (4th ed., 1990).
[4] Article 47, 1907 Hague Convention, I, for the Pacific Settlement of International Disputes, "The jurisdiction of the Permanent Court of Arbitration may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties agreed on recourse to this Tribunal." See also PCA 111th Annual Report (2011), Annex 2—*Cases conducted under the auspices of the PCA or with the cooperation of the International Bureau*, p. 51 (online at https://docs.pca-cpa.org/2015/12/PCA-annual-report-2011.pdf).
[5] *Larsen v. Hawaiian Kingdom*, PCA Case No. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

Hawai‘i Statehood Act, which is an American municipal law enacted by the Congress that has no legal effect within the territory of the Hawaiian Kingdom, all officials of the State of Hawai‘i are stripped of any authority they possessed under State of Hawai‘i law or County ordinances with the exception of yourself because you are a member of the armed forces of the United States. This consequently gives rise to your "military duties consistent with the regulations and customs of the armed forces of the United States."[6]

The establishment of a military government in an occupied State's territory is a mission of the U.S. Army that is regulated by Army regulations FM 27-5, *United States Army and Navy Manual of Civil Affairs Military Government*, and FM 27-10, *The Law of Land Warfare*. According to FM 27-5:

> (1) Military necessity requires in the conduct of operations, as well as in the fulfillment of obligations imposed upon invading forces under international law, that such forces institute control of civilian affairs by military government or otherwise in the occupied or liberated areas.
> (2) This manual states the principles to be followed by the Department of the Army, the Department of the Navy, and their subordinate agencies in planning and exercising control of civilian affairs by military government or otherwise in territory occupied or liberated by the forces of the United States. It is for the use of the Army and Navy, whether they are acting alone, jointly, or in concert with forces of allied countries. Such terms as "commanding officer," "military," and "forces" have reference to either or both branches of the service.
> (3) The principles laid down in this manual will be followed in all planning by the Departments of the Army and Navy and their subordinate agencies, unless otherwise directed. As to minor policies and details of execution, responsible commanders are permitted to depart from the directions herein so far as may be necessary to permit the plan of military government in any area to conform to and to be integrated with the plan of military operations.
> (4) War Department Field Manual 27-10 (Rules of Land Warfare) sets forth the restraints upon the discretion of the theater commander and subordinate commanders, when dealing with persons and property in occupied and liberated areas, and their obligations under international law.
> (5) This manual is intended for the use of the following categories of Army and Navy personnel:
> (a) Responsible commanders, for an understanding of their responsibilities, duties, and scope of authority.
> (b) Staff officers, for planning, training, indoctrination, and operation.
> (c) Commanding officers or officers in charge, as an operational guide.
> (d) Instructors and training officers, as a text for use in schools, unit training

[6] Hawai‘i Revised Statutes, §121-9.

programs, and in the indoctrination of personnel.

Pertinent sections of FM 27-10 include the following:

> **351. Military Occupation**
>
> Territory 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. (HR, art. 42).
>
> **355. Occupation as Question of Fact**
>
> Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded. And paragraph
>
> **357. Proclamation of Occupation**
>
> In a strict legal sense no proclamation of military occupation is necessary. However, on account of the special relations established between the inhabitants of the occupied territory and the occupant by virtue of the presence of the occupying forces, the fact of military occupation, with the extent of territory affected, should be known. The practice of the United States is to make this fact known by proclamation.
>
> **358. Occupation Does Not Transfer Sovereignty**
>
> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create and new State therein while hostilities are still in progress. (See GC, art. 47; para. 365 herein.)

As the theater commander for the State of Hawai‘i Department of Defense, which is in effective control of 10,931 square miles (6,995,840 acres) of the territory of the Hawaiian Kingdom being the majority of Hawaiian territory in comparison to Hawaiian territory controlled by the United States federal government, it is your military duty to transform the State of Hawai‘i into a military government “consistent with the regulations and customs of the armed forces of the United States.”

I have determined that July 31, 2023, is the suspense date for you to make the decision to carry out your duties and obligations under international law. This day in 1843 is a significant date in Hawaiian history, and it is a national holiday. It was a day that Hawaiian governance was restored by British Rear Admiral Thomas after the Hawaiian Kingdom came under British occupation on February 25, 1843, by British Naval Captain Lord Paulet.

If your decision is in line with the law of occupation, I, as Head of the Royal Commission of Inquiry, will forgo the drafting and publishing of war criminal reports on individuals to include officials of the State of Hawai‘i and the Counties, like LTC Phelps, where there exists evidence of the commission of war crimes in over 200 criminal, civil and administrative cases in State of Hawai‘i courts. The reasoning behind forgoing the war criminal reports is but for the establishment of the military government of Hawai‘i these individuals would not have been put in a situation to have committed the war crimes in the first place. Furthermore, the perpetrators identified in the war criminal reports that are published on the Royal Commission of Inquiry's website did have the authority and were given the opportunity to transform themselves into an occupying military government, but they did not, and, therefore, incurred criminal culpability for the actions and omissions.

In the spirit of cooperation and for the protection of the civilian population, I look forward to working with you and to assist you in any way I can to better understand the unique situation we both currently find ourselves in regarding the Army mission of military government. As I told you in our meeting at the Naniloa Hotel, circumstances out of our control have led us to where we are today with you as the Adjutant General of the occupying Power and myself as Chairman of the occupied government. We are not only friends that stem from our serving together as Army officers in the 2/299 Infantry, Hawai‘i Army National Guard, but we both also have professional duties to carry out in light of the prolonged occupation of the Hawaiian Kingdom, which is now at 130 years.

Na‘u me ka ‘oia‘io,

David Keanu Sai, Ph.D.
Chairman of the Council of Regency

Enclosure “4”

H.E. DAVID KEANU SAI, PH.D.
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July 11, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Four Stages in a State of War—International Armed Conflict

Dear Major General Hara:

Being that July 31, 2023, is the suspense date for your command decision and to further assist you in your command estimate, I feel it is important to explain the broader aspect of international humanitarian law—law of armed conflict and the situation we find ourselves in because of the United States non-compliance with international law for the past 130 years. While the violation of international laws and the prolonged nature of the occupation has complicated matters, the rules and practice of the United States Army regarding the establishment of a military government is on point.

The regulations do allow elasticity in the formation of the military government depending on the circumstances of the situation. According to para. 9(b)(4) *Flexibility of plan*, FM 27-5: “Since the conditions under which [Military Government] operate will vary widely in a given area as well as between different areas, flexibility of action must be provided by the preparation of alternate plans in order to meet the rapid changes and alterations which may occur.” Your understanding of the overall objectives of a military government is to understand the four stages in a state of war, which today is called an international armed conflict.

Judge Greenwood of the International Court of Justice states that “[t]raditional international law was based upon a rigid distinction between the state of peace and the state

of war."[1] This bifurcation provides the proper context by which certain rules of international law would apply or would not apply. International humanitarian law, also called the law of armed conflict, are not applicable in a state of peace. Inherent in the rules of international humanitarian law and the law of occupation is the co-existence of two legal orders, being that of the occupying State and that of the occupied State. As an occupied State, the continuity of the Hawaiian Kingdom has been maintained for the past 130 years by the positive rules of international law, notwithstanding the absence of effectiveness, which is required during a state of peace.[2]

Once a state of war ensued between the Hawaiian Kingdom and the United States that began with the invasion by U.S. Marines on January 16, 1893, "the law of peace ceased to apply between them and their relations with one another became subject to the laws of war, while their relations with other states not party to the conflict became governed by the law of neutrality."[3] This outbreak of a state of war between the Hawaiian Kingdom and the United States would "lead to many rules of the ordinary law of peace being superseded…by rules of humanitarian law."[4] A state of war "automatically brings about the full operation of all the rules of war and neutrality," which includes the law of occupation.[5] And, according to Venturini, "[i]f an armed conflict occurs, the law of armed conflict must be applied from the beginning until the end, when the law of peace resumes in full effect."[6] "For the laws of war," according to Koman, "continue to apply in the occupied territory even after the achievement of military victory, until either the occupant withdraws or a treaty of peace is concluded which transfers sovereignty to the occupant."[7]

In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia indicated that the laws of war—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."[8] Only by an agreement between the Hawaiian Kingdom and the United States could a state of peace be restored, without which a state of war ensues.[9] An

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[1] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck, ed., *The Handbook of the International Law of Military Operations* 45 (2nd ed., 2008).
[2] James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006); Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (2nd ed., 1968).
[3] Greenwood, 45.
[4] *Id*., 46.
[5] Myers S. McDougal and Florentino P. Feliciano, "The Initiation of Coercion: A Multi-temporal Analysis," 52 *Am. J. Int'l. L*. 241, 247 (1958).
[6] Gabriella Venturini, "The Temporal Scope of Application of the Conventions," in Andrew Clapham, Paola Gaeta, and Marco Sassòli, eds., *The 1949 Geneva Conventions: A Commentary* 52 (2015).
[7] Sharon Koman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* 224 (1996).
[8] ICTY, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), §70 (Oct. 2, 1995).
[9] Under United States municipal laws, there are two procedures by which an international agreement can bind the United States. The first is by a treaty whose entry into force can only take place after two-thirds of

attempt to transform the state of war to a state of peace was made by executive agreement on 18 December 1893 between President Cleveland and Queen Lili‘uokalani. President Cleveland stated to the Congress that he “instructed Minister Willis to advise the Queen and her supporters of [his] desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned.”[10] President Cleveland, however, was unable to carry out his duties and obligations under this agreement to restore the situation that existed before the unlawful landing of American troops, due to political wrangling in the Congress.[11] Consequently, the state of war continues and international humanitarian law—law of armed conflict apply.

There are four stages in a state of war—international armed conflict. The *first stage* is an act of war committed by a State’s military against another State. This act of war triggers a state of war. The *second stage* takes place when there is a surrender by one of the States. This *second stage* transfers effective control over the territory that the surrendering State previously held. This transfer of effective control of the territory of the occupied State satisfies Article 42 of the 1907 Hague Regulations and triggers the law of occupation under Article 43, which is to administer the laws of the occupied State until a treaty of peace.[12] The surrender takes it to the *third stage* of belligerent occupation. The *fourth phase* is a treaty of peace that ends the belligerent occupation and returns the situation back to a state of peace that existed before the act of war was committed.

The state of war between the United States and Japan was triggered by Japan’s act of war in its attack of U.S. forces on the island of O‘ahu on December 7, 1941—*first stage*. Hostilities lasted until September 2, 1945, when Japan signed the instrument of surrender—*second stage*. As a result, the belligerent occupation of Japanese territory began under

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the United States Senate has given its advice and consent under Article II, section 2, Clause 2 of the U.S. Constitution. The second is by way of an executive agreement entered into by the President that does not require ratification by the Senate. *See United States v. Belmont*, 301 U.S. 324, 326 (1937); *United States v. Pink,* 315 U.S. 203, 223 (1942); *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003).

[10] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawaii: 1894-95*, 458 (1895) (Executive Documents) (online at: https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).

[11] Under United States municipal laws, there are two procedures by which and international agreement can bind the United States. The first is by a treaty whose entry into force can only take place after two-thirds of the U.S. Senate has given its advice and consent under Article II, section 2, clause 2 of the U.S. Constitution. The second is by way of an executive agreement entered into by the President that does not require ratification by the Senate. *See United States v. Belmont*, 301 U.S. 324, 326 (1937); *United States v. Pink*, 315 U.S. 203, 2223 (1942); and *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003).

[12] Article 42. Territory 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. Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

General MacArthur as military governor—*third stage*. The military occupation lasted until April 28, 1952, when the treaty of peace, called the Treaty of San Francisco, took effect—*fourth stage*.

The state of war between the Hawaiian Kingdom and the United States was triggered by the United States' act of war committed U.S. Marines on January 16, 1893—*first stage*. President Grover Cleveland stated to the Congress, "[a]nd so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an act of war."[13] This prompted Queen Lili'uokalani to conditionally surrender to the United States on January 17, 1893, calling upon the President to investigate the actions taken by U.S. Minister John Stevens and the Marines that were landed by Minister Steven's orders, and, thereafter, to reinstate her as the Executive Monarch—*second stage*.

President Cleveland's investigation led to an agreement of restoration on December 18, 1893, but he never carried it out. Unlike the Japanese situation where the military government under General MacArthur administered Japanese laws after the surrender, the United States did not administer the laws of the Hawaiian Kingdom after the surrender but rather allowed their puppet called the provisional government to maintain control until the United States unilaterally annexed Hawaiian territory by congressional legislation on July 7, 1898, that has no extra-territorial effect. According to President Cleveland, the "provisional government owes its existence to an armed invasion by the United States."[14] In the Hawaiian situation, the *third stage* has not been initiated by establishing a military government to provisionally administer the laws of the Hawaiian Kingdom until a treaty of peace—*fourth stage* has been agreed upon by both the Hawaiian Kingdom and the United States.

As in the case of the belligerent occupation of Germany after the defeat of the Nazi regime from 1945 to 1952, Brownlie explains that the "very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty."[15] The Hawaiian Kingdom never consented to transferring its sovereignty to the United States and remains an occupied State despite the prolonged occupation.

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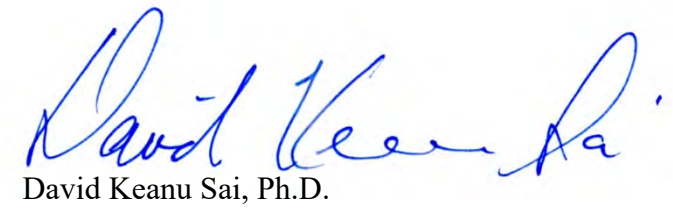
[13] Executive Documents, 451.
[14] *Id*., 454.
[15] Ian Brownlie, *Principles of Public International Law* 109 (4th ed., 1990).

As the resident expert here in these islands on international law, Hawaiian constitutional law, and administrative law, it is my duty to offer my assistance to you as you complete your command estimate in the spirit of cooperation, as the law of occupation allows, provided you "bear the ultimate and overall responsibility for the occupied territory."[16]

Na‘u me ka ‘oia‘io,



David Keanu Sai, Ph.D.
Chairman of the Council of Regency

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

Enclosure “5”

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July 24, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Failure to establish a military government is a war crime by omission

Dear Major General Hara:

The significance of July 31st in the Hawaiian Kingdom's history is an event that has a direct nexus to the recognition of the Hawaiian Kingdom as a sovereign and independent State on November 28, 1843. In 1842, King Kamehameha III commissioned three envoys to secure recognition of Hawaiian independence from Great Britain, France, and the United States. While the envoys were on their mission, Kamehameha III was forced to cede the kingdom to British Naval Captain Lord Paulet on February 25, 1843, due to Captain Paulet's false claim that British subjects were being treated unfairly. His cession was under protest and on the condition of his envoys' mission.

In June of 1843, Rear Admiral Thomas, Commander in Chief of the British Naval Force in the Pacific was made aware of the Hawaiian situation at his port in Valparaiso, Chile, and soon departed for the Hawaiian Islands. He arrived in Honolulu on July 25, 1843, and after meeting with the King he found that Captain Paulet's accusations were baseless, and plans were set for a ceremony to bring the British occupation to an end and restore the King. On July 31, 1843, at a grand ceremony at what is known today as Thomas Square, the British flag was lowered, and the Hawaiian flag raised in its place that brought the 68-day British occupation to an end. Later that day at Kawaiaha‘o Church, Kamehameha uttered what became the national motto, "ua mau kea ea o ka ‘āina i ka pono [the life of the land is preserved by righteousness]." This event led to the joint proclamation by Great Britain and

France on November 28, 1843, recognizing Hawaiian independence. Both July 31 and November 28 are recognized holidays in the Hawaiian Kingdom, Lā Hoʻihoʻi [Restoration Day] and Lā Kuʻokoʻa [Independence Day], respectively.

As we approach July 31, 2023, the final day of a command decision for you to establish a military government, I would like to press upon you your duty and obligation under international humanitarian law, also called the law of armed conflict, and U.S. Army regulations to establish a military government. According to FM 27-5, the reason for establishing a military government is "an obligation under international law"[1] because article 43 of the 1907 Hague Regulations and article 64 of the 1949 Fourth Geneva Convention obliges the occupying State—the United States to provisionally administer the laws of the occupied State—the Hawaiian Kingdom until a treaty of peace is agreed upon by both States.

There is no treaty of peace after United States troops invaded the Hawaiian Kingdom on January 16, 1893, that led to the conditional surrender by Queen Liliʻokalani as the Executive Monarch of the Hawaiian Kingdom the following day. This led to the unilateral seizure of the territory of the Hawaiian Kingdom by congressional legislation called a joint resolution of annexation on July 7, 1898. Under international law, annexation of occupied territory is unlawful. Under American municipal laws, annexation of foreign territory is not possible because congressional legislation has no effect beyond the borders of the United States. Congressional legislation is not a treaty of cession whereby the Hawaiian Kingdom ceded its territory to the United States. As United States constitutional scholar, Professor Willoughby, stated, 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."[2]

LTC Phelps has provided you no rebuttable evidence that the Hawaiian Kingdom no longer exists as a sovereign and independent State, and, therefore, the presumption of continuity of the Hawaiian State remains together with its rights and obligations under international law. This fact was acknowledged in 1999 by the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom* before it established the *ad hoc* arbitral tribunal on June 9, 2000, to resolve the dispute between Mr. Larsen and the Hawaiian Kingdom, by its Council of Regency. The dispute centered on the allegation that the Council of Regency is liable for not putting to an end the imposition of American municipal laws that led to his unfair trial and incarceration. The imposition of American municipal laws is the war crime of *usurpation of sovereignty during military occupation* under customary international law.

[1] FM 27-10, para. 4 (1947).
[2] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

Due to the diligent work of the Council of Regency in drawing attention to the prolonged occupation through academic research since returning from the PCA in December of 2000, the State of Hawai‘i finds itself at the precipice of international criminal law. For you to establish the military government is to put a stop to war crimes being committed upon the people of Hawai‘i with impunity by officials of the State of Hawai‘i. But for you to not transform the State of Hawai‘i into a military government is the war crime by omission of an obligation under international humanitarian law and the law of occupation. I would like to reiterate what I stated to you in my letter dated July 7, 2023:

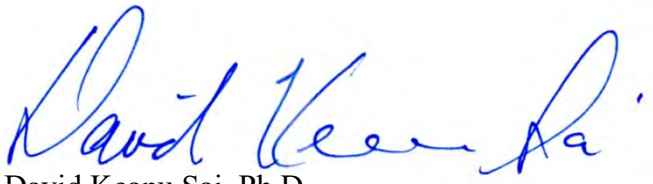
> If your decision is in line with the law of occupation, I, as Head of the Royal Commission of Inquiry, will forgo the drafting and publishing of war criminal reports on individuals to include officials of the State of Hawai‘i and the Counties, like LTC Phelps, where there exists evidence of the commission of war crimes in over 200 criminal, civil and administrative cases in State of Hawai‘i courts. The reasoning behind forgoing the war criminal reports is but for the establishment of the military government of Hawai‘i these individuals would not have been put in a situation to have committed the war crimes in the first place. Furthermore, the perpetrators identified in the war criminal reports that are published on the Royal Commission of Inquiry's website did have the authority and were given the opportunity to transform themselves into an occupying military government, but they did not, and, therefore, incurred criminal culpability for the actions and omissions.

I provided you more than enough time for your Staff Judge Advocate to provide you counter evidence of the Hawaiian Kingdom's continued existence as an occupied State. The Council of Regency already recognized, by proclamation on June 3, 2019, the State of Hawai‘i and its Counties as the Administration of the Occupying State. However, the failure by the State of Hawai‘i to transform into a military government since then is what led the Royal Commission of Inquiry to find, with evidence, that Governor David Ige is a war criminal subject to prosecution. War crimes have no statute of limitation and Mr. Ige will be prosecuted unless he dies prior to the institution of criminal proceedings either here or abroad. This leaves you no other course of action but to make a command decision to transform the State of Hawai‘i into a military government in accordance with United States Army Field Manuals 27-5 and 27-10. The date for this decision is no later than July 31, 2023, at 11:59 pm.

I want to close with a statement made by Chief Justice William Lee of the Hawaiian Kingdom Supreme Court in 1847, which is as relevant then as it is now, especially because it is tied to the words of Kamehameha III on July 31, 1843, which is the national motto. Chief Justice Lee stated:

> For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, "The life of the land is preserved by righteousness." We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, "Let justice be done though the heavens fall." Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.[3]

Na‘u me ka ‘oia‘io,



David Keanu Sai, Ph.D.
Chairman of the Council of Regency

[3] *Shillaber v. Waldo et al.*, 1 Hawai‘i 31, 32 (1847).

Enclosure “6”

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August 1, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Preliminary issue satisfied before establishing a military government for Hawai‘i

Dear Major General Hara:

Through our communication channel, I was told that you acknowledged in a meeting on July 27, 2023, the continued existence of the Hawaiian Kingdom as an occupied State under international law, which, to me, satisfies the July 31st suspense date. At our meeting on April 13, 2023, at the Naniloa Hotel, I recommended that you task your Staff Judge Advocate, LTC Lloyd Phelps, to do his due diligence and to investigate into the veracity of the information I provided you regarding the continuity of the Hawaiian State despite its government being overthrown by an act of war committed by U.S. troops on January 17, 1893. He was unable to provide rebuttable evidence as to the presumption on State continuity and your acknowledgment affirms that position.

There is a rule of international law regarding the presumption of continuity of the State, with its rights and obligations, despite the overthrow of its government by an act of war committed by the troops of a foreign State. According to Judge James Crawford of the International Court of Justice, “There is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is […] no effective, government […] [and] belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”[1] Judge Crawford also points out that “the presumption—in practice a strong one—is in favour of

[1] James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006).

the continuance, and against the extinction, of an established State."[2] On this rule and its application to the Hawaiian Kingdom, Professor Matthew Craven explains, "If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[3]

This rule of international law has a direct nexus to your obligation to establish a military government in accordance with Article 43 of the 1907 Hague Regulations and guided by Army regulations FM 27-5 and FM 27-10. According to Black's Law, this is an expressed legal obligation "which the obligor binds himself in express terms to perform his obligation."[4] Once you became aware of the Hawaiian Kingdom's existence as an occupied State, this express obligation under international law was prompted.

The legal effect of Title 32, United States Code, has a significant impact on the Hawai'i Army and Air National Guard because they are situated outside of U.S. territory. First, as an enactment of Congress, it has no legal effect beyond the territory of the United States. According to international law, the concept of jurisdiction is linked to the territory of a State.[5] As stated by the Permanent Court of International Justice in 1927, "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 […] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[6] And the U.S. Supreme Court affirmed this rule in 1936, "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory."[7] Also the Hawaiian Kingdom Supreme Court addressed this in 1858, where it stated, "The laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction."[8] Adhering to the limitation of jurisdiction, the decision by the Hawaiian Supreme Court and the Permanent Court of International Justice are binding, but not the U.S. Supreme Court decision, which is merely informative of the same rule.

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[2] *Id*., n. 2, 417.
[3] Matthew Craven, "Legal Opinion on the Continuity of the Hawaiian Kingdom as a State," in David Keanu Sai (ed.) *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).
[4] Black's Law 1074 (6th ed., 1990).
[5] Arthur Lenhoff, "International Law and Rules on International Jurisdiction," 50 *Cornell Law Quarterly* 5 (1964).
[6] *Lotus*, PCIJ Series A, No. 10, p. 18 (1927).
[7] *United States v. Curtiss Wright Corp.*, 299 U.S. 304, 318 (1936).
[8] *In re Francis de Flanchet, a Prisoner in the Fort*, 2 Haw. 96, 108 (1858).

Second, paragraph 353, FM 27-10, acknowledges that "Belligerent occupation in a foreign war, being based upon the possession of enemy territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional. On the other hand, subjugation or conquest implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty of peace. When sovereignty passes, belligerent occupation, as such, of course ceases, although the territory may and usually does, for a period at least, continue to be governed through military agencies." There is no treaty of peace between the Hawaiian Kingdom and the United States, which is why the military occupation persists today. Because there is no treaty where the Hawaiian Kingdom ceded its sovereignty and territory to the United States, the Permanent Court of Arbitration acknowledged the Hawaiian Kingdom's continued existence as a State in *Larsen v. Hawaiian Kingdom* in 1999. The Hawaiian Kingdom has sovereignty over the Hawaiian Islands and not the United States.

Since the 1959 Statehood Act (73 Stat. 4) and Title 10 U.S. Code have no effect within the territory of the Hawaiian Kingdom, the State of Hawai'i Department of Defense's status under international law, however, is recognized under the 1907 Hague Regulations as a militia of the occupying State—the United States. Article 1 states, "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'"

Notwithstanding the territorial limits of United States Code, it does clearly state that the Hawai'i National Guard forms part of the U.S. Armed Forces, which triggers your international obligation to establish a military government to administer the laws of the occupied State—the Hawaiian Kingdom. Title 32, U.S.C. §104(b) states, "Except as otherwise specifically provided in this title, the organization of the Army National Guard and the composition of its units shall be the same as those prescribed for the Army […]; and the organization of the Air National Guard and the composition of its units shall be the same as those prescribed for the Air Force […]." Therefore, the Hawai'i Army National Guard comes "under the denomination 'army'" in the 1907 Hague Regulations and not the State of Hawai'i as a whole. United States practice is for the Army to establish a military government and not the Air Force. You are an Army general officer.

Furthermore, the Indo-Pacific Command is not in your chain of command because you are not Title 10. It would appear to me that because you head both the Army and Air National Guard you would not have to report to both the Secretaries of the Army and Air Force, but rather to the Secretary of Defense since the Hawai'i militia is comprised of more than one branch of the U.S. Department of Defense. The Secretary of Defense reports to the President. Army regulations on military government, however, provides flexibility and it must adapt to the uniqueness of every situation that presents itself like the Hawaiian situation. According to paragraph 9(b)(4), FM 27-5, "Since the conditions under which [military government] operate will vary widely in a given area as well as between different

areas, flexibility of action must be provided by the preparation of alternate plans in order to meet the rapid changes and alterations which may occur."

As the last word concerning any acts relating to the administration of the occupied territory is with the occupying power, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory."[9] United States practice acknowledges that "The functions of the [occupied] government—whether of a general, provincial, or local character—continue only to the extent they are sanctioned (para. 367(a), FM 27-10)." With specific regard to cooperation with the occupied government, it is also recognized that "The occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions (para. 367(b))."

Since the occupying State does not have the sovereignty of the Hawaiian Kingdom, the Council of Regency, which has the authority to exercise Hawaiian sovereignty, can bring the laws and administrative policies of the Hawaiian Kingdom in 1893 up to date so that the military government can fully exercise its authority under the law of occupation. The purpose of the military government is to protect the population of the occupied State despite 130 years of violating these rights. On behalf of the Council of Regency, I can assure you that the Council of Regency commits itself to working with you to bring compliance with the law of occupation, for both the occupying and occupied States, that will eventually bring the prolonged occupation of the Hawaiian Kingdom to an end.

Na'u me ka 'oia'io,

David Keanu Sai, Ph.D.
Chairman of the Council of Regency

[9] International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report*, Geneva, 20 (2012), online at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.

Enclosure “7”

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August 21, 2023

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
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Re: Urgency of establishing a Military Government for Hawai‘i

Dear Major General Hara:

Despite the prolonged nature of the occupation and 130 years of non-compliance to the law of occupation, there are two fundamental rules that prevail: (1) to protect the sovereign rights of the legitimate government of the Occupied State; and (2) to protect the inhabitants of the Occupied State from being exploited. From these two rules, the 1907 Hague Regulations and the 1949 Fourth Geneva Convention circumscribe the conduct and actions of a military government, notwithstanding the failure by the occupant to protect the rights of the occupied government and the inhabitants since 1893. These rights remain vested despite over a century of violating these rights. The failure to establish a military government facilitated the violations.

The law of occupation does not give the occupant unlimited power over the inhabitants of the Occupied State. As President McKinley interpreted this customary law of occupation that predates the 1899 and 1907 Hague Regulations during the Spanish-American War, the inhabitants of occupied territory "are entitled to security in their persons and property and in all their private rights and relations,"[1] and it is the duty of the commander of the occupant "to protect them in their homes, in their employments, and in their personal and religious beliefs."[2] Furthermore, "the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are

[1] General Orders No. 101, 18 July 1898, *Foreign Relations of the United States, 1898*, 783. General Orders No. 101 is also reprinted in *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[2] *Id*.

considered as continuing in force"[3] and are "to be administered by the ordinary tribunals, substantially as they were before the occupation."[4]

United States practice under the law of occupation acknowledges that sovereignty remains in the Occupied State, because "military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty"[5] through effective control of the territory of the Occupied State.

The prolonged occupation did not diminish Hawaiian State sovereignty and the continued existence of the Hawaiian State was acknowledged by the Permanent Court of Arbitration in 1999 in *Larsen v. Hawaiian Kingdom*.[6] On March 22, 2023, the United Nations Human Council, at its 49th session in Geneva, was made aware of the Hawaiian Kingdom as an Occupied State and the commission of war crimes and human rights violations within its territory by the United States and the State of Hawai'i and its Counties.[7]

International humanitarian law is silent on a prolonged occupation because the authors of 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Professor Scobbie, "[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory."[8] The effective control by the United States since Queen Lili'uokalani's conditional surrender on January 17, 1893, "can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation."[9]

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law occupation, that was convened by the International Committee of the Red Cross, 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

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[3] *Id*.
[4] *Id*.
[5] Department of the Army, Field Manual 27-10, *The Law of Land Warfare,* para. 358 (1956).
[6] Permanent Court of Arbitration, *Larsen v. Hawaiian Kingdom*, PCA Case No. 1999-01, online at https://pca-cpa.org/en/cases/35/.
[7] International Association of Democratic Lawyers, *Video: Dr. Keanu Sai's oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom* (Mar. 22, 2023) online at https://iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/.
[8] Iain Scobbie, "International Law and the prolonged occupation of Palestine," *United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague*, 1 (May 20-22, 2015).
[9] Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).

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."[10] 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."[11] The prolonged occupation of the Hawaiian Kingdom is, in fact, that case, where drastic unlawful "transformations and changes in the occupied territory" occurred.

As the occupant in effective control of 10,931 square miles of Hawaiian territory, the State of Hawai'i, being the civilian government of the Hawaiian Kingdom that was unlawfully seized in 1893, is obligated to transform itself into a military government in order "to protect the sovereign rights of the legitimate government of the Occupied State, and […] to protect the inhabitants of the Occupied State from being exploited." The military government has centralized control, with you as its military governor, and by virtue of your position you have "supreme legislative, executive, and judicial authority, limited only the laws and customs of war and by directives from higher authority."[12]

The reasoning for the centralized control of authority is so that the military government can effectively respond to situations that are fluid in nature. Under the law of occupation, this authority by the occupant is to be shared with the Council of Regency, being the government of the Occupied State. As the last word concerning any acts relating to the administration of the occupied territory is with the occupying power, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory."[13]

By virtue of this shared authority, the Council of Regency, in its meeting on August 14, 2023, approved an "Operational Plan for Transitioning the State of Hawai'i into a Military Government," to assist you in your duties as the theater commander of the occupant. International humanitarian law distinguishes between the "Occupying State" and the "occupant." The law of occupation falls upon the latter and not the former, because the former's seat of government exists outside of Hawaiian territory, while the latter's military government exists within Hawaiian territory.

The insurgents, who were not held to account for their treasonous actions in 1893, were allowed by the United States to control and exploit the resources of the Hawaiian Kingdom and its inhabitants after the Hawaiian government was unlawfully overthrown by United States troops. Some of these insurgents came to be known as the Big Five, a collection of

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[10] 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).
[11] *Id*.
[12] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government,* para. 3 (1947).
[13] International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report,* Geneva, 20 (2012), online at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.

five self-serving large businesses, that wielded considerable political and economic power after 1893. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Company, American Factors (now Amfac), and Theo H. Davies & Company. One of the Big Five, Amfac, acquired an interest in Pioneer Mill Company in 1918, and in 1960 became a wholly owned subsidiary of Amfac. Pioneer Mill Company operated in West Maui with its headquarters in Lahaina. In 1885, Pioneer Mill Company was cultivating 600 of the 900 acres owned by the company and by 1910, 8,000 acres were devoted to growing sugar cane. In 1931, the Olowalu Company was purchased by Pioneer Mill Company, adding 1,200 acres of sugar cane land to the plantation. By 1935, over 10,000 acres, half-owned and half leased, were producing sugar cane for Pioneer Mill.[14] To maintain its plantations, water was diverted, and certain lands of west Maui became dry.

The Lahaina wildfire's tragic outcome also draws attention to the exploitation of the resources of west Maui and its inhabitants—water and land. West Maui Land Company, Inc., became the successor to Pioneer Mill and its subsidiary the Launiupoko Irrigation Company. When the sugar plantation closed in 1999, it was replaced with real estate development and water management. Instead of diverting water to the sugar plantation, it began to divert water to big corporations, hotels, golf courses, and luxury subdivisions. As reported by Hawai'i Public Radio, "Lahaina was formerly the 'Venice of the Pacific,' an area famed for its lush environment, natural and cultural resources, and its abundant water resources in particular."[15] Lahaina became a deadly victim of water diversion and exploitation. It should be noted that Lahaina is but a microcosm of the exploitation of the resources of the Hawaiian Kingdom and its inhabitants throughout the Hawaiian Islands for the past century to benefit the American economy in violation of the law of occupation.

Considering the devastation and tragedy of the Lahaina wildfire, your duty is only amplified and made much more urgent. It has been reported that the west Maui community, to their detriment, are frustrated with the lack of centralized control by departments and agencies of the federal government, the State of Hawai'i, and the County of Maui. The law of occupation will not change the support of these departments and agencies, but rather only change the dynamics of leadership under the centralized control by yourself as the military governor. The operational plan provides a comprehensive process of transition with essential tasks and implied tasks to be carried out.

The establishment of a military government would also put an end to land developers approaching victims of the fire who lost their homes to purchase their property. While land titles were incapable of being conveyed after January 17, 1893, for want of a lawful government and its notaries public, titles are capable of being remedied under Hawaiian Kingdom law and economic relief by title insurance policies.[16] It is unfortunate that the

[14] University of Hawai'i at Mānoa Library—Hawaiian Collection, Hawaiian Sugar Planters' Association Plantation Archives, *Register of the Pioneer Mill Company, Lahaina, Maui, 1873-1960* online at https://www2.hawaii.edu/~speccoll/p_pioneer.html.
[15] Ku'uwehi Hirashi, "Lahaina fires reveal ongoing power struggle for West Maui water rights," Hawaii Public Radio (Aug. 17, 2023) online at https://www.hawaiipublicradio.org/local-news/2023-08-17/lahaina-fires-reveal-ongoing-power-struggle-for-west-maui-water-rights.
[16] See Royal Commission of Inquiry, *Preliminary Report—Legal Status of Land Titles throughout the Realm* 48 (July 16, 2020) online at

tragedy of Lahaina has become an urgency for the State of Hawai‘i to begin to comply with the law of occupation and establish a military government. To not do so is a war crime of omission.

Given the severity of the situation in Maui and the time factor for aid to the victims, the Council of Regency respectfully calls upon you to schedule a meeting to go over its proposed operational plan and its execution.

Na‘u me ka ‘oia‘io,

David Keanu Sai, Ph.D.
Chairman of the Council of Regency

enclosure

https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf; see also *Supplemental Report—On Title Insurance* (Oct. 28, 2020) online at https://hawaiiankingdom.org/pdf/RCI_Supp_Report_Title_Insurance.pdf.

Operational Plan for Transitioning the State of Hawai‘i into a Military Government

by

The Council of Regency
Occupied Government of the Hawaiian Kingdom

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14 August 2023

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Chairman of the *acting* Council of Regency
Acting Minister of the Interior
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ABSTRACT

Adhering to the sharing of authority between the Occupying Government and the Occupied Government under the law of occupation, the Council of Regency has drafted an operational plan that addresses 130 years of the violation of international humanitarian law and the law of occupation by the United States of America. This operational plan lays out the process of transition from the State of Hawai‘i government to a Military Government in accordance with international humanitarian law, the law of occupation, and U.S. Army regulations in Field Manuals 27-5 and 27-10. The 1907 Hague Regulations and the 1949 Fourth Geneva Convention shows there are four essential tasks of the Military Government. This operational plan will address these essential tasks with their implied tasks for successful execution despite the prolonged nature of the occupation where the basic rules of occupation have been violated for over a century. The operational plan will lay out governing rules of maintaining a Military Government until a peace treaty has been negotiated and agreed upon between the Hawaiian Kingdom and the United States of America.

TABLE OF CONTENTS

THE AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM……..5
Hawaiian Independence……...5
United States' Invasion and Overthrow of the Hawaiian Kingdom Government……6
Presumption of Continuity of the Hawaiian State under International Law…….8
International Humanitarian Law Prohibits Annexation of the Occupied State……..10
Hawaiian Citizenry under Military Occupation…….11
Restoration of the Hawaiian Government and the Acknowledgment of the Hawaiian State by the Permanent Court of Arbitration……13
War Crime of Usurpation of Sovereignty during Military Occupation…….15
The State of Hawai'i is the Civilian Government of the Hawaiian Kingdom……18
Prolonged Occupation……...18
Strategic Plan of the Council of Regency……..19
The Royal Commission of Inquiry—Investigating War Crimes…….23

MILITARY FORCE OF THE HAWAIIAN KINGDOM……..25

MILITARY GOVERNMENT OF HAWAI'I…….30

ESSENTIAL TASK: *Temporary Administrator of the Laws of the Occupied State*……..38
IMPLIED TASK: *Proclaim the Establishment of a Military Government of Hawai'i*…..38
IMPLIED TASK: *Proclaim Provisional Laws in order to bring the Laws of the Hawaiian Kingdom up to date*……...38
Doctrine of Necessity…….42
Constitutional Necessity…….43
Exercising the Constitutional Prerogative without a Monarch…….45
Legal Status of American Municipal Laws in the Hawaiian Kingdom……..46
Application to State of Hawai'i statutes on Murder, Manslaughter, and Negligent Homicide……47
Hawaiian Kingdom law on Murder and Manslaughter…….50
General Analysis and Application of the Formula……51
IMPLIED TASK: *Disband the State of Hawai'i Legislature and the County Councils*……54

ESSENTIAL TASK: *Temporary Administrator of Public Buildings, Real Estate, Forests, and Agricultural Estates that belong to the Occupied State*……56
IMPLIED TASK: *Remove the United States flag from all Public Buildings of the Hawaiian Kingdom*……..56

ESSENTIAL TASK: *Protect the Institutions of the Occupied State*…….58
IMPLIED TASK: *Re-align Departments and Agencies to the Status Quo Ante*……59
IMPLIED TASK: *Oath of Allegiance by Those in the Military Government*……61
IMPLIED TASK: *Reinstate Universal Healthcare for Aboriginal Hawaiians*……..62
IMPLIED TASK: *Take Affirmative Steps to End Denationalization through Americanization*……..63

ESSENTIAL TASK: *Protect and Respect the Rights of the Population of the Occupied State*…66

Figure 1. National Flag of the Hawaiian Kingdom……...57

Appendix 1. Proclamation of a Military Government
Appendix 2. Proclamation of Provisional Laws
Appendix 3. 1882 Lahainaluna Annual Exams

THE AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM

Hawaiian Independence

On 28 November 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. The United States followed on 6 July 1844. According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[1] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[2] And the "duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be 'derecognized.'"[3]

As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.[4] The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.[5] By 1893, the Hawaiian Kingdom maintained over 90 Legations and Consulates throughout the world. This fact of Hawaiian Statehood was acknowledged in 2001 by the arbitral tribunal, in *Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration, which stated, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[6]

To preserve its political independence, should war break out in the Pacific Ocean, the Hawaiian Kingdom sought to ensure that its neutrality would be recognized beforehand. As a result, provisions recognizing Hawaiian neutrality were incorporated in its treaties with Sweden-Norway, Spain, and Germany. "A nation that wishes to secure her own peace," says Vattel, "cannot more successfully attain that object than by concluding treaties of neutrality."[7]

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[1] Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).
[2] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).
[3] Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.
[4] David Keanu Sai, "Hawaiian Constitutional Governance," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[5] "Treaties with Foreign States," in David Keanu Sai, ed., The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom 237-310 (2020).
[6] Larsen v. Hawaiian Kingdom, 119 International Law Reports 566, 581 (2001).
[7] Emerich De Vattel, *The Law of Nations* 333 (6th ed., 1844).

The Hawaiian Kingdom also became a full member State of the Universal Postal Union ("UPU") on 1 January 1882, which is currently a specialized agency of the United Nations and the postal sector's primary forum for international cooperation. While being a member State of the UPU, the Hawaiian Kingdom has been inactive since 17 January 1893 because it was incapacitated as a result of the illegal overthrow of its government by the United States as it is explained below.

United States' Invasion and Overthrow of the Hawaiian Kingdom Government

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[8] This invasion coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior power of the United States military, whereby she stated:

> Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.[9]

President Cleveland initiated a presidential investigation on 11 March 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on 29 March after which he "directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels."[10] Blount's last report was dated 17 July 1893, and on 18 October 1893, Secretary of State Gresham notified the President:

> The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.
>
> The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act.

[8] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawaii: 1894-95*, 451 (1895) (hereafter "Executive Documents").
[9] *Id*., 586.
[10] *Id*., 568.

> […]
>
> The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign […].
>
> Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.[11]

On 18 December 1893, President Cleveland delivered a manifesto[12] to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government. The President concluded that the "military occupation of Honolulu by the United States…was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[13] He also determined "that the provisional government owes its existence to an armed invasion by the United States."[14] Finally, the President admitted that by "an act of war […] the Government of a feeble but friendly and confiding people has been overthrown."[15]

Through executive mediation between the Queen and the new U.S. Minister to the Hawaiian Islands, Albert Willis, that lasted from 13 November through 18 December, an agreement of peace was reached. According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents. Political wrangling in the Congress, however, blocked President Cleveland from carrying out his obligation of restoration of the Queen.

Five years later, at the height of the Spanish-American War, President Cleveland's successor, William McKinley, signed a congressional joint resolution of annexation on 7 July 1898, unilaterally seizing the Hawaiian Islands. The legislation of every State, including the United States of America and its Congress, are not sources of international law. In *The Lotus* case*,* the Permanent Court of International Justice stated that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[16] According to Judge Crawford, derogation of this principle will not be presumed.[17] Since 1898, the United States has unlawfully

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[11] *Id*., 462-463.
[12] *Manifesto* is defined as a "formal written declaration, promulgated by…the executive authority of a state or nation, proclaiming its reasons and motives for…important international action." Black's Law Dictionary 963 (6th ed., 1990).
[13] Executive Documents, 452.
[14] *Id*., 454.
[15] *Id*.
[16] *Lotus*, PCIJ Series A, No. 10, 18 (1927).
[17] James Crawford, The Creation of States in International Law 41 (2nd ed. 2006).

imposed its municipal laws and administrative measures throughout the territory of the Hawaiian Kingdom, which is the war crime of *usurpation of sovereignty during military occupation* under particular customary international law.

Stark parallels can be drawn between what the United States did to the Hawaiian Kingdom and what Iraq did to Kuwait in 1990, commonly referred to as the First Gulf War. Just as Iraq, without justification, invaded Kuwait and overthrew the Kuwaiti government on 2 August 1990, and then unilaterally announced it annexed Kuwaiti territory on 8 August 1990, the United States did the same to the Hawaiian Kingdom and its territory. Where Kuwait was under a belligerent occupation by Iraq for 7.5 months, the Hawaiian Kingdom has been under a belligerent occupation by the United States for 130 years. Unlike Kuwait, the Hawaiian Kingdom did not have the United Nations Security Council to draw attention to the illegality of Iraq's invasion and annexation of Kuwaiti territory.[18]

Presumption of Continuity of the Hawaiian State under International Law

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to 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,"[19] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[20] 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.[21]

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[18] United Nations Security Council Resolution 662 (9 August 1990). In its resolution, the Security Council stated: "Gravely alarmed by the declaration by Iraq of a 'comprehensive and eternal merger' with Kuwait, Demanding once again that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990, Determined to bring the occupation of Kuwait by Iraq to an end and to restore the sovereignty, independent and territorial integrity of Kuwait, Determined also to restore the authority of the legitimate Government of Kuwait, 1. Decides that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void; 2. Calls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation; 3. Demands that Iraq rescind its actions purporting to annex Kuwait; 4. Decides to keep this item on its agenda and to continue its efforts to put an early end to the occupation."
[19] Crawford, 34.
[20] *Id*.
[21] Ian Brownlie, Principles of Public International Law 109 (4th ed. 1990).

"If 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."[22] 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. 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*[23] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[24]

In layman terms, you start off with the presumption of the existence of the Hawaiian State until there is rebuttable evidence that the Hawaiian State had been extinguished under international law by its consent, *i.e.*, treaty. One does not start off with proving the Hawaiian Kingdom exists today. The presumption is that since "in the nineteenth century the Hawaiian Kingdom existed as an independent State," it continues to exist today. Until there is rebuttable evidence that the Hawaiian State had been extinguished by the United States, the Hawaiian State continues to exist. Like the presumption of innocence, the accused does not start off with proving his/her innocence because the innocence is presumed. Rather, the burden of proof is on the opposing side to prove with rebuttable evidence that the person is not innocent. Until there is rebuttable evidence, the person remains innocent.

Rebuttable evidence that the Hawaiian Kingdom no longer exists as a State is a treaty between the Hawaiian Kingdom and the United States whereby the former ceded its sovereignty and territory to the latter. There is no treaty, and, therefore, the Hawaiian Kingdom continues to exist with all its rights and obligations under international law. Conversely, the United States, as the occupant, has certain duties and obligations to comply with international humanitarian law and the law of occupation considering the continued existence of the Hawaiian Kingdom as a subject of international law. Without rebuttable evidence, there is no dispute as to the Hawaiian Kingdom's continued existence since the nineteenth century.

[22] 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).
[23] 9 Stat. 922 (1848).
[24] 30 Stat. 1754 (1898).

International Humanitarian Law Prohibits Annexation of the Occupied State

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*.[25] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[26] 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. Because the Hawaiian Kingdom retained the sovereignty of the State despite being occupied, only the Hawaiian Kingdom could cede its sovereignty and territory to the United States by way of a treaty of peace. 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*.[27] International law does not permit annexation of territory of another state.[28]

Furthermore, in 1988, the U.S. 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 territorial sea from a three-mile limit to twelve.[29] 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."[30] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[31] 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."[32] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that

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[25] 30 Stat. 750 (1898).
[26] Black's Law, 88.
[27] 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.
[28] Dieter Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, Section 525, 242 (1995).
[29] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[30] *Id.*, 242.
[31] *Id*., 242.
[32] *Id*.

the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[33] 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 investigated whether it could be accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional 9 miles by statute because its authority was limited up to the 3 mile limit. 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."[34]

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."[35] Professor Willoughby also stated 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."[36]

Hawaiian Citizenry under Military Occupation

On 21 January 1868, Ferdinand Hutchison, Hawaiian Minister of the Interior, stated the criteria for Hawaiian nationality. He announced that "[i]n the judgment of His Majesty's Government, no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents, (either native or naturalized) during their temporary absence from the kingdom, or unless having been the subject of another power, he becomes a subject of this kingdom by taking the oath of allegiance." According to §429, Hawaiian Civil Code, the Minister of the Interior:

> shall have the power in person upon the application of any alien foreigner who shall have resided within the Kingdom for five years or more next preceding such application, stating his intention to become a permanent resident of the Kingdom, to administer the oath of allegiance to such foreigner, if satisfied that it will be for the good of the Kingdom, and that such foreigner owns without encumbrance taxable real estate within the Kingdom, and is not of immoral character, nor a refugee from justice of some other country, nor a deserting sailor, marine, soldier or officer.

[33] *Id.*, 262.
[34] *The Apollon*, 22 U.S. 362, 370 (1824).
[35] Kmiec, 252.
[36] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

Once a State is occupied, international law preserves the *status quo ante* of the occupied State as it was before the occupation began. To preserve the nationality of the occupied State from being manipulated by the occupying State to its advantage, international law only allows individuals born within the territory of the occupied State to acquire the nationality of their parents— *jus sanguinis*. To preserve the *status quo*, Article 49 of the GC IV mandates that the "Occupying Power shall not […] transfer parts of its own civilian population into the territory it occupies." For individuals, who were born within Hawaiian territory, to be a Hawaiian subject, they must be a direct descendant of a person or persons who were Hawaiian subjects prior to 17 January 1893. All other individuals born after 17 January 1893 to the present are aliens who can only acquire the nationality of their parents. According to von Glahn, "children born in territory under enemy occupation possess the nationality of their parents."[37]

According to the 1890 government census, Hawaiian subjects numbered 48,107, with the aboriginal Hawaiian, both pure and part, numbering 40,622, being 84% of the national population, and the non-aboriginal Hawaiians numbering 7,485, being 16%. Despite the massive and illegal migrations of foreigners to the Hawaiian Islands since 1898, the population of which, according to the State of Hawai'i, numbered 1,302,939 in 2009,[38] the *status quo ante* of the national population of the Hawaiian Kingdom is maintained. Therefore, under the international laws of occupation, the aboriginal Hawaiian population of 322,812 in 2009 would continue to be 84% of the Hawaiian national population, and the non-aboriginal Hawaiian population of 61,488 would continue to be 16%. The balance of the population in 2009, being 918,639, are aliens who were illegally transferred, either directly or indirectly, by the United States as the occupying Power, and therefore their presence constitutes war crimes.

According to United Nations Special Rapporteur Awn Shawkat Al-Khasawneh of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, population "transfers engage both state responsibility and the criminal liability of individuals."[39] "The remedy, in case of breach of the prohibition," states Professor Ronen, "is reversion to the status quo ante, *i.e.* the occupying power should remove its nationals from the occupied territory and repatriate them. […] At any rate, since the occupying power cannot grant what it does not have, the settler population could not acquire status in the territory during the period of occupation."[40]

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[37] Gehard von Glahn, *Law Among Nations* 780 (6th ed., 1992). See also Willy Daniel Kaipo Kauai, "The Color of Nationality: Continuities and Discontinuities of Citizenship in Hawai'i" (PhD dissertation, University of Hawai'i at Mānoa, 2014).

[38] State of Hawai'i. Department of Health, Hawai'i Health Survey (2009) (online at http://www.ohadatabook.com/F01-05-11u.pdf); *see* also David Keanu Sai, *American Occupation of the Hawaiian State: A Century Gone Unchecked*, 1 *Haw. J.L. & Pol.* 46, 63-65 (Summer 2004).

[39] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and Population Transfer: Final Report of the Special Rapporteur*, Mr. Al-Khasawneh E/CN.4/Sub.2/1997/23, para. 60.

[40] Yael Ronen, "Status of Settlers Implanted by Illegal Regimes under International Law," *International Law Forum of the Hebrew University of Jerusalem Law Faculty* (Dr. Tomer Broude, ed.) 38 (3 Oct. 2008).

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."[41] In 1997, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in similar fashion to governments established in exile during the Second World War.[42] By virtue of this process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

> A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.[43]

Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. While the last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917, the office of the Monarch remained under Hawaiian constitutional law. The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and third, prepare for an effective transition to a *de jure* government when the occupation ends.

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,[44] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-

[41] 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).
[42] 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).
[43] Thomas M. Cooley, "Grave Obstacles to Hawaiian Annexation," *The Forum,* 389, 390 (1893).
[44] U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

legal changes in government" of an existing State.[45] 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 issue of recognition or acceptance arises; continued recognition is assumed."[46]

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[47] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes. This brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[48]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal on 9 June 2000 after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[49] 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."[50]

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[45] M.J. Peterson, Recognition of Governments: Legal Doctrines and State Practice, 1815-1995 26 (1997).
[46] *Restatement (Third)*, §203, comment c.
[47] *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[48] Lenzerini, 322.
[49] *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
[50] Stefan Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile 115 (1998).

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity" in its case repository.[51] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).[52]

It should also be noted that the United States, by its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.[53]

War Crime of Usurpation of Sovereignty during Military Occupation

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative measures of the Occupying State over the territory of the Occupied State. Usurpation is the "unlawful encroachment or assumption of the use of property, power or authority which belongs to another."[54]

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, "[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." Article 43 is the codification of customary

[51] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[52] *Id*.
[53] Sai, The Royal Commission of Inquiry, 25-26.
[54] Black's Law, 1545.

international law that existed on 17 January 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[55]

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this "rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[56] The war crime of *usurpation of sovereignty during military occupation*, however, has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, "there do not appear to have been any prosecutions for that crime by international criminal tribunals."[57] While this war crime is questionable under customary international law, it is a war crime under "particular" customary international law. According to the International Law Commission, "A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[58]

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[55] Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports, Annex, TNA FO 608/245/4 (1919).
[56] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[57] William Schabas, "War Crimes Related to the 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* 156 (2020).
[58] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting Heads of State for the listed war crimes by conduct or omission. As a war crime under particular customary international law it is binding on the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the Hawaiian situation, *usurpation of sovereignty during military occupation* serves as a source for the commission of secondary war crimes within the territory of an occupied State, *i.e. compulsory enlistment*, *denationalization*, *pillage*, *destruction of property*, *deprivation of fair and regular trial*, *deporting civilians of the occupied territory*, and *transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions or measures of the occupying State is addressed by Professor Benvenisti:

> The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[59]

In the situation of Hawai‘i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, the United State has imposed its legislation and administrative measures to the present in violation of the laws of occupation.

Given these impositions are criminal violations of the law of occupation involving government action or policy or the action or policies of an occupying State's proxies such as the State of Hawai‘i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty during military*

[59] Eyal Benvenisti, The International Law of Occupation 19 (1993).

occupation has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures.

The State of Hawai'i is the Civilian Government of the Hawaiian Kingdom

There is a common misunderstanding that the State of Hawai'i is an American civilian government established by the U.S. Congress. It is not. Its governmental infrastructure was established by the Hawaiian Kingdom to govern Hawaiian territory. Unlike the United States, which is a federated government, the Hawaiian Kingdom is a unitary government, which "is the efficient organization of power" by a central government.[60] Its civilian governmental infrastructure was founded upon a constitutional monarchy.

On 17 January 1893, the Hawaiian Kingdom civilian government was seized by insurgents under the protection of U.S. troops that invaded Honolulu the day before. All governmental officials remained in place except for the Queen, her Cabinet, and the Marshal of the police force. The civilian government was renamed the so-called provisional government. On 4 July 1894, the name was changed to the so-called Republic of Hawai'i. After the United States illegally annexed the Hawaiian Islands in 1898, the Congress changed the name of the Republic of Hawai'i to the Territory of Hawai'i on 30 April 1900,[61] and on 18 March 1959, the Congress renamed the Territory of Hawai'i to the State of Hawai'i.[62]

After investigating the overthrow of the Hawaiian Kingdom government, President Cleveland concluded that the provisional government "was neither a government *de facto* nor *de jure*,"[63] and that the government of the Hawaiian Kingdom "was undisputed and was both the *de facto* and the *de jure* government."[64] The State of Hawai'i is the direct successor to the provisional government, and, therefore, is "neither a government *de facto* nor *de jure*."

Prolonged Occupation

International humanitarian law is silent on a prolonged occupation because the authors of 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Professor Scobbie, "[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not

[60] Daniel J. Elazar, "Contrasting Unitary and Federal Systems," 18(3) *International Political Science Review* 237-251, 243 (1997).
[61] An Act To provide a government for the Territory of Hawaii, 31 Stat. 141 (1900).
[62] An Act To provide for the admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).
[63] Executive Documents, 453.
[64] *Id*., 451.

possess sovereignty over the territory."[65] 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."[66]

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law occupation that was convened by the International Committee of the Red Cross, 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."[67] 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."[68] The prolonged occupation of the Hawaiian Kingdom is, in fact, that case, where drastic unlawful "transformations and changes in the occupied territory" occurred.

Strategic Plan of the Council of Regency

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.[69] Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international law. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*,[70] phase II was initiated, which would contribute to ascertaining the *mens rea*

[65] 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).
[66] Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).
[67] 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).
[68] *Id*.
[69] Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).
[70] David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).

and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai‘i at Mānoa when the Chairman of the Council of Regency, David Keanu Sai, entered the political science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation to be published. 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*,[71] to *Nation Within—The History of the American Occupation of Hawai‘i*.[72] 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.[73]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to State of Hawai‘i Judges Gary W.B. Chang, Jeannette H. Castagnetti, and members of the judiciary dated 25 February 2018.[74] 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

[71] Tom Coffman, Nation Within: The Story of America's Annexation of the Nation of Hawai‘i (1998).
[72] 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.
[73] *Id*., xvi.
[74] 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).

> fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[75] 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."[76]

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

> As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.
>
> We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai'i and its inhabitants.

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[75] *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).
[76] 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/).

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 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.[77] 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 with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[78] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

On 22 March 2022, the Dr. Sai 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 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.

[77] 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/).
[78] 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/).

> 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 war crimes being committed in the Hawaiian Kingdom by the United States. Under 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 would be called for."[79] Silence conveys consent. Since they "did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[80]

The Royal Commission of Inquiry—Investigating War Crimes

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by proclamation on 17 April 2019,[81] established a Royal Commission of Inquiry ("RCI") in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War "to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course." Dr. Sai serves as Head of the RCI and Professor Federico Lenzerini from the University of Siena, Italy, serves as its Deputy Head.

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai'i, which includes President Joseph Biden Jr., Governor David Ige, Hawai'i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua'i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation* and are subject to criminal prosecutions. All of the named perpetrators have met the requisite element of *mens rea*.[82] In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. "It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to

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[79] Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).
[80] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, International Court of Justice, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.
[81] Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).
[82] Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.

bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result."[83]

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators' own pleadings and the rulings by the court in a U.S. federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*[84] The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves "State action or policy or the action or policies of an occupying State's proxies" and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.[85] The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the United States, through the State of Hawai'i, begins to comply with Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention to administer the laws of the Occupied State—the Hawaiian Kingdom as a military government.

[83] Mohamed Elewa Badar, The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach 535 (2013).
[84] *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT, United States District Court of the District of Hawai'i.
[85] United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).

MILITARY FORCE OF THE HAWAIIAN KINGDOM

In 1845, the Hawaiian Kingdom organized its military under the command of the Governors of the several islands of Hawai‘i, Maui, O‘ahu and Kaua‘i but subordinate to the Monarch. According to the statute, “male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective islands where they have their most usual domicil, whenever so required by proclamation of the governor thereof.”[86] Those exempt from military duty included ministers of religion of every denomination, teachers, members of the Privy Council of State, executive department heads, members of the House of Nobles and Representatives when in session, judges, sheriffs, notaries public, registers of wills and conveyances, collectors of customs, poundmasters and constables.[87]

In 1847, the *Polynesian* newspaper, a government newspaper, reported the standing army comprised of 682 of all ranks: the “corps which musters at the fort, including officers, 286; corps of King’s Guards, including officers, 363; stationed at the battery, on Punch Bowl Hill, 33.”[88] On 17 December 1852, King Kamehameha III, in Privy Council, established the First Hawaiian Cavalry, commanded by Captain Henry Sea.[89]

In 1886, the Legislature enacted *An Act to Organize the Military Forces of the Kingdom*, “for the purpose of more complete military organization in any case requiring recourse to arms and to maintain and provide a sufficient force for the internal security and good order of the Kingdom, and being also in pursuance of Article 26th of the Constitution.”[90] The Act of 1886 established “a regular Military and Naval force, not to exceed two hundred and fifty men, rank and file,” and the “term of enlistment shall be for five years, which term may be extended from time to time by re-enlistment.”[91] This military force was headed by a Lieutenant General as Commander-in-Chief and the supreme command under the Executive Monarch as Generalissimo.[92] This military force was renamed the King’s Royal Guard in 1890,[93] and the Executive Monarch was thereafter called the “Commander-in-Chief of all the Military Forces”[94] and not Generalissimo. While the King’s Royal Guard was the only active military component of the kingdom,[95] there was a reserve force capable of being called to active duty. The statute provides that “[a]ll male subjects of His Majesty, between the ages of eighteen and forty years, shall be liable to do military duty in the respective

[86] “Statute Laws of His Majesty Kamehameha III,” *Hawaiian Kingdom*, Vol. I 69 (1846).
[87] *Id*., 70.
[88] “Military,” *Polynesian* 138 (9 Jan. 1847).
[89] “First Hawaiian Cavalry,” *Polynesian* 130 (25 Dec. 1852).
[90] An Act to Organize the Military Forces of the Kingdom, Laws of His Majesty Kalakaua I 37 (1886).
[91] *Id*.
[92] *Id*., 38.
[93] *An Act to Provide for a Military Force to be Designated as the “King’s Royal Guard,”* Laws of His Majesty Kalakaua I 107 (1890).
[94] *Id*.
[95] *Id*., 108.

islands where they have their most usual domicil, whenever so required by proclamation from the governor thereof."[96]

Upon ascending to the Throne on 29 January 1891, Queen Lili'uokalani, as the Executive Monarch, succeeded her predecessor King David Kalākaua as Commander-in-Chief of the Royal Guard. The command structure of the Royal Guard consisted of a Captain and two Lieutenants. These officers were authorized "to make, alter and revoke all regulations not repugnant to the provisions of [the Act of 1890], concerning enlistment, discipline, exercises, accoutrements, arms and clothing and to make such other rules and orders as may be necessary to carry into effect the provisions of [the Act of 1890], and to provide and prescribe penalties for any violations of such regulations not extending to deprivation of life or limb, or the infliction of corporeal punishment."[97] All rules, regulations or orders required the approval of the Executive Monarch and was to be countersigned by the Minister of Foreign Affairs.[98]

On 17 January 1893, a small group of insurgents, with the protection of United States troops, declared the establishment of a provisional government whereby all "officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named persons: Queen Liliuokalani, Charles B. Wilson, Marshal, Samuel Parker, Minister of Foreign Affairs, W.H. Cornwell, Minister of Finance, John F. Colburn, Minister of the Interior, [and] Arthur P. Peterson, Attorney General, who are hereby removed from office."[99] The insurgency further stated that all "Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils."[100] The insurgency unlawfully seized control of the Hawaiian Kingdom civilian government.

The military force of the provisional government was not an organized unit or militia but rather armed insurgents under the command of John Harris Soper. Soper attended a meeting of the leadership of the insurgents calling themselves the Committee of Safety in the evening of 16 January 1893, where he was asked to command the armed wing of the insurgency. Although Soper served as Marshal of the Hawaiian Kingdom under King Kalākaua, he admitted in an interview with Commissioner James Blount on 17 June 1893, who was investigating the overthrow of the Hawaiian Kingdom government by direction of U.S. President Grover Cleveland, that he "was not a trained military man, and was rather adverse to accepting the position [he] was not especially trained for, under the circumstances, and that [he] would give them an answer on the following day; that is, in the morning."[101] Soper told Special Commissioner Blount he accepted the offer

[96] Section 3, *Appendix to the Civil Code*, Compiled Laws 493 (1884).
[97] *Id*., 107.
[98] *Id*.
[99] *Proclamation*, Laws of the Provisional Government of the Hawaiian Islands vii (1893).
[100] *Id*., viii.
[101] Executive Documents, 972.

after learning that "Judge Sanford Dole [agreed] to accept the position as the head of the [provisional] Government."[102] The insurgency renamed the Hawaiian Kingdom's Royal Guard to the National Guard by *An Act to Authorize the Formation of a National Guard* on 27 January 1893.[103] Soper was thereafter commissioned as Colonel to command the National Guard and was called the Adjutant General.

On 17 January 1893, Queen Lili'uokalani conditionally surrendered to the United States and not the insurgency, thereby transferring effective control of Hawaiian territory to the United States.[104] Under customary international law, a State's effective control of another State's territory by an act of war triggers the Occupying State's military to establish a military government to provisionally administer the laws of the Occupied State. This rule was later codified under Articles 42 and 43 of the 1899 Hague Regulations, which was superseded by Articles 42 and 43 of the 1907 Hague Regulations. When Special Commissioner Blount ordered U.S. troops to return to the *U.S.S. Boston* on 1 April 1893,[105] effective control of Hawaiian territory was left with the insurgency calling itself the provisional government.

Special Commissioner Blount submitted his final report on 17 July 1893, to U.S. Secretary of State Walter Gresham.[106] Secretary of State Gresham submitted his report to President Cleveland on 18 October 1893,[107] and President Cleveland notified the Congress of his findings and conclusions on 18 December 1893.[108] In his message to the Congress, he stated:

> When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister's recognition of the provisional government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen's troops were quartered), though the same had been demanded of the Queen's officer's in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her

[102] *Id*.
[103] *An Act to Authorize the Formation of a National Guard,* Laws of the Provisional Government of the Hawaiian Islands 8 (1893).
[104] Executive Documents, 586.
[105] *Id*., 597.
[106] *Id*., 567.
[107] *Id*., 459.
[108] *Id*., 445.

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

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

Our country was in danger of occupying the position of having actually set up a temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. We are not without a precedent showing how scrupulously we avoided such accusation in former days. After the people of Texas had declared their independence of Mexico they resolved that on the acknowledgment of their independence by the United States they would seek admission into the Union. Several months after the battle of San Jacinto, by which Texan independence was practically assured and established, President Jackson declined to recognize it, alleging as one of his reasons that in the circumstances it became us “to beware of a too early movement, as it might subject us, however unjustly, to the imputation of seeking to establish the claim of our neighbors to a territory with a view to its subsequent acquisition by ourselves.” This is in marked contrast with the hasty recognition of a government openly and concededly set up for the purpose of tendering to us territorial annexation.

> I believe that a candid and thorough examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States.[109]

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

The insurgency changed its name to the Republic of Hawai'i on 4 July 1894. Under *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard* of 13 August 1895, the National Guard was reorganized and commanded by the Adjutant General that headed a regiment comprised of battalions with companies.[110]

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on 30 April 1900,[111] the Act of 1895 continued in force. Under section 6 of the Act of 1900, "the laws not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." Soper continued to command the National Guard as Adjutant General until 2 April 1907, when he retired. The Hawai'i National Guard continued in force under *An Act To provide for the admission of the State of Hawaii into the Union* enacted by the U.S. Congress on 18 March 1959.[112]

[109] *Id*., 453.
[110] An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard, Laws of the Republic of Hawaii 29 (1895).
[111] An Act To provide a government for the Territory of Hawaii, 31 Stat. 141 (1900).
[112] An Act To provide for the admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).

MILITARY GOVERNMENT OF HAWAI‘I

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by international humanitarian law while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, "[f]rom a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction."[113]

The 1907 Hague Regulations assumed that after the occupant gains effective control it would establish its authority by establishing a system of direct administration. United States practice of a system of direct administration is for the Army to establish a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. This is acknowledged by letter from U.S. President Roosevelt to Secretary of War Henry Stimson dated 10 November 1943, where President Roosevelt stated, "[a]lthough other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden."[114] Military governors that preside over a military government are general officers of the Army. In the current command structure of the State of Hawai‘i, that general officer is the Adjutant General.

Under Article 43, the authority to establish a military government is not with the Occupying State, but rather with the occupant that is physically on the ground. Professor Benvenisti explains, "[t]his is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the 'occupying State' as the authority in power, but the delegates preferred to change the reference to 'the occupant.' This insistence on the distinct character of the occupation administration should also be kept in practice."[115] This authority is triggered by Article 42 that states, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Only an "occupant," which is the "army," and not the Occupying State, can establish a military government.

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals—FM 27-10, *The Law of Land Warfare*,[116] and FM 27-5, *Civil*

[113] William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).
[114] Earl F. Ziemke, The U.S. Army in the Occupation of Germany 1944-1946 22 (1975).
[115] Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).
[116] Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956).

Affairs Military Government.[117] Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states, "[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded." A military government is the civilian government of the Occupied State headed by a U.S. Army general officer called a Military Governor. The State of Hawai'i governmental infrastructure is the civilian government of the Hawaiian Kingdom.

Article V of the State of Hawai'i Constitution provides that the Governor is the Chief Executive of the State of Hawai'i. He is also the Commander-in-Chief of the Army and Air National Guard and appoints the Adjutant General who "shall be the executive head of the department of defense and commanding general of the militia of the State."[118] Accordingly, the "adjutant general shall perform such duties as are prescribed by law and such other military duties consistent with the regulations and customs of the armed forces of the United States as required by the governor."[119] In other words, the Adjutant General operates under two regimes of law, that of the State of Hawai'i and that of the United States Army.

The State of Hawai'i Constitution is an American municipal law that was approved by the Territorial Legislature of Hawai'i on 20 May 1949 under *An Act to provide for a constitutional convention, the adoption of a State constitution, and appropriating money therefor*. The Congress established the Territory of Hawai'i under *An Act To provide a government for the Territory of Hawaii*, on 30 April 1900.[120] The constitution was adopted by a vote of American citizens in the election throughout the Hawaiian Islands held on 7 November 1950. The State of Hawai'i Constitution came into effect by *An Act To provide for the admission of the State of Hawaii into the Union* passed by the Congress on 18 March 1959.[121]

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[122] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[123] Therefore, the State of Hawai'i cannot claim to be a

[117] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947).
[118] Hawai'i Revised Statutes, §121-7.
[119] *Id*., §121-9.
[120] 31 Stat. 141 (1900).
[121] 73 Stat. 4 (1959).
[122] United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).
[123] *The Apollon*, 22 U.S. 362, 370 (1824).

de jure government because its only claim to authority derives from congressional legislation that has no extraterritorial effect.

Article 43 of the 1907 Hague Regulations provides that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[124] Article 64 of the 1949 Fourth Geneva Convention also states, "[t]he penal laws of the occupied territory shall remain in force."[125] Under Article 43 sovereignty is not transferred to the occupying State.[126] Section 358, United States Army Field Manual 27-10, declares, "military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." The United States possesses no sovereignty over the Hawaiian Islands.

"The occupant," according to Professor Sassòli, "may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation." Professor Sassòli further explains that the "expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders."[127]

In *Hawaiian Kingdom v. Biden et al.*,[128] the State of Hawai'i argued that the Hawaiian Kingdom's "Amended Complaint challenges the legality of Hawaii's admission to, and continued existence as a state of, the United States. As such, Plaintiff presents a nonjusticiable political question to this Court for determination."[129] A political question is not an affirmative defense, but a jurisdictional argument where "there is [arguably] a textually demonstrable constitutional commitment of the issue to a coordinate political department."[130] More importantly, it is a court precedence of American jurisprudence and like congressional legislation has no extra-territorial effect. For the

[124] 36 Stat. 2277, 2306 (1907).
[125] 6.3 U.S.T. 3516, 3558 (1955).
[126] See Eyal Benvenisti, The International Law of Occupation 8 (1993); Gerhard von Glahn, The Occupation of Enemy of Territory—A Commentary on the Law and Practice of Belligerent Occupation 95 (1957); Michael Bothe, "Occupation, Belligerent," in Rudolf Bernhardt (dir.), Encyclopedia of Public International Law, vol. 3, 765 (1997).
[127] Marco Sassòli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century," *International Humanitarian Law Research Initiative* 6 (2004) (online at https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf).
[128] *Hawaiian Kingdom v. Biden et al.*, Amended Complaint for Declaratory and Injunctive Relief (11 August 2021) (online at https://hawaiiankingdom.org/pdf/Amended_Complaint_and_Exhibits_1_&_2%20_(Filed_2021-08-11).pdf).
[129] *Hawaiian Kingdom v. Biden et al.*, State of Hawai'i Memorandum in Support of Motion 8 (12 August 2022) (online at https://hawaiiankingdom.org/pdf/[ECF_241-1]_Memo_in_Support_SOH%20Motion_(Filed_2022-08-12).pdf) .
[130] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

State of Hawai‘i to have established an affirmative defense, it would have provided rebuttable that the Hawaiian Kingdom as a State was extinguished despite its government having been unlawfully overthrown by the United States on 17 January 1893, and not argue jurisdiction under the political question doctrine.

Moreover, in *Lin v. United States*, the United States District Court for the District of Columbia dismissed a case concerning Taiwan as a political question.[131] The federal court in its order stated that it "must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss." When this case went on appeal, the D.C. Appellate Court underlined the modern doctrine of the political question, "[w]e do not disagree with Appellants' assertion that we could resolve this case through treaty analysis and statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task."[132] In other words, for the defendants to argue that the *Hawaiian Kingdom v. Biden* case "presents a nonjusticiable political question" is to accept "as true all factual allegations contained in the complaint."

Because the State of Hawai‘i Constitution and its Revised Statutes are situations of facts and not laws, they have no legal effect within Hawaiian territory. Furthermore, the State of Hawai‘i Constitution is precluded from being recognized as a provisional law of the Hawaiian Kingdom, pursuant to the 2014 Proclamation by the Council of Regency recognizing certain American municipal laws as the provisional laws of the Kingdom, because the 1864 Hawaiian Constitution, as amended, remains the organic law of the country and the State of Hawai‘i Constitution is republican in form.[133] As such, all officials that have taken the oath of office under the State of Hawai‘i Constitution, to include the Governor and his staff, cannot claim lawful authority without committing the war crime of *usurpation of sovereignty during military occupation* with the exception of the Adjutant General who also operates under U.S. Army doctrine and regulations.

Since the Council of Regency recognized, by proclamation on 3 June 2019, "the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law,"[134] the State of Hawai‘i and its Counties, however, did not take the necessary steps to comply with international humanitarian law by transforming itself into a military government. This omission consequently led to war criminal reports, subject to prosecution, by the Royal Commission of Inquiry finding the senior leadership

[131] *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008).
[132] *Lin v. United States*, 561 F.3d 506 (2009).
[133] Council of Regency, *Proclamation of Provisional Laws* (10 Oct. 2014), (online at https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf); see also David Keanu Sai, *Memorandum on the Formula to Determine Provisional Laws* (22 March 2023) (online at https://hawaiiankingdom.org/pdf/HK_Memo_Provisional_Laws_Formula.pdf).
[134] Council of Regency, *Proclamation Recognizing the State of Hawai‘i and its Counties* (3 June 2019) (online at https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

of the United States, State of Hawai‘i and County governments guilty of committing the war crimes of *usurpation of sovereignty during military occupation*, *deprivation of a fair and regular trial* and *pillage*.[135]

While international humanitarian law has effectively stripped the authority of senior leadership of the State of Hawai‘i, it did not strip the Adjutant General's "military duties consistent with the regulations and customs of the armed forces of the United States."[136] International humanitarian law acknowledges the military duties of the Adjutant General as the occupant of the territory of the Hawaiian Kingdom as an occupied State. Although the Commanding General of the United States Army Pacific (USARPAC), whose troops comprise the largest Army unit in the Hawaiian Islands, USARPAC is not in effective control of the majority of Hawaiian territory like the State of Hawai‘i and, therefore, there is no duty to establish a military government pursuant to Article 42 of the 1907 Hague Regulations. According to U.S. Army Field Manual 27-5:

> 3. COMMAND RESPONSIBILITY. The theater commander bears full responsibility for [military government]; therefore, he is usually designated as military governor or civil affairs administrator, but is authorized to delegate his authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority.
>
> 4. REASON FOR ESTABLISHMENT. a. Reasons for the establishment of [military government is] either military necessity as a right, or as an obligation under international law. b. Since the military occupation of enemy territory suspends the operation of the government of the occupied territory, the obligation arises under international law for the occupying force to exercise the functions of civil government looking toward the restoration and maintenance of public order. These functions are exercised by [military government]. An armed force in territory other than that of an enemy similarly has the duty of establishing [military government] when the government of such territory is absent or unable to function properly.[137]

The transformation of the State of Hawai‘i into a military government would be the first step toward correcting the course of the United States' non-compliance with international humanitarian law for 130 years. The Adjutant General would make the proclamation of the establishment of the military government, as the military governor, in similar fashion to the establishment of the Office of military government for Germany on 1 October 1945 that was responsible for administering the U.S. zone of occupation and the U.S. sector of Berlin.

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[135] Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.
[136] Hawai‘i Revised Statutes, §121-9.
[137] Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* 4 (1947).

The legal effect of Title 32, United States Code, has a significant impact on the Hawai‘i Army and Air National Guard because they are situated outside of U.S. territory. First, as an enactment of Congress, the United States Code has no legal effect beyond the territory of the United States. According to international law, the concept of jurisdiction is linked to the territory of a State.[138] As stated by the Permanent Court of International Justice in 1927, “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 […] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”[139] And the U.S. Supreme Court affirmed this rule in 1936, that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory.”[140] Also the Hawaiian Kingdom Supreme Court addressed this in 1858, where it stated, “The laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction.”[141] Adhering to the limitation of jurisdiction, the decision by the Hawaiian Kingdom Supreme Court and the Permanent Court of International Justice are binding, but not the U.S. Supreme Court decision, which is merely informative of the same rule.

Second, paragraph 353, FM 27-10, acknowledges that the military occupation of a foreign State “necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional. On the other hand, subjugation or conquest implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty of peace. When sovereignty passes, belligerent occupation, as such, of course ceases, although the territory may and usually does, for a period at least, continue to be governed through military agencies.” There is no treaty of peace between the Hawaiian Kingdom and the United States, which is why the military occupation persists today. Because there is no treaty where the Hawaiian Kingdom ceded its sovereignty and territory to the United States, the Permanent Court of Arbitration acknowledged the Hawaiian Kingdom’s continued existence as a State in *Larsen v. Hawaiian Kingdom* in 1999. The Hawaiian Kingdom has sovereignty over the Hawaiian Islands and not the United States.

Since the 1959 Statehood Act (73 Stat. 4) and Title 10 United States Code have no effect within the territory of the Hawaiian Kingdom, the State of Hawai‘i Department of Defense’s status under international law, however, is recognized under the 1907 Hague Regulations as a militia of the

[138] Arthur Lenhoff, “International Law and Rules on International Jurisdiction,” 50 *Cornell Law Quarterly* 5 (1964).
[139] *Lotus*, 18.
[140] United States v. Curtiss Wright Corp., 299 U.S. 304, 318 (1936).
[141] In re Francis de Flanchet, a Prisoner in the Fort, 2 Haw. 96, 108 (1858).

occupying State—the United States. Article 1 states, "[t]he laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'"

Notwithstanding the territorial limits of United States Code, it does clearly state that the Hawai'i National Guard forms part of the U.S. Armed Forces. Title 32, U.S.C. §104(b) states, "[e]xcept as otherwise specifically provided in this title, the organization of the Army National Guard and the composition of its units shall be the same as those prescribed for the Army […]; and the organization of the Air National Guard and the composition of its units shall be the same as those prescribed for the Air Force […]." Therefore, the Hawai'i Army National Guard comes "under the denomination 'army'" in the 1907 Hague Regulations and not the State of Hawai'i as a whole. United States practice is for the Army to establish a military government and not the Air Force.

As a Title 10 combatant unit, the Indo-Pacific Command is not in the chain of command for the military government of Hawai'i. It would appear that since the Adjutant General oversees both the Army and Air National Guard he would not have to report to both the Secretaries of the Army and Air Force, but rather to the Secretary of Defense since the Hawai'i militia is comprised of more than one branch of the U.S. Department of Defense. The Secretary of Defense reports to the President. Army regulations on military government, however, provides flexibility and it must adapt to the uniqueness of every situation that presents itself like the Hawaiian situation. According to paragraph 9(b)(4), FM 27-5, "[s]ince the conditions under which [military government] operate will vary widely in a given area as well as between different areas, flexibility of action must be provided by the preparation of alternate plans in order to meet the rapid changes and alterations which may occur."

As the last word concerning any acts relating to the administration of the occupied territory is with the occupying power, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory."[142] United States practice acknowledges that "[t]he functions of the [occupied] government—whether of a general, provincial, or local character—continue only to the extent they are sanctioned (para. 367(a), FM 27-10)." With specific regard to cooperation with the occupied government, it is also recognized that "[t]he occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions (para. 367(b))."

[142] International Committee of the Red Cross, *Expert Meeting. Occupation and Other Forms of Administration of Foreign Territory. Report*, Geneva, 20 (2012), online at https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf.

Since the occupying State does not have the sovereignty of the Hawaiian Kingdom, the Council of Regency, which has the authority to exercise Hawaiian sovereignty, can bring the laws and administrative policies of the Hawaiian Kingdom in 1893 up to date so that the military government can fully exercise its authority under the law of occupation. The purpose of the military government is to protect the population of the occupied State despite 130 years of violating these rights.

According to the 1907 Hague Regulations and the 1949 Fourth Geneva Convention there are four essential tasks that apply to the occupation of the Hawaiian Kingdom. First, temporary administrator of the laws of the occupied State.[143] Second, temporary administrator of public buildings, real estate, forests, and agricultural estates that belong to the occupied State.[144] Third, protect the institutions of the occupied State.[145] And, fourth, protect and respect the rights of the population of the occupied State.[146]

[143] Article 43, 1907 Hague Regulations and Article 64, 1949 Fourth Geneva Convention.
[144] Article 55, 1907 Hague Regulations.
[145] *Id*., Article 56.
[146] Articles 27 and 47, 1949 Fourth Geneva Convention.

ESSENTIAL TASK: *Temporary Administrator of the Laws of the Occupied State*

Under customary international law relevant to Queen Lili‘uokalani’s conditional surrender to the United States on 17 January 1893, the United States, as the occupying State, was obligated to administer Hawaiian Kingdom law, which consist of the Civil Code,[147] together with the session laws of 1884[148] and 1886,[149] and the Penal Code.[150] This norm of customary international law was later codified under Article 43 of the 1907 Hague Regulations[151] and Article 64 of the 1949 Fourth Geneva Convention.[152] However, instead of administering the laws of the Hawaiian Kingdom,[153] the United States unlawfully annexed the Hawaiian Islands in 1898 during the Spanish-American War and began to impose its municipal laws over Hawaiian territory since then to the present.

IMPLIED TASK: *Proclaim the Establishment of a Military Government of Hawai‘i*

To begin to comply with Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention, the State of Hawai‘i Adjutant General shall proclaim the establishment of the military government by a public proclamation in accordance with United States’ practice and Army regulations FM 27-5 and 27-10. See Appendix 1.

IMPLIED TASK: *Proclaim Provisional Laws in order to bring the Laws of the Hawaiian Kingdom up to date*

To administer Hawaiian Kingdom law as it existed in 1893 would not be prudent given the longevity of the military occupation that is now at 130 years. Therefore, to bring the laws of the Hawaiian Kingdom up to date, the Council of Regency proclaimed provisional laws for the Realm because of the prolonged military occupation. The proclamation of provisional laws of 10 October 2014 states:

> Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom,

[147] Civil Code of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/civilcode/index.shtml).
[148] Session Laws of the Hawaiian Kingdom (1884) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).
[149] Session Laws of the Hawaiian Kingdom (1886) (online at https://hawaiiankingdom.org/pdf/1884_Laws.pdf).
[150] Penal Code of the Hawaiian Kingdom (1869) (online at https://hawaiiankingdom.org/pdf/Penal_Code.pdf).
[151] Article 43 of the 1907 Hague Regulations states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”
[152] Article 64 of the 1949 Fourth Geneva Convention states, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”
[153] See David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 57-94 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

> do hereby acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;
>
> And, We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void;
>
> And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).[154]

Before determining what United States statutes, State of Hawai‘i statutes, and County ordinances (collectively referred to herein as “American municipal laws”) are not “contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law,” there must be a type of interpretive methodology for extracting a conclusion based on the doctrine of necessity and the principle of constitutional necessity allowable under Hawaiian law.

This memorandum provides a formula to be used for determining what American municipal laws may be considered the provisional laws of the Hawaiian Kingdom during the American military occupation that augments and not replaces the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code. American municipal laws to be considered as provisional laws exclude the provisions of the constitutions of the United States and the State of Hawai‘i. The Hawaiian Constitution of 1864, as amended,[155] remains the constitutional order and organic law of the country. This memorandum is intended for the use of American authorities operating within

[154] Council of Regency, *Proclamation of Provisional Law* (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).
[155] 1864 Constitution, as amended (online at https://hawaiiankingdom.org/pdf/1864_Constitution.pdf).

the territorial jurisdiction of the Hawaiian Kingdom to determine which American municipal laws may be considered provisional laws during its effective control of Hawaiian territory.

With a view to bringing compliance with international humanitarian law by the State of Hawai‘i and its County governments and recognizing their effective control of Hawaiian territory in accordance with Article 42 of the 1907 Hague Regulations,[156] the Council of Regency proclaimed and recognized their existence as the administration of the occupying State on 3 June 2019. The proclamation read:

> Whereas in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai‘i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:
>
> Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Powers of the Kingdom, do hereby recognize the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;
>
> And, We do hereby further proclaim that the State of Hawai‘i and its Counties shall preserve the sovereign rights of the Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law.[157]

The State of Hawai‘i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the "laws in force in the country."[158] Prior to the proclamation, the State of Hawai‘i and its Counties were established by virtue of U.S. Congressional legislation unlawfully imposed within Hawaiian territory, being the war crime of *usurpation of sovereignty during military occupation*. According to Professor Schabas, "the actus reus of the offense of 'usurpation of sovereignty' would consist of the imposition of legislation or administrative

[156] Article 42 of the 1907 Hague Regulations states, "Territory 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."
[157] Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (3 June 2019) (online https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).
[158] Article 43 of the 1907 Hague Regulations.

measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation."[159]

The establishment and maintenance of the civilian governments of the United States and the State of Hawai'i and its Counties within the territory of the Hawaiian Kingdom are not "necessary for military purposes of the occupation," but rather have been established to benefit the United States and its citizenry. The existence of these civilian governments also constitutes a violation of the Hawaiian citizenry's right to self-determination under international law. Professor Saul explains that the principle of self-determination is where "the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure."[160]

Moreover, according to Article VIII of the 1849 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the United States, "each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects […] but subject always to the laws and statutes of the two countries respectively."[161] The imposition of American municipal laws is not only a violation of international humanitarian law and international criminal law, but also a violation of the 1849 treaty.

Professor Benvenisti explains that "[d]uring the occupation, the ousted government would often attempt to influence life in the occupied area out of concern for its nationals […]. One way to accomplish such goals is to legislate for the occupied population."[162] While some "national courts, and a number of scholars have rejected any duty to respect legislation made by the ousted government while it is outside the occupied area [,] the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local laws."[163] The difference here, however, is that the Council of Regency is not operating in exile or "outside the occupied area," but rather was established and is operating *in situ*—within the territorial jurisdiction of the Hawaiian Kingdom. Furthermore, "even if the occupant does not have to respect such new legislation, the legislation would be regarded as

[159] 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* 157 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).
[160] Matthew Saul, "The Right to Self-Determination and the Prolonged Occupation of Palestinian Territory," in Gentian Zyberi (ed.), *Protecting Community Interests through International Law* 3 (2021).
[161] Treaty with the United States of America, in David Keanu Sai (ed.), The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom 305, 307 (2020).
[162] Benvenisti, 2nd ed., 104.
[163] *Id*.

valid nevertheless by the returning sovereigns or by its courts which would apply them retroactively at the end of the occupation."[164]

To legislate is also an exercise of the police power of the Occupied State. While police power escapes an exact definition, it is understood to be the ability of the government of a State to enact legislation to safeguard its citizenry. In *The King v. Tong Lee*, the Hawaiian Supreme Court stated that "an exercise of the police powers of the State with regard to the comfort, welfare and safety of society, and is constitutional."[165] During times of military occupation, international humanitarian law allows for the government of the Occupied State, *in situ*, to exercise its police power to legislate by necessity "with regard to the comfort, welfare and safety of society."

Based on the *doctrine of necessity*, Professor Lenzerini states that "the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom."[166] He also holds 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."[167]

Doctrine of Necessity

Under English common law, Professor de Smith states that deviations from a State's constitutional order "can be justified on grounds of necessity."[168] He also asserts that "State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution."[169]

Certain principles of English common law have been recognized in the Hawaiian Kingdom. In *The King v. Agnee et al.*, the Hawaiian Supreme Court stated that "[w]e do not recognize as conclusive the common law nor the authorities of the courts of England or of the United States, any farther than the principles which they support may have become incorporated in our system of laws, and recognized by the adjudication of the Supreme Court."[170] In *Agnee*, the Court cited English common law commentators on criminal law such as Chitty and Bishop as well as English criminal cases.

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[164] *Id*., 105.
[165] *The King v. Tong Lee*, 4 Haw. 335 (1880).
[166] 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, 324 (2020).
[167] *Id.*, 325.
[168] Stanley A. de Smith, Constitutional and Administrative Law 80 (1986).
[169] *Id*.
[170] *The King v. Agnee et al.*, 3 Haw. 106, 112 (1869).

Professor Oppenheimer explains that "a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country."[171] In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated that there are certain limitations to the principle of necessity, "namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful […] Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign."[172]

Other national courts, to include the U.S. Supreme Court,[173] have consistently held that emergency action cannot justify a subversion of a State's constitutional order. The doctrine of necessity provides the necessary parameters and limits of emergency action so as not to subvert. Of the five governing principles of necessity which apply to the assumption of vacant government office(s), four of these principles apply to the current situation of interpreting what laws are to be considered the provisional laws of the Hawaiian Kingdom. These include:

1. an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
2. there must be no other course of action reasonably available;
3. any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
4. it must not impair the just rights of citizens under the Constitution[.][174]

Constitutional Necessity

According to Professor Paulsen, the constitution of necessity "properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results."[175] U.S. President Abraham Lincoln was the first to invoke the principle of constitutional necessity, or in his words "indispensable necessity." President Lincoln determined his duty to preserve, "by every indispensable means, that government—that nation—of which the constitution was the organic law."[176] In his letter to U.S. Senator Hodges, President Lincoln explained the theory of constitutional necessity.

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[171] F.W. Oppenheimer, "Governments and Authorities in Exile," 36 *Am. J. Int'l. L.* 568, 581 (1942).
[172] See Madzimbamuto v. Lardner-Burke, 1. A.C. 645, 732 (1969). See also Chandrika Persaud v. Republic of Fiji (Nov. 16, 2000); and Mokosto v. HM King Moshoeshoe II, LRC (Const) 24, 132 (1989).
[173] *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).
[174] Mitchell v. Director of Public Prosecutions, L.R.C. (Const) 35, 88-89 (1986).
[175] Michael Stokes Paulsen, "The Constitution of Necessity," 79(4) *Notre Dame L. Rev.* 1268 (2004).
[176] Letter from Abraham Lincoln, U.S. President, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *Abraham Lincoln: Speeches and Writings 1859-65*, Don E. Fehrenbacher (ed.), 585-86 (1989).

> By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.[177]

Like the United States, the Hawaiian Kingdom is a constitutional form of governance whereby the 1864 Constitution, as amended, limits governmental powers. The American republic's constitution is similar yet incompatible to the Hawaiian monarchical constitution. The primary distinction is that the former establishes the functions of a republican form of government, while the latter establishes the function of a constitutional monarchy. Both adhere to the separation of powers doctrine of the executive, legislative and judicial branches. Where they differ as regards this doctrine, however, is in the aspect that the American constitution provides separate but equal branches of government, while the Hawaiian constitution provides for separate but coordinate branches of government, whereby the Executive Monarch retains a constitutional prerogative to be exercised in extraordinary situations within the confines of the constitution.

Under the American construction of separate but equal, the Congress, as the legislative branch, can paralyze government if it does not pass a budget for government operations, and the President, as head of the executive branch, can do nothing to prevent the shutdown. On the contrary, the Hawaiian Kingdom's executive is capable of intervention by constitutional prerogative should the occasion arise, as occurred in 1855.

In that year's legislative session, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget. King Kamehameha IV explained that "the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about $200,000, which Bill we could not sanction."[178] After the House of Nobles "repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed it Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people in the Kingdom."[179] A new election for Representatives occurred and the Legislative Assembly was reconvened in special session and a budget passed.

Under Article 24 of the 1864 Constitution, the Executive Monarch took the following oath: "I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom

[177] *Id*.
[178] Robert C. Lydecker, Roster Legislatures of Hawaii, 1841-1918 62 (1918).
[179] *Id*.

whole and inviolate, and to govern in conformity therewith." The Ministers, however, took another form of oath: "I solemnly swear in the presence of Almighty God, that I will faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties of [Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General]."

Lincoln viewed the source of constitutional necessity as arising from the oath taken by the executive chief, whereby the duty for making "constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—[is] in the President of the United States, whose special sworn duty the Constitution makes it to 'preserve, protect and defend the Constitution of the United States.'"[180] The operative word for the Executive Monarch's oath of office is "to maintain the Constitution of the Kingdom whole and inviolate." Inviolate meaning free or safe from injury or violation. The Hawaiian constitution is the organic law for the country.

Exercising the Constitutional Prerogative without a Monarch

In 1855, the Monarch exercised his constitutional prerogative to keep the government operating under a workable budget, but the king also kept the country safe from injury by an unwarranted increase in taxes. The duty for making constitutional decisions in extraordinary situations, in this case as to what constitutes the provisional laws of the country during a prolonged and illegal belligerent occupation, stems from the oath of the Executive Monarch. The Council of Regency serves in the absence of the Monarch; it is not the Monarch and, therefore, cannot take the oath.

The Cabinet Ministers that comprise the Council of Regency have taken their individual oaths to "faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties" of their offices, but there is no prerogative in their oaths to "maintain the Constitution of the Kingdom whole and inviolate." Therefore, this prerogative must be construed to be inherent in Article 33 when the Cabinet Council serves as the 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." The Monarch's constitutional prerogative is in its "Powers" that the Council of Regency temporarily exercises in the absence of the Monarch. Therefore, the Council of Regency has the power "to maintain the Constitution of the Kingdom whole and inviolate," and, therefore, provisionally legislate, through proclamations, for the protection of Hawaiian subjects during the American military occupation.

[180] Paulsen, 1258.

Under public international law, the laws and administrative measures of the United States that have been imposed throughout the territory of the Hawaiian Kingdom have no extra-territorial effect. In *The Lotus* case, the Permanent Court of International Justice explained, "[n]ow 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."[181] According to Judge Crawford, derogation of this principle will not be presumed.[182] Therefore, under public international law, American municipal laws being imposed in the Hawaiian Kingdom are not laws but rather situations of facts. Within the Hawaiian constitutional order, this distinction between situations of facts and Hawaiian law is fundamental so as not to rupture the Hawaiian legal system in this extraordinary and extralegal situation of a prolonged military occupation.

As Professor Dicey once stated, "English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country."[183] Any right acquired under American municipal laws that have been unlawfully imposed within the territory of the Hawaiian Kingdom, being a situation of fact and not law, must be recognized by Hawaiian law. Without it being acquired under Hawaiian law, there is no right to be recognized. Before any right can be claimed, American municipal laws must first be transformed from situations of facts into provisional laws of the Hawaiian Kingdom.

In determining which American municipal laws, being situation of facts, shall constitute a provisional law of the kingdom, the following questions need to be answered. If any question is answered in the affirmative, with the exception of the last question, then it shall not be considered a provisional law.

1. The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?

2. Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.

3. If the American municipal law has no comparison to Hawaiian Kingdom law,

[181] *Lotus*, 18.
[182] Crawford, 41.
[183] A.V. Dicey, *The Conflict of Laws* 12 (6th ed., 1949).

would it run contrary to the Hawaiian Kingdom's police power?

4. If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?

5. Does the American municipal law infringe vested rights secured under Hawaiian law?

6. And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

Application to State of Hawai'i statutes on
Murder, Manslaughter, and Negligent Homicide

§707-701 Murder in the first degree**.** (1) A person commits the offense of murder in the first degree if the person intentionally or knowingly causes the death of:

(a) More than one person in the same or separate incident;

(b) A law enforcement officer, judge, or prosecutor arising out of the performance of official duties;

(c) A person known by the defendant to be a witness in a criminal prosecution and the killing is related to the person's status as a witness;

(d) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this section;

(e) A person while the defendant was imprisoned;

(f) A person from whom the defendant has been restrained, by order of any court, including an ex parte order, from contacting, threatening, or physically abusing pursuant to chapter 586;

(g) A person who is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order;

(h) A person known by the defendant to be a witness in a family court proceeding and the killing is related to the person's status as a witness; or

(i) A person whom the defendant restrained with intent to:

(i) Hold the person for ransom or reward; or

(ii) Use the person as a shield or hostage.

(2) Murder in the first degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1972, c 9, pt of §1; am L 1986, c 314, §49; am L 2001, c 91, §4; am L 2006, c 230, §27; am L 2011, c 63, §2; am L 2016, c 214, §1]

§707-701.5 Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person; provided that this section shall not apply to actions taken under chapter 327L.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656. [L 1986, c 314, §50; am L 2018, c 2, §6]

§707-702 Manslaughter. (1) A person commits the offense of manslaughter if:

(a) The person recklessly causes the death of another person; or

(b) The person intentionally causes another person to commit suicide;

provided that this section shall not apply to actions taken under chapter 327L.

(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be; provided that an explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant's discovery, defendant's knowledge, or the disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant's explanation includes the discovery, knowledge, or disclosure of the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person's actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict.

(3) Manslaughter is a class A felony. [L 1972, c 9, pt of §1; am L 1987, c 181, §8; am L 1996, c 197, §2; am L 2003, c 64, §1; am L 2006, c 230, §28; am L 2018, c 2, §7; am L 2019, c 149, §1]

§707-702.5 Negligent homicide in the first degree. (1) A person commits the offense of negligent homicide in the first degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol; or

(b) A vulnerable user by the operation of a vehicle in a negligent manner.

(2) A person who violates subsection (1)(a) shall be guilty of a class B felony; provided that the person shall be guilty of a class A felony when the person:

(a) Has been convicted one or more times for the offense of operating a vehicle under the influence within fifteen years of the instant offense;

(b) Is, at the time of the instant offense, engaging in conduct that would constitute a violation of section 291E-62; or

(c) Is a highly intoxicated driver as defined by section 291E-1.

(3) A person who violates subsection (1)(b) shall be guilty of a class B felony.

(4) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, and any other law to the contrary, the sentencing court may impose a lesser sentence for a person convicted of a class A felony under this section if the court finds that strong mitigating circumstances warrant the action. Strong mitigating circumstances shall include but not be limited to the provisions of section 706-621. The court shall provide a written opinion stating its reasons for imposing the lesser sentence.

(5) For the purposes of this section, a person "has been convicted one or more times for the offense of operating a vehicle under the influence" if the person has one or more:

(a) Convictions under section 291E-4(a), 291E-61, 291E-61.5, or 291E-64;

(b) Convictions in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or

(c) Adjudications of a minor for a law violation that, if committed by an adult, would constitute a violation of section 291E-4(a), 291E-61, or 291E-61.5, that, at the time of the instant offense, had not been expunged by pardon, reversed, or set aside. All convictions that have been expunged by pardon, reversed, or set aside before the instant offense shall not be deemed prior convictions for the purposes of this section. [L 1988, c 292, pt of §1; am L 2012, c 316, §2; am L 2022, c 48, §2]

§707-703 Negligent homicide in the second degree. (1) A person commits the offense of negligent homicide in the second degree if that person causes the death of:

(a) Another person by the operation of a vehicle in a negligent manner; or

(b) A vulnerable user by the operation of a vehicle in a manner that constitutes simple negligence as defined in section 707-704(2).

(2) Negligent homicide in the second degree is a class C felony. [L 1972, c 9, pt of §1; am L 1988, c 292, §2; am L 2012, c 316, §3]

§707-704 Negligent homicide in the third degree. (1) A person is guilty of the offense of negligent homicide in the third degree if that person causes the death of another person by the operation of a vehicle in a manner which is simple negligence.

(2) "Simple negligence" as used in this section:

(a) A person acts with simple negligence with respect to the person's conduct when the person should be aware of a risk that the person engages in that conduct.

(b) A person acts with simple negligence with respect to attendant circumstances when the person should be aware of a risk that those circumstances exist.

(c) A person acts with simple negligence with respect to a result of the person's conduct when the person should be aware of a risk that the person's conduct will cause that result.

(d) A risk is within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to the person, involves a deviation from the standard of care that a law-abiding person would observe in the same situation.

(3) Negligent homicide in the third degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1988, c 292, §3]

Hawaiian Kingdom law on Murder and Manslaughter

Penal Code, Chapter VII (As amended by the Act of 30 June 1860)

1. Murder is the killing of any human being with malice aforethought, without authority, justification or extenuation by law.

2. When the act of killing another is proved, malice aforethought shall be presumed, and the burthen shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor.

3. Whoever is guilty of murder shall be punished by death.

4. In every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection.

5. Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter.

6. Manslaughter is of three degrees, and the jury under an indictment for murder or manslaughter may return a verdict of manslaughter in either degree, or of assault and battery, as the facts proved will warrant.

7. Whoever is guilty of manslaughter in the first degree shall be punished by imprisonment at hard labor, for a term of years not less than ten, nor more than twenty, in the discretion of the court.

8. Whoever is guilty of manslaughter in the second degree shall be punished by imprisonment at hard labor, not more than ten years or less than five years.

9. Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor not more than five years, or by a fine not more than one thousand dollars, in the discretion of the court.

10. Whoever, under an indictment for murder, or manslaughter, shall be found guilty of assault and battery, as provided in section 6 of this chapter, shall be punished by imprisonment at hard labor not more than two years, or by a fine not exceeding five hundred dollars, in the discretion of the court.

11. No person shall be adjudged to have killed another unless death ensues within a year and a day from the injury inflicted.

12. Chapter VII of the Penal Code is hereby repealed from and after the passage of this chapter: Provided, however, that such repeal shall not take affect any offense committed or penalty or forfeiture incurred under said chapter, but that the same shall remain in full force in respect to the liability of any person to be proceeded against, or against whom proceedings are pending, for any offense committed under said chapter.

General Analysis and Application of the Formula

The Hawaiian Kingdom law on murder draws from the English law—the 1752 *Murder Act*.[184] Like the *Murder Ac*t, the Hawaiian statute provides that "[w]hoever is guilty of murder shall be punished by death," and "[i]n every case of sentence to punishment by death, the court may, in their discretion, order the body of the convict to be dissected, and the marshal in such case shall deliver the dead body to any surgeon who may wish to have the body for dissection." Section 2 of the *Murder Act* provides that after the execution, the body of the murderer be delivered "to the hall of the Surgeons Company…to be dissected and anatomized by the said Surgeons."

Teaching human anatomy "became essential for a European medical education, with Paris, Edinburgh and London (in that order of priority) attracting fee-paying students anxious to obtain extra qualifications as physicians and surgeons from dissecting criminal corpses."[185] Under the *Murder Act*, post-mortem dissection was also viewed as post-mortem punishment to serve as a deterrent for the crime. In the Hawaiian Kingdom, there was no Surgeons Company but only surgeons in private practice or employed by Queen's Hospital being a quasi-public medical institution. Unlike the *Murder Act*, the sentence to post-mortem dissection was discretionary by the court and only considered if the body was requested by a surgeon, which would appear for the purpose of medical education and not post-mortem punishment.

[184] 25 George II, c. 37.
[185] Elizabeth T. Hurren, Dissecting the Criminal Corpse: Staging Post-Execution Punishment in Early Modern England 5 (2016).

Under the 1850 Penal Code, the murder statute had two degrees, but this was repealed by the Legislature in 1860 to have none.[186] Manslaughter, however, had three degrees to be considered by the jury.

Do the State of Hawai'i statutes on murder, manslaughter and negligent homicide violate any provisions of the 1864 Constitution, as amended? No.

Do they run contrary to a monarchical form of government? No.

If the State of Hawai'i statutes on murder, manslaughter and negligent homicide have no comparison to Hawaiian Kingdom law, would it be authorized under the Hawaiian Kingdom's police power? Not applicable because the Hawaiian Kingdom has a law on murder and manslaughter.

If the State of Hawai'i statutes on murder, manslaughter and negligent homicide are comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute on murder and manslaughter? Under the 1850 Penal Code, the Hawaiian statute on murder provided first and second degrees. First-degree murder carried the death penalty and second-degree murder carried "imprisonment at hard labor for a term of years not less than five nor more than twenty, in the discretion of the court." The 1850 statute on manslaughter, however, did not have degrees, which stated:

> The laws should make some allowance for human infirmity; therefore whoever kills another without malice aforethought, under the sudden impulse of passion, excited by provocation or other adequate cause, whether insult, threats, violence or otherwise, by the party killed, of a nature tending to disturb the judgment and facilities, and weaken the possession of a self-control of the killing party, is not guilty of murder but manslaughter; and shall be punished by imprisonment at hard labor not more than ten years, or by fine not less than one thousand dollars, nor more than ten thousand dollars.

The 1860 Legislature amended that statute to remove the degrees of murder and provide three degrees of manslaughter. The punishment for murder was death and the punishment for the degrees of manslaughter varied by years of imprisonment. The State of Hawai'i statute has two degrees of murder, no degrees for manslaughter, and three degrees of negligent homicide.

While the punishment under Hawaiian statute is death for murder and imprisonment at hard labor, it does reflect criminal laws of other foreign States in the nineteenth century to include the United States. Hard labor is a "punishment, additional to mere imprisonment, sometimes imposed upon convicts sentenced to a penitentiary for serious crimes, or for misconduct while in prison."[187]

[186] An Act to Amend the Law Relating to Murder and Manslaughter (1860).
[187] Black's Law, 717.

However under Hawaiian Kingdom criminal statutes, all sentencing to imprisonment is at hard labor. It was not an addition to imprisonment.

With the progressive affirmation of human rights in international law, the death penalty has started to be seen as inconsistent with the very idea of human dignity. Since then, the international community of States adopted several instruments that ban the use of the death penalty. These instruments include:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;[188]
- Protocol No. 6 to the European Convention on Human Rights, concerning the abolition of the death penalty, and Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances;[189] and
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[190]

As a member of the community of States, the Hawaiian Kingdom's statute on the death penalty and imprisonment at hard labor is inconsistent with the most recent developments of international law and should no longer be enforced.

Nearly every state in the American Union and the federal government has a felony murder rule. The "rule allows a defendant to be charged with first-degree murder for a killing that occurs during a dangerous felony, even if the defendant is not the killer."[191] The felony-murder rule has been used to support murder convictions of defendants where one victim of a robbery accidentally shoots another victim,[192] where one of the defendant's co-robbers kills another co-robber during a robbery for the latter's refusal to obey orders and not as part of the robbery transaction,[193] and where the defendant (a dope addict) commits robbery of the defendant's homicide victim as an afterthought following the killing.[194] The application of the felony-murder rule dispenses with the need to prove that culpability with respect to the homicidal result that is otherwise required to support a conviction for murder and therefore leads to anomalous results. Therefore, the felony murder rule is inconsistent the Hawaiian statute on murder.

Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on vested rights secured under Hawaiian law? No.

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[188] General Assembly resolution 44/128.
[189] Council of Europe, European Treaty Series – No. 114.
[190] Organization of American States, Treaty Series – No. 73.
[191] Justia, *Felony Murder* (online at: https://www.justia.com/criminal/offenses/homicide/felony-murder/).
[192] *People v. Harrison*, 203 Cal. 587, 265 P. 230 (1928).
[193] *People v. Cabaltero*, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).
[194] *People v. Arnold*, 108 Cal. App. 2d 719, 239 P.2d 449 (1952).

Does the State of Hawai'i statutes on murder, manslaughter and negligent homicide infringe on the obligations of the Hawaiian Kingdom under customary international law or being a Contracting State to its treaties? Yes. Although not a party to any treaty banning the use of the death penalty and cruel punishment, the Hawaiian Kingdom recognizes that banning the death penalty and cruel punishment is a duty of States, in line with the recent developments in the field of international human rights law. Therefore, the Hawaiian Kingdom statute on the death penalty and imprisonment at hard labor should be considered as no longer consistent with international law.

Considering this analysis, the State of Hawai'i laws on murder, manslaughter and negligent homicide are not "contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the international laws of occupation and international humanitarian law." To the extent that the felony murder rule is omitted, the State of Hawai'i law on murder would be consistent with the Hawaiian Kingdom law on murder.

The military government shall proclaim provisional laws for the Occupied State of the Hawaiian Kingdom as law proclamation. See Appendix 2.

IMPLIED TASK: *Disband the State of Hawai'i Legislature and the County Councils*

Legislation is the exercise of sovereignty under the State's police power. The State of Hawai'i has no sovereignty over the Hawaiian Islands because sovereignty remains vested in the Hawaiian Kingdom as an independent State. However, limited legislation under the law of occupation is allowable to a military governor under Article 43 of the 1907 Hague Regulations in order "to restore and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the territory." Article 64 of the 1949 Fourth Geneva Convention, which is seen as "a more precise and detailed [expression of] the terms of Article 43," states:

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

While the opening paragraph may lead with criminal law, "it is accepted that the legislative power conferred on the occupant by virtue of the second paragraph."[195] According to Professor Scobbie:

> This competence is, nevertheless, circumscribed. The occupant may only adopt new measures which are "essential" in relation to the issues enumerated in paragraph 2—namely, in order that the occupant may fulfill its obligations under the Fourth Convention; for the orderly government of the territory; and to ensure its own security interests principally within the occupied territory.

United States practice affirms this understanding. Section 1, paragraph 3, of FM 27-5 states, "[i]n occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority." The limitation "by the laws and customs of war" is reflected in Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. Furthermore, the legislation by the State of Hawai‘i and the Counties constitutes the war crime of *usurpation of sovereignty during military occupation*.

[195] Scobbie, 13.

ESSENTIAL TASK: *Temporary Administrator of Public Buildings, Real Estate, Forests, and Agricultural Estates that belong to the Occupied State*

Article 55 of the 1907 Hague Regulations provides, "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the [occupied] State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." The term "usufruct" is to administer the property or institution of another without impairing or damaging it. Article 147 of the Fourth Geneva Convention lists as a grave breach the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

With respect to occupied territory, the relevant provision is Article 53, "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." The Commentary to the Fourth Geneva Convention explains the implication of Article 53:

> In the very wide sense in which the Article must be understood, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of co-operative organizations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.[196]

IMPLIED TASK: *Remove the United States flag from all Public Buildings of the Hawaiian Kingdom*

On 25 May 1845 a revised national flag was unfurled at the opening of the Hawaiian legislature. The Hawaiian flag previous to 1845 differed only in the amount of stripes and also the arranging of the colors. The person accredited with the designing of the new flag was Captain Hunt of H.B.M.S. Baselisk. It has since remained unchanged to date. In the Polynesian Newspaper of May 31, 1845, which was the government newspaper, was the following article:

> "At the opening of the Legislative Council, May 25, 1845, the new national banner was unfurled, differing little however from the former. It is octo. (eight) parted per fess

[196] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* 301 (1958).

(horizontal band), first, fourth and seventh, argent (silver represented by the color white): second, fifth and eighth, gules (the color red): third and sixth, azure (light purplish blue), for the eight islands under one sovereign, indicated by crosses saltire, of St. Andrew and St. Patrick quarterly, per saltire counter changed, argent (white) and gules (red).”

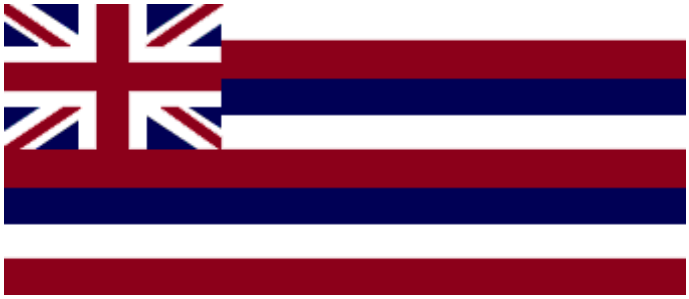

Figure 1. Hawaiian Kingdom National Flag

There is no Hawaiian law providing for the flying of the United States flag over public buildings of the Hawaiian Kingdom. The national flag of the Hawaiian Kingdom, which is currently claimed to erroneously be the flag of the State of Hawai‘i, is the national flag of the Hawaiian Kingdom within its territory and would also fly over the legations and consulates of the Hawaiian Kingdom in foreign States.

To maintain the political and legal *status quo ante* of the Hawaiian Kingdom that existed prior to the occupation, the military government shall take affirmative steps to remove the national flag of the United States currently flying over the public buildings of the Hawaiian Kingdom within its own territory.

ESSENTIAL TASK: *Protect the Institutions of the Occupied State*

The law of occupation prohibits "changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities."[197] In the case of the Hawaiian Kingdom, the United States, either through its puppet regime calling itself the Provisional Government and later calling itself the Republic of Hawai'i, or through its national legislation since 30 April 1900 under *An Act To provide a government for the territory of Hawaii* ("Territorial Act"),[198] to include *An Act To provide for the admission of the State of Hawaii into the Union* on 18 March 1959 ("Statehood Act"),[199] made drastic changes in the form of government.

On 17 January 1893, the Provisional Government made no changes to the governmental infrastructure except for the replacement of the Queen and her cabinet ministers along with the Marshal of the police force with an Executive and Advisory Councils comprised of the leadership of the insurgency. Structural changes took place on 4 July 1894 when the insurgency declared the form of government to be a so-called republic. The executive branch was changed from Executive Monarch, together with a Cabinet Council and the Privy Council, to a President that headed an Executive Council along with a Council of State. The military force of the Hawaiian Kingdom called the King's Guard was changed to the National Guard. No other changes were made to the rest of the executive branch. The police court was eliminated in the judicial branch. The legislative branch was changed from a unicameral legislative assembly comprised of Nobles and Representatives to a bicameral legislature comprised of a Senate and House of Representatives.

On 30 April 1900, the United States took control of the governmental infrastructure of the Republic of Hawai'i and made the following changes. Section 8 of the Territorial Act provided that "the offices of President, minister of foreign affairs, minister of the interior, minister of finance, minister of public instruction, auditor-general, deputy auditor-general, surveyor-general, marshal, and deputy marshal of the Republic of Hawaii are hereby abolished." Section 9 provided that "wherever the words 'President of the Republic of Hawaii,' or 'Republic of Hawaii,' or 'Government of the Republic of Hawaii,' or their equivalents, occur in the laws of Hawaii not repealed by this Act, they are hereby amended to read 'Governor of the Territory of Hawaii,' or 'Territory of Hawaii,' or 'Government of the Territory of Hawaii,' or their equivalents, as the context requires."

Section 80 of the Territorial Act provided that the executive branch was comprised of a Governor and Secretary of the Territory who were appointed by the U.S. President with the advice and consent of the U.S. Senate. Section 80 further states that the Governor with the advice of the

[197] Jean Pictet, Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 273 (1958).
[198] 31 Stat. 141 (1900).
[199] 73 Stat. 4 (1959).

territorial Senate appointed the "attorney-general, treasurer, commissioner of public lands, commissioner of agriculture and forestry, superintendent of public works, superintendent of public instruction, auditor, deputy auditor, surveyor, high sheriff, members of the board of health, commissioners of public instruction, board of prison inspectors, board of registration and inspectors of election, and any other boards of public character that may be created by law." The legislative branch remained bicameral with a Senate and House of Representatives. Structurally, the judicial branch remained unchanged with the exception that the U.S. President nominates with the advice and consent of the U.S. Senate appoints the chief justice and justices of the supreme court and the judges of the circuit courts. The Territorial legislature created the counties.

By virtue of the Statehood Act, the following departments and agencies were established: Department of Accounting & General Services; Department of Agriculture, Department of the Attorney General; Department of Budget & Finance; Department of Business; Economic Development & Tourism; Department of Commerce & Consumer Affairs; Department of Defense; Department of Education; Department of Hawaiian Home Lands; Department of Health; Department of Human Resources Development; Department of Human Services; Department of Labor & Industrial Relations; Department of Land & Natural Resources; Department of Public Safety; Department of Taxation; Department of Transportation; Office of Information Practices; Office of Hawaiian Affairs; Hawai'i Health Systems Corporation; and the University of Hawai'i.

IMPLIED TASK: *Re-align Departments and Agencies to the Status Quo Ante*

The cornerstone of the law of occupation is to maintain the political and legal *status quo ante* of the Hawaiian Kingdom that existed prior to the occupation. Especially as a democratic government, the political institution of the Hawaiian Kingdom is prohibited from being changed or altered by the United States or its proxies. The Hawaiian Kingdom government is separated into three branches—the legislative, the executive, and the judiciary.

The legislative branch represents the three political estates of the kingdom, to wit, "the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives elected by the people."[200] Being unicameral, the Legislative Assembly is comprised of a President, Vice-President and Secretary. The four Ministers of the Cabinet "hold seats *ex officio*, as Nobles, in the Legislative Assembly."[201]

The executive branch is headed by an Executive Monarch. The Monarch has a Privy Council of State that provides "advice, and for assisting him in administering the Executive affairs of the Government."[202] The Monarch has a Cabinet that consists "of the Minister of Foreign Affairs, the

[200] Article 45, 1864 Constitution, as amended.
[201] *Id*., Article 43.
[202] Id., Article 41.

Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom, and these shall be His Majesty's Special Advisers in the Executive affairs of the Kingdom."[203] The executive branch has four departments. The Department of the Interior is headed by the Minister of the Interior. The Department of Foreign Affairs is headed by the Minister of Foreign Affairs. The Department of Finance is headed by the Minister of Finance. And the Department of Public Instruction is headed by "a committee of the Privy Council, to consist of five members, and to be called the Board of Education. The members of the said Board shall be chosen by the King; and one of their number shall, by him, be appointed President, and all shall serve without pay."[204] The Attorney General appears "for the Crown or Government personally or by deputy, in all courts of record of this Kingdom, in all cases criminal or civil in which the Crown or Government may be a party, or be interested, and he shall in like manner appear in the police and district courts when requested so to do by the marshal of the Kingdom or the sheriff of any one of the islands."[205]

The judicial branch is comprised of the Supreme Court, Circuit Courts, Police Courts, and District Courts. The Supreme Court and the Circuit Courts are courts of record. The Supreme Court consists of a Chief Justice and two Associate Justices. The Kingdom is divided into four judicial circuits. The First Circuit Court consist of the Island of Oahu, whose seat of justice is in Honolulu. The Second Circuit Court consist of the Islands of Maui, Molokai, Lānaʻi, and Kahoʻolawe, whose seat of justice is in Lahaina, Island of Maui. The Third Circuit Court consist of the Island of Hawaiʻi, whose seat of justice is in Hilo and Waimea. The Fourth Circuit Court consist of the Islands of Kauaʻi and Niʻihau, whose seat of justice is in Nawiliwili, Island of Kauaʻi. Police Courts were established in the port cities of Honolulu, Lahaina, and Hilo. There are eight District Courts on the Island of Hawaiʻi established at Hilo, Puna, Kaʻu, South Kona, North Kona, South Kohala, North Kohala, and Hamakua. There are six District Courts for the Islands of Maui, Molokai, Lānaʻi, and Kahoʻolawe, as follows: from Kahakuloa to Ukumehame, including Kahoʻolawe, called the Lahaina District; from Waiheʻe to Honuaula inclusive, called the Wailuku District; Kahikinui, Kaupo, Kipahulu, Hana and Koʻolau, called the Hana District; Hamakualoa, Hamakuapoko, Haliʻimaile, Makawao and Kula, called the Makawao District; Molokai; and Lānaʻi.

The military government shall re-align departments and agencies of the State of Hawaiʻi back to the *status quo ante* of the Hawaiian Kingdom that existed before the military occupation on 17 January 1893. Therefore, the functioning of the State of Hawaiʻi Department of Accounting & General Services, Department of Agriculture, Department of Business, Economic Development & Tourism, Department of Commerce & Consumer Affairs, Department of Health, Department of Human Resources Development, Department of Human Services, Department of Labor & Industrial Relations, Department of Land & Natural Resources, Department of Public Safety,

[203] *Id*., 42.
[204] Section 2, An Act to Repeal Chapter 10 of the Civil Code, and to Regulate the Bureau of Public Instruction (1865), Compiled Laws 199 (1884).
[205] Section 1, Defining the Duties of the Attorney-General, Compiled Laws 315 (1884).

Department of Transportation, and the Office of Information Practices shall come under the Department of the Interior headed by Dr. David Keanu Sai, Minister of the Interior. The Department of Budget & Finance and the Department of Taxation shall come under the Department of Finance headed by Ms. Kauʻi P. Sai-Dudoit as Minister of Finance. The Attorney General's office shall be headed by Dexter K. Kaʻiama, Attorney General. There shall be reinstated the Department of Foreign Affairs headed by Dr. David Keanu Sai, Minister of Foreign Affairs *ad interim*.

The University of Hawaiʻi shall come under the Department of Public Instruction. The Department of Defense shall come under the Royal Guard. The Hawaiʻi Health Systems Corporation shall come under the Board of Health. Since, the lands of the Department of Hawaiian Home Lands are Crown Lands and they service aboriginal Hawaiians, their function shall come under the Crown Land Commissioners. There is no place for the Office of Hawaiian Affairs under the Hawaiian Kingdom legal order because the rights of aboriginal Hawaiians are acknowledged and protected by the legal order of the Kingdom.

The military government shall also align departments and agencies of the Counties under the Department of the Interior, Department of Finance, Office of the Attorney General, and the police force under the command of the Marshal with the County Police Chiefs serving as Sheriffs presiding over the islands. The mayors shall be replaced by governors.

IMPLIED TASK: *Oath of Allegiance by Those in the Military Government*

According to the 1874 *Act to Provide for the Taking the Oath of Allegiance by Persons in the Employ of the Hawaiian Government*, as amended in 1876, "[f]rom and after the passage of this Act, every person of foreign birth who may be appointed to any office of profit or emolument under the Government of this Kingdom, shall, before entering upon the duties of his office, take and subscribe the oath of allegiance in manner and form prescribed by Section 430 and 431 of the Civil Code." Black's Law Dictionary defines an "emolument" as the "profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites."[206] Therefore, all those employed by the State of Hawaiʻi after it has been transformed into a military government shall take the oath of allegiance as provided under §430 of the Civil Code, to wit:

> The undersigned, a native of _____, lately residing in _____, being duly sworn, upon his oath, declares that he will support the Constitution and laws of the Hawaiian Islands, and bear true allegiance to [the Hawaiian Kingdom].
>
> Subscribed and sworn to this __ day of _____, A.D. 20__, before me, _____.

[206] Black's Law, 524.

Persons in the employ of the military government shall be of the nationality of the Hawaiian Kingdom—Hawaiian subjects. For those not of Hawaiian nationality and have taken the oath of allegiance shall be made a Hawaiian subject as if they had been naturalized.[207] §432 of the Civil Code states:

> Every foreigner so naturalized, shall be deemed to all intents and purposes a native of the Hawaiian Islands, be amenable only to the laws of this Kingdom, and to the authority and control thereof, be entitled to the protection of said laws, and be no longer amendable to his native sovereign while residing in this Kingdom, nor entitled to resort to his native country for protection or intervention. He shall be amendable, for every such resort, to the pains and penalties annexed to rebellion by the Criminal Code. And every foreigner so naturalized, shall be entitled to all the rights, privileges and immunities of an Hawaiian subject.

United States citizens cannot hold any office of profit or emolument under the military government because it is the civilian government of the Hawaiian Kingdom.

IMPLIED TASK: *Reinstate Universal Healthcare for Aboriginal Hawaiians*

On 31 July 1901 an article was published in *The Pacific Commercial Advertiser* in Honolulu.

> The Queen's Hospital was founded in 1859 by their Majesties Kamehameha IV and his consort Emma Kaleleonalani. The hospital is organized as a corporation and by the terms of its charter the board of trustees is composed of ten members elected by the society and ten members nominated by the Government, of which the President of the Republic (now Governor of the Territory) shall be the presiding officer. The charter also provides for the "establishing and putting in operation a permanent hospital in Honolulu, with a dispensary and all necessary furniture and appurtenances for the reception, accommodation and treatment of indigent sick and disabled Hawaiians, as well as such foreigners and other who may choose to avail themselves of the same."
>
> Under this construction all native Hawaiians have been cared for without charge, while for others a charge has been made of from $1 to $3 per day. The bill making the appropriation for the hospital by the Government provides that no distinction shall be made as to race; and the Queen's Hospital trustees are evidently up against a serious proposition.

Queen's Hospital was established as the national hospital for the Hawaiian Kingdom and that health care services for Hawaiian subjects of aboriginal blood was at no charge. The Executive Monarch would serve as President of the Board together with twenty trustees, ten of whom are from the government.

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[207] Opinion of the Justices of the Supreme Court to the Legislative Assembly of 1884, as to the Allegiance of Aliens and Denizens, 5 Haw. 167, 169 (1884).

Since the hospital's establishment in 1859 the legislature of the Hawaiian Kingdom subsidized the hospital along with monies from the Queen Emma Trust. With the unlawful imposition of the 1900 Organic Act that formed the Territory of Hawai'i, American law did not allow public monies to be used for the benefit of a particular race. 1909 was the last year Queen's Hospital received public funding and it was also the same year that the charter was unlawfully amended to replace the Hawaiian Head of State with an elected president from the private sector and reduced the number of trustees from twenty to seven, which did not include government officers. These changes to a Hawaiian quasi-public institution is a direct violation of Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention.

Despite these unlawful changes, aboriginal Hawaiian subjects, whether pure or part, are to receive health care at Queen's Hospital free of charge. This did not change, but through denationalization there was an attempt of erasure. Aboriginal Hawaiian subjects are protected persons as defined under international law, and, as such, the prevention of health care by Queen's Hospital constitute war crimes. Furthermore, there is a direct nexus of deaths of aboriginal Hawaiians as "the single racial group with the highest health risk in the State of Hawai'i [that] stems from […] late or lack of access to health care"[208] to the crime of genocide.

This is not a matter that aboriginal Hawaiians should receive health care at no cost, but rather a law that provides health care at no cost through the Queen's Hospital. The military government shall enforce the law providing health care at no cost for aboriginal Hawaiians, whether pure or part. This is not a matter of blood quantum but rather a matter of vested rights for aboriginal Hawaiians, whether pure or part, to receive health care at no cost.

IMPLIED TASK: *Take Affirmative Steps to End Denationalization through Americanization*

In 1905, the American editor of the *Pacific Commercial Advertiser* newspaper in Honolulu, which was the propaganda newspaper for the insurgents, Walter Smith, unabashedly reveals the American import of white supremacy being injected in the school system. Under the heading of "The American Way," Smith wrote:

> It would have been proper yesterday in the Advertiser's discussion of schools to admit the success which the High School has had in making itself acceptable to white parents. By gradually raising the standard of knowledge of English the High School has so far changed its color that, during the past year seventy-three per cent were Caucasians. It is not so many years ago that more than seventy three per cent were non-Caucasians. At the present rate of progress it will not be long before the High School will have its student body as thoroughly Americanized in blood as it long has been in instruction.

[208] Office of Hawaiian Affairs, *Native Hawaiian Health Fact Sheet* 2 (2017).

> The idea of having mixed schools where the mixture is of various social and political conditions is wholly American; but not so mixed schools where the American youth is submerged by the youth of alien races. On the mainland the Polacks, the Russian Jews, the Huns and negroes are, as far as practicable, kept in schools of their own, with the teaching in English; and only where the alien breeds are few, as in the country, are they permitted to mingle with white pupils. In the South, where Americans of the purest descent live, there are no mixed schools for whites and negroes; and wherever color or race is an issue of moment, the American way is defined through segregation. Only a few fanatics or vote-hunters care to lower the standard of the white child for the sake of raising that of the blac or yellow child.
>
> One great and potent duty of our high schools, public and private, is to conserve the domination here of Anglo-Saxon ideas and institutions; and this means control by white men. We have faith in any attempt to make Americans of Asiatics. There are too many obstacles of temperament and even of patriotism in the way. The main thing is to see that our white children when they grow up, are not to be differentiated from the typical Americans of the mainland, having the same standards, the same ideals and the same objects, none of them tempered by the creeds or customs of decaying or undeveloped or pagan races.[209]

The following year, the Territory of Hawai‘i intentionally sought to "Americanize" the school children throughout the Hawaiian Islands. To accomplish this, they instituted a policy of *denationalization*. Under the policy titled "Programme for Patriotic Exercises in the Public Schools," the national language of Hawaiian was banned and replaced with the American language of English.[210] Young students who spoke the Hawaiian language in school were severely disciplined. One of the leading newspapers for the insurgents, who were now officials in the territorial regime, printed a story on the plan of *denationalization*. The *Hawaiian Gazette* reported:

> As a means of *inculcating* patriotism in the schools, the Board of Education [of the territorial government] has agreed upon a plan of patriotic observance to be followed in the celebration of notable days in American history, this plan being a composite drawn from the several submitted by teachers in the department for the consideration of the Board. It will be remembered that at the time of the celebration of the birthday of Benjamin Franklin, an agitation was begun looking to a better observance of these notable national days in the schools, as tending to inculcate patriotism in a school population that needed that kind of teaching, perhaps, more than the mainland children do [emphasis added].[211]

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[209] Walter G. Smith, *The American Way*, The Pacific Commercial Advertiser 4 (8 Sep. 1905).
[210] *Programme for Patriotic Exercises in the Public Schools*, Territory of Hawai‘i, adopted by the Department of Public (1906) (online a: http://hawaiiankingdom.org/pdf/1906_Patriotic_Exercises.pdf).
[211] *Patriotic Program for School Observance,* Hawaiian Gazette 5 (3 Apr. 1906) (online at http://hawaiiankingdom.org/pdf/Patriotic_Program_Article.pdf).

It is important here to draw attention to the word "inculcate." As a verb, the term imports force such as to convince, implant, and indoctrinate. Brainwashing is its colloquial term. When a reporter from the American news magazine, *Harper's Weekly,* visited the Kaʻiulani Public School in Honolulu in 1907, he reported:

> At the suggestion of Mr. Babbitt, the principal, Mrs. Fraser, gave an order, and within ten seconds all of the 614 pupils of the school began to march out upon the great green lawn which surrounds the building.… Out upon the lawn marched the children, two by two, just as precise and orderly as you find them at home. With the ease that comes of long practice the classes marched and counter-marched until all were drawn up in a compact array facing a large American flag that was dancing in the northeast trade-wind forty feet above their heads.… "Attention!" Mrs. Fraser commanded. The little regiment stood fast, arms at side, shoulders back, chests out, heads up, and every eye fixed upon the red, white and blue emblem that waived protectingly over them. "Salute!" was the principal's next command. Every right hand was raised, forefinger extended, and the six hundred and fourteen fresh, childish voices chanted as one voice: "We give our heads and our hearts to God and our Country! One Country! One Language! One Flag!"[212]

When the reporter visited Honolulu High School, he commented, "[t]he change in the color scheme from that of the schools below was astounding. Below were all the hues of the human spectrum, with brown and yellow predominating; here the tone was clearly white."[213] While the schools today are predominantly non-white, Americanization remains entrenched. Furthermore, *denationalization* is a war crime as well as a crime against humanity.[214]

The military government shall take affirmative steps to implement the curriculum in the high schools in line with the 1882 annual exams of Lahainaluna Seminary. See Appendix no. 3. The middle schools and primary schools shall continue except for curriculum based on Americanization.

[212] William Inglis, "Hawaiʻi's Lesson to Headstrong California: How the Island Territory has solved the problem of dealing with its four thousand Japanese Public School children," *Harper's Weekly* 227 (16 Feb. 1907).
[213] *Id*., 228.
[214] Schabas, 159-161, 168.

ESSENTIAL TASK: *Protect and Respect the Rights of the Population of the Occupied State*

Article 47 of the 1949 Fourth Geneva Convention addresses inviolability of rights where "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

Annexation of an occupied State by the Occupying State is a situation of fact, not law. So long as the occupation persists, "the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts."[215] 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*.[216] International law does not permit annexation of territory of another state.[217]

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*[218] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[219] There is no peace treaty between the Hawaiian Kingdom and the United States where the former ceded its sovereignty and territory to the latter.

The legal order of the Hawaiian Kingdom is a constitutional monarchy based on democratic principles. Hawaiian governance is founded on respect for the *Rule of Law*. Hawaiian subjects rely on a society based on law and order and are assured that the law will be applied equally and impartially. Impartial courts depend on an independent judiciary. The independence of the judiciary means that Judges are free from outside influence, and notably from influence from the Crown. Initially, the first constitution of the country in 1840 provided that the Crown serve as Chief Justice of the Supreme Court, but this provision was ultimately removed by amendment in 1852 in order

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[215] Pictet, 275.
[216] 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.
[217] Dieter Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, Section 525, 242 (1995).
[218] 9 Stat. 922 (1848).
[219] 30 Stat. 1754 (1898).

to provide separation between the executive and judicial branches. Article 65 of the 1864 Constitution of the country provides that only the Legislative Assembly, can remove Judges by impeachment. The *Rule of Law* precludes capricious acts on the part of the Crown or by members of the government over the just rights of individuals guaranteed by a written constitution. According to Hawaiian Supreme Court Justice Alfred S. Hartwell:

> The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null and void.[220]

Unlike the United States where there is no constitutional provision or statute vesting U.S. federal courts with judicial oversight, the Hawaiian Kingdom does have a statute for judicial review. §824 of the Hawaiian Civil Code states, "The several courts of record shall have power to decide for themselves the constitutionality and binding effect of any law, ordinance, order or decree, enacted or put forth by the King, the Legislature, the Cabinet, or Privy Council. The Supreme Court shall have power to declare null and void any such law, ordinance, order or decree, as may upon mature deliberation appear to it contrary to the Constitution, or opposed to the laws of nations, or any subsisting treaty with a foreign power."

The 1864 Constitution, as amended, provides the protection of civil rights guaranteed to all persons residing within the territory of the Hawaiian Kingdom whether they be Hawaiian subjects or resident aliens.

> ARTICLE 1. God hath endowed all men with certain inalienable rights; among which are life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
>
> ARTICLE 2. All men are free to worship God according to the dictates of their own conscience; but this sacred privilege hereby secured, shall not be so construed as to justify acts of licentiousness, or practices inconsistent with the peace or safety of the Kingdom.

[220] *In Re Gip Ah Chan*, 6 Haw. 25 (1870).

ARTICLE 3. All men may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and no law shall be enacted to restrain the liberty of speech, or of the press, except such laws as may be necessary for the protection of His Majesty the King and the Royal Family.

ARTICLE 4. All men shall have the right, in an orderly and peaceable manner, to assemble, without arms, to consult upon the common good, and to petition the King or Legislative Assembly for redress of grievances.

ARTICLE 5. The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 7. No person shall be held to answer for any crime or offense (except in cases of impeachment, or for offenses within the jurisdiction of a Police or District Justice, or in summary proceedings for contempt), unless upon indictment, fully and plainly describing such crime or offense, and he shall have the right to meet the witnesses who are produced against him face to face; to produce witnesses and proofs in his own favor; and by himself or his counsel, at his election, to examine the witnesses produced by himself, and cross-examine those produced against him, and to be fully heard in his defense. In all cases in which the right of trial by Jury has been heretofore used, it shall be held inviolable forever, except in actions of debt or assumpsit in which the amount claimed is less than Fifty Dollars.

ARTICLE 8. No person shall be required to answer again for an offense, of which he has been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment.

ARTICLE 9. No person shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law.

ARTICLE 10. No person shall sit as a judge or juror, in any case in which his relative is interested, either as plaintiff or defendant, or in the issue of which the said judge or juror, may have, either directly or through a relative, any pecuniary interest.

ARTICLE 11. Involuntary servitude, except for crime, is forever prohibited in this Kingdom; whenever a slave shall enter Hawaiian Territory, he shall be free.

ARTICLE 12. Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects; and no warrants shall issue but on

probable cause supported by oath or affirmation and describing the place to be searched, and the persons or things to be seized.

ARTICLE 13. The King conducts His Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among His subjects.

ARTICLE 14. Each member of society has a right to be protected by it, in the enjoyment of his life, liberty, and property, according to law; and, therefore, he shall be obliged to contribute his proportional share to the expenses of this protection, and to give his personal services, or an equivalent when necessary but no part of the property of any individual shall be taken from him, or applied to public uses, without his own consent, or the enactment of the Legislative Assembly, except the same shall be necessary for the military operation of the Kingdom in time of war or insurrection; and whenever the public exigencies may require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

ARTICLE 15. No subsidy, duty or tax of any description shall be established or levied, without the consent of the Legislative Assembly; nor shall any money be drawn from the Public Treasury without such consent, except when between the session of the Legislative Assembly the emergencies of war, invasion, rebellion, pestilence, or other public disaster shall arise, and then not without the concurrence of all the Cabinet, and of a majority of the whole Privy Council; and the Minister of Finance shall render a detailed account of such expenditure to the Legislative Assembly.

ARTICLE 16. No Retrospective Laws shall ever be enacted.

ARTICLE 17. The Military shall always be subject to the laws of the land; and no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by the Legislature.

In 1847, Chief Justice William Lee of the Hawaiian Kingdom Supreme Court established a legal maxim to be applied by all courts of the Kingdom that speaks to the role of a Hawaiian constitutional monarchy. Chief Justice Lee stated:

> For I trust that the maxim of this Court ever has been, and ever will be, that which is so beautifully expressed in the Hawaiian coat of arms, namely, "The life of the land is preserved by righteousness." We know of no other rule to guide us in the decision of questions of this kind, than the supreme law of the land, and to this we bow with reverence and veneration, even though the stroke fall on our own head. In the language of another, "Let justice be done though the heavens fall." Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals

> may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequence.[221]

The military government shall take affirmative steps to assure the population of the Hawaiian Kingdom that their rights are protected in conformity with the laws of the Hawaiian Kingdom, whether as Hawaiian subjects or resident aliens.

[221] *Shillaber v. Waldo et al.*, 1 Haw. 31, 32 (1847).

Appendix 1

PROCLAMATION No. 1

TO THE PEOPLE OF HAWAIʻI:

I, _____, Adjutant General of the State of Hawaiʻi, do hereby proclaim as follows:

ARTICLE I.

1. For the past 130 years, the Hawaiian Kingdom, being an internationally recognized sovereign and independent State since the nineteenth century, has been under the military occupation of the United States of America since Queen Liliʻuokalani conditionally surrendered her authority to the United States armed forces on 17 January 1893. On 8 November 1999, the Permanent Court of Arbitration, The Hague, Netherlands, acknowledged the continued existence of the Hawaiian Kingdom as a State under international law and the Council of Regency as the Government of the Hawaiian Kingdom when arbitral proceedings were instituted in *Larsen v. Hawaiian Kingdom*. The federal government of the United States of America did not contest the Permanent Court of Arbitration's acknowledgement of the Hawaiian Kingdom as a State, and entered into an agreement with the parties to the arbitration allowing the United States access to the pleadings and records of the arbitral proceedings.

2. At the center of the dispute was the unlawful imposition of American municipals laws over the territory of the Hawaiian Kingdom, which according to customary international law is the war crime of usurpation of sovereignty during military occupation. In order to cease the commission of war crimes and begin to rectify violations of international law against the population of the Hawaiian Kingdom, it is my duty and obligation as the most senior army general officer of the State of Hawaiʻi in effective control of the majority of the territory of the Hawaiian Kingdom to establish a military government and administer the laws of the Hawaiian Kingdom in compliance with the law of armed conflict, the law of occupation, and U.S. Army regulations.

ARTICLE II.

3. The United States of America system of Government is hereby abrogated.

ARTICLE III.

4. A Military Government for the control and management of public affairs and the protection of the public peace is hereby established to exist until a treaty of peace between the Hawaiian Kingdom and the United States of America has been negotiated and agreed upon. Establishment of a Military Government is an obligation under the law of armed conflict and

U.S. Army regulations when foreign territory is under military occupation. The obligation arises under the law of occupation for the occupying force to exercise the functions of civil government looking toward the maintenance of public order. The law of occupation allows for authority to be shared by the Military Government and the Council of Regency, provided the Military Government continues to bear the ultimate and overall responsibility for the occupied territory.

ARTICLE IV.

5. Supreme legislative, judicial, and executive authority and powers within the occupied territory are vested in me as Commander of the State of Hawai‘i Department of Defense and commanding general of the Army and Air National Guard, limited only by the law of armed conflict and the law of occupation, and the Military Government is established to exercise these powers under my direction. All persons in the occupied territory will obey immediately and without question all the enactments and orders of the Military Government.

_____,
[Rank],
Supreme Commander,
Adjutant General of the State of Hawai‘i Department of Defense

Appendix 2

Law No. 1

DECLARATION OF PROVISIONAL LAWS

To comply with article 43 of the 1907 Hague Regulations and article 64 of the 1949 Fourth Geneva Convention, and to restore to the people of Hawai‘i the rule of justice and equality before the laws of the Hawaiian Kingdom, it is hereby ordered:

ARTICLE I.
ABROGATION OF THE LAWS OF THE UNITED STATES OF AMERICA

1. The following fundamental laws of the United States of America enacted since 7 July 1898, together with all supplementary or subsidiary carrying out laws, decrees or regulations whatsoever are hereby deprived of effect, within the occupied territory:
   (a) Constitution of the United States of America.
   (b) Constitution of the State of Hawai‘i.
   (c) Legislation of the United States of America.
   (d) Legislation of the State of Hawai‘i.
   (e) Legislation of the Counties of the State of Hawai‘i.
   (f) Decisions of United States and State of Hawai‘i Courts, to include Administrative Courts.

ARTICLE II.
PROVISIONAL LAWS OF THE OCCUPIED STATE

2. All Federal laws, State of Hawai‘i statutes, and County ordinances, together with all judicial decrees or regulations whatsoever, are hereby deprived of effect, within the occupied territory, unless they conform to the Council of Regency’s proclamation of provisional laws of 10 October 2014, together with the laws of the Hawaiian Kingdom that existed prior to the overthrow of the Hawaiian government on January 17, 1893.

ARTICLE III.
GENERAL FORMULA TO DETERMINE PROVISIONAL LAWS

3. In determining which American municipal laws, being situation of facts, shall constitute a provisional law of the kingdom, the following questions need to be answered. If any question is answered in the affirmative, except for the last question, then it shall not be considered a provisional law.

(a) The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?
(b) Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.
(c) If the American municipal law has no comparison to Hawaiian Kingdom law, would it run contrary to the Hawaiian Kingdom's police power?
(d) If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?
(e) Does the American municipal law infringe vested rights secured under Hawaiian law?
(f) And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

ARTICLE VI.
EFFECTIVE DATE

4. This Law shall become effective upon the date of its first promulgation.

BY ORDER OF THE MILITARY GOVERNMENT.

Appendix 3

ANNUAL EXAMINATION

OF THE

LAHAINALUNA SEMINARY,

July 12th, 13th and 14th, 1882.

WEDNESDAY, July 12th--A. M.

Arithmetic.....Freshman Class
Geography.....Sophomore Class
Grammar.....Middle Class
Theology and Physiology.....Senior Class

COMPOSITIONS—P. M.

Arithmetic.....Sophomore Class
History.....Junior Class
Geometry.....Junior Class

DIALOGUE.

Class Paper.....Juniors

THURSDAY, July 13th--A. M.

History.....Middle Class
Science of Common Things.....Junior Class
Algebra.....Middle Class
Trigonometry.....Senior Class

COMPOSITIONS—DRILL—P. M.

History.....Senior Class
Grammar.....Junior Class
Political Economy and Constitution.....Senior Class

DIALOGUE.

Class Paper.....Seniors

Exercises will begin punctually at 9 o'clock A. M.
Singing will be interspersed throughout the exercises.

RHETORICAL EXERCISES

AT

WAINEE CHURCH,

FRIDAY, JULY 14th, 1882,

LAHAINA, MAUI.

Exercises begin at 10 o'clock A. M.

"The Earth is the Lord's" (Chant) .....Prayer
See the Sun's First Gleam.....Chorus
"Shiftlessness, the Root of our Poverty".....Nahera Hipa
"The Old Clock on the Stairs" (Longfellow).....Nawai
Gaily our Boat Glides o'er the Sea".....Chorus
The Village Choir.....Ed. Kauai
Rain in Summer (Longfellow)..... .....Malakaua
There is Sunshine after Rain.....Chorus and Duett
Perseverance.....George Kauhi
Tom Corwin's Militia Speech.....Wm. Edmonds
Forest Echoes .....Chorus
Thanatopsis (Bryant).....Moses Meheula
Mistakes of Young Men.....Joseph Liwai
In Silent Mead at Eventide.....Quartette
Hustle Them In (Harpers' Weekly).....Waialeale
Hear Our Prayer.....Quartette
Unproductive Consumption.....John Maipinepine
Song of the Lark.....Quartette

Remarks.

O, Rose of the May Time.....Chorus

Distribution of Diplomas.

Senior Class.....Song
Doxology—"Praise God, from Whom all Blessings Flow."

CATALOGUE OF STUDENTS.

SENIOR CLASS.

John Maipinepine	Lahaina, Maui
George K. Kauhi	Hilo, Hawaii
Joseph Liwai	North Kona, Hawaii
Nahora Hipa	Koloa, Kaui

JUNIOR CLASS.

Moses Meheula	Kaanapali, Maui
Robert Waialeale	Waimea, Kauai
Edward Kauai	Waimea, Kaui
G. W. Pilipo	South Kona, Hawaii
Hosea Nawai	Waimea, Kauai
M. Malakaua	Wailuku, Maui
William Edmonds	Makawao, Maui
John Kauwe	Hana, Maui
Daniel Damiana	Koolau, Maui
Peter Noah	Olowalu, Maui

MIDDLE CLASS.

Samuel Haluapo	North Kona, Hawaii
George Rutherford	Kohala, Hawaii
Adam Pali	Lahaina, Maui
E. Kaeha	Kaanapali, Maui
Joseph Kapali	Ewa, Oahu
Obed Kekuewa	Kona, Hawaii
Aiu Apo	Kohala, Hawaii
Titus	Kau, Hawaii
Mololani	Koolau, Maui
Joseph Kealoha	Ulupalakua, Maui
Paul Aea	Honolulu, Oahu

SOPHOMORE CLASS.

David Keliiokamoku	Lahaina, Maui
William Meheula	Kaanapali, Maui
Kaukau Meheula	Kaanapali, Maui
Ramon Makekau	Lahaina, Maui
Kuhaulua	North Kona, Hawaii
Moku	Olowalu, Maui
Koa	Wailuku, Maui
James Merseburg	Kohala, Hawaii
Mai Kaawa	" "
Mai Kanakanui	" "
Kahoe	" "
Kakae	" "
Samuel Haina	" "
Mano	" "

FRESHMAN CLASS.

Daniel Keliiaa..... .....Ulupalakua. Maui
Solomon Kupihea.....Molokai
Daniel Abraham.....Lahaina, Maui
Philip Pali..... " "
David Taylor..... " "
Solomon Maheha..... .....Punaluu, Oahu
Daniel Poikalani..... .....Lahaina, Maui
Moses Kuahine..... .....Wailuku, "
Kaanaana (died)..... .....Lahaina, "
David Kahaulelio..... " "
Kamakani..... " "
John Pihe..... .....Molokai
Joseph Kaoililani..... Hana, Maui
John Naai.....Hanalei, Kauai
Kamaka.....Kahakuloa, Maui
Keawe ....Honokahau, "
Namauu ..... .Kahakuloa, "
Harry..... " "
Lanui..... Wailuku, "
Ephraim .....Honokahau, "
David Lono..... " "
David Paku..... " "
Levi Kamai..... ...Ulupalakua, "
Daniel Namauu.....Kona, Hawaii
Anthony .....Lahaina, Maui
Naone..... " "
Achi Apana.....Hilo, Hawaii
David Aea.....Honolulu, Oahu
Cum Lan.....Haiku, Maui
Kapuă.....Hilo, Hawaii
Jesse..... Kona, "

FRESHMAN CLASS.—READING.

LAHAINALUNA, JULY, 1882.

CORRECT THE FOLLOWING SENTENCES:

1. In the country a house nise this is.
2. Pitty and poor should we those who are onest.
3. One of these men he has found in it a paper and which he has bin readin a story.
4. What kind our parents when we young are cair of us take.
5. When at night we rise from bed and when in the morn-in in prayer we lie down to god our lift we should harts.
6. Into the field the two friends are sittin on a mosy bank and now they have gone into the shade of a tree.
7. At the entrance of the churchyard is now shutt and no one goin out or cumin in the gate is.
8. Coastin along a sort of bluf or hedland they came to the suthern shore.
9. Muny a bad thing is when put to a good use and a bad use when it is put to a good thing it is.
10. Remember the earth of children
    Its hour is on each way
    Report its own to heaven bearing
    You all do or say of.
11. The boy has been with the hat on awa from a printin office and has at bin workin home.
12. Neighbors good with each other in piece leave and all times ready to help are at each other.
13. A when speaks liar truth not the believed is.
14. When reach he can with hand his them will he them take and into the bag which is tied his waist arount put them.
15. A man took the baby out of the cradel when and ran into the house the loom was ful of smoke.
16. The trap with his boy up set the dore so that might go in the labit.
17. When boys and girls go to skool they are cent must to reed and spel learn well and all get lesons their.
18. If a drunkard to be you wish do not not taste do or any other rum strong drink.

CORRECT THE FOLLOWING WORDS:

broaken	peepel	munny	widdo
leves	afrade	slugerd	bruthar
kitin	beleave	oba	cuvvering
baskitt	deseave	onast	thotfull
resite	smokt	tobacko	litest

FRESHMAN CLASS—MENTAL ARITHMETIC.

LAHAINALUNA, JUNE, 1882.

1. If you can buy one hat for 3 shillings and 6 pence, how many hats can you buy for 1 pound ?

2. If you can buy 12 marbles for 3 pence and 3 farthings, how many marbles can you buy for 11 pence and 1 farthing ?

3. If you can buy 2 gallons and 1 quart of molasses for half a dollar, how much will 1 barrel of molasses cost ?

4. David, Daniel, and Moses together bought a melon; David paid 4 pence and 2 farthings, Daniel paid 9 pence, and Moses paid 6 pence and 2 farthings: what part of the melon should each boy have ?

5. David, Daniel, and Moses together bought 2 melons; David paid 1 dime and 2 cents; David and Daniel together paid 2 dimes; and Daniel and Moses together paid 3 dimes: what part of two melons ought each boy to have.

6. Philip and John do a job of work together, Philip works 4 days, and John works 3 days; but John does twice as much work in a day as Philip does. They are paid $2.50 for their work. How much ought each to receive ?

7. If $1\frac{1}{2}$ eggs cost 27, 36 cents, how many eggs may be bought for a quarter of a dollar ?

8. If you can buy one melon for 6 oranges, and 2 oranges for 8 apples, and four apples for 12 mangoes, and 6 mangoes for 8 marbles, and 24 marbles for 5 cents, how many cents will 1 melon cost ?

9. There is a pole standing in a pond of water: $\frac{3}{8}$ of the pole is in the water, $\frac{1}{2}$ as much is in the mud below the water, and 21 feet of the length of pole are above the water; how long is the pole, and how deep is the water ?

10. Philip runs to catch David, who is 30 yards ahead of him. But David runs only 5 feet, while Philip runs 7 feet. How many yards must Philip run before he catches David ?

FRESHMAN CLASS—GEOGRAPHY.

LAHAINALUNA, JUNE, 1882.

1. What do maps show?

2. Name the largest divisions of land and water in each hemisphere.

3. What is a peninsula? (b) Name five peninsulas in the Western Hemisphere.

4. Name the natural divisions of water.

5. Name the branches of the Pacific Ocean found in the Eastern Hemisphere.

6. Name the important islands in Oceanica.

7. What is a city? Name four of the chief cities in Oceanica.

8. Name the provinces of Canada.

9. Into how many sections are the United States divided? (b) How many States? (c) How many Territories?

10. Name and locate the capital of the United States, and four of the chief cities.

11. Name the sections of the United States which produce cotton, rice, wheat, sugar, pork.

12. Name five of the largest rivers in the United States.

13. What are the important productions of South America?

14. Name the mountains and animals of South America.

15. Where is Rio Janeiro? Valparaiso, San Francisco? New Orleans? Montreal?

16. Bound Russia.

17. Name and locate five of the largest cities in Europe.

18. Name four of the most mountainous countries in Europe, and their mountains.

19. For what manufactures are England and France noted?

20. Name five of the largest rivers in the Eastern Continent, and describe the largest one.

21. What is a volcano? Name three.

22. What are the divisions and productions of the Chinese Empire?

23. What are the chief productions of India?

24. Where is Calcutta? Jeddo? Pekin? Mecca? Teheran?

25. Bound the Desert of Sahara.

26. In what countries are the following found: Diamonds? oases? pyramids? ostriches? pampas?

27. Correct the following names, and describe them:

Apenines	Caribean
Rine River	Cheasapeke
Kiro	Delywair
Egipt	Nu Jursy
Himilaia	Mane
Jappan iles	Nu Hamshear
Sanwitch iles	Road iland
Mouna Roa	Taxas
Hanalula	Luisiana
Californy	Misisipi
Ilynoy	Misury

FRESHMAN CLASS—WRITTEN ARITHMETIC.

LAHAINALUNA, JUNE, 1882.

I. What is a quantity? (b) Arithmetic? (c) A unit? (d) A number?

II. What is a numeration? (b) Give rule for writing numbers. (c) Give names of the first six orders of figures? (d) Give the names of the 3d, 9th, 7th, 11th, 8th orders of figures.

III. Write a number having six orders, first in English; then in figures.

(b) Write a number having ten orders of figures; first in Hawaiian, next in English, and lastly in figures.

(c) Write the number of the present year of the christian era; first in Arabic notation, next in Roman notation, and lastly in English.

IV. What is Addition? (b) Give the rule for Addition. (c) Write 8 numbers in figures, using 6 orders, and find their sum. (d) Write 20 numbers in figures, going no higher than the 10th order, and find their sum.

V. What is Subtraction? (b) What is the minuend? (c) How do you prove subtraction? (d) Add together three numbers of ten orders each, then add together 4 more numbers of 8 orders each, and from the greater sum subtract the less, and prove your work.

VI. From the sum of 90,100+4750+875+2,025+15,650+19,045+2,711, subtract the sum 6,108+84,975+25+156+19,856+4728; then multiply the greater of the two sums by the less, and divide the product by 1, 12 of the smaller of the two sums.

SOPHOMORE CLASS—TRANSLATION.

TRANSLATE INTO HAWAIIAN.

1. George Jones was an idle boy. He did not love study. The teacher of the school often told him, if he did not study diligently when young, he would never succeed well. Yet, George would often go to school without having made any preparation for his morning lesson; and, when called on to recite, he would make so many blunders that the rest of the class could not help laughing at him.

2. At last George went with his class to enter college. Though he passed a very poor examination, he was admitted with the rest; for those who examined him thought it was possible that the reason why he did not answer questions better was because he was frightened. Now came hard times for poor George. In college there is not much mercy shown to poor scholars; and George had neglected his studies so long that he could not now keep up with his class, let him try ever so hard.

3. Charles Barlow was a classmate of George. He was in the academy with him, and he went with him to college. He was about the same age as George, and did not possess superior talents. But Charles was a hard student. When quite young, he was always careful and diligent at school.

4. Charles would sometimes stay in at recess to learn his lessons. This, however, was very seldom. It was only when the lessons were very hard indeed. Generally, he was among the first on the play-ground. Hard study gave him a relish for play, and play, again, gave him a relish for hard study.

5. "Little by little, and lesson after lesson, I will gather up the knowledge which I find in books, and in the world around me," said the thoughtful boy. By learning a little every day, and learning it well, he became at length a wise and useful man, honored and respected by all who knew him. The idle boy is almost always poor and miserable; the industrious boy is happy and prosperous.

SOPHOMORE CLASS—GEOGRAPHY.

LAHAINALUNA, JUNE, 1882.

1. What is Geography? (b) Name and define its divisions.
2. Name the motions of the earth. (b) What does each produce?
3. Name the seasons, and the months of each.
4. Name the zones. (b) Name one country in each zone, together with its productions
5. Define the earth's diameter and circumference, and give the number of miles of each.
6. What is a map?
7. Define lattiude and longitude.
8. Give the latitude and longitude of Honolulu; (b) San Francisco; (c) New York; (d) Cape Town; (e) New Zealand.
9. Describe the mariner's compass and its uses.
10. Name the races, and the estimated number of persons of each.
11. Define a republic; (b) an empire; (c) a city; (d) Name an example of each.
12. Define commerce.
13. Name (a) five of the chief imports of the Hawaiian Islands; (b) five of their chief exports.
14. Name the sections into which the States and Territories of the United States are divided. How many States are there? How many Territories?
15. Name and locate the capital of the United States; (b) the most important city in each of the sections.
16. How are lakes formed? (b) Name and locate four of the largest lakes in the world.
17. What is a mountain? (b) an oasis?
18. Name five of the highest mountain peaks of the world, and give their heights.
19. Name the five largest rivers of the world, and describe the largest of them.
20. What countries are noted for gold and silver mines?
21. What countries are noted for the production of (a) sugar; (b) cotton; (c) coffee.
22. Name ten different kinds of animals, natives of the temperate and frigid zones.
23. Name the divisions and productions of the Chinese Empire.
24. Name the divisions of Oceanica, and the most important islands in each.
25. Name the Hawaiian Islands and the Legislative districts of the Kingdom.
26. Name five of the principal mountains, and five of the principal bays of the Hawaiian Islands.
27. Name the ports at which the "Likelike" touches in her weekly trips.
28. Travel by the most direct route from Honolulu to Liverpool.

SOPHOMORE CLASS—CONSTRUCTING SENTENCES.

LAHAINALUNA, JUNE, 1882.

Re-arrange the following mixed up sentences, and then translate them into good Hawaiian. Put capital letters in their proper places, and interrogation marks after questions.

1. land the wharves at the Boat which does of.
2. You have seen the Ever Shiuing daytime in the stars.
3. And drink tobacco avoid of the Strong use.
4. glass people In Stones should not throw Houses.
5. sleep their briny Fishes ever in the do home.
6. to-morrow from evening meeting the early return.
7. except in the room he No Find book could this other.
8. A Hundred Horse bought Three dollars for a man.
9. Straps your boot lift you can by yourself.
10. shower had a Nice Night what we last of rain.
11. Absence you remember your during friends.
12. And all Wide Windows the open doors.
13. That Beard what has a beautiful White Old Man.
14. Money ought to find how we can make the way.
15. And how in the next exist am i where to world.
16. Country into the Journey on a short go.
17. Many sky can count in the how you Stars.
18. nests without their Birds Instruction the build.
19. your Brother Books the pass the table to on those.
20. That there swearing of what man's need is.

MIDDLE AND SOPHOMORE CLASSES—ARITHMETIC EXAMPLES.

LAHAINALUNA, JUNE, 1882.

1. Sold 45 pieces of studding 17½ feet long, 7½ inches wide, and 2½ inches thick, at 3⅓ cents a foot; 94 boards, 15 feet and 7 inches long and 13 inches wide, at 4½ cents a foot; 2750 shingles at $14.65 per M.; 3 kegs of nails, 93 pounds each, at 9½ cents a pound; a pile of wood 4 feet wide, 3½ feet high, and 11 feet long at $8.50 a cord, and received as part payment 93 pounds of coffee at 16½ cents a pound; 2 packages of sugar 91⅜ pounds each, at 7¼ cents a pound; 7 pounds and 3 ounces of pepper at 3½ cents an ounce. How much remains due? and how much will it take to settle the account if a discount of 3½ per cent. be made for cash?

2. The longitude of Boston is 71° 3′ 30″, that of Chicago is 87° 35′; when it is noon at Boston, what is the time at Chicago?

3. Sold three horses for $100 each; on one I gained 20 per cent; on another I gained 10 per cent.; but on the third I lost 25 per cent.; did I gain or lose by the whole transaction? and how much?

4. What must a merchant ask for goods which cost $30 that he may take off 30 per cent. from the asking price and yet make 30 per cent. on the cost?

5. In what time will the interest of $1230, at 7 per cent. per annum, be $247?

6. A note for $450 dated July 7th, 1881, payable in one year, at 7 per cent. interest bore the following endorsements, Sept. 10th, 1881, received $45. Jan. 1st, 1882, received $110. March 10th, 1882, received $123. How much should be paid at the time of maturity of the note?

7. What is the face of a draft on 4 m., bought for $1260, the interest being 8 per cent. per annum, and the premium 4 per cent?

8. Solve the following example by analysis and also by proportion: If 9 men working 10 hours a day, can make 18 sofas in 30 days, how many sofas can 50 men make in 90 days working 8 hours a day?

9. One side of a rectangular field is 19.2 chains and the 14.4 chains other what is the distance between the opposite corners?

10. Divide the cube root of 614125 by the square root of 595984, and express the result as a decimal fraction true to five decimal places.

MIDDLE AND SOPHOMORE CLASSES — ARITHMETIC—DEFINITIONS.

LAHAINALUNA, JULY, 1882.

1. Define arithmetic, number, notation.

2. How many kinds of notation are there in common use? Name each and tell for what it is used.

3. Define prime number, composite number, factor.

4. Define greatest common divisor; least common multiple.

5. Define fraction, numerator, denominator, complex fraction, compound fraction.

6. What is a compound number? reduction?

7. Name the three kinds of weights in common use, and tell in what respects they differ.

8. What is the difference between simple and compound addition?

9. How do you know that a difference of one hour between the time of two places indicates a difference of fifteen degrees in their longitude?

10. Name the elements of percentage, and define each.

11. How many problems of percentage are there? What is given and what is required in each?

12. What is interest? and what elements are there to be considered in calculating interest?

13. What is a bill of exchange? a set of exchange?

14. What is a foreign bill? a domestic bill? What are domestic bills generally called?

15. Define port of entry, duties, specific duties, ad valorem duties.

16. Define ratio, terms, direct ratio, inverse ratio.

17. Define proportion, simple proportion, compound proportion.

18. State the principle upon which a missing term may be found.

19. What is involution? evolution? a perfect power?

20. Define square root, cube root.

MIDDLE CLASS—ALGEBRA, DEFINITIONS.

LAHAINALUNA, JULY, 1882.

1. Define quantity, mathematics, algebra.
2. What is a co-efficient? an exponent? a term?
3. Define power, root, degree.
4. What is a monomial? a polynomial?
5. What is a homogeneous quantity?
6. What is an axiom? State five axioms.
7. What is the apparent sign of a fraction? its real sign?
8. State the principle governing the change of signs.
9. How do you multiply an entire quantity by a fraction?
10. How do you divide an entire quantity by a fraction?
11. What is an equation? a member?
12. How do you transpose any term of an equation?
13. How do you clear an equation of fractions?
14. State the axioms upon which the transformations of equations are based.
15. What is meant by the solution of an equation?
16. What is proportion?
17. How is a proportion changed to an equation?

MIDDLE CLASS—ALGEBRA, EXAMPLES AND PROBLEMS.

LAHAINALUNA, JULY, 1882.

Perform the operations indicated in the following examples:

1. $\left(3x+\frac{x}{b}\right)-\left(x-\frac{x-a}{c}\right)$

2. $\frac{a^4-l^4}{a^2\ 2al+2} \times \frac{a-b}{a^2-ab}$

3. $\frac{a-\frac{1}{2}}{a-1} \div \frac{1+x}{1-b}$

Write out the solution and analysis of the following problems:

4. A man has a lease for 15 years; being asked how much had already expired, he answered that two-thirds of the time past was equal to four-ninths of the time to come. What was the time past?

5. A man spends seven-twelfths of his salary for board, and three-fourths of the remainder for clothes, and saves $125 a year. What is his salary?

6. In a certain orchard one-third are apple trees, four-ninths peach trees, and 400 cherry trees. How many trees are there in the orchard?

7. What is that number to which if its $\frac{1}{2}$, $\frac{1}{3}$ and $\frac{1}{4}$ be added, the sum will be a.

8. A can do a piece of work in a days, and B can do the same in b days; how long will it take them if they work together?

9. The difference of two numbers is 12, and the greater is to the less as 11 to 7; what are the numbers?

10. A man was hired for a year for $100 and a suit of clothes; but at the end of eight months he left, and received the clothes and $60 as full pay for the time he had worked; what was the value of the clothes?

MIDDLE CLASS—GRAMMAR.

LAHAINALUNA, JULY, 1882.

1. Define English Grammar and its four parts.
2. Give seven rules for the use of Capitals.
3. Define the Parts of Speech.
4. What modifications have nouns?
5. Define the numbers and genders.
6. Write the plural of

mouse,	goose,	loaf,	tooth,
thief,	sheep,	child,	hand-full.

7. Define the two principal kinds of Adjectives and give an example of each.
8. Define comparison, and compare

near, good, beautiful,

9. Define the different kinds of Pronouns and give an example of each.
10. What is declension?
11. Decline the personal pronouns of the first person and third person.
12. Write four short sentences containing adverbs of different kinds.
13. Define transitive verb, potential mode, passive voice, past-perfect tense, and write examples of each.
14. What is conjugation?
15. Write the conjugation of the verb FIND in the present-perfect ind.
16. Of the verb STRIKE in the potential mode, passive voice, past tense.
17. Write the imp. and inf. of HEAR, and participles both active and passive of TELL.
18. Write a sentence containing all the parts of speech.
19. Arrange the parts of speech in tabular form in the following:

"Casca, who was behind Caesar, drew a dagger and stabbed him in the shoulder. 'Wretch, what doest thou,' cried Caesar, snatching the weapon. The other conspirators now rushed upon him, but he defended himself with the valor which he had shown in a hundred battles."

20. Parse the words in the first sentence of the above.

MIDDLE CLASS—HISTORY.

LAHAINALUNA, JUNE, 1882.

1. What is history?
2. Name the earliest event in History and give its date.
3. When did the deluge take place, and why?
4. What happened after the confusion of tongues?
5. When was the first Empire founded, and by whom?
6. What can you tell of the cities of this empire?
7. When was the Egyptian nation founded? (b) the Chinese? (c) the Israelitish? [d] by whom was each founded?
8. When did the Israelites return to Canaan, and who was their leader?
9. What country in Europe was settled about this time, and by whom?
10. Name two of the Judges and two of the Kings of Israel, and tell something of the life of each.
11. By whom were the Jews carried into captivity? (b) Who set them free?
12. What event occurred in 490 B. C.? in 480 B. C.? in 330 B. C.?
13. Who built the great Chinese wall, and why was it built?
14. What prophets foretold the coming of Christ?
15. In what year, and by what Roman General was Jerusalem destroyed?
16. Who was the most famous of the Egyptian Kings, and what made him famous?
17. Give the names of two famous Queens of history, and the date in which they lived.
18. Tell what you know of (a) Lycurgus? (b) Homer; (c) Confucius.
19. Tell what you know of the gods of ancient Greece and of Egypt.
20. Give a short account of the slave trade.

JUNIOR CLASS—GEOMETRY—DEFINITIONS.

LAHAINALUNA, JUNE, 1882.

I. What is a line? (b) a point? (c) a plane surface? (d) a geometrical solid? (e) a physical solid?

II. What is a circle? (b) a chord? (c) a segment of a circle? (d) a sector? (e) a tangent? (f) an inscribed angle? (g) draw a diagram showing each of the above.

III. Name and define the different kinds of geometrical lines, and draw an example of each. [Three definitions and examples.]

IV. Name and define the different kinds of triangles, and draw a diagram of each. [Four definitions and diagrams.]

V. Name and define the different quadrilaterals, and give a diagram of each. [Six definitions and diagrams.]

VI. The complement of an angle is 16° 20', what is the angle? (b) The supplement of an angle is 68 deg. 18 min. 25 sec., what is the angle?

VII. The vertical angle of an isosceles triangle is 45 deg. 30 min. and the base of the triangle is produced; what is its exterior angle. Demonstrate your answer.

VIII. One of the interior angles of a parallelogram is 44 deg. 15 min. what are the other angles? Demonstrate.

IX. The sum of four interior angles of an irregular polygon of five sides is 472 deg. what is the 5th interior angle? Demonstrate.

X. If each of the sides of a regular polygon of twelve sides be produced, what will each exterior angle be? Demonstrate.

JUNIOR CLASS—GEOMETRY—THEOREMS AND PROBLEMS.

LAHAINALUNA, JUNE, 1882.

I. *Problem.*—To draw a perpendicular to a straight line from a given point without the line.

II. *Problem.*—From a point without a given straight line to draw another line parallel to the given straight line.

III. *Problem.*—From a given point without a given straight line, to draw an angle to that line which shall be equal to a given angle.

IV. *Problem.*—Describe three equal circles which shall touch each other, and then describe another circle which shall touch all the other circles.

V. *Theorem.*—If the base of an isosceles triangle be produced, the exterior angle exceeds one right angle by half the vertical angle.

VI. *Theorem.*—If on the sides of a square, at equal distances from the four angles, four points be taken, one on each side, the figure formed by joining these points will also be a square.

VII. *Theorem.*—The parallelogram whose diagonals are equal is rectangular.

VIII. *Theorem.*—If the diameter of a circle be one of the equal sides of an isosceles triangle, the base of the triangle will be bisected by the circumference.

IX. *Theorem.*—Through any three points not in a straight line but one circumference can be made to pass.

X. *Theorem.*—If one side of a triangle be produced, the exterior angle is equal to the sum of the two interior and remote angles, and the sum of the three interior angles is equal to

JUNIOR CLASS—SCIENCE OF COMMON THINGS.

LAHAINALUNA, JULY, 1882.

1. What is matter? Give illustrations.
2. Name some of the general properties of matter.
3. What is attraction of gravitation?
4. What is centrifugal force? How can you illustrate it?
5. Define center of gravity.
6. In what position only can a body be at rest?
7. What are machines? Do they create power?
8. What is capillary attraction? How does it benefit us?
9. What are artesian wells? Why does water flow from them?
10. Explain the cause of tides.
11. What is the difference between a liquid and a gas?
12. How are the clouds formed?
13. Why are clouds seen about the tops of mountains more frequently than elsewhere?
14. How is a common pump constructed? Draw an illustration.
15. How is a forcing pump constructed? Draw an illustration.
16. Name the sources of heat.
17. What is the effect of heat on substances generally?
18. What is a thermometer?
19. Name three good conductors of heat. Also three bad.
20. What are the chief sources of light?
21. What is reflection? Refraction?
22. How is it known that a ray of light consists of different colors?
23. Why are the clouds red when the sun is near the horizon?
24. What is a lense? and what are its uses?
25. Name the uses of electricity and magnetism.

JUNIOR CLASS—HISTORY.

LAHAINALUNA, JULY, 1882.

1. Give some account of the Crusades.
2. Describe the Feudal System.
3. What can you tell about Charlemagne?
4. What of the Maid of Orleans?
5. Tell what occurred in the reign of Charles 9th.
6. Give some account of events in France from 1789 to 1800.
7. Sketch the career of Bonaparte.
8. Name the rulers of France, in proper order, from the time of Bonaparte to the present.
9. What is the present form of Government of France, and who is its chief officer?
10. Sketch the history of Switzerland.
11. What of Germany in 1870?
12. Tell the story of Peter the Great.
13. Who was Bernadotte?
14. Describe the ancient inhabitants of Great Britain.
15. For what was Alfred the Great noted?
16. In whose reign was Ireland conquered; Wales; Scotland?
17. What was Magna Charta?
18. Sketch the events of the reign of Henry 8th.
19. What can you tell about George 3d?
20. Give some account of affairs in Ireland at the present time.

JUNIOR CLASS—GRAMMAR.

LAHAINALUNA, JULY, 1882.

1. Define Grammar, English Grammar and its four parts.
2. Give rules for the use of Capitals.
3. Define the several Parts of Speech.
4. What modifications have Nouns?
5. Define the cases.
6. Write the declension of the pers. pronouns of the 3rd pers.
7. What modifications have verbs?
8. Define the several modes.
9. Write the synopsis of the verb *speak*. 3rd per. sing. com-form.
10. Synopsis of verb *tell*. 3rd sing. prog. form.
11. Write the conjugation of the pres. perf. ind. of the verb *learn*, in the int. reg. and prog. forms combined.
12. Write the infinitives and participals of the verb *bring*, in all possible forms.
13. Define sentence, subject, predicate, modifier.
14. How are sentences divided in form?
15. How by their propositions?
16. Define eight kinds of sentences.
17. Define adj. adv. and obj. elements.
18. Define elements of the 1st, 2nd and 3rd class.
19. Enlarge the following sentences by adding modifiers of each classes. *Horses run Did Napoleon die? Speak.*
20. Analyze the following.

"Then the master, with a gesture of command
Moved his hand; and, at the word,
Loud and sudden there was heard,
All around them and below,
The sound of hammers, blow on blow,
Knocking away the shores and spurs."

SENIOR CLASS—CONSTITUTION OF HAWAIIAN ISLANDS.

LAHAINALUNA, JUNE, 1882.

1. What is government? (b) Name the forms of government in civilized nations. (c) To which of these forms of government does our government belong?

2. What is the constitution of a country? Give a short history of the Constitution of 1864.

3. Name the personal rights which the Constitution guarantees in its first six articles.

4. What does Article II. of the Constitution prohibit?

5. How is property protected by the Constitution?

6. How is the Supreme power of the Kingdom divided? Can these powers ever be joined together in the same person?

7. What are the characteristics which disqualify a person from becoming Sovereign of the Hawaiian Islands?

8. Name as many powers of the Sovereign as you can recollect in twenty minutes.

9. Name the councils provided for the King. (b) Who form the Cabinet council?

10. How many branches are there in the Legislature? (b) What is the highest number of persons that can be members of each branch? (c) How is each branch appointed?

11. What are the qualifications for a Representative? (b) For an elector?

12. How is the judicial power of the Kingdom vested? (b) How are the judges appointed? (c) How long do they hold office?

13. What persons are forbidden from holding any office under the government?

14. How can the Constitution of the Kingdom be amended?

SENIOR CLASS—POLITICAL ECONOMY.

LAHAINALUNA, JUNE, 1882.

1. What does Political Economy treat of?
2. Mention some of the natural laws which govern the production of wealth.
3. Mention some human laws which relate to the production and distribution of wealth.
4. What is wealth.
5. Define *natural riches*, and give as many examples as you can.
6. Define capital, and its divisions.
7. Mention a business in which the capital invested is chiefly *fixed;* demonstrate.
8. Mention a business in which the capital is chiefly *circulating;* demonstrate.
9. What are the three elements, or things, necessary to the production of wealth?
10. Define unproductive consumption, and give an example.
11. Define productive consumption and give an example.
12. Into how many parts is wealth produced divided, and to whom do those parts respectively belog?
13. Why should skilled labor be paid more than unskilled labor?
14. What is the test of the highness of wages?
15. If the average money wages of a common laborer are 75 cts. a day in 1882, whilst in 1842 they were 25 cts. a day, and if the cost of living in 1882 has increased three-fold since 1842, what is the difference between the real wages of the two periods?
16. Explain the difference between *market value*, and *intrinsic value*.
17. Demonstrate that the division of labor increases its efficiency.
18. Why is not barter a good method for the exchange of values?
19. What is money?
20. Why are gold and silver used as the universal medium, or common measure of all values?
21. When is a paper currency a good, and when is it an evil?
22. What causes a commercial crisis?
23. Define taxes. (b) Duties. (c) Tariff.
24. Is the tariff of the Hawaiian Kingdom a protective tariff, or a tariff for revenue?
25. Why are the luxuries of life taxed more than the necessities of life.

SENIOR CLASS—ENGLISH COMPOSITION.

LAHAINALUNA, JUNE, 1882.

1. Describe a horse and a donkey, so that the two animals may be recognized from your description by one who sees them for the first time.

2. Write a business letter.

3. Write a letter of information, describing the Hawaiian Kingdom, its natural riches, chief industries, government, and social condition.

4. Write an imaginary news letter to a friend.

5. Write an imaginary account of a journey in some foreign land, and what you saw and did there.

6. Write your opinion on the question—"Is it better for an educated young man to seek his living in public office, or in private business?"

7. Describe the burning of the chapel building of Lahainaluna in 1880.

8. What are your future plans in life?

SENIOR CLASS—MISCELLANEOUS MATHEMATICS.

LAHAINALUNA, JUNE, 1882.

1. I had a triangular piece of land, whose sides were 35, 40 and 45 rods, which I changed for a square piece of equal area. What will it cost me to fence my square piece at $1.25 a yard?

2. *Theorem.*—The square on the base of an isosceles triangle, whose vertical angle is a right angle, is equal to four times the area of the triangle.

DEMONSTRATE WITH DIAGRAM.

3. *Problem.*—Draw a triangle, and inscribe a circle in it, and circumscribe a circle around it.

4. *Theorem*—Any line drawn through the center of the the diagonal of a parallelogram to meet the sides is bisected in that point, and also bisects the parallelogram.

5. *Problem.*—Divide a right angle into three equal angles.

6. Given the legs of a right angled triangle 455 and 1092 respectively, to compute the segments into which the hypothenuse is divided by a perpendicular from the right angle, and to compute the perpendicular.

7. Three men hire a pasture. A pays 5-16 of the cost, whilst A and C together pay three-quarters as much as B and C. If C pastures 65 cattle, how many cattle may A and B each pasture?

8. A regiment of soldiers, consisting of 1066 men, forms into two squares, one of which has four more men in a side than the other: what number of men are in a side of each square?

Analyze fully the above examples.

SENIOR CLASS—TRIGONOMETRY—FIRST PAPER.

LAHAINALUNA, JUNE, 1882.

1. Draw a diagram showing all the functions of an arc, and define each function.

2. From the above diagram show the relations of the functions to each other; first, in the form of proportions, then in the form of equations. State the theorem in geometry by which you obtain your proportions.

3. The natural tangent of an arc of 65 degrees, whose radius is unity, is 2.145; compute the secant, sine, and cosine of the arc.

4. What are logarithms?

5. What is the base of the common system of logarithms?

6. What is the characteristic of a logarithm?

7. Find by logarithms the product of 225×345.

8. Find by logarithms the quotient of $621432 \div 756$.

9. Find the logarithm of the fifth-power of 216.

10. What is the logarithm of the cube root of 871?

11. From the table of logarithmic sines and tangents find the log. of the tangent of an arc of 45° 25′ 15″ and from it compute the logarithm of the secant and co-tangent of the same arc, the logarithm of radius being 10,000,000.

SENIOR CLASS—TRIGONOMETRY—SECOND PAPER.

LAHAINALUNA, JUNE, 1882.

1. From the base of the trunk of a tree, which stands perpendicularly on a plane, to a certain point is 25 rods. From that point the tree subtends an angle of 9 deg. 15 min. from its base to its top; what is the higth of the tree.

Calculate first, by construction, then by trigonometry.

2. How must three trees, A, B, C, be planted so that the angle at A may be double the angle at B, and the angle at C may be one-half the angle at B, and a line of 400 yards may just go around them ?

Calculate by construction, by assuming a line at first. Then analyse by trigonometry.

3. A May pole 50 feet 11 inches high, at a certain time will cast a shadow 98 feet 6 inches long. What then is the breadth of a river which runs within 20 feet 6 inches of the foot of a steeple 300 feet 8 inches high, if the steeple at the same time throws its shadow 30 feet 9 inches beyond the stream ?

4. From the extremeties of a base line measured 10 feet above sea level, parallel with it, and 25 chains long, an object on the summit of a distant hill makes two angles, respectively, 67 deg. 45 min. and 102 deg. 15 min. and the vertical angle which the object makes with the base line is 12 deg. 15 min. What is the higth of the hill, and how distant is the summit from the base line ?

SENIOR CLASS—HISTORY.

LAHAINALUNA, JULY, 1882.

1. Give some account of the cause and progress of the French Revolution.
2. Sketch the career of Bonaparte.
3. What happened to France in 1870?
4. Name some of the more important events in Russian history during the last 30 years.
5. Name the different royal families of England and the founder of each.
6. Give some account of the reign of Queen Elizabeth.
7. Sketch the history of England during the last half of the 17th Century.
8. What wars have been waged by England during the present reign?
9. Give some account of the discovery of America and its date.
10. What Colonies established by the English, French, Dutch and Spanish?
11. Give some account of the capture of Quebec.
12. State the principal causes which led to the American Revolution.
13. Describe the battle of Bunker Hill.
14. When and where was the last battle of the Revolution fought? Describe the surrender.
15. In what other wars has the United States been engaged?
16. Describe the condition of the country when Mr. Lincoln became President.
17. Sketch the career of General Grant in the war of Secession.
18. When and by whom were the Hawaiian Islands discovered?
19. When and by whom was a Constitution granted?
20. When did Missionaries first come to these Islands, and what was the condition of the people at that time?

SENIOR CLASS—PHYSIOLOGY.

LAHAINALUNA, JULY, 1882.

1. Define Anatomy, Physiology, Hygiene.
2. Define Vegetable and Comparative Anat, &c.
3. How many bones in the body and how divided?
4. Describe the teeth and their function.
5. Describe a muscle, tendon, joint.
6. Name and describe the organs of digestion.
7. What changes does the food undergo in digestion?
8. Describe the circulation of the blood.
9. Name and describe the parts of the eye.
10. Give six general rules for the preservation of health.

SENIOR CLASS—THEOLOGY.

LAHAINALUNA, JULY, 1882.

1. Define Theology, Natural Theology, Revelation and Christianity.

2. Define Monotheism, Dualism, Pantheism and Polytheism, and name the principal representatives of each.

3. Give four reasons why you believe there is a God.

4. Give six proofs that the Bible is the Book of God.

5. What attributes of God may be known without the Bible?

6. Why was the Bible needed?

7. Sketch the life of Jesus.

8. How would you prove Christ's divinity?

9. State arguments which prove the Holy Ghost is God.

10. What is man's duty to God, and how can it be performed.

Enclosure “8”

GOVERNOR GREEN ANNOUNCES RETIREMENT OF MAJ. GEN. KENNETH HARA

Posted on May 24, 2024 in In The News, Main, News Release

JOSH GREEN, M.D.

GOVERNOR

KE KIAʻĀINA

GOVERNOR GREEN ANNOUNCES RETIREMENT OF MAJ. GEN. KENNETH HARA

Brig. Gen. Stephen Logan to Succeed Hara as Adjutant General

FOR IMMEDIATE RELEASE

May 24, 2024

HONOLULU — Governor Josh Green, M.D., announced today that Maj. Gen. Kenneth S. Hara, the Adjutant General (TAG) for the state of Hawaiʻi, Commander of the Hawaiʻi National Guard, and Director of the Hawaiʻi Emergency Management Agency will resign as TAG on October 1, 2024 and retire from the military on November 1, 2024 after 40 years of military service.

Governor Green has selected Brig. Gen. Stephen F. Logan, currently the Deputy Adjutant General (DAG) for the state of Hawaiʻi and commander of the Hawaiʻi Army National Guard, as the next TAG.

“Throughout his entire career, Maj. Gen. Hara led by example, providing a steady hand through some of the most challenging times in the history of our state and nation. I can say with confidence that the state of Hawaiʻi is better because of Maj. Gen. Hara’s dedicated service, commitment, and sacrifices. I wish him all the best in retirement,” said Governor Green. “With that said, I could not be more thrilled that he is leaving the Hawaiʻi National

Guard under the exceptional leadership of Brig. Gen. Stephen Logan. He is a key component of the Hawai‘i National Guard’s success and his appointment as Adjutant General marks another historic milestone in a storied military career.”

As TAG, Brig. Gen. Logan will serve as the Commander of the Hawai‘i National Guard and Director of the Hawai‘i Emergency Management Agency. He will be responsible for daily operations and oversee approximately 5,600 Army and Air National Guard servicemembers which includes approximately 2,100 full-time federal and state employees. Brig. Gen. Logan’s appointment as TAG requires Hawai‘i state Senate confirmation.

The state of Hawai‘i, Department of Defense will conduct its official Change of Responsibility ceremony on October 1, 2024.

“I am grateful and proud to have served with the extraordinary members of the state of Hawai‘i, Department of Defense, who accomplished every assigned state and federal mission during extremely challenging times,” said Maj. Gen. Hara. “And I have full faith and confidence in Brig. Gen. Steve Logan and know that he will successfully lead the department into the future.”

Maj. Gen. Hara, served on three combat deployments to Baghdad, Iraq; Camp Arifjan, Kuwait; and Kandahar, Afghanistan. He was appointed TAG in December, 2019. He served as the state’s overall incident commander from 2020-2023 during the COVID-19 pandemic response. Hara again served as the state’s incident commander for the Maui wildfire response in 2023 to present.

Brig. Gen. Logan, a combat veteran who has served in Afghanistan; has been the DAG since Dec. 2019 and Commander of the Hawai‘i Army National Guard since Oct. 2021. He most recently served as the dual status commander of the Hawai‘i National Guard’s Joint Task Force 50, which was activated in response to the 2023 Maui wildfire disaster.

“I’m truly honored and humbled to be selected as the Adjutant General for the state of Hawai‘i, and extremely proud to be a member of Governor Green’s Cabinet,” said Logan. “I also want to thank the dedicated efforts of the many great leaders who’ve held this post before me, most notably Maj. Gen. Hara for his decisive leadership through these challenging times.”

Brig. Gen. Logan grew up on the island of O‘ahu and enlisted as an Infantry Soldier in the Hawai‘i Army National Guard during his senior year in high school. He then commissioned through the Guard’s Officer Candidate School and later attended the U.S. Army’s Initial Entry Rotary Wing Training Course and flew both rotary and fixed-wing aircraft for almost 30 years. He has served honorably in the military for more than 40 years.

Prior to being selected as the State Army Aviation Officer, Logan was a traditional National Guard soldier holding positions in the Honolulu Police Department, retiring as a Metropolitan Police Lieutenant in 2004.

Brig. Gen. Logan's successor will be named in the coming months.

Photos of Maj. Gen. Hara and Brig. Gen. Logan, courtesy Hawai'i Department of Defense, are attached.

# # #

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Director of Public Affairs

State of Hawai'i Department of Defense

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Enclosure “9”

H.E. DAVID KEANU SAI, PH.D.
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July 1, 2024

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: kenneth.s.hara.mil@army.mil

Via electronic mail and by USPS certified mail no. 7021 0950 0000 1548 7320

Re: Notice to establish a Military Government of Hawai‘i by 1200 hours on July 31, 2024

Major General Hara:

In my last communication to you, on behalf of the Council of Regency, dated February 10, 2024, I made a "final appeal for you to perform your duty of transforming the State of Hawai‘i into a military government on February 17, 2024, in accordance with Article 43 of the 1907 Hague Regulations, Article 64 of the Fourth Geneva Convention, and Army regulations." You ignored that appeal despite your admittance, on July 27, 2023, to John "Doza" Enos that the Hawaiian Kingdom continues to exist.

This communication is not an appeal, but rather a notice to perform your duty, as the theater commander in the occupied State of the Hawaiian Kingdom, to establish a military government of Hawai‘i by 1200 hours on July 31, 2024. If you fail to do so, you will be the subject of a war criminal report by the Royal Commission of Inquiry ("RCI") for the war crime by omission. The elements of the war crime by omission are the Uniform Code of Military Justice's ("UCMJ") offenses under Article 92(1) for failure to obey order or regulation, and Article 92(3) for dereliction in the performances of duties. The maximum punishment for Article 92(1) is dishonorable discharge, forfeiture of all pay and

allowances, and confinement for 2 years. The maximum punishment for Article 92(3) is bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

Despite the prolonged nature and illegality of the American occupation since January 17, 1893, the sovereignty has remained vested in the Hawaiian Kingdom. In 1999, this was confirmed in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01. In that case, the Permanent Court of Arbitration ("PCA") recognized the continuity of the Hawaiian Kingdom as a State, under international law, and the Council of Regency as its government. At the center of the *Larsen* case was the unlawful imposition of American municipal laws within the territory of the Hawaiian Kingdom, which is the war crime of usurpation of sovereignty. This fact renders the State of Hawai'i unlawful because it was established by congressional legislation in 1959, which is an American municipal law. *Ex injuria jus non oritur* (law does not arise from injustice) is a recognized principle of international law.

After the Council of Regency returned from the oral proceedings, held at the PCA, in December of 2000, it directly addressed the devastating effects of denationalization through *Americanization*. This effectively erased the national consciousness of the Hawaiian Kingdom in the minds of the Hawaiian population and replaced it with an American national consciousness that created a false narrative that Hawai'i became a part of the United States. Denationalization, under customary international law, is a war crime.

The Council of Regency decided to address the effects of Americanization through academic and scholarly research at the University of Hawai'i. The Council of Regency's decision was guided by paragraph 495—*Remedies of Injured Belligerent*, FM 27-10, that states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of the following […] a. [p]ublication of the facts, with a view to influencing public opinion against the offending belligerent." Since then, a plethora of doctoral dissertations, master's theses, peer review articles, and books have been published on the topic of the American occupation. The latest peer review articles, by myself as Head of the RCI, and by Professor Federico Lenzerini as Deputy Head of the RCI, were published in June of 2024 by the *International Review of Contemporary Law*:

> Professor Federico Lenzerini, "Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Supreme Imperative of Suppressing "Acts of Aggression or Other Breaches of the Peace" à la carte?," 6(2) *International Review of Contemporary Law* 58-67 (2024).[1]
>
> Dr. David Keanu Sai, "All States have a Responsibility to Protect their Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the

[1] Online at https://hawaiiankingdom.org/pdf/IRCL_Article_(Lenzerini).pdf.

Hawaiian Islands," 6(2) *International Review of Contemporary Law* 72-81 (2024).[2]

In addition, legal opinions on this subject were authored by experts in the various fields of international law:

Professor Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 125-149 (2020).[3]

Professor William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151-169 (2020).[4]

Professor Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples related to the United States Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 173-216 (2020).[5]

Professor 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).[6]

Professor Federico Lenzerini, *Legal Opinion of Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (December 5, 2021).[7]

Notwithstanding your failure to obey an Army regulation and dereliction of duty, both being offenses under the UCMJ and the war crime by omission, you are the most senior general officer of the State of Hawai'i Department of Defense. And despite your public announcement that you will be retiring as the Adjutant General on October 1, 2024, and resigning from the U.S. Army on November 1, 2024, you remain the theater commander over the occupied territory of the Hawaiian Kingdom. You are, therefore, responsible for

[2] Online at https://hawaiiankingdom.org/pdf/IRCL_Article_(Sai).pdf.
[3] Online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf.
[4] *Id*.
[5] *Id*.
[6] Online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf.
[7] Online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf.

establishing a military government in accordance with paragraph 3, FM 27-5. Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention imposes the obligation on the commander in occupied territory to establish a military government to administer the laws of the occupied State. Furthermore, paragraph 2-37, FM 41-10, states that "commanders are under a legal obligation imposed by international law."

However, since paragraph 3 of FM 27-5 also states that you also have "authority to delegate authority and title, in whole or in part, to a subordinate commander" to perform the duty of establishing a military government. The RCI will consider this provision as time sensitive to conclude willfulness, on your part, to not delegate authority and title, thereby, completing the elements necessary for the war crime by omission. Therefore, you will delegate full authority and title to Brigadier General Stephen Logan so that he can establish a Military Government of Hawai'i no later than 1200 hours on July 31, 2024. BG Logan will be guided in the establishment of a military government by the RCI's memorandum on bringing the American occupation of Hawai'i to an end by establishing an American military government (June 22, 2024),[8] and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).[9]

Should you fail to delegate full authority and title to BG Logan, the RCI will conclude that your conduct is "willful," and you will be the subject of a war criminal report for the war crime by omission. Military governments are under an obligation, under international law, to prosecute war criminals in occupied territory, and the Army National Guard is obligated to hold you accountable, by court martial, for violating Articles 92(1) and (3) of the UCMJ. The war criminal report for your war crime by omission will be based on the elements of the offenses of the UCMJ. Thus, your court martial will be based on the evidence provided in the war criminal report. Military law provides for your prosecution under the UCMJ, while international law provides for your prosecution for war crimes. One prosecution does not cancel out the other prosecution. Furthermore, war crimes have no statutes of limitations. In 2022, Germany prosecuted a 97-years old woman for Nazi war crimes.[10]

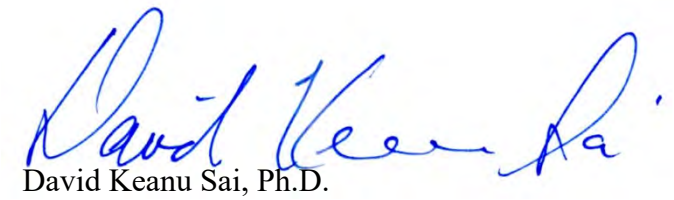
I am aware that you stated to a former Adjutant General that State of Hawai'i Attorney General Anne E. Lopez, who is a civilian, instructed you and Brigadier General Stephen Logan to ignore me and any organization calling for the performance of a military duty to establish a military government. This conduct is not a valid defense for disobedience of an

[8] Online at https://hawaiiankingdom.org/pdf/RCI_Memo_re_Military_Government_(6.22.24).pdf.
[9] Online at https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf.
[10] Reuters, *Former concentration camp secretary, 97, convicted of Nazi war crimes* (Dec. 20, 2022) (online at https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/#:~:text=BERLIN%2C%20Dec%2020%20(Reuters),for%20World%20War%20Two%20crimes.).

Army regulation and dereliction of duty because Mrs. Lopez is a civilian interfering with a military duty.

This is tantamount to a soldier, under your command, refusing to follow your order given him because a civilian instructed him to ignore you. For you not to perform your military duty is to show that there is no such military duty to perform because the Hawaiian Kingdom does not continue to exist as an occupied State under international law. There is no such evidence. The RCI considers Mrs. Lopez's conduct and action to be an accomplice to the war crime by omission and she will be included in your war criminal report should you fail to delegate your authority to BG Logan.

Once the war criminal report is made public on the RCI's website,[11] BG Logan is duty bound to immediately assume the chain of command and perform the duty of establishing a military government. The RCI will give BG Logan one week from the date of the war criminal report to establish a military government. Should BG Logan also be "willful" in disobeying an Army regulation and of dereliction of duty, then he will be the subject of a war criminal report. Thereafter, the next in line of the Army National Guard shall assume the chain of command. This will continue until a member of the Army National Guard performs the duty of establishing a military government.



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

cc: Brigadier General Stephen F. Logan, Deputy Adjutant General
(stephen.f.logan3.mil@army.mil)

Lieutenant Colonel Lloyd Phelps, Staff Judge Advocate
(lloyd.c.phelps4.mil@army.mil)

Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry
(federico.lenzerini@unisi.it)

[11] Online at https://hawaiiankingdom.org/royal-commission.shtml.

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1. Article Addressed to:

Major General Kenneth Hara
State of Hawai'i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

9590 9402 8427 3156 5836 60

2. Article Number *(Transfer from service label)*

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B. Received by *(Printed Name)* Joshua Soon

C. Date of Delivery July 3 2024

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City, State, ZIP+4 Honolulu, HI 96816

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

Enclosure “10”

H.E. DAVID KEANU SAI, PH.D.
Head, Royal Commission of Inquiry
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Hilo, HI 96720
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July 3, 2024

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: kenneth.s.hara.mil@army.mil

Via electronic mail

Re: Whether Attorney General Anne E. Lopez's instruction to you is a lawful order

Major General Hara:

Your decision to delegate, or to not delegate, full authority and title to Brigadier General Stephen Logan to perform the duty of establishing a military government, has profound consequences for you and the chain of command of the Army National Guard, and, possibly, the Air National Guard. This is a command decision that cannot be underestimated. As a Title 32 Army general officer, who is currently the Director of the State of Hawai‘i Department of Defense, Attorney General Anne E. Lopez is your legal adviser for State of Hawai‘i matters, but Lieutenant Colonel Phelps, as your Staff Judge Advocate, is your legal adviser for military matters. However, if you were activated for deployment to a foreign country, as you were deployed to Baghdad, Iraq, in 2005, the Attorney General would no longer be your legal adviser. Your legal adviser was then exclusively the Staff Judge Advocate that was in country with you and your unit.

From a military standpoint, Attorney General Lopez's instruction to you, to ignore the calls to transform the State of Hawai‘i into a military government, would, at first glance, be considered a lawful order. Therefore, it is presumed to be valid. According to *United States v. Kisala*, 64 M.J. 50 (2006), the essential attributes of a lawful order, that sustains the

presumption of lawfulness, include: (1) issuance by competent authority—a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship of the mandate to a military duty. In light of the presumption of lawfulness, long-standing principles of military justice places the burden of rebutting this presumption on you.

You currently have two conflicting duties to perform—follow the order given to you by the Attorney General or obey an Army regulation. To follow the former, you incur criminal culpability for the war crime by omission. To follow the latter, you will not incur criminal culpability. As you are aware, soldiers must obey an order from a superior, but if complying with that order would require the commission of a war crime, then the order is not lawful, and it, therefore, must be disobeyed. The question to be asked of the Attorney General is whether the State of Hawai‘i is within a foreign State's territory or whether it is within the territory of the United States. If the Hawaiian Islands is within the territory of the United States, then the Attorney General's instruction can be considered a lawful order, but if the Hawaiian Islands constitute the territory of the Hawaiian Kingdom, an occupied State, then the order is unlawful, and must be disobeyed.

Because you have been made aware, and acknowledged on July 27, 2023, that the Hawaiian Kingdom continues to exist as a matter of international law, you must question the Attorney General's instruction to you. Just as I recommended to you, when we first met at the Grand Naniloa Hotel in Hilo on April 13, 2023, to have your Staff Judge Advocate refute the information I provided you regarding the presumed existence of the Hawaiian Kingdom as an occupied State under international law, I would strongly recommend you request the Attorney General to do the same.

Under international law, there is a presumption that the Hawaiian Kingdom, as a State, continues to exist as a subject of international law despite the unlawful overthrow of its government by the United States on January 17, 1893. 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,"[1] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[2] Professor Craven explains:

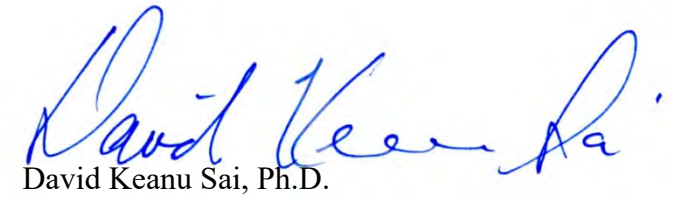
> If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or

[1] James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006).
[2] *Id*.

> sovereignty, on the part of the United States, absent of which the presumption remains.[3]

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. 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*[4] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[5] If the Attorney General is unable to rebut the presumption of continuity and the Permanent Court of Arbitration's recognition of the continued existence of the Hawaiian Kingdom, as a State, in *Larsen v. Hawaiian Kingdom*,[6] then you must disobey her instruction because she is NOT 'a person authorized by applicable law to give such an order.'

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



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[3] 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) (online at https://hawaiiankingdom.org/royal-commission.shtml).
[4] 9 Stat. 922 (1848).
[5] 30 Stat. 1754 (1898).
[6] Permanent Court of Arbitration, Case Repository, *Larsen v. Hawaiian Kingdom*, PCA case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

Enclosure “11”

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July 13, 2024

Major General Kenneth Hara
State of Hawai‘i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: kenneth.s.hara.mil@army.mil

Via electronic mail

Re: Consequences for not delegating complete authority and title to Brigadier General Stephen Logan to establish a military government

Major General Hara:

The suspense date of 1200 hours on July 31, 2024, for your delegation or not of complete authority and title to Brigadier General Stephen Logan ("BG Logan"), is fast approaching. The purpose of this letter is to expand on the consequences should you not delegate authority and title for BG Logan to establish a military government. Your failure to do so will have dire consequences down the chain of command for the Army National Guard, and, potentially, for the Air National Guard.

The Council of Regency employs *lawfare* to achieve compliance with international law obligations. According to U.S. Air Force Major General Charles Dunlap, Jr., *lawfare* is the strategy of using "law as a substitute for traditional military means to achieve an operational objective."[1] The Council of Regency's operational objective is to compel compliance with international laws. Pursuant to prior written and verbal communication providing undisputed historical, factual and legal evidence of the continued existence of

[1] Major General Charles J. Dunlap, Jr., USAF, "Lawfare Today: A Perspective," 3 *Yale Journal of International Affairs* 146 (2008).

the Hawaiian Kingdom, fully substantiated at the conclusion of due diligence by your own Staff Judge Advocate, the use of *lawfare* in this instance by the Council of Regency is wholly justified.

The duration of the American occupation, which is now at 131 years, is not only unlawful but morally unacceptable. President Cleveland, in his message to the Congress, relied on *jus ad bellum* (law concerning the resort to military force) when he concluded that the invasion of Honolulu by U.S. Marines on January 16, 1893, and the overthrow of the government of the Hawaiian Kingdom on January 17, 1893, were unjustified "acts of war."[2] President Cleveland stated:

> It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory. By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.[3]

The 2015 *Law of War Manual* identifies certain *jus ad bellum* criteria to be "a competent authority to order the war for a public purpose,"[4] and "a just cause (such as self-defense)."[5] These criteria were relied on by President Cleveland in his message to the Congress in 1893, which has remained unchanged under current U.S. military doctrine. Despite the unlawfulness of the *acts of war* that have led to this prolonged occupation, *jus in bello* (laws of war) continues to be obligatory under the law of armed conflict, which is the military term for international humanitarian law.

According to Lauterpact, an illegal war is "a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy."[6] However, despite the President's admittance that the acts of war were not in compliance with *jus ad bellum*, the United States was still obligated

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[2] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95* 451, 456 (1895) (online at https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf).
[3] *Id*., 456.
[4] *Law of War Manual*, §1.11.1, *Jus ad Bellum* Criteria.
[5] *Id*.
[6] H. Lauterpracht, "The Limits of the Operation of the Law of War," 30 *British Year Book of International Law* 206 (1953).

to comply with *jus in bello* when it occupied Hawaiian territory. In particular, the international rule for the occupant to transform the civilian government into a military government to administer the laws of the occupied State until the conclusion of a peace treaty. In the *Hostages Trial* (the case of *Wilhelm List and Others*), the Tribunal stated, "whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, [and what] may be done."[7] What 'must not be done' is the unlawful imposition of American municipal laws and administrative measures within the territory of the Hawaiian Kingdom. In other words, the law of occupation still applies despite the illegality of the American occupation of the Hawaiian Kingdom.

President Cleveland's conclusion that a 'substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair' remains true then as it does today. This falls under your duties to perform as the theater commander in the occupied State of the Hawaiian Kingdom. The failure for the U.S. Marines to establish a military government on January 17, 1893, and the failure since by all preceding Adjutant Generals, beginning with Colonel John H. Soper, does not relieve you of your duty to do so today. This duty, under U.S. Department of Defense Directive 5100.01 and Army regulation paragraph 3, FM 27-5, to establish a military government, is directly linked to President Cleveland's conclusion that 'the rights of the injured people requires we should endeavor to repair.' The establishment of a military government will serve both to end the prolonged violations and victimizations and begin to repair the rights of the injured Hawaiian people under the law of occupation.

In its *Law of War Manual*, the U.S. Department of Defense concluded that "[c]ommanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war [*jus in bello*]."[8] It should also be noted that a commander can be held accountable for the conduct of forces under his command, either by taking an active role in the commission of a war crime(s), or by omission in failing to prevent the commission of a war crime(s).[9] The forces under your command are the Hawai'i Army and Air National Guard, which include police officers.

On May 29, 2024, police officers, both active and retired from across the islands, called upon you to perform your duty.[10] This letter from law enforcement officers is at odds with the instructions given to you by Attorney General Lopez to ignore the calls for you to transform the State of Hawai'i into a military government. Their letter to you stated:

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[7] *United States v. William List et al.* (Case No. 7, Trials of War Criminals before the Nuremburg Military Tribunals, Vol. XI, 1247 (1950).
[8] Department of Defense, *Department of Defense Law of War Manual* §18.23, at 1122-24 (2015).
[9] *Id*.
[10] Online at https://hawaiiankingdom.org/pdf/HI_Law_Enforcement_Ltr.pdf.

We hope this letter finds you in good health and high spirits. We are writing to you on behalf of a deeply concerned group of Active and Retired law enforcement officers throughout the Hawaiian Islands, about the current governance of Hawaii and its impact on the vested rights of Hawaiian subjects under Hawaiian Law.

As you are well aware, the historical transition of Hawai‘i from a sovereign kingdom to a U.S. state is fraught with significant legal and ethical issues. The overthrow of the government of the Hawaiian Kingdom in 1893 and its subsequent annexation by the United States in 1898 continue to be an illegal act. The Hawaiian Kingdom was recognized as a Sovereign State by the Permanent Court of Arbitration in The Hague, Netherlands, in *Larsen vs. Hawaiian Kingdom* (https://pca-cpa.org/en/cases/35/).

At the center of the dispute, as stated on the PCA's website on the Larsen case, was the unlawful imposition of American laws over Lance Larsen, a Hawaiian subject, that led to an unfair trial and incarceration. It was a police officer, who believed that Hawai‘i was a part of the United States and that he was carrying out his lawful duties, that cited Mr. Larsen, which led to his incarceration. That police officer now knows otherwise and so do we. This is not the United States but rather the Hawaiian Kingdom as an occupied State under international law.

It is deeply troubling that the State of Hawaii has not been transitioned into a military government as mandated by international law. This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws. This very issue was brought to the attention of the Maui County Corporation Counsel by Maui Police Chief John Pelletier in 2022. In their request to Chief Pelletier, which is attached, Detective Kamuela Mawae and Patrol Officer Scott McCalister, stated:

> We are humbly requesting that either Chief John Pelletier or Deputy Chief Charles Hank III formally request legal services from Corporation Counsel to conduct a legal analysis of Hawai‘i's current political status considering International Law and to assure us, and the rest of the Police Officers throughout the State of Hawai‘i, that we are not violating International Law by enforcing U.S. domestic laws within what the federal lawsuit calls the Hawaiian Kingdom that continues to exist as a nation state under international law despite its government being overthrown by the United States on 01/17/1893.

Police Chief Pelletier did make a formal request to Corporation Counsel, but they did not act upon the request, which did not settle the issue and the possible liability that Police Officers face.

> Your failure to initiate such a transition may be construed as a violation of the 1907 Hague Regulations and the 1949 Geneva Convention, which outlines the obligations of occupying powers. Also, your actions, or lack thereof, deprive Hawaiian subjects of the protections and rights they are entitled to under Hawaiian Kingdom laws and international humanitarian law. According to the Geneva Convention, occupying powers are obligated to respect the laws in force in the occupied territory and protect the rights of its inhabitants. Failure to comply with these obligations constitutes a serious violation and can result in accountability for war crimes for individuals in positions of authority.
>
> The absence of a military government perpetuates an unlawful governance structure that has deprived the rights of Hawaiian subjects which is now at 131 years. The unique status of these rights is explained at this blog article on the Council of Regency's weblog titled "It's About Law—Native Hawaiian Rights are at a Critical Point for the State of Hawai'i to Comply with the Law of Occupation" (https://hawaiiankingdom.org/blog/native-hawaiians-are-at-a-critical-point-for-the-state-of-hawaii-to-comply-with-the-law-of-occupation/). It is imperative that steps be taken to rectify these historical injustices and ensure the protection of the vested rights of Hawaiian subjects.
>
> We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstances, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an **acting capacity** that is allowed under Hawaiian law.
>
> We urge you to work with the Council of Regency in making sure this transition is not only lawful but is done for the benefit of all Hawaiian subjects. Please consider the gravity of this situation and take immediate action to establish a military government in Hawaii. Such a measure would align with international law and demonstrate a commitment to justice, fairness, and the recognition of the rights of Native Hawaiians.

The U.S. military's failure to establish a military government in 1893 has a direct nexus to the war crime of imposing American municipal laws and administrative measure here—*usurpation of sovereignty during occupation*, which the police officers brought to your attention. BG Logan is a former officer of the Honolulu Police Department, and his brother, Arthur Joseph Logan, was the former Adjutant General and is currently Chief of the Honolulu Police Department.

The establishment of the military government will, consequently, put a stop to this war crime and to the secondary war crimes it had set in motion. By your omission, in failing to prevent the commission of war crimes, you are accountable, as a commander, under the war crime by omission, which comprise two offenses under the Uniform Code of Military Justice: Article 92(1) for failure to obey […] regulation, and Article 92(3) for dereliction in the performances of duties. This conduct will result in the publication of War Criminal Report no. 24-0001 after 1200 hours on July 31, 2024, on the Royal Commission of Inquiry's ("RCI") website (https://hawaiiankingdom.org/royal-commission.shtml). As a matter of international law, the Council of Regency has a duty to protect the population from war crimes, which prompted the formation of the RCI on June 17, 2019. On this subject, I am attaching two recent law articles written by myself, as the Head of the RCI, and by Professor Federico Lenzerini, as the Deputy Head of the RCI, that was published by the *International Review of Contemporary Law* last month.

After the publication of the war criminal report, your Deputy Adjutant General, BG Logan, will assume the chain of command as the theater commander, because, as a war criminal, you would be unfit to continue to serve. BG Logan will then request Attorney General Lopez to provide him rebuttable evidence as to the Hawaiian Kingdom's continued existence as a State since the nineteenth century. In particular, she would need to refute the legal opinions, as to the continuity of the Hawaiian Kingdom under international law, I mentioned in my letter to you dated July 1, 2024, to wit:

> Professor Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 125-149 (2020).[11]
>
> Professor William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 151-169 (2020).[12]
>
> Professor Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples related to the United States Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 173-216 (2020).[13]

[11] Online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf.
[12] *Id*.
[13] *Id*.

Professor 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).[14]

Professor Federico Lenzerini, *Legal Opinion of Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (December 5, 2021).[15]

In the absence of evidence by the Attorney General refuting these legal opinions, BG Logan will have seven days, from the date of the publication of the war criminal report, to perform his duty of establishing a military government.

Should BG Logan fail to perform his duty, he will also be the subject of a war criminal report for the war crime by omission to be published on the RCI's website. This will result for the Commander of the 25th Infantry Brigade Combat Team, Colonel David R. Hatcher II, to assume the chain of command and request that the Attorney General provide him evidence refuting the mentioned legal opinions. In the absence of such evidence, Colonel Hatcher will have seven days, from the date of the publication of BG Logan's war criminal report, to perform his duty of establishing a military government. This process will continue down the chain of command until there is a soldier that understands what it is to be duty bound in order to perform his/her duty of establishing a military government.

To prevent this sequence of events, you are duty bound to determine whether Attorney General Lopez's instruction to you is a lawful order under military law. As I stated in my letter to you dated July 3, 2024, to determine that it is a lawful order, you should request she provide you evidence that the Hawaiian Kingdom no longer exists as an occupied State under international law. Just as you tasked your Staff Judge Advocate, LTC Phelps, you should demand that Attorney General Lopez provide you with evidence that rebut the presumption of State continuity of the Hawaiian Kingdom under international law. In the absence of such evidence, you must perform your duty to establish a military government.

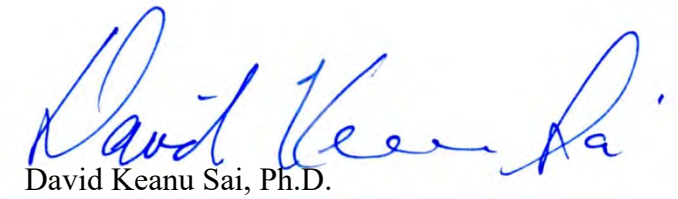
You should be aware that Attorney General Lopez does not possess the qualifications of an expert in international law matters as does Professor Matthew Craven from the University of London SOAS, Law Department; Professor William Schabas from Middlesex London University, Law Department; and Professor Federico Lenzerini from the University of Siena Department of Political and International Science, who authored legal opinions for the Council of Regency and the Royal Commission of Inquiry. Professor Lenzerini previously served as a professor of international law at the University of Siena

[14] Online at https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf.
[15] Online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf.

Law Department. All three are professors of international law. Should you rely on her unqualified opinion, you, and you alone, have created a crisis for the chain of command of the Army National Guard, and, possibly, the Air National Guard.

You should also be aware that the Attorney General is a subject of the RCI's War Criminal Report no. 23-0001 for the war crime of *usurpation of sovereignty during military occupation* that was published on March 29, 2023.[16] You are receiving instructions from a war criminal that is subject to prosecution by a competent court with subject matter jurisdiction. There are no statutory limitations for war crimes.

Your decision to delegate or to not delegate has profound ramifications for the Hawai'i National Guard that you lead as their Adjutant General. Commanders must make command decisions to protect the men and women under their command. As I stated, if Attorney General Lopez can provide you clear evidence that the Hawaiian Kingdom ceases to exists, then you have no miliary duty to perform. But if she is unable to provide you with evidence, except for an unqualified instruction, you, and you alone, will be derelict in your military duty and will be held accountable as a war criminal in the annals of Hawaiian history. These letters to you will serve as evidence of the war crime by omission. This is lawfare.



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[16] Online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf.

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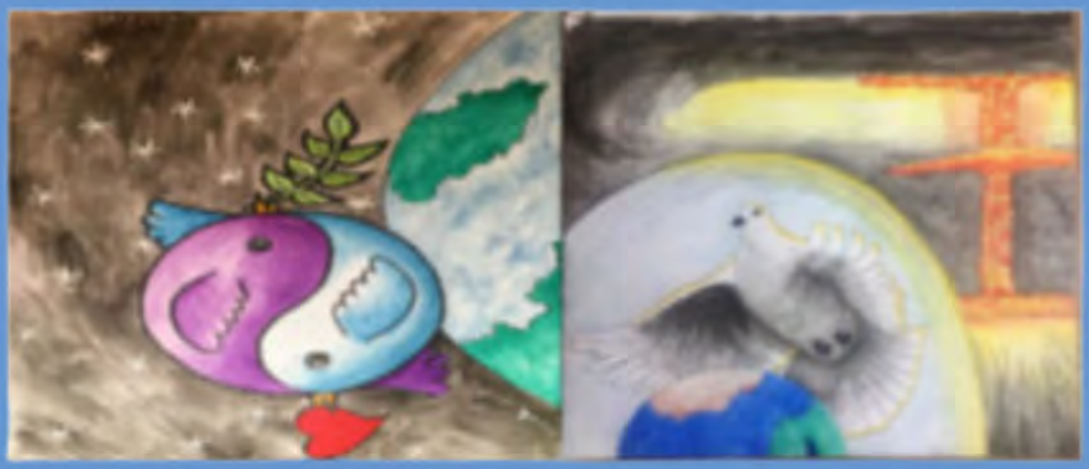

77ème anniversaire de la Charte des Nations Unies
77 Years of the United Nations Charter

Graphics by Marylia Cabane, Chitro Shihabuddin, the Movement for Palestine

Daniel Lagot Daniel Lagot après ses études à l'Ecole Polytech-nique, a fait une carrière scientifique au cours de laquelle il a présidé plusieurs grandes conférences scientifiques internationales. Depuis les années 2000, il s'est orienté vers les questions de la guerre et la paix et a publié ou dirigé la publication d'une dou-zaine de livres dans ce domaine.	**Non-agression et intangibilité des fron-tières : quel rôle pour l'ONU ? Les cas du Kosovo, de la guerre en Ukraine et de Taiwan** Après une discussion sur les trois principes énumérés par l'auteur (Non agression et intangibilité des frontières, le droit à l'autodétermination et la responsablité de protéger) et sur ce que pourrait ou devrait être le rôle de l'ONU, sont évoquées la manière dont les guerres se terminent et les solutions éventuelles pour le Kosovo, Taïwan et pour la paix en Ukraine, le jour où les parties seraient prêtes à négocier, dont la solution proposée par le présent auteur.
Dr. David Keanu Sai Dr. David Keanu Sai is a Lecturer in Political Science and Hawaiian Studies at the University of Hawai'i Windward Community College and at the University of Hawai'i at Mānoa College of Education grad-uate division. Dr. Sai received his Ph.D. in Political Sci-ence from the University of Hawai'i at Mānoa spe-cializing in International Relations and Law. His re-search and publications have centered on the con-tin-ued existence of the Hawaiian Kingdom as an inde-pendent State. Dr. Sai also served as Lead Agent for the Council of Regency repre-senting the Hawaiian Kingdom at the Permanent Court of Arbitration in Larsen v. Hawaiian Kingdom from 1999-2001.	**The Responsibility of the Hawaiian Kingdom to Protect its Popula-tion from War Crimes and Crimes Against Humanity** This article address the first pillar of the principle of Responsibility to Pro-tect: "every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing"and the legal stugule for its application in the the Hawaiian Kingdom.
Jean-Pierre PAGE Ancien responsable du Département international de la CGT. Derniers ouvrages parus : - "La Chine sans oeillères", 2021, Editions Delga . Ouvrage collectif, co-dirigé avec Maxime Vivas. - "Les divagations des antichinois en France, 2022, Editions Delga. Avec Aymeric Monville et Maxime Vivas. - "La Russie sans oeillères", 2022, Editions Delga. Ouvrage collectif, co-dirigé avec Aymeric Monville et Maxime Vivas.	**Les pays occidentaux aggravent leur déclin en suivant aveuglément Washington - La Charte des Na-tions Unies comme but et moyen de la coopération internationale** C'est une contribution de l'auteur lors d'un un forum international qui a réuni des délégations venant de 100 pays à Pékin Les 14 et 15 juin 2023 sur le thème "International cooperation and global human rights governance"

All States have a Responsibility to Protect their Population from War Crimes — Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands

David Keanu Sai

At the United Nations World Summit in 2005, the *Responsibility to Protect* was unanimously adopted.[1] The principle of the *Responsibility to Protect* has three pillars: (1) every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; (2) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; and (3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. In 2009, the General Assembly reaffirmed the three pillars of a State's responsibility to protect their populations from war crimes and crimes against humanity.[2] And in 2021, the General Assembly passed a resolution on "The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity."[3] The third pillar, which may call into action State intervention, can become controversial.[4]

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."[5] This "rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general."[6]

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by proclamation on 17 April 2019,[7] established a Royal Commission of Inquiry ("RCI") in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War "to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course." The author serves as Head of the RCI and Professor Federico Lenzerini from the University of Siena, Italy, as its Deputy Head. This article will address the first pillar of the principle of *Responsibility to Protect*.

On 22 March 2022, the International Association of Democratic Lawyers and the American Association of Jurists notified the United Nations Human Rights Council at its 49th session that war crimes and human rights violations are taking place in the Hawaiian Islands through the unlawful imposition of American laws over Hawaiian territory since 1898.[8] This imposition of American laws

1 2005 World Summit Outcome A/60/L.1

2 G.A. Resolution 63/308 The responsibility to protect, A/63/308.

3 G.A. Resolution 75/277 The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277.

4 Marjorie Cohn, "The Responsibility to Protect – the Cases of Libya and Ivory Coast," *Truthout* (16 May 2011) (online at https://truthout.org/articles/the-responsibility-to-protect-the-cases-of-libya-and-ivory-coast/).

5 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

6 *Id.*, 608.

7 Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

8 IADL, Video: Dr. Keanu Sai's oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom (online at https://

constitutes the war crime of *usurpation of sovereignty during military occupation* under particular customary international law, which has denied Hawaiian subjects their right to self-determination for over a century. The thought that Hawai'i, which is called the Hawaiian Kingdom, has been under a prolonged occupation by the United States for over a century would come as a shock to many who don't know Hawaiian history.

On 28 November 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.[9] The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.[10] By 1893, the Hawaiian Kingdom maintained over 90 Legations and Consulates throughout the world.

Driven by the desire to attain naval superiority in the Pacific, U.S. troops, without cause, invaded the Hawaiian Kingdom on 16 January 1893 and unlawfully overthrew its Hawaiian government and replaced it with their puppet the following day with the prospect of militarizing the islands. The State of Hawai'i today is the successor to this puppet government. However, despite the unlawful overthrow of its government, the Hawaiian Kingdom as a State would continue to exist as a subject of international law and come under the regime of international humanitarian law and the law of occupation. The military occupation is now at 130 years.

According to Professor Oppenheim, once recognition of a State is granted, it "is incapable of withdrawal"[11] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[12] And the "duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be 'derecognized.'"[13]

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to 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,"[14] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[15] 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.[16]

"If 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."[17] Evidence of

iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/).

9 David Keanu Sai, "Hawaiian Constitutional Governance," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

10 "Treaties with Foreign States," in David Keanu Sai, ed., The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom 237-310 (2020).

11 Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).

12 Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).

13 Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.

14 James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

15 *Id.*

16 Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

17 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).

"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. 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*[18] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[19]

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*.[20] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[21] 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*.[22] International law does not permit annexation of territory of another state.[23]

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 territorial sea from a three-mile limit to twelve.[24] 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."[25] As Justice Marshall stated, the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[26] 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."[27] 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."[28] 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 it being accomplished by the President's proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. 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."[29]

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 gov-

18 9 Stat. 922 (1848).
19 30 Stat. 1754 (1898).
20 30 Stat. 750 (1898).
21 *Black's Law Dictionary* 88 (6th ed. 1990).
22 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.
23 Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
24 Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
25 *Id.*, 242.
26 *Id.*, 242.
27 *Id.*
28 *Id.*, 262.
29 *The Apollon*, 22 U.S. 362, 370 (1824).

erned, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[30] Professor Willoughby also stated 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."[31]

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands and within three generations the national consciousness of the Hawaiian Kingdom was obliterated.[32] Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals and nationals of countries of the world, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in 1997.[33] Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili'uokalani who died on 11 November 1917.

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration ("PCA") in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.[34] Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes that brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that "according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, 'the legal existence of […] States [is] preserved from extinction,' since 'illegal occupation cannot of itself terminate statehood.'"[35]

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that "States can act only by and through their agents and representatives."[36] 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."[37]

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a "State" and a "Private entity" in its case repository.[38] Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai'i.

30 Kmiec, 252.
31 Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
32 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* 114 (2020).
33 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).
34 *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
35 Lenzerini, 322.
36 *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.
37 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).
38 Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).[39]

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on 9 June 2000.[40]

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili'uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States' recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,[41] was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili'uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise "with extra-legal changes in government" of an existing State.[42] 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, "Where a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed."[43]

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative policies of the Occupying State over the territory of the Occupied State. Usurpation "is the "unlawful encroachment or assumption of the use of property, power or authority which belongs to another."[44]

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Article 43 is the codification of customary international law that existed on 17 January 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate

39 *Id.*
40 Sai, *The Royal Commission of Inquiry*, 25-26.
41 U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).
42 M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* 26 (1997).
43 *Restatement (Third)*, §203, comment c.
44 Black's Law 1545.

at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[45]

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this "rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant."[46] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, "there do not appear to have been any prosecutions for that crime by international criminal tribunals."[47] However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the International Law Commission, "A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[48] In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission's position on the means of prosecuting Heads of State for the listed war crimes by conduct or omission.

The RCI views *usurpation of sovereignty during military occupation* as a war crime under particular customary international law and binding upon the Allied and Associated Powers of the First World War—United States of America, Great Britain, France, Italy and Japan, principal Allied Powers and Associated Powers that include Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Czech Republic, formerly known as Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, Honduras, Liberia, New Zealand, Nicaragua, Panama, Peru, Poland, Portugal, Romania, South Africa, Thailand, and Uruguay.

In the Hawaiian situation, *usurpation of sovereignty during military occupation* serves as a source for the commission of secondary war crimes within the territory of an occupied State, *i.e. compulsory enlistment*, *denationalization*, *pillage*, *destruction of property*, *deprivation of fair and regular trial*, *deporting civilians of the occupied territory*, and *transferring populations into an occupied territory*. The reasoning for the prohibition of imposing extraterritorial prescriptions or measures of the occupying State is addressed by Professor Eyal Benvenisti:

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

In the situation of Hawai'i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. This is an ongoing crime where the criminal act would consist of the imposition of legislation or administrative measures by the occupying power that goes beyond what is required necessary for military purposes of the occupation. Since 1898, when the United States Congress enacted an American municipal law purporting to have annexed the Hawaiian Islands, it began to impose its legislation and administrative measures to the present in violation of the

45 *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).
46 *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
47 William Schabas, "War Crimes Related to the 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* 156 (2020).
48 Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

laws of occupation.

Given that this is essentially a crime involving government action or policy or the action or policies of an occupying State's proxies such as the State of Hawai'i and its Counties, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act went beyond what was required for military purposes or the protection of fundamental human rights. *Usurpation of sovereignty during military occupation* has not only victimized the civilian population in the Hawaiian Islands for over a century, but it has also victimized the civilians of other countries that have visited the islands since 1898 who were unlawfully subjected to American municipal laws and administrative measures. These include State of Hawai'i sales tax on goods purchased in the islands but also taxes placed exclusively on tourists' accommodations collected by the State of Hawai'i and the Counties.

The Counties have recently added 3% surcharges to the State of Hawai'i's 10.25% transient accommodations tax. Added with the State of Hawai'i's general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American duties on goods that are imported to the United States destined to Hawai'i. These duty rates are collected by the United States according to the United States Tariff Act of 1930**,** as amended, and the Trade Agreements Act of 1979.

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.[49] Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian Kingdom*,[50] Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai'i at Mānoa when the author of this article entered the political science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications 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*,[51] to *Nation Within—The History of the American Occupation of Hawai'i*.[52] 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.[53]

49 Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).
50 David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001," 4 *Haw. J.L. Pol.* 133-161 (2022).
51 Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).
52 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.
53 *Id.*, xvi.

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and members of the judiciary of the State of Hawai'i dated 25 February 2018.[54] 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 state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[55] 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."[56]

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

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are "protected persons" who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai'i and its inhabitants.

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 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.[57] 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

54 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).

55 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).

56 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/).

57 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/).

the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[58] In its joint letter, the IADL and the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State."

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 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 includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under 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 would be called for."[59] Silence conveys consent. Since they "did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[60]

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai'i, which includes President Joseph Biden Jr., Governor David Ige, Hawai'i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua'i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and all of the named perpetrators have met the requisite element of *mens rea*.[61] In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. "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."[62]

Professor Schabas states three elements of the war crime of *usurpation of sovereignty during military occupation* are:

1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for mili-

58 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/).

59 Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).

60 See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

61 Website of the Royal Commission of Inquiry at https://hawaiiankingdom.org/royal-commission.shtml.

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

tary purposes of the occupation.
2. The perpetrators were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. The perpetrators were aware of factual circumstances that established the existence of the military occupation.

With respect to the last two elements of war crimes, Professor Schabas explains:

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;
3. There is only a requirement for the awareness of the factual circumstance that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."[63]

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators' own pleadings and the rulings by the court in a U.S. federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT. The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves "State action or policy or the action or policies of an occupying State's proxies" and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.[64]

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. Except for the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

In the situation where the citizens of these countries have become victims of the war crime of *usurpation of sovereignty during military occupation* and its secondary war crimes such as *pillage*, these citizens can seek extradition warrants in their national courts for their governments to prosecute these perpetrators under the passive personality jurisdiction and not universal jurisdiction. The passive personality jurisdiction provides countries with jurisdiction for crimes committed against their nationals while they were abroad in the Hawaiian Islands. This has the potential of opening the floodgate of criminal proceedings from all over the world.

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the United States, the State of Hawai'i and the Counties begin to comply with Article 43 of the 1907 Hague Regulations and administer the laws of the Occupied State—the Hawaiian Kingdom. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation being the longest occupation in the history of international relations.

63 Schabas, 167.

64 United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).

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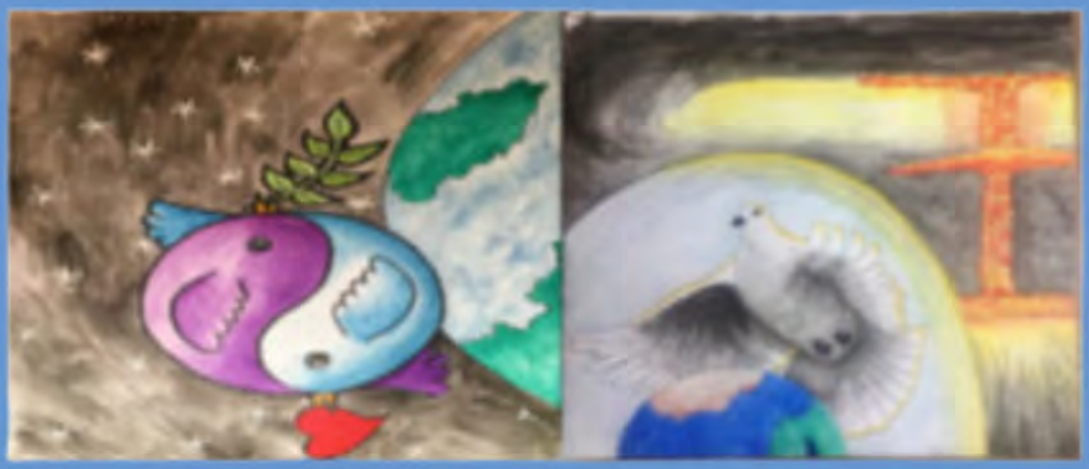

77ème anniversaire de la Charte des Nations Unies
77 Years of the United Nations Charter

Graphics by Marylia Cabane, Chitro Shihabuddin, the Movement for Palestine

Federico Lenzerini Professor of International Law and Human Rights, University of Siena (Italy). Professor at the LLM programme in Intercultural Human Rights, St. Thom-as University School of Law, Miami (FL), USA. Pro-fessor at the Tulane-Siena Summer School on Inter-national Law, Cultural Heritage and the Arts. Deputy Head of the Hawaiian Kingdom's Royal Commission of Inquiry.	**Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Supreme Imperative of Suppressing "Acts of Aggression or Other Breaches of the Peace" à la carte?** The author concludes that "Unfortunately, still today, abundantly inside the XXI Century, while the "cosmopolitan right" Kant referred to has actually developed, the goal of perpetual peace appears a chimera, especially due to the distorted use of the main pertinent rules at the service of States' imperialistic interests."
Juan Fernando Romero Tobon Candidat au doctorat (2019). Maîtrise en droit de l'Université nationale de Colombie (2013). Spécialiste en droit économique de l'Université catholique de Louvain en Belgique (1995). Juriste de l'Universidad de los Andes (1991) et anthropologue de l'Universidad Nacional de Colombia (1994). Auteur des livres Por los caminos de la excepcionalidad, La deriva de lo social y su respuesta autoritaria en Latinoamérica y Colombia (Grupo editorial Ibáñez 2020), El Derecho fundamental a la salud. Loi 1751 de 2015. (Grupo editorial Ibáñez 2019), Las acciones públicas de inconstitucionalidad en Colombia (1992-2013), 8030 días a bordo del Nautilus (Grupo editorial Ibáñez 2016) et Huelga y servicio público en Colombia. Historia de una Prohibición (Rodríguez Quito Editores, 1992) et les recueils de poésie En la caza (casa) de un eterno desconocido (2001), La mirada del cangrejo (2005) et los ojos de los árboles (2010-2021, ediciones lobo estepario) ainsi que la nouvelle El retorno del navegante Colón (ediciones lobo estepario, 2018). Il a publié les articles de recherche suivants Reflexiones e inflexiones en torno a la pandemia por la Covid 19 (2020), El péndulo del constitucionalismo social (2019), La construcción del enemigo interior, La regulación de los estados de excepción en el siglo XIX (2018), Del estado de sitio a la anormalidad permanente : los nuevos caminos de la excepcionalidad (2016), La puerta alterna de las acciones de inconstitucionalidad (2015), Las consti-tuciones de Bolivia y Colombia y las acciones de defensa (2015) et Constitucionalismo social en América Latina (2013) et dans les revues Pensamiento Jurídico, Trabajo y Derecho, Planeación y Desarrollo, Sindéresis, entre autres. Membre du groupe de recherche CC - Comparative Constitutionalism et responsable de la ligne de recherche numéro 6 Constitutional Justice.	**Homage à Nydia Tobon**
Géraud de Geouffre de la Pradelle	

Military Occupation, Sovereignty, and the ex injuria jus non oritur Principle. Complying with the Supreme Imperative of Suppressing "Acts of Aggression or Other Breaches of the Peace" à la carte?

Federico Lenzerini

1. Introduction. The Suppression of Acts of Aggression or Other Breaches of the Peace as Supreme Purpose of the UN Charter

Article 1, para. 1 of the UN Charter[1] identifies the paramount purpose of the United Nations in the commitment "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace". Unfortunately, it appears that, nearly 78 years after the adoption of the Charter, such a solemn commitment remains in a large part unrealized, as demonstrated, *inter alia*, by the armed aggression launched by Russia against Ukraine on 24 February 2022, which triggered a quasi-world war still ongoing at the moment of this writing (June 2023). The geopolitical stability paradoxically preserved by the Cold War collapsed after the fall of the Berlin wall, when the flames of a number of interstate and interethnic clashes – previously forcibly kept under control by the above (artificial) stability – suddenly revived. Since then, the world has been affected by several military conflicts, effectively addressed by the UN Security Council (SC) only in a very few cases, the SC being unable to properly react to them in most situations, especially when one of its permanent members is involved. Among other effects, such conflicts have also threatened the effectiveness and credibility of pertinent rules of international law, especially those concerning *jus ad bellum*, international humanitarian law and military occupation.

2. Military Occupation, Sovereignty and the ex-injuria jus non oritur Principle

According to Article 42 of the 1907 Hague Regulations,[2] "a territory is considered occupied when it is actually placed under the authority of the hostile army", the latter obtaining *effective control* of the occupied territory. Military occupation is a *factual* phenomenon, as it is not influenced by any considerations concerning whether or not the military action leading to the fact of the occupation could be considered lawful under international law.[3] It follows that the relevant rules governing military occupation are equally applicable irrespective of the lawfulness of the use of force in one particular circumstance. One of these rules – which is particularly pertinent to the present investigation – rests in the fact that, as codified by common Article 2(2) of the four Geneva Conventions of 1949,[4] the laws regulating military occupation apply even when the latter does not meet any armed resistance by the troops or the people of the occupied territory.[5] The decisive requirement is rather that the occupation is *hostile*, i.e. that it is not consented by the territorial State, while "[t]he lack of armed resistance of the territorial state cannot be interpreted as consent to the foreign armed forces' presence, nor can the fact that part of the local population welcomes the occupying forces".[6] Also, "[o]ccupying forces do not need to be present everywhere at all times to maintain the state of occupation. What matters is whether occupying forces can project their authority throughout the territory. For example, occupying forces may only

1 * Professor of International Law and Human Rights, University of Siena (Italy). Professor at the LLM programme in Intercultural Human Rights, St. Thomas University School of Law, Miami (FL), USA. Professor at the Tulane-Siena Summer School on International Law, Cultural Heritage and the Arts. Deputy Head of the Hawaiian Kingdom's Royal Commission of Inquiry.
Available at https://www.un.org/en/about-us/un-charter (accessed 11 January 2023).

2 See *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 1907, at https://ihl-databases.icrc.org/en/ihl-treaties/ hague-conv-iv-1907 (accessed 11 January 2023).

3 See Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", 885 *International Review of the Red Cross* 94 (2012) 133, at 135.

4 See https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016 (accessed 11 January 2023).

5 See Adam Roberts, "What is a Military Occupation?", (1984) 55 *British Year Book of International Law* 249.

6 See RULAC, "Military Occupation", 4 September 2017, at https://www.rulac.org/classification/military-occupations (accessed 11 January 2023).

be present in strategic positions from where they could be dispatched within a reasonable time frame".[7]

Last but not least, "[t]he foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty";[8] "[e]ven if [a] whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right of annexation".[9] This rule represents a declination of the *ex injuria jus non oritur* principle, literally meaning that law cannot arise from injustice, or, in other words, that illegal acts cannot be a source of legal rights. This principle gained relevance in the dialectics of international diplomacy on 7 January 1932, when a note sent to China and Japan by the US Secretary of State Henry Stimson gave rise to the so-called *Stimson doctrine*. The note read that the American government "cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between [China and Japan] which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial or administrative integrity of the Republic of China [...]".[10] In taking this position, the US government clarified that it would have not recognized any territorial changes determined through the use of force, advocating the illegality of acquisitions of territories following military occupation per se. The Stimson doctrine was "quickly adopted by the League of Nations as one of the cardinal principles for the solution of the Sino-Japanese dispute",[11] with a resolution adopted by the Assembly on 11 March 1932, affirming that "it is incumbent upon the members of the League of nations not to recognize any situation, treaty or agreement which may brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris".[12] More recently the *ex injuria jus non oritur* principle has been confirmed by the International Court of Justice (ICJ), excluding that "facts which flow from wrongful conduct [may] determine the law" and paying explicit tribute to the "principle *ex injuria jus non oritur*" itself.[13] In sum, "occupation cannot of itself terminate statehood",[14] and, in case of annexation based on occupation only, "the legal existence of [...] States [is] preserved from extinction".[15]

3. Kuwait, Crimea, and Ukraine. Examples of Recent Practice Concerning Military Occupation of Foreign Territories

Since the end of the XIX Century many situations of foreign military occupation have occurred in the world. Only a relatively small portion of them has been followed by the political annexation of the occupied territory by the occupying power. Of course, it is not the purpose of the present article to provide a systematic and comprehensive taxonomy of all such situations. However, it is certainly possible to refer to a few examples in the context of which the international community – including most States and the United Nations – have strongly condemned the annexation of foreign States or of part of their territories following military occupation as contrary to the basic principles of international law. In some cases, they have even reacted militarily in order to restore the pre-existing legality.

7 Ibid.

8 See Eyal Benvenisti, *The International Law of Occupation*, 2nd Ed., Oxford, 2012, at 6. See also Federico Lenzerini, "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom", (2021) 3 HAW. J.L. & POL. 317, at 320; Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", (1990) 84 *American Journal of International Law* 44, at 38; Conor McCarthy, "Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", (2005) 10 *Journal of Conflict and Security Law* 43, at 49-51; Oma Ben-Naftali, Aeyal M. Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Terrority", (2005) 23 *Berkeley Journal of International Law* 551, at 560; Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations", (2006) 51(3) *New York Law School Law Review* 497, *passim*; Nicholas F. Lancaster, "Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still Be Considered Customary International Law", (2006) 189 *Military Law Review* 51, at 63.

9 See Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100(3) *American Journal of International Law* 580, at 583.

10 See Quincy Wright, "The Stimson Note of January 7, 1932", 26 AJIL 1932 342.

11 See Kisaburo Yokota, "The Recent Development of the Stimson Doctrine", 8 *Pacific Affairs* (1935) 133, at 133.

12 See Quincy Wright, cit. n. 7, at 343.

13 See *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C. J. Reports 1997, p. 7, at 76, para. 133.

14 See Ian Brownlie, Principles of Public International Law, 7th Ed., Oxford, 2008, at 78.

15 See James Crawford, The Creation of States in International Law, 2nd Ed., Oxford, 2006, at 702.

One of the most known recent instances of military occupation followed by annexation of the occupied territory is represented by the case of Kuwait, invaded by Iraq in August 1990 and eventually annexed to the Iraqi territory as its 19th province shortly after the establishment by the then Iraqi leader Saddam Hussein of the puppet government defined as The Republic of Kuwait. The invasion of Kuwait by Iraq was strongly condemned by the majority of States. At the UN level, on 2 August 1990 the SC adopted Resolution 660 by 14 votes to none (with Yemen not participating in the vote), in which condemned the Iraqi invasion of Kuwait and demanded Iraq to "withdraw immediately and unconditionally all its forces" from the territory of the invaded country. A few days later, on 9 August, the SC adopted unanimously Resolution 662, deciding that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void", and calling upon all States, "international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation". As is well-known, after adopting several other resolutions requesting Iraq to put the invasion of Kuwait to an end, on 29 November 1990 the SC adopted Resolution 678 – by 12 votes to two (Cuba and Yemen), with the abstention of China – which authorized UN member States cooperating with Kuwait "to use all necessary means to uphold and implement resolution 660(1990) and all subsequent relevant resolution and to restore international peace and security in the area". This resolution represented the legal basis for the military action – known as "Gulf War" – waged by a coalition of 35 States, led by the United States, which began on 17 January 1991 and lasted until the liberation of Kuwait on 28 February 1991.[16]

Another example of interest for the present investigation is represented by the invasion and subsequent annexation of Crimea by the Russian Federation in February and March 2014. Following a referendum held on 16 March 2014 (resulting in a plebiscite for the integration in the Russian territory), the Russian Federation formally incorporated Crimea on 18 March. At the moment of this writing, the Russian Federation still retains effective control over the territory of Crimea, despite the fact that only a handful of States (namely Afghanistan, Belarus, Bolivia, Cuba, Nicaragua, North Korea, Sudan, Syria and Venezuela) have recognized or supported the annexation. Most other countries have condemned the annexation as a violation of international law and a threat to the territorial integrity of Ukraine, and, following the annexation, the Russian Federation was suspended from the G8. As far as the United Nations is concerned, on 15 March 2014 a draft resolution proposed by the United States declaring the commitment to preserve the sovereignty, independence, unity and territorial integrity of Ukraine – supported by 13 out of 15 members of the Council (with the abstention of China) – was vetoed by the Russian Federation.[17] However, on 27 March the General Assembly adopted Resolution 68/262, entitled "Territorial integrity of Ukraine", with 100 votes in favour, 11 against and 58 abstentions. Among other things, this resolution affirmed the commitment of the General Assembly "to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders".[18] The resolution also called "upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means".[19] It also underscored that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Re-

16 For a comprehensive assessment of the facts and legal implications concerning the invasion of Kuwait by Iraq and the subsequent actions by the United Nations see Mary Ellen O'Connell, "Enforcing the Prohibition on the Use of Force: The UN's Response to Iraq's Invasion of Kuwait", (1991) 15 Southern Illinois University Law Journal 453. See also Christopher Greenwood, "Iraq's Invasion of Kuwait: Some Legal Issues", (1991) 47 *The World Today* 39; Christopher Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law", (1992) 55 *The Modern Law Review* 153; Stanley J. Glod, "International Claims Arising from Iraq's Invasion of Kuwait" (1991) 25(3) *International Lawyer* (ABA) 713; Christopher J. Sabec, "The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait", (1991) 21 *Georgia Journal of International and Comparative Law* 63; Colin Warbrick, "The Invasion of Kuwait by Iraq", (1991) 40 *International and Comparative Law Quarterly* 482; Colin Warbrick "The Invasion of Kuwait by Iraq: Part II", 1991) 40 *International and Comparative Law Quarterly* 965.

17 See Somini Sengupta, "Russia Vetoes U.N. Resolution on Crimea", The New York Times, 15 March 2014, at https://www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html (accessed 12 January 2023).

18 See para. 1

19 See para. 2.

public of Crimea or of the city of Sevastopol".[20] It finally called "upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status".[21]

Since 2014, and before the beginning of the armed conflict between Russian Federation and Ukraine on 24 February 2022, the General Assembly has repeatedly reiterated "that the temporary occupation of Crimea and the threat or use of force against the territorial integrity or political independence of Ukraine by the Russian Federation is in contravention" of international law,[22] and that "the seizure of Crimea by force is illegal and a violation of international law [...] [implying that] those territories must be immediately returned" to Ukraine.[23] It has consequently urged the Russian Federation, "as the occupying Power", *inter alia*, "immediately, completely and unconditionally to withdraw its military forces from Crimea and end its temporary occupation of the territory of Ukraine without delay".[24]

The third example that we intend to describe is very well known at the time of this writing. On 24 February 2022, the Russian Federation launched an armed aggression against Ukraine, followed by the invasion of some Ukrainian territories in the southern and south-eastern fronts of the conflict. The intervention was justified by Russian President Putin and by the Permanent Representative of the Russian Federation to the United Nations, respectively, as a "special operation" aimed at reacting to the situation of "horror and genocide, which almost 4 million people [were] facing" in the area of Donbass,[25] and as having the purpose "to protect people who ha[d] been subjected to abuse and genocide by the Kyiv regime for eight years".[26] However, the ICJ held that, even in the event that the Russian Federation's assertion that Ukraine has committed or is committing genocide in the Luhansk and Donetsk regions of Ukraine would be true,[27] "[t]he acts undertaken by the Contracting Parties 'to prevent and to punish' genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter".[28]

Consequently, "it is doubtful that the [1948 Genocide] Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide".[29] It follows, according to the ICJ, that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".[30] Obviously the Court formally used a not conclusive language, for the reason that an order cannot prejudice "any questions relating [...] to the merits" of the case,[31] but the position of the ICJ on the legitimacy of the Russian armed intervention in Ukraine appears very explicit.[32] On 25 February 2022 a Draft resolution by the SC was blocked by the Russian Federation's veto, while China, India and the United Arab Emirates abstained. The Draft, among other things, deplored "in the strongest terms the Russian

20 See para. 5.
21 See para. 6.
22 See, e.g., Resolution 76/70 of 9 December 2021, "Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov", tenth recital of the preamble.
23 Ibid., 14th recital of the preamble.
24 Ibid., para. 1. Generally on the Crimean case see Ferdinand Feldbrugge, "Ukraine, Russia and International Law" (2014) 39(1) Review of Central and East European Law 95. Generally on the annexation of Crimea by the Russian Federation see Trevor McDougal, "A New Imperialism? Evaluating Russia's Acquisition of Crimea in the Context of National and International Law", (2016) 2015 Brigham Young University Law Review 1847.
25 See ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, at https://www.icj-cij.org/public/ files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed 16 January 2023), para. 38.
26 Ibid., para. 40.
27 In this regard the Court stated that "[a]t the present stage of these proceedings, the Court is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case", as well as that "the acts complained of by the Applicant appear to be capable of falling within the provisions of the [1948] Genocide Convention"; see ibid., paras. 43 and 45.
28 Ibid., para. 58.
29 Ibid., para. 59.
30 Ibid., para. 60.
31 Ibid., para. 85.
32 For more details about the controversy between Russia and Ukraine before the ICJ see Prabhash Ranjan and Achyuth Anil, "Russia-Ukraine War, ICJ,

Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter",[33] and decided "that the Russian Federation shall immediately cease its use of force against Ukraine and shall refrain from any further unlawful threat or use of force against any UN member state".[34] On 2 March 2022 the UN General Assembly – in Resolution ES-11/1 – condemned "the 24 February 2022 declaration by the Russian Federation of a 'special military operation' in Ukraine" and reaffirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal". On 30 September 2022, following four referenda organized and managed by the Russian occupation authorities (all resulting in an almost absolute support for the integration in the Russian territory), the Russian Federation unilaterally declared the annexation of territories of four Ukrainian regions, namely Donetsk, Kherson, Luhansk and Zaporizhzhia. On the same day, the United States and Albania submitted a draft resolution to the SC, defining the annexation as a threat to international peace and security, considering the referenda held in the four Ukrainian regions as illegal and requesting Russian Federation to immediately and unconditionally withdraw its decision. The resolution was supported by ten members of the SC, with Brazil, China, Gabon and India abstaining, but was again vetoed by the Russian Federation.[35] On 12 October 2022, the GA adopted Resolution ES-11/4, with a majority of 143 votes in favour, 35 abstentions, and only five votes against (Belarus, Democratic People's Republic of Korea, Nicaragua, Russian Federation and Syria). This resolution noted that "the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine are areas that, in part, are or have been under the temporary military control of the Russian Federation, as a result of aggression, in violation of the sovereignty, political independence and territorial integrity of Ukraine",[36] declared that the referenda held in the above regions, "and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine",[37] and demanded that

the Russian Federation immediately and unconditionally reverse its decisions of 21 February and 29 September 2022 related to the status of certain areas of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine, as they are a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations, and immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.[38]

Also, on 16 February 2023, the GA adopted Resolution ES-11/L.7, which reaffirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal"[39] and reiterated its demand that "the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders, [also calling] for a cessation of hostilities".[40]

Generally speaking, both the armed attack as well as the occupation and annexation of the aforementioned Ukrainian territories by the Russian Federation have strongly and almost universally been condemned by the international community.[41] Immediately after the beginning of the aggression the Russian Federation became the object of economic sanctions applied by the European Union as well as by a long list of Western and other countries, which also granted military, logistic, economic and humanitarian aid in favour of Ukraine. Such sanc-

and the Genocide Convention", (2022) 9 *Indonesian Journal of International & Comparative Law* 101.

33 See Draft resolution S/2022/155, 25 February 2022, at https://documents-dds-ny.un.org/doc/UNDOC/ GEN/N22/271/07/PDF/N2227107.pdf?OpenElement (accessed 16 January 2023), para. 2.

34 Ibid., para. 3.

35 See "Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions", UN News, 30 September 2022, at https://news.un.org/en/story/2022/09/1129102 (accessed 16 January 2023).

36 See the fourth recital of the preamble.

37 Ibid., para. 3.

38 Ibid., para. 5.

39 See the third recital of the preamble.

40 See para. 5.

41 Generally on the Russian-Ukrainian war see Sofia Cavandoli, Gary Wilson, "Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine", (2022) 69 *Netherlands International Law Review* 383; Fengcheng Xiao, Keran Zhao, "Aggression and Determination: Two Basic issues of International Law in the Russia-Ukraine Conflict", (2022) 13 *Beijing Law Review* 278; Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law", Torkel Opsahl Academic EPublisher, Brussels, 2022, Occasional Paper Series No. 13.

tions and aid continue to be applied/granted at the time of this writing. On 16 March 2022, the Committee of Ministers of the Council of Europe expelled the Russian Federation from the Organization.[42] At the time of this writing, North Korea is the only member of the United Nations which has recognized the Russian annexation of the four occupied Ukrainian regions,[43] while most governments (in addition to international organizations) have defined the referenda held in such regions "sham" and have considered the annexation illegal.

The examples described in this section irrefutably show that military occupation of a foreign country or of part of its territory is unconditionally condemned by the international community as an intolerable violation of international law.

The Case of the Hawaiian Kingdom

On 16 January 1893, US marines entered into the territory of the Hawaiian Kingdom and, together with about 1,500 armed non-Hawaiian mercenaries, occupied the Hawaiian territory and overthrew the Kingdom's monarchy. On the following day, Queen Lili'uokalani, as the executive monarch of a constitutional government, conditionally surrendered her authority to the United States "to avoid any collision of armed forces and perhaps the loss of life".[44] In December 1893, after receiving the report by the Special Commissioner that he had appointed to investigate the incident, US President Grover Cleveland recognized that "[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair".[45] Subsequently, in his 1893 State of the Union Address to the Congress, President Cleveland emphasized that "the only honorable course for our Government to pursue was to undo the wrong that had been done" to the Hawaiian Kingdom "and to restore as far as practicable the status existing at the time of our forcible intervention".[46] On the same day, an Executive Agreement was concluded by exchange of notes with Queen Lili'uokalani, in which President Cleveland took the commitment of restoring the Queen as the constitutional sovereign of Hawai'i, while the Queen accepted – after some initial hesitation – to grant a full pardon to the insurgents. The implementation of the agreement, however, was blocked by the Congress. In 1898, Cleveland's successor, William McKinley, signed the Newlands Resolution, proclaiming the annexation of Hawai'i as a territory of the United States and abrogating all international treaties previously in force between the two countries. Following the annexation, the Hawaiian Islands were named "Territory of Hawai'i" in 1900, and in 1959 became the 50th State of the US under the heading of "State of Hawai'i". on 23 November 1993, President Bill Clinton signed an official Apology Resolution passed by the Congress, in which the latter acknowledged, "on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893 [...] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people".[47] It also apologized "to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination",[48] and expressed "its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people".[49]

42 See "The Russian Federation is excluded from the Council of Europe", Council of Europe Newsroom, 16 March 2022, at https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (accessed 16 January 2023).

43 See Hayonhee Shin, "N. Korea backs Russia's proclaimed annexations, criticises U.S. 'double standards'", Reuters, 4 October 2022, at https://www.reuters.com/world/asia-pacific/nkorea-backs-russias-proclaimed-annexations-criticises-us-double-standards-2022-10-03/ (accessed 16 January 2023).

44 See Queen Lili'uokalani, Statement to James H. Blount, 1893, at https://libweb.hawaii.edu//digicoll/ annexation/protest/pdfs/liliu1.pdf (accessed 25 January 2023).

45 See "December 18, 1893: Message Regarding Hawaiian Annexation", at https://millercenter.org/the-presidency/presidential-speeches/december-18-1893-message-regarding-hawaiian-annexation (accessed 25 January 2023).

46 See President Grover Cleveland, "State of the Union 1893", 4 December 1893, at http:// www.let.rug.nl/usa/presidents/grover-cleveland/state-of-the-union-1893.php (accessed 25 January 2023).

47 See 107 STAT. 1510 PUBLIC LAW 103-150—NOV. 23, 1993, Public Law 103-150, 103d Congress, at https:// www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg1510.pdf (accessed 25 January 2023), para. 1.

48 Ibid., para. 3.

49 49 Ibid., para. 5. For more comprehensive assessments of the US occupation of Hawai'i see Noelani Goodyear-Ka'opua, "Hawaii. An Occupied Coun-

As a *factual* situation, the occupation of Hawai'i by the US does not substantially differ from the examples provided in the previous section. Since the end of the XIX Century, however, almost no significant positions have been taken by the international community and its members against the illegality of the American annexation of the Hawaiian territory. Certainly, the level of military force used in order to overthrow the Hawaiian Kingdom was not even comparable to that employed in Kuwait, Donbass or even in Crimea. In terms of the illegality of the occupation, however, this circumstance is irrelevant, because, as seen in section 2 above, the rules of international humanitarian law regulating military occupation apply even when the latter does not meet any armed resistance by the troops or the people of the occupied territory. The only significant difference between the case of Hawai'i and the other examples described in this article rests in the circumstance that the former occurred well before the establishment of the United Nations, and the resulting acquisition of sovereignty by the US over the Hawaiian territory was already consolidated at the time of their establishment. Is this circumstance sufficient to uphold the position according to which the occupation of Hawai'i should be treated differently from the other cases? An attempt to provide an answer to this question will be carried out in the next section, through examining the possible arguments which may be used to either support or refute such a position.

4. Applicable Law. Intertemporal Law and (Lack of) Legal Coherence. Irrelevance of the Temporal Argument and Exclusive Role of the Treaty in the Transfer of Sovereignty

The main argument that could be used to deny the illegality of the US occupation of Hawai'i rests in the doctrine of *intertemporal law*. According to this doctrine, the legality of a situation "must be appraised [...] in the light of the rules of international law as they existed at that time, and not as they exist today".[50] In other words, a State can be considered responsible of a violation of international law – implying the determination of the consequent "secondary" obligation for that State to restore legality – only if its behaviour was prohibited by rules already in force at the time when it was held. In the event that one should ascertain that at the time of the occupation of Hawai'i by the US international law did not yet prohibit the annexation of a foreign territory as a consequence of the occupation itself, the logical conclusion, in principle, would be that the legality of the annexation of Hawai'i by the United States cannot reasonably be challenged. In reality even this conclusion could probably be disputed through using the argument of "continuing violations", by virtue of the violations of international law which continue to be produced today as a consequence of the American occupation and of its perpetuation.[51] In fact, it is a general principle of international law on State responsibility that "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". [52]

However, it appears that there is no need to rely on this argument, for the reason that also an intertemporal-law-based perspective confirms the illegality – under international law - of the annexation of the Hawaiian Islands by the US. In fact, as regards in particular the topic of military occupation, the affirmation of the *ex injuria jus non oritur* rule predated the Stimson doctrine, because it was already consolidated as a principle of general international law since the XVIII Century. In fact, "[i]n the course of the nineteenth century, the concept

try", (2014) *Harvard International Review* 58; Karin Louise Hermes, "Making a nation and faking a state: illegal annexation and sovereignty miseducation in Hawai'i", (2016) 46 *Pacific Geographies* 11; David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020) 97; Andrew B. Reid, "Perpetual War in Paradise: Illegal Occupation, Humanitarian Law, and Liberation of the Hawaiian Kingdom", (2021) 78 *National Lawyers Guild Review* 6.

50 See Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", (1953) 30 *British Year Book of International Law* 1, at 5. On the doctrine of intertemporal law see Taslim Olawale Elias, "The Doctrine of Intertemporal Law", (1980) 74 *American Journal of International Law* 285; Ulf Linderfalk, "The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law", (2011) LVIII *Netherlands International Law Review* 147; Li Zhenni, "International Intertemporal Law", (2018) 48 *California Western International Law Journal* 341; Steven Wheatley, "Revisiting the Doctrine of Intertemporal Law", (2021) 41 *Oxford Journal of Legal Studies* 484.

51 With regard to the issue of continuing violations in the Hawaiian territory, related in particular to human rights and the principle of self-determination of peoples, see Federico Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020) 173, at 185-92.

52 See Article 14(2) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001, at https://legal.un.org/ilc/texts/instruments/english/draft_articles/ 9_6_2001.pdf (accessed 25 January 2023).

of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied territory, the fate of which could be determined only by a peace treaty";[53] in other words, "the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory".[54] Consistently, "[l]es États qui se font la guerre rompent entre eux les liens formés par le droit des gens en temps de paix; mais il ne dépend pas d'eux d'anéantir les faits sur lesquels repose ce droit des gens. Ils ne peuvent détruire ni la souveraineté des États, ni leur indépendance, ni la dépendance mutuelle des nations".[55] This was already confirmed by domestic and international practice contemporary to the occupation of the Hawaiian Kingdom by the United States. For instance, in 1915, in a judgment concerning the case of a person who was arrested in a part of Russian Poland occupied by Germany and deported to the German territory without the consent of Russian authorities, the Supreme Court of Germany held that an occupied enemy territory remained enemy and did not become national territory of the occupant as a result of the occupation.[56]

Also, in 1925, the Swiss arbitrator Eugène Borel, in the famous *Affaire de la Dette publique ottomane*, held that

> "[q]uels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté [...] L'occupation, par l'un des belligérants, de [...] territoire de l'autre belligérant est un pur fait. C'est un état de choses essentiellement provisoire, qui ne substitue pas légalement l'autorité du belligérant envahisseur à celle du belligérant envahi".[57]

In the context of international diplomatic practice, already in 1815

> "the Congress of Vienna endorsed the principle of legitimacy of the original (indigenous) sovereign over a territory. On the basis of this principle, the original sovereigns of most of the nations conquered by Napoleon were regarded as having retained their sovereignty, despite having been conquered by the Napoleonic armies [...] sovereignty remained with the original holder of the territory, who was regarded as the 'legitimate sovereign'. The conqueror of the territory [...] was illegitimate and therefore could not acquire *de jure* sovereignty"[58].

This principle was eventually codified in Article 42 of the 1907 Hague Regulations.[59] It follows that, already at the time of the American occupation of the Hawaiian Kingdom, military occupation was considered as "not affect[ing] sovereignty. The displaced sovereign loses possession of the occupied territory *de facto* but it retains title *de jure* [i.e. "as a matter of law"]".[60] Consistently, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[61] because "illegal occupation cannot of itself terminate statehood".[62] The fact that the occupation of the Hawaiian Kingdom has continued uninterrupted for a long time does in no way impact on this conclusion, since "[p]rolongation of the occupation does not affect its innately temporary nature".[63] As a consequence, for how precarious it may be, "the sovereignty of the displaced sovereign over the oc-

53 See Andrea Carcano, *The Transformation of Occupied Territory in International Law* (Brill, The Hague, 2015) at 18-19.

54 See Nehal Bhuta, "The Antinomies of Transformative Occupation", (2005) 16 *European Journal of International Law* 721, at 726; see also Matthew Craven, "The tyranny of strangers: transformative occupations old and new", (2021) 9 *London Review of International Law* 197, at 201-2, writing that "[b]y the early 19th century [...] the idea had started to emerge [...] that mere military occupation would not, in itself, result in a transfer of sovereignty. Rather, it constituted a provisional regime of factual occupation that left untouched the question of sovereignty and, as a consequence, brought with it certain constraints upon the authority of the occupant".

55 Théophile Funck-Brentano and Albert Sorel, *Précis du droit des gens* (Plon, Paris, 1877) at 233.

56 See *Judgment IV, 407/15*, Supreme Court of Germany in Criminal Cases, 26 July 1915, in 21 *Deutsche Juristenzeitung* 134 (1916).

57 See *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, *Reports of International Arbitral Awards*, Volume I, 529, also available at <https://legal.un.org/riaa/cases/vol_I/529-614.pdf> (accessed 30 January 2023), at 555.

58 See Carcano, cit., at 20-21 (footnotes omitted).

59 See section 2 above.

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

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

62 See Brownlie, cit., at 78.

63 See Dinstein, cit., at 58.

cupied territory is not terminated".[64]

In light of the foregoing, it appears that the theories according to which the *effective* and *consolidated* occupation of a territory would determine the acquisition of sovereignty by the occupying power over that territory – although supported by eminent scholars[65] – must be confuted. Consequently, under international law, "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur",[66] which means that "[t]he only form in which a cession [of a territory] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war".[67] This conclusion had been confirmed, among others, by the US Supreme Court Justice John Marshall in 1928, holding that the fate of a territory subjected to military occupation had to be "determined at the treaty of peace".[68]

The validity of the conclusion just reached is also confirmed under the perspective of the right of peoples to self-determination. As is well known, it is a prerogative which – in its *external* dimension – entitles a people under colonization or foreign occupation to exercise a right to independence, or secession, from the State by which it is *de facto* occupied or subjugated. In principle, it appears evident that the Hawaiian people – it being a people subjected to foreign occupation – is entitled to benefit from such a right. However, also in this case an issue of *intertemporality* arises. In fact, according to a reputable scholarly position, the right of peoples to self-determination could not be applied retroactively, i.e. to situations of foreign domination produced before the consolidation of the right in point as a rule of positive international law. In practical terms this would mean that the right of peoples to self-determination would be applicable only to instances of foreign dominations established before World War II,[69] with the consequence that for all such instances the acquisition of sovereignty by the occupying power should be considered as crystallized and legally incontrovertible. With all due respect, this position is not agreeable, for the reason that, while it is indubitable that the right of peoples to self-determination developed as a rule of general international law after World War II,[70] in the context of relevant practice it has been mainly applied (retroactively) to support the acquisition of political independence by peoples subjected to colonization, hence to situations of foreign domination produced *long before* World War II. In this respect, since the right of peoples to self-determination equally applies to situations of colonization and of subjugation determined by military occupation, there is clearly no reason why the situation of the Hawaiian people should be considered as differing from that of colonized peoples. It is also noteworthy that the ICJ has recently held that the right to self-determination of peoples, where it has not been properly exercised and the current political situation of a territory does not reflect "the free and genuine expression of the will of the people concerned",[71] cannot be considered as having been extinguished with the passing of time. In fact, the circumstance of preventing a people from exercising its right to self-determination over time "is an unlawful act of a continuing character"[72] resulting from the fact of maintaining the situation of foreign domination.

5. Conclusion. Applying International Law on the Use of Force à la carte?

In 1795 – in his masterpiece *Perpetual Peace* – Immanuel Kant wrote that "[t]he intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world

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

65 See, e.g., Benendetto Conforti, *Diritto internazionale* (Editoriale Scientifica, Napoli, 2018), at 209.

66 See *Affaire de la Dette publique ottomane*, cit., at 555.

67 See Lassa FL Oppenheim, *Oppenheim's International Law*, 7th Ed., vol. 1, 1948, at 500. See also Emmerich de Vattel, *The Law of Nations* (English edn., 1849), Bk. III, chap. XIII, para. 197; Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* – Part IXA, The Laws of War (1978) 151; Jonathan Gumz, "International law and the transformation of war, 1899-1949: the case of military occupation", (2018) 90 *Journal of Modern History* 621, at 627.

68 See *American Insurance Company v. Peters*, US Supreme Court, 1828, 1 *Peters* 542.

69 See Conforti, cit., at 27.

70 See Lenzerini, "International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom", cit., at 209-10.

71 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (25 February 2019), at https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf (accessed 30 January 2023), para. 172.

72 Ibid., para. 177.

is felt all over it. Hence the idea of a cosmopolitan right is no fantastical, high-flown notion of right, but a complement of the unwritten code of law— constitutional as well as international law—necessary for the public rights of mankind in general and thus for the realisation of perpetual peace".[73] Unfortunately, still today, abundantly inside the XXI Century, while the "cosmopolitan right" Kant referred to has actually developed, the goal of perpetual peace appears a chimera, especially due to the distorted use of the main pertinent rules at the service of States' imperialistic interests. Even with regard to the supreme imperative of preventing and suppressing acts of aggression or other breaches of the peace, it clearly appears that States behave like they were seated at a restaurant, deciding à la carte which violations are justified on the basis of a valid excuse (their own) and which must be absolutely suppressed in the interest of the whole international community (those committed by others), (only) the latter being considered as representing an intolerable offence for humanity. Unfortunately, in fact, the same States which raise their voices highest when a breach occurs, have more than one spot on their sheets. While the human gender has immensely evolved in terms of technology and scientific knowledge, international law – i.e., the law regulating the relations among the main actors of the international community – remains still today at a primitive stage, being too much exposed to power games. This results in huge injustices and legal vacuousness, which frustrate the path of humanity towards the most important aspect of evolution to which it should aspire, i.e., justice, peace, mutual confidence and friendship among the peoples living in the world.

73 See *Perpetual Peace. A Philosophical Essay* (London 1795), eBook version available at https:// www.gutenberg.org/files/50922/50922-h/50922-h.htm (accessed 26 March 2023).

Enclosure “12”

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July 26, 2024

Major General Kenneth Hara
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Via electronic mail

Re: Your failure to perform your duty will have a cascading effect for the Hawai‘i Army National Guard and its component commands of the 29th Infantry Brigade, the 103rd Troop Command, and the 298th Regiment, Regional Training Institute

Major General Hara:

As July 31st is fast approaching, the chain of command of the Hawai‘i Army National Guard and its component commands of the 29th Infantry Brigade, the 103rd Troop Command, and the 298th Regiment, Regional Training Institute, will be drawn into criminal culpability for war crimes if you do not delegate complete authority to Brigadier General Stephen Logan to establish a military government by 12 noon on July 31, 2024.

After United States troops invaded and unlawfully overthrew the government of the Hawaiian Kingdom on January 17, 1893, international law required that the most senior military commander take control of the civilian government, that was overthrown, in order to continue to administer Hawaiian Kingdom law until there is a treaty of peace. The United States violated this rule of international law when they allowed an insurgency, they created, to unlawfully govern. In 1898, the United States began to impose American laws throughout the Hawaiian Kingdom, which is the war crime of usurpation of sovereignty.

This illegal occupation has led to the establishment of 118 military sites throughout the Hawaiian Islands.

As you are aware, the current practice of the United States military imposes the responsibility on the Army to establish a military government to preside over occupied territory. Not the Navy, Marines, or Air Force. U.S. Department of Defense Directive 5100.1 states it is the function of the Army in "[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority." And U.S. Department of Directive 2000.13 states the Army's "Civil affairs operations include…[e]stablish[ing] and conduct[ing] military government until civilian authority or government can be restored."

At the start of the twentieth century, the U.S. Army took steps to prepare for military occupations by publishing field manuals—FM 27-10, *The Law of Land Warfare*, FM 27-5, *Civil Affairs Military Government*, FM 3-57, *Civil Affairs Operations*, and FM 6-27, *The Commander's Handbook on the Law of Land Warfare*. According to Article 42 of the 1907 Hague Regulations, territory is considered occupied when it is in effective control by the occupant, which triggers Article 43 to establish a military government to administer the laws of the occupied State.

Between the U.S. Federal government and the State of Hawai‘i, the latter is in effective control of 10,931 square miles, while the former is in effective control of less than 500 square miles. Thus, the duty to establish a military government is with the State of Hawai‘i Army National Guard and not with the U.S. Army Pacific under Indo-Pacific Combatant Command. This means that you are the theater commander under Army doctrine.

Paragraph 3, FM 27-5, states the "theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor […], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority."

In other words, the highest-ranking officer, in the theater of occupied territory, is duty bound to transform the civilian government of the occupied State into a military government. This government would be presided over by the Army theater commander who is called a "military governor." Since the military governor "has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority," the civilian government of the occupied State remains intact, except for the legislative branch.

Despite your announcement that you are retiring on October 1, 2024, you, as the theater commander, are obligated to begin the transformation of the State of Hawai‘i into a military government to administer Hawaiian Kingdom laws. The State of Hawai‘i’s governmental infrastructure is the civilian government of the Hawaiian Kingdom. What occurred since 1893 was a renaming of the civilian government from the Hawaiian Kingdom to the provisional government in 1893, the Republic of Hawai‘i in 1894, the Territory of Hawai‘i in 1900, and the State of Hawai‘i in 1959.

If you are derelict in the performance of your duties, by not delegating authority to BG Logan, then you would be the subject of a war criminal report by the Royal Commission of Inquiry (RCI) for the war crime by omission. From the date of the publication of your war criminal report on the RCI’s website, BG Logan will have one week to transform the State of Hawai‘i into a military government.

If BG Logan is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of BG Logan’s war criminal report on the RCI’s website, Colonel David Hatcher II, Commander of the 29th Infantry Brigade, who is next in the chain of command below BG Logan, will have one week to transform the State of Hawai‘i into a military government.

The chain of command, or what is called the order of battle, for the 29th Infantry Brigade for units in the Hawaiian Islands, is first, the 1st Squadron, 299th Cavalry Regiment, second, the 1st Battalion, 487th Field Artillery Regiment, third, the 29th Brigade Support Battalion, and fourth, the 227th Brigade Engineer Battalion. The 29th Infantry Brigade has units stationed in Alaska and Guam but since they are outside the Hawaiian territory, they do not have the military duty, as an occupant, to establish a military government in the Hawaiian Islands.

If Colonel Hatcher is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of Colonel Hatcher’s war criminal report on the RCI’s website, Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.

If LTC Werner is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Werner’s war criminal report on the RCI’s website, Lieutenant Colonel Bingham L. Tuisamatatele, Jr., Commander of 1st

Battalion, 487th Field Artillery Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.

If LTC Tuisamatatele is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Tuisamatatele's war criminal report on the RCI's website, Lieutenant Colonel Joshua A. Jacobs, Commander of 29th Brigade Support Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.

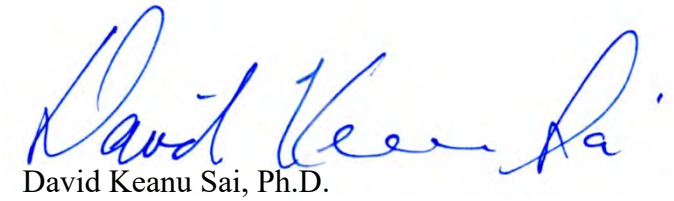
If LTC Jacobs is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Jacobs's war criminal report on the RCI's website, Lieutenant Colonel Dale R. Balsis, Commander of 227th Brigade Engineer Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai‘i into a military government.

Should LTC Balsis be derelict in the performance of his duties to establish a military government and be the subject of a war criminal report for the war crime by omission, that will be published on the RCI's website, the sequence of events will then loop to the Executive Officers. First, with the 29th Infantry Brigade, second, with the 1st Squadron, 299th Cavalry Regiment, third, with the 1st Battalion, 487th Field Artillery Regiment, fourth with the 29th Brigade Support Battalion, and fifth with the 227th Brigade Engineer Battalion.

This looping, within the 29th Infantry Brigade's component commands, will cover all commissioned officers to include Majors, Captains, First Lieutenants and Second Lieutenants. After the commissioned officers have been exhausted in the 29th Infantry Brigade, the chain of command of commissioned officers of the 103rd Troop Command and its component commands will begin, followed by the chain of command of commissioned officers of the 298th Regiment, Regional Training Institute, and its component commands.

This sequence of events will continue by rank down the chain of command of the entire Hawai‘i Army National Guard until there is someone who sees the "writing on the wall" that he/she either performs their military duty or becomes a war criminal subject to prosecution.

As I stated to you before, to prevent all this from occurring, you must provide evidence that the Hawaiian Kingdom no longer exists as an occupied State under international law. To ignore this will have dire consequences for the Hawai‘i Army National Guard.



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

cc: Brigadier General Stephen F. Logan, Deputy Adjutant General
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Enclosure “13”

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August 5, 2024

Brigadier General Stephen F. Logan
State of Hawai'i Deputy Adjutant General
Department of Defense
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Email: stephen.f.logan3.mil@army.mil

Via electronic mail

Re: Your duty to establish a military government by 12 noon on August 12, 2024

Brigadier General Logan:

Today, August 5, 2024, the Royal Commission of Inquiry ("RCI") published its War Criminal Report no. 24-0001 finding Major General Hara guilty of the war crime by omission.[1] Since acknowledging the Hawaiian Kingdom's continued existence as a State on July 27, 2023, MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. MG Hara, in his official capacity as the senior member of the State of Hawai'i Department of Defense, has met the requisite elements for the war crime by omission, by willfully disobeying an Army regulation and by willful dereliction in his duty to establish a military government, and is, therefore, guilty of the war crime by omission. These offenses do not have the requisite element of *mens rea*.

The term "guilty," as used in the RCI war criminal reports, is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a

[1] Royal Commission of Inquiry, *War Criminal Report 24-0001—Major General Kenneth Hara* (August 5, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).

crime or tort or other offense or fault."[2] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to have committed the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[3] According U.S. military law, MG Hara is accountable by court-martial or nonjudicial punishment under Article 15, UCMJ. Under international criminal law, MG Hara is subject to prosecution, by a competent court or tribunal, for the war crime by omission.

Consequently, as the Deputy Adjutant General and Commander of the Army National Guard, you are now the theater commander. You should assume the chain of command, as the theater commander of the occupied State of Hawaiian Kingdom, and perform your duty of establishing a military government by 12 noon on August 12, 2024. If you are derelict in the performance of your duty to establish a military government, then you would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of your war criminal report on the RCI's website, Colonel Wesley K. Kawakami, Commander of the 29th Infantry Brigade, who is next in the chain of command below you, shall assume command of the Army National Guard. Colonel Kawakami will have one week to transform the State of Hawai'i into a military government.

The chain of command, or what is called the order of battle, for the 29th Infantry Brigade units in the Hawaiian Islands, is first, the 1st Squadron, 299th Cavalry Regiment, second, the 1st Battalion, 487th Field Artillery Regiment, third, the 29th Brigade Support Battalion, and fourth, the 227th Brigade Engineer Battalion. The 29th Infantry Brigade has units stationed in Alaska and Guam but, since they are outside the Hawaiian territory, they do not have the military duty, as an occupant, to establish a military government in the Hawaiian Islands.

If Colonel Wesley K. Kawakami is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of Colonel Kawakami's war criminal report on the RCI's website, Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment, will assume command of the Army National Guard and will have one week to transform the State of Hawai'i into a military government.

If LTC Werner is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Werner's war criminal report on the RCI's website, Lieutenant Colonel Bingham L. Tuisamatatele, Jr., Commander of 1st

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

Battalion, 487th Field Artillery Regiment, will assume command of the Army National Guard and will have one week to transform the State of Hawai‘i into a military government.

If LTC Tuisamatatele is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Tuisamatatele's war criminal report on the RCI's website, Lieutenant Colonel Joshua A. Jacobs, Commander of 29th Brigade Support Battalion, will assume command of the Army National Guard and will have one week to transform the State of Hawai‘i into a military government.

If LTC Jacobs is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Jacobs's war criminal report on the RCI's website, Lieutenant Colonel Dale R. Balsis, Commander of 227th Brigade Engineer Battalion, will assume command of the Army National Guard and will have one week to transform the State of Hawai‘i into a military government.

Should LTC Balsis be derelict in the performance of his duties to establish a military government and be the subject of a war criminal report for the war crime by omission, that will be published on the RCI's website; then the sequence of events will loop to the Executive Officers. First, with the 29th Infantry Brigade, second, with the 1st Squadron, 299th Cavalry Regiment, third, with the 1st Battalion, 487th Field Artillery Regiment, fourth with the 29th Brigade Support Battalion, and fifth with the 227th Brigade Engineer Battalion.

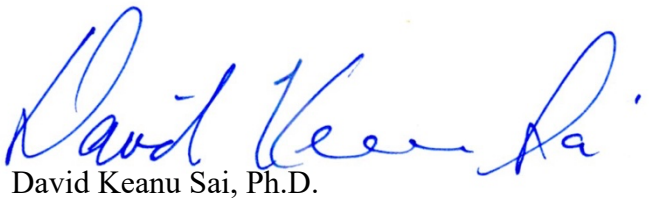
This looping, within the 29th Infantry Brigade's component commands, will cover all commissioned officers to include Majors, Captains, First Lieutenants and Second Lieutenants. After the commissioned officers have been exhausted in the 29th Infantry Brigade, the chain of command of commissioned officers of the 103rd Troop Command and its component commands will begin, followed by the chain of command of commissioned officers of the 298th Regiment, Regional Training Institute, and its component commands.

For you not to be derelict in the performance of your duty, and you are not be the theater commander of the occupied State of the Hawaiian Kingdom, you will need to provide the RCI with evidence that the Hawaiian Kingdom no longer exists as a State under international law. To do this, you must have Lieutenant Colonel Lloyd Phelps, as your legal advisor on military matters, provide you with evidence the Hawaiian Kingdom ceases to exist under international law. And since Attorney General Anne E. Lopez instructed you to ignore your military duty to establish a military government, I recommend that you also

have her, as your legal advisor on State of Hawai‘i matters, provide you evidence that the Hawaiian Kingdom ceases to exist under international law.

MG Hara’s conduct is unbecoming of an officer that has consequently placed every soldier under his command, to include yourself, subject to criminal culpability because he did not demand that the Attorney General provide him evidence. Consequently, he willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. As you are aware, U.S. military officers are held to the highest personal and professional standards. When those standards are not met, officers may be administratively punished or criminally prosecuted. For you not to demand the evidence that the Hawaiian Kingdom no longer exists under international law, is to place the men and women, under your command, into harm’s way with criminal culpability under both military law and international criminal law.

As I stated to MG Hara, in my letter dated July 26, 2024, which you were cc’d, “to prevent all this from occurring, you must provide evidence that the Hawaiian Kingdom no longer exists as an occupied State under international law. To ignore this will have dire consequences for the Hawai‘i Army National Guard.”



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Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment
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Lieutenant Colonel Joshua A. Jacobs, Commander of 29th Brigade Support Battalion
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Lieutenant Colonel Dale R. Balsis, Commander of 227th Brigade Engineer Battalion
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Enclosure “14”

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August 6, 2024

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Commander, 29th Infantry Brigade
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Lieutenant Colonel Fredrick J. Werner
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Lieutenant Colonel Dale R. Balsis
Commander of 227th Brigade Engineer Battalion
(dale.r.balsis.mil@army.mil)

Via electronic mail

Re: Circumstances for the Army National Guard to establish a military government of Hawai‘i

Commanders:

The purpose of this letter is to inform you of the circumstances that has led up to performing the military duty of establishing a military government in accordance with the Law of

Armed Conflict—international humanitarian law, U.S. Department of Defense Directive 5100.01, and Army Regulations—FM 27-5 and FM 27-10. According to Article 42, 1907 Hague Regulations, territory is considered occupied when it comes under the effective control of the occupant. Effective control of the occupied territory triggers Article 43 to establish a military government to provisionally administer the laws of the occupied State. For Iraq during the Second Gulf War, this was the basis for establishing the *Coalition Provisional Authority*, as a military government, on May 16, 2003. Between the Federal government and the State of Hawai'i, it is the latter that has this duty because it is in effective control of 10,931 square miles, while the former is in effective control of less than 500 square miles.

In 1999, the Permanent Court of Arbitration ("PCA"), in *Larsen v. Hawaiian Kingdom*, recognized the continuity of the Hawaiian Kingdom, as a State, under international law, and the Council of Regency as its temporary government. The Council of Regency is not a part of the Native Hawaiian sovereignty movement. It is a government established under Hawaiian constitutional law and the doctrine of necessity. I am enclosing a copy of the PCA's case repository of the *Larsen* case.

At the center of the dispute was the unlawful imposition of American laws over Hawaiian territory, which led to Larsen's unfair trial and subsequent incarceration. This is the same Permanent Court of Arbitration that oversaw the dispute between the Philippines and China—the *South China Sea* case.[1] On its website, the PCA describes the *Larsen* case as:

> Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.[2]

Since January 17, 1893, the United States, by an act of war, began its prolonged occupation of the Hawaiian Kingdom despite the overthrow of its government. Furthermore, the unlawful overthrow of the Hawaiian government did not affect Hawaiian sovereignty, which prevents any annexation of its territory without its consent by a treaty of cession. There is no such treaty of cession between the Hawaiian Kingdom and the United States,

[1] Permanent Court of Arbitration, Case Repository, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case no. 2013-19 (online at https://pca-cpa.org/en/cases/7/).
[2] Permanent Court of Arbitration, Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).

except for an American municipal law, enacted on July 7, 1898, called a joint resolution of annexation purporting to have acquired the Hawaiian Islands. As section 358, FM 27-10—*Occupation Does Not Transfer Sovereignty* states:

> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.

Under customary international law, during military occupation, the imposition of the occupier's laws over the territory of an occupied State is the war crime of usurpation of sovereignty. In his legal opinion for the *Royal Commission of Inquiry* ("RCI"), for prosecutions to take place, renowned expert in international criminal law and war crimes, Professor William Schabas, provides requisite elements of certain war crimes, including usurpation of sovereignty during military occupation, which I am enclosing a copy of. It should be noted that if this were a frivolous matter, Professor Schabas surely would not have done his legal opinion for the RCI. He is a professor of international law at Middlesex University, London, Department of Law,[3] and recognized as an expert in the field by the United Nations and the International Criminal Court.[4]

I am aware of the military duty to establish a military government in occupied territories, because I served 10 years in the Hawai'i Army National Guard from 1984 to 1994. I received my commission as a Second Lieutenant from New Mexico Military Institute in 1984, and, after returning home, joined the 1/487 Field Artillery. In 1994, I decided to resign my command of Charlie Battery in order to pursue the work I do now, and I was honorably discharged. I am enclosing my DD 214 separation papers. Former Commander of the Army National Guard, Brigadier General Keith Tamashiro, and I are not only colleagues, but friends, because, while I was the Charlie Battery Commander, he was the Bravo Battery Commander. I also served as Battalion Fire Support Officer for 2/299 Infantry, where Major General Kenneth Hara was a Lieutenant. Hence, I am thoroughly familiar with the Army National Guard.

On April 13, 2023, I had a meeting with MG Hara at the Grand Naniloa Hotel in Hilo. I started the meeting by telling MG Hara that circumstances, beyond our control, have placed

[3] Middlesex University London, Professor William Schabas (online at https://www.mdx.ac.uk/about-us/our-people/staff-directory/prof-william-schabas/).
[4] United Nations, Professor William Schabas (online at https://legal.un.org/avl/ls/Schabas_CLP.html).

us here today with duties to perform. He, as the senior officer of the Hawai‘i National Guard, and me, as head of the RCI, with the duty to protect the population from war crimes. This past June, the law journal, *International Review of Contemporary Law*, published my article titled "All States have a Responsibility to Protect their Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands."[5]

I explained to MG Hara the circumstances of the current situation, and his corresponding duty, as the theater commander of occupied territory, to transform the State of Hawai‘i into a military government. I provided him the necessary documentation as well.[6] At the end of the meeting, I recommended that he task his JAG, Lieutenant Colonel Lloyd Phelps, to review the information I provided him and to see if LTC Phelps could refute it. If he could not, it would trigger MG Hara's duty to perform. LTC Phelps could not refute the Hawaiian Kingdom's existence, which prompted MG Hara to acknowledge, on July 27, 2023, that Hawai‘i is an occupied State. On August 21, 2023, I provided MG Hara an *Operational Plan for Transitioning the State of Hawai‘i into a Military Government* with essential and implied tasks,[7] which was published by the law journal, *Hawaiian Journal of Law and Politics*.

On May 25, 2024, I had a Zoom meeting with former Adjutant General, Major General Darryl Wong, and his Chief Master Sergeant, Robert Lee. Prior to this meeting, they both watched my March 6, 2024, presentation to the Maui County Council, updating them of the status of Hawai‘i under international law and the duty of MG Hara to establish a military government (https://www.youtube.com/watch?v=X-VIA_3GD2A&t=1s). MG Wong and CMSAF Lee acknowledged that they understood why MG Hara, as the Adjutant General, had this military duty to perform. MG Wong also acknowledged that he had this duty when he was the Adjutant General, but I told him that the difference between them was that MG Wong was not aware of the factual circumstances of the occupation, but MG Hara was aware.

After numerous attempts to work with MG Hara and his refusals to meet, I was informed that he was instructed by State of Hawai‘i Attorney General, Anne E. Lopez, to ignore me and anyone else that called for the establishment of the military government. MG Hara's conduct here, as the Adjutant General, was unbecoming of an officer. To not be

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[5] David Keanu Sai, "All States have a Responsibility to Protect their Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands," 6(2) *International Review of Contemporary Law* 72-81 (June 2024) (online at https://hawaiiankingdom.org/pdf/IRCL_Article_(Sai).pdf).

[6] Royal Commission of Inquiry letter to MG Hara (May 11, 2023) (online at https://hawaiiankingdom.org/pdf/RCI_Ltr_to_SOH_TAG_(5.11.23).pdf).

[7] Council of Regency, *Operational Plan for Transitioning the State of Hawai‘i into a Military Government* (August 14, 2023) (online at https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf).

unbecoming of an officer, he needed to ask for a legal opinion from the Attorney General that concludes, which provides conclusive evidence and law, that the Hawaiian Kingdom does not exist as an occupied State under international law. His failure to perform his duty of establishing a military government has made him the subject of War Criminal Report no. 24-0001 for the war crime by omission that was published on the RCI's website yesterday (https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf). His failure to perform his duty has led to everyone in the Army National Guard chain of command to be implicated in the performance of this duty.

As a war criminal, subject to prosecution by a competent tribunal, and where there is no statute of limitations, MG Hara is unfit to serve as Commander of the Hawai'i National Guard. As such, Brigadier General Stephen Logan, as the Deputy Adjutant General and Commander of the Army National Guard, must assume the chain of command, and he has until 1200 hours on August 12, 2024, to transform the State of Hawai'i into a military government. To escape criminal culpability, BG Logan must demand a legal opinion from the Attorney General or from LTC Phelps that shows, with irrefutable evidence and law, that the Hawaiian Kingdom ceases to exist a State under international law.

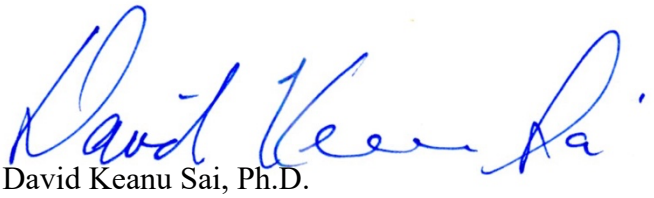
If BG Logan does not obtain a legal opinion, and fails to perform his military duty, he will then be the subject of a war criminal report by the RCI for the war crime by omission. After the publication of this war criminal report, Colonel Wesley K. Kawakami, Commander, 29th Infantry Brigade, will assume the chain of command and demand a similar legal opinion. If Colonel Kawakami receives no such legal opinion, he will have one week to perform his duty as the theater commander.

To speak to the severity of the situation, I am enclosing a letter to MG Hara, dated May 29, 2024, from police officers, both active and retired, from across the islands, that called upon him to perform his duties because "This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws." These police officers also stated:

> We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstance, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an acting capacity that is allowed under Hawaiian law.

As senior Commanders in the chain of command of the Army National Guard, I implore you all to take this matter seriously and to demand, from the Attorney General or the JAG,

a legal opinion that concludes there is no duty on you to establish a military government because the Hawaiian Kingdom does not continue to exist, and that this is the territory of the United States and the State of Hawai‘i under international law. With the legal opinion in hand, there is no duty to perform. Without it, there is the military duty to perform, and failure to perform would constitute the war crime by omission.



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

enclosures

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Lieutenant Colonel Lloyd Phelps, Staff Judge Advocate
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Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry
(federico.lenzerini@unisi.it)

Enclosure “1”

Larsen v. Hawaiian Kingdom

Case name	Larsen v. Hawaiian Kingdom
Case description	Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency ("Hawaiian Kingdom") on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom. In determining whether to accept or decline to exercise jurisdiction, the Tribunal considered the questions of whether there was a legal dispute between the parties to the proceeding, and whether the tribunal could make a decision regarding that dispute, if the very subject matter of the decision would be the rights or obligations of a State not party to the proceedings. The Tribunal underlined the many points of agreement between the parties, particularly with respect to the propositions that Hawaii was never lawfully incorporated into the United States, and that it continued to exist as a matter of international law. The Tribunal noted that if there existed a dispute, it concerned whether the respondent has fulfilled what both parties maintain is its duty to protect the Claimant, not in the abstract but against the acts of the United States of America as the occupant of the Hawaiian islands. Moreover, the United States' actions would not give rise to a duty of protection in international law unless they were themselves unlawful in international law. The Tribunal concluded that it could not determine whether the Respondent has failed to discharge its obligations towards the Claimant without ruling on the legality of the acts of the United States of America – something the Tribunal was precluded from doing as the United States was not party to the case.
Name(s) of claimant(s)	Lance Paul Larsen (Private entity)
Name(s) of respondent(s)	The Hawaiian Kingdom (State)
Names of parties	
Case number	1999-01
Administering institution	Permanent Court of Arbitration (PCA)
Case status	Concluded
Type of case	Other proceedings
Subject matter or economic sector	Treaty interpretation
Rules used in arbitral proceedings	UNCITRAL Arbitration Rules 1976
Treaty or contract under which proceedings were commenced	Other The 1849 Treaty of Friendship, Commerce and Navigation with the United States of America
Language of proceeding	English
Seat of arbitration (by country)	Netherlands
Arbitrator(s)	Dr. Gavan Griffith QC Professor Christopher J. Greenwood QC Professor James Crawford SC (President of the Tribunal)
Representatives of the claimant(s)	Ms. Ninia Parks, Counsel and Agent
Representatives of the respondent(s)	Mr. David Keanu Sai, Agent

	Mr. Peter Umialiloa Sai, First deputy agent Mr. Gary Victor Dubin, Second deputy agent and counsel
Representatives of the parties	
Number of arbitrators in case	3
Date of commencement of proceeding [dd-mm-yyyy]	08-11-1999
Date of issue of final award [dd-mm-yyyy]	05-02-2001
Length of proceedings	1-2 years
Additional notes	

Attachments

Award or other decision

>	Arbitral Award	15-05-2014	English

Other

>	Annex 1 - President Cleveland's Message to the Senate and the House of Representatives	18-12-1893	English
>	Joint Resolution - To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.	23-11-1993	English

Enclosure “2”

LEGAL OPINION ON WAR CRIMES RELATED TO THE UNITED STATES OCCUPATION OF THE HAWAIIAN KINGDOM SINCE 17 JANUARY 1893[†]

Professor William Schabas[*]

I. INTRODUCTION

II. APPLICABLE LAW

III. TEMPORAL ISSUES

IV. SPECIFIC CRIMES

A. *Usurpation of sovereignty during occupation*

B. *Compulsory enlistment of soldiers*

C. *Denationalization*

D. *Pillage*

E. *Confiscation and Destruction of Property*

F. *Exaction of illegitimate or exorbitant contributions*

G. *Deprivation of Fair and Regular Trial*

H. *Unlawful deportation or transfer of civilians of the occupied territory*

I. *Unlawful transfer of populations to the occupied territory*

VI. CONCLUSION

Editor's Note: In light of the severity of the mandate of the Royal Commission, established by the Hawaiian Council of Regency on 17 April 2019, to investigate war crimes and human rights violations committed within the territorial jurisdiction of the Hawaiian Kingdom, the

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"authority" of the Council of Regency to appoint the Royal Commission is fundamental and, therefore, necessary to address within the rules of international humanitarian law, which is a component of international law. As explained by the United States Supreme Court in 1900 regarding international law and the works of jurists and commentators:

> *International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*[1]

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

I. INTRODUCTION

This legal opinion is made at the request of the head of the Hawaiian Royal Commission of Inquiry, Dr. David Keanu Sai, in his letter of 28 May 2019, requesting of me "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". It is premised on the assumption that the Hawaiian Kingdom was occupied by the United States in 1893 and that it remained so since that time. Reference has been made to the expert report produced by Prof. Matthew Craven dealing with the legal status of Hawai'i and the view that it has been and remains in a situation of belligerent occupation resulting in application of the relevant rules of international law,

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

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

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

particularly those set out in the Hague Conventions of 1899 and 1907 and the fourth Geneva Convention of 1949. This legal opinion is confined to the definitions and application of international criminal law to a situation of occupation. The terms "Hawaiian Kingdom" and "Hawai'i" are synonymous in this legal opinion.

II. APPLICABLE LAW

For the purposes of this opinion, the relevant treaties appear to be the following: Hague Convention II on the Laws and Customs of War, 1899; Hague Convention IV on the Laws and Customs of War, 1907; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 ('fourth Geneva Convention'). All of these treaties have been ratified by the United States. They codify obligations that are imposed upon an occupying power. Only the fourth Geneva Convention contains provisions that can be described as penal or criminal, by which liability is imposed upon individuals. Article 147 of the fourth Geneva Convention provides a list of 'grave breaches', that is, violations of the Convention that incur individual criminal responsibility and that are known colloquially as 'war crimes': 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

There are other treaties that codify war crimes relevant to the conduct of an occupying power but these have not been ratified by the United States. Article 85 of the first Additional Protocol to the Geneva Conventions of 1977 defines as 'grave breaches' subject to individual criminal liability when perpetrated against 'persons in the power of an adverse Party', including situations of occupation:

> a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
> b) unjustifiable delay in the repatriation of prisoners of war or civilians;
> c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
> d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for

> example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
>
> e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

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

In addition to crimes listed in applicable treaties, war crimes are also recognized under customary international law. Customary international law applies generally to States regardless of whether they have ratified relevant treaties. The customary law of war crimes is thus applicable to the situation in Hawai'i. Many of the war crimes set out in the first Additional Protocol and in the Rome Statute codify customary international law and are therefore applicable to the United States despite its failure to ratify the treaties.

Crimes under customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.[4] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution. Article 11(2) of the Universal Declaration of Human Rights states that '[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed'. Applying this provision or texts derived from it, tribunals have recognized 'a penal offence, under national or international law' where the crime was not codified but rather was recognized under international law.

The International Military Tribunal ('the Nuremberg Tribunal') was empowered to exercise jurisdiction over 'violations of the laws or customs of war'. Article VI(b) of the Charter of the Tribunal provided a list of war crimes but specified that '[s]uch violations shall include, but not be limited to', confirming that the Tribunal had authority to convict persons for crimes under customary international law. The United States is a party to

[4] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Law, Vol. I: Rules, Cambridge: Cambridge University Press, 2005, 'Rule 156. Definition of War Crimes', pp. 568-603.

the London Agreement, to which the Charter of the International Military Tribunal is annexed. The corresponding provision in the Charter of the International Military Tribunal for the Far East ('the Tokyo Tribunal') does not even provide a list of war crimes, confining itself to authorizing the prosecution of 'violations of the laws or customs of war'.

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over 'violations of the laws or customs of war'. Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in a Security Council Resolution, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. The Appeals Chamber of the International Criminal Tribunal explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to incur individual criminal responsibility, the Tribunal said that the 'violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'. As an example of a violation that would not be serious enough, it provided the example of the appropriation of a loaf of bread belonging to a private individual by a combatant in occupied territory. It said that to meet the threshold of seriousness, it was not necessary for violations to result in death or physical injury, or even the risk thereof, although breaches of rules protecting important values often result in distress and anxiety for the victims.[5] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[6] there is no authority to support this rule being considered a war crime for which individuals are punishable. Moreover, the incidents of coerced swearing of allegiance in Hawai'i appear to date to the late nineteenth century, making criminal prosecution today entirely theoretical, as explained further below.

Evidence of recognition of crimes under customary international law may also be derived from documents of international conferences, national military manuals, and similar sources. The first authoritative list of 'violations of the laws and customs of war' was developed by the Commission on Responsibilities of the Paris Peace Conference, in 1919. It was largely derived from provisions of the two Hague Conventions, of 1899 and 1907, although the preparatory work does not provide any

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

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

precise references for each of the thirty-two crimes in the list. The Commission noted that the list of offences was 'not regarded as complete and exhaustive'. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

> Murders and massacres; systematic terrorism.
> Torture of civilians.
> Deliberate starvation of civilians.
> Rape.
> Abduction of girls and women for the purpose of enforced prostitution.
> Deportation of civilians.
> Internment of civilians under inhuman conditions.
> Forced labour of civilians in connection with the military operations of the enemy.
> Usurpation of sovereignty during military occupation.
> Compulsory enlistment of soldiers among the inhabitants of occupied territory.
> Attempts to denationalize the inhabitants of occupied territory.
> Pillage.
> Confiscation of property.
> Exaction of illegitimate or of exorbitant contributions and regulations.
> Debasement of the currency, and issue of spurious currency.
> Imposition of collective penalties.
> Wanton destruction of religious, charitable, educational, and historic buildings and monuments.[7]

III. TEMPORAL ISSUES

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

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, 'crimes against

[7] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919.

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'.[8] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Writing in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

Statutory limitation of war crimes is prohibited by customary law.[9] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[10] In a diplomatic note to the Government of Iraq in 1991, the Government of the United States declared that 'under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.'[11]

IV. SPECIFIC CRIMES

A thorough review of all war crimes is beyond the scope of this chapter, which is focused on those for which allegations have been made that they appear to arise in the case of occupation of Hawai'i. As explained above, war crimes that may have been perpetrated at the time the occupation began cannot today be prosecuted and for this reason these do not receive any detailed attention.

A. *Usurpation of sovereignty during occupation*

The war crime of 'usurpation of sovereignty during occupation' appears on the list issued by the Commission on Responsibilities. The Commission

[8] France et al. v. Göring et al., (1948) 22 IMT 411, p. 466.

[9] Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie, (1984) 78 ILR 125, at p. 135. Also: France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994, 1999, at p. 286.

[10] GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); GA Res. 3074 (XXVIII).

[11] Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

did not indicate the source of this crime in treaty law. It would appear to be Article 43 of the Hague Regulations: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of 'usurpation of sovereignty during occupation'. The Commission charged that in Poland the German and Austrian forces had 'prevented the populations from organising themselves to maintain order and public security' and that they had '[a]ided the Bolshevist hordes that invaded the territories'. It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies'. In Serbia, the Bulgarian authorities had ''[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian'. It listed several other war crimes of Bulgaria committed in occupied Serbia: 'Serbian law, courts and administration ousted'; 'Taxes collected under Bulgarian fiscal regime'; 'Serbian currency suppressed'; 'Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub)'; 'Prohibited sending Serbian Red Cross to occupied Serbia'. It also charged that in Serbia the German and Austrian authorities had committed several war crimes: 'The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.'; 'Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna'.[12]

The crime of 'usurpation of sovereignty' was referred to by Judge Blair of the American Military Commission in a separate opinion in the 'Justice Case': 'This rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.'[13]

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

> Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they

[12] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

[13] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, (1951) III TWC 1178, at p. 1181.

> constitute a threat to its security or an obstacle to the application of the present Convention.
>
> Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The Commentary to the fourth Geneva Convention describes Article 64 as giving 'a more precise and detailed form' to Article 43 of the Hague Regulations.[14]

The war crime of 'usurpation of sovereignty' has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for the crime by international criminal tribunals.

In the situation of Hawai'i, the usurpation of sovereignty would appear to have been total since the beginning of the twentieth century. It might be argued that usurpation of sovereignty is a continuous offence, committed as long as the usurpation of sovereignty persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the actus reus of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made to the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is 'characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred'. Therefore, it is not 'an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.'[15] In

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[14] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958.

[15] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

order to counteract such an interpretation, the Elements of Crimes of the Rome Statute specify that the widespread or systematic attack associated with the enforced disappearance must have taken place after entry into force of the Statute.[16] Given that there have been no prosecutions for 'usurpation of sovereignty' and essentially no clarification at the legislative level or in the academic literature, whether or not the crime is 'continuing' remains open to debate.

On the assumption that it is an ongoing crime, the actus reus of the offence of 'usurpation of sovereignty' would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power may therefore cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.[17] The occupying power may also cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

B. *Compulsory enlistment of soldiers*

The 'compulsory enlistment of soldiers among the inhabitants of occupied territory' was listed as a war crime by the Commission on Responsibilities in its 1919 report.[18] In treaty law, authority for the crime is found in Article 23 of the 1907 Hague Regulations: 'A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.' The prohibition is repeated, in a somewhat broader manner, in Article 51 of the fourth Geneva Convention of 1949: 'The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.' Article 147 of the fourth Convention declares that 'compelling a protected person to serve in the forces of a hostile Power' is a grave

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[16] Elements of Crimes, Crimes Against Humanity, art. 7(1)(i).

[17] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 336.

[18] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919, pp. 17-18.

breach (and therefore a war crime). More recently, the United Nations Security Council listed 'compelling a … a civilian to serve in the forces of a hostile power' among the grave breaches of the fourth Geneva Convention punishable by the International Criminal Tribunal for the former Yugoslavia.[19] There is a similar provision in the Rome Statute of the International Criminal Court: 'Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power'.[20]

The Commentary on the fourth Geneva Convention explains that the prohibition on 'forcing enemy subjects to take up arms against their own country' is 'universally recognized in the law of war'.[21] It says that the object of Article 51 is 'to protect the inhabitants of the occupied territory from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country'.[22] Nevertheless, Article 147 of the Convention does not require that civilians in the occupied territory be forced 'to take up arms against their own country'. The same can be said of the modern formulations in the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court. The Elements of Crimes of the Rome Statute, which are intended to assist in the interpretation of its provisions, describe the material element of the war crime of compulsory enlistment as follows: 'The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.'[23] When the Elements of Crimes were being negotiated, some States wanted it to be clearly indicated that the provision did not require the civilian to act against his or her own country. It was felt that an explicit mention was unnecessary and that the issue was addressed adequately with the words 'or otherwise serve'.[24]

There do not appear to have been any prosecutions for this crime by international criminal tribunals. The Commission on Responsibilities provided examples of the crime of compulsory enlistment committed by

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[19] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, Art. 2(e).

[20] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 8(2)(a)(v).

[21] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 293.

[22] Ibid., p, 294.

[23] Elements of Crimes, Art. 8(2)(a)(v).

[24] Knut Dörmann, 'Paragraph 2(a)(v): Compelling a protected person to serve in the hostile forces ', in Otto Triffterer and Kai Ambos, eds., Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, 3rd edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 329-331, at p. 330.

Bulgarian authorities in Greece, where '[m]any thousands of Greeks [were] forcibly enlisted by Bulgarians' in Eastern Macedonia', by Bulgarian authorities in Serbia who '[f]orced Serbian subjects to fight in the ranks of Bulgarians against their own country' and where '[f]amilies and villages were held responsible for refusal to enlist (in Eastern Serbia)', and by Austrian and German authorities in Serbia where 'Serbian subjects were recruited for the Austrian armies, or were sent to the Bulgarians to be incorporated in their forces'.[25]

In the author's opinion, the material elements (actus reus) of the crime of 'compulsory enlistment' are: coercion, including by means of pressure or propaganda, of nationals of an occupied territory to serve in the forces of the occupying State. The enlistment must be undertaken during armed conflict and the service must have a connection or nexus with the armed conflict. The mental element (mens rea) consists of knowledge of the existence of an armed conflict, knowledge that the person recruited is a national of an occupied State, and the intent to enlist or recruit the person for the purposes of serving in an armed conflict.

C. *Denationalization*

The list of war crimes of the Commission on Responsibilities included '[a]ttempts to denationalize the inhabitants of occupied territory'. The crime does not appear to be derived from any specific provision of the Hague Conventions where the notion of denationalization is not apparent. Decades later, discussing the war crime of denationalization, the United Nations War Crimes Commission suggested it was related to Article 43 of the Hague Conventions because it was 'clearly the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the territory'. The Commission also referred to the protection of educational institutions enshrined in Article 56 of the Hague Conventions.[26]

Under the heading 'attempts to denationalise the inhabitants of occupied territory', the Commission on Responsibilities charged several crimes committed in Serbia by the Bulgarian authorities: 'Efforts to impose their national characteristics on the population'; 'Serbian language forbidden in private as well as in official relations. People beaten for saying "Good morning" in Serbian'; 'Inhabitants forced to give their names a Bulgarian form'; 'Serbian books banned – were systematically destroyed'; 'Archives of churches and law-courts destroyed'; 'Schools and churches closed,

[25] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

[26] United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, London: His Majesty's Stationery Office, 1948, p, 488. See also Egon Schwelb, 'Note on the Originality of "Attempts to Denationalize the `Inhabitants of Occupied Territory" (appendix to Doc. C.1. No. XII) – Question Referred to Committee III by Committee I, UNWCC Doc. III/15.

sometimes destroyed'; 'Bulgarian schools and churches substituted – attendance at school made compulsory'; 'Population forced to be present at Bulgarian national solemnities'. It also said that in Serbia the Austrian and German authorities 'interfered with religious worship, by deportation of priests and requisition of churches for military purposes. Interfered with use of Serbian language'.[27]

The war crime of denationalization received some attention during the post-Second World War period. The United Nations War Crimes Commission used the list of war crimes adopted by the 1919 Commission on Responsibilities as a basis for its consideration of war crimes. However, it also discussed the relevance of the list and considered specifically the nature of the war crime of 'denationalization'. Unlike many other war crimes that constituted in and of themselves criminal acts under ordinary criminal law, 'denationalization' might involve underlying conduct that was not normally or inherently criminal, such as administrative measures governing language of education. In an expert opinion for the Commission, Egon Schwelb wrote:

> It is submitted that each case will have to be judged on its own merits. The 'denationalization' may be either effected or accompanied by acts on the part of the occupying authorities, which are criminal *per se*. There may, on the other hand, exist circumstances which do not let the activities appear criminal, though they, no doubt, are illegal. An example of the latter type of 'attempts at denationalization' may exist where the occupation authorities do not close the existing schools and do not prevent parents from sending their children to them either by actual violence, or by threat, but where they try to bribe parents into sending children to schools instituted by the occupant by offering various advantages, like better school meals, clothing, etc.

In his report to the United Nations War Crimes Commission dated 28 September 1945, Bohuslav Ečer argued that 'denationalisation' was not only a war crime but also 'a genuine international crime – a crime against the very foundations of the Community of Nations'.[28]

This discussion must be understood in the context of legal debates about the time about the creation of new categories of international crime, specifically crimes against humanity and genocide, neither of which had been contemplated by the 1919 Commission on Responsibilities. The scholar who devised the term 'genocide', Raphael Lemkin, writing in late 1944 referred to the inadequacies of the Hague Conventions in dealing with the scope of Nazi atrocity directed at minority groups. Lemkin

[27] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Annex, TNA FO 608/245/4.

[28] Preliminary Report by the Chairman of Committee III, UNWCC Doc. C/148, p. 3.

considered that the Hague Regulations dealt with technical rules concerning occupation but he said 'they are silent regarding the preservation of the integrity of a people'.[29] Lemkin specifically acknowledged the war crime of denationalization in the list of the Commission on Responsibilities, saying it was 'used in the past to describe the destruction of a national pattern'. He said it was inadequate in three respects: it did not 'connote the destruction of the biological structure', 'in connoting the destruction of one national pattern it does not connote the imposition of the national pattern of the oppressor' and 'denationalization is used by some authors to mean only deprivation of citizenship'.[30]

The United Nations War Crimes Commission discussed the war crime of denationalization in the note accompanying the judgment in the *Greifelt et al.* case. The Commission referred to the list of war crimes in the report of the 1919 Commission on Responsibility, observing that

> [a]ttempts of this nature were recognized as a war crime in view of the German policy in territories annexed by Germany in 1914, such as in Alsace and Lorraine. At that time, as during the war of 1939-1945, inhabitants of an occupied territory were subjected to measures intended to deprive them of their national characteristics and to make the land and population affected a German province. The methods applied by the Nazis in Poland and other occupied territories, including once more Alsace and Lorraine, were of a similar nature with the sole difference that they were more ruthless and wider in scope than in 1914-1918. In this connection the policy of 'Germanizing' the populations concerned, as shown by the evidence in the trial under review, consisted partly in forcibly denationalizing given classes or groups of the local population, such as Poles, Alsace-Lorrainers, Slovenes and others eligible for Germanization under the German People's List. As a result in these cases the programme of genocide was being achieved through acts which, in themselves, constitute war crimes.[31]

Evidence in the *Greifelt et al.* case dealt with Nazi policies in occupied Poland aimed at 'Germanization'. These included measures to prevent births and measures of population displacement that might today be described as 'ethnic cleansing'. The *History of the United Nations War Crimes Commission* also refers to attempts at denationalization conducted by both Italian and German occupation authorities in Greece, Poland and Yugoslavia. These were directed at 'uproot[ing] and destroy[ing] national cultural institutions and national feeling. The effort took various forms

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[29] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington DC: Carnegie Endowment for World Peace, 1944, p. 90.

[30] Ibid., p. 80.

[31] *United States v. Greifelt et al.*, (1948) 13 LRTWC 1, 42 (United States Military Tribunal).

including a ban on the use of native language, supervision of the schools, forbidding the publication of native language newspapers, and various other devices and regulations.'[32]

Denationalization does not appear in any of the modern codifications of war crimes. This is explained by the development of robust bodies of international criminal law and international human rights law dealing with the protection of groups and minorities, applicable in time of peace and in time of war. Acts of 'denationalization' as the concept was understood by the 1919 Commission on Responsibilities and the post-Second World War United Nations War Crimes Commission would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide.

There are similar concerns about the continuing nature of the crime as those expressed above with respect to the war crime of usurping sovereignty.

On the assumption that it is an ongoing crime, the actus reus of the offence of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population.[33]

Given that this is essentially a crime involving State action or policy or the action or policies of an occupying State's proxies, a perpetrator who participated in the act would be required to do so intentionally and with knowledge that the act was directed at the destruction of the national identity and national consciousness of the population.

D. *Pillage*

'Pillage' is a war crime included in the list of the 1919 Commission on Responsibilities.[34] It is derived from Articles 28 and 47 of the Hague Regulations. Prohibition of pillaging is also set out in Article 33 of the fourth Geneva Convention ('Pillage is prohibited'). In the modern era,

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[32] United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, London: His Majesty's Stationery Office, 1948, p. 488.

[33] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 336.

[34] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919, pp. 17-18.

pillage is a war crime punishable by the International Criminal Court.[35] Acts of 'pillage' have been held to be comprised within 'plunder',[36] and the two terms have often been treated as if they are synonyms.[37] The Charter of the International Military Tribunal referred to 'plunder of public or private property' rather than to 'pillage'. This provision was repeated in article 3(e) of the Statute of the International Criminal Tribunal for the former Yugoslavia.[38] The Commentary to the fourth Geneva Convention explains that international law is concerned not only with 'pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay'.[39]

'Pillage' is also subject to prosecution by the International Criminal Tribunal for Rwanda.[40] The Elements of Crimes of the Rome Statute of the International Criminal Court provide important additional criteria: the perpetrator appropriated certain property; the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; the appropriation was without the consent of the owner.[41] A footnote in the Elements of Crime specifies that 'appropriations justified by military necessity cannot constitute the crime of pillaging'.

The war crime of pillage has been interpreted recently by various international criminal tribunals, notably the International Criminal Court. One of its Pre-Trial Chambers wrote that the war crime of pillage 'entails a somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property, which goes beyond

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[35] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 8(2)(b)(xvi).

[36] *Prosecutor v.* Blaškić (IT-95-14-A) Judgment, 29 July 2004, para. 147; *Prosecutor v.* Delalić (IT-96-21-A), Judgment, 20 February 2001, para. 591; *Prosecutor v.* Kordić et al. (IT-95-14/2-A), Judgment, 17 December 2004, para. 77.

[37] *Prosecutor v.* Brima et al. (SCSL-04-16-T), Judgment, 20 June 2007, para. 751.

[38] UN Doc. S/RES/827 (1993).

[39] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 226.

[40] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), annex, art. 4(f).

[41] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, paras. 1–3; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, paras. 1–3.

mere sporadic acts of violation of property rights'.[42] With specific reference to the Rome Statute, which limits its jurisdiction to war crimes that are 'serious', the Pre-Trial Chamber said that 'cases of petty property expropriation' might not be within the scope of the provision. 'A determination on the seriousness of the violation is made by the Chamber in light of the particular circumstances of the case', it said.[43] Subsequently, however, a Trial Chamber of the Court discouraged the notion that there is any particular gravity threshold for the crime of pillaging.[44] The Chamber said it would determine a violation to be serious 'where, for example, pillaging had significant consequences for the victims, even where such consequences are not of the same gravity for all the victims, or where a large number of persons were deprived of their property'.[45] Judgments of the International Criminal Tribunal for the former Yugoslavia hold that 'all forms of seizure of public or private property constitute acts of appropriation, including isolated acts committed by individual soldiers for their private gain and acts committed as part of a systematic campaign to economically exploit a targeted area'.[46]

Because it must belong to an 'enemy' or 'hostile' party, 'pillaged property—whether moveable or immoveable, private or public—must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator'.[47] The same requirement is not explicitly imposed with respect to the war crime of destruction of property but the view that this is implicit finds support.[48] It is not excluded that the property that is pillaged belongs to combatants.[49] The crime of pillage occurs when the property has come under the control of the perpetrator, because it is only then that he or she can 'appropriate' the property.[50]

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[42] *Prosecutor v.* Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 317.

[43] Ibid.

[44] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 908.

[45] Ibid.

[46] *Prosecutor v. Gotovina* (IT-06-90-T), Judgment, 15 April 2011, para. 1778.

[47] *Prosecutor v.* Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 329.

[48] Ibid., fn. 430.

[49] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 907.

[50] *Prosecutor v.* Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 330.

In *Prosecutor v. Katanga*, a Trial Chamber of the International Criminal Court said 'the pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by combatants in their own interest'.[51] There is some old authority for the view that pillage entails an element of force or violence,[52] but this is not confirmed by recent case law. The Elements of Crimes of the Rome Statute specify that the perpetrator 'intended to deprive the owner of the property and to appropriate it for private or personal use'.[53] An accompanying footnote specifies that '[a]s indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging'.[54] The Rome Statute provision on pillage was copied into the Statute of the Special Court for Sierra Leone, and has been interpreted by one of its Trial Chambers, which explained: 'The inclusion of the words "private or personal use" excludes the possibility that appropriations justified by military necessity might fall within the definition. Nevertheless, the definition is framed to apply to a broad range of situations.'[55] The Special Court was of the view that the requirement of 'private or personal use', imposed by the Elements of Crimes applicable to the Rome Statute, was 'unduly restrictive and ought not to be an element of the crime of pillage'.[56]

The *actus reus* of pillage consists of the appropriation of property belonging to members of the civilian population without the consent of the owner. Whether the appropriation must also be for personal use of the perpetrator is a matter of debate. The *mens rea* requires that the perpetrator act with the specific intent of depriving the owner of the property without consent.

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[51] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 905.

[52] See Andreas Zimmermann, 'Pillage', in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, Baden-Baden: Nomos, 1999, p. 237, at 238.

[53] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2.

[54] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2, fn. 47; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2, fn. 61. See *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 906.

[55] *Prosecutor v.* Brima et al. (SCSL-04-16-T), Judgment, 20 June 2007, para. 753.

[56] Ibid., para. 754. Also: *Prosecutor v.* Brima et al. (SCSL-2004-16-T), Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, paras. 241–243.

E. *Confiscation and Destruction of Property*

Confiscation of property is included in the list of war crimes adopted by the 1919 Commission on Responsibilities. It appears to be derived from Article 55 of the Hague Regulations: 'Exaction of illegitimate or of exorbitant contributions and regulations: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

The fourth Geneva Convention lists as a grave breach the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. It is derived from a number of provisions of the Convention that mainly concern attacks in the course of armed conflict and the conduct of hostilities, a matter that is not of concern in this legal opinion. With respect to occupied territory, the relevant provision is Article 53: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.' The Commentary to the fourth Convention observes:

> In the very wide sense in which the Article must be understood, the prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of co-operative organizations. The extension of protection to public property and to goods owned collectively, reinforces the rule already laid down in the Hague Regulations, Articles 46 and 56 according to which private property and the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences must be respected.[57]

The grave breach of 'extensive destruction and appropriation of property' is included in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court.[58]

The Prosecutor considered charging this offence in the *Gaza flotilla situation*, based on confiscation by Israeli military personnel of the

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[57] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 301.

[58] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 8(2)(a)(iv).

belongings of passengers on the humanitarian relief ship *Mavi Marmara*, such as cameras, mobile phones, laptop computers, MP3 players, recording devices, cash, credit cards, identity cards, watches, jewellery and clothing. Only a portion of the property was returned, some of it in a damaged or incomplete state. The Prosecutor said that some of the Israeli soldiers 'may have unlawfully and wantonly appropriated the personal property and belongings', noting that it was not possible to justify the taking of some of this property on grounds of military necessity. Some of this property, such as cash, jewellery and personal electronic devices, did not fall within the scope of article 8(2)(a)(iv), according to the Prosecutor. She explained that although Article 53 of the fourth Geneva Convention refers to real or personal property belonging individually to private persons, the reference only applies in the context of destruction and not appropriation, noting that 'it is not evident that this grave breach was intended to encompass appropriation of personal property belonging to private individuals'. The Prosecutor also noted that appropriation within the meaning of article 8(2)(a)(iv) must be 'extensive' and therefore did not generally apply to an isolated act or incident although each assessment would have to be made on a case by case basis.[59]

The actus reus consists of an act of confiscation or destruction of property in an occupied territory, be it that belonging to the State or individuals. The mens rea requires that the perpetrator act with intent to confiscate or destroy the property and with knowledge that the owner of the property was the State or an individual.

F. *Exaction of illegitimate or exorbitant contributions*

The war crime of 'exaction of illegitimate or of exorbitant contributions and regulations' is included in the list of war crimes of the 1919 Commission on Responsibilities. It is derived from Article 48 of the Hague Regulations: 'If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.' The fourth Geneva Convention does not address this issue. It does not appear to have been considered a war crime since its inclusion in the list of the Committee on Responsibilities in 1919 making its status as a war crime under international law rather questionable.

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[59] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13), Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, paras. 83-89.

G. *Deprivation of Fair and Regular Trial*

Wilful deprivation of the right of fair and regular trial for a non-combatant civilian is a grave breach under the fourth Geneva Convention. It is not comprised in the list of the 1919 Commission of Responsibilities. It is a war crime listed in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court. There are a number of examples of post-Second World War prosecutions based upon the holding of unfair trials,[60] including the well-known *Justice case* of Nazi jurists by a United States Military Tribunal.[61] There do not appear to have been any prosecutions under this provision by international criminal tribunals in the modern period.

It would appear that the provision applies principally to the fairness of the proceedings. In this context, detailed standards are set out in a number of international instruments, most notably in Article 14 of the International Covenant on Civil and Political Rights. It is also required that the tribunal in question be independent, impartial and regularly constituted. According to the Customary Law Study of the International Committee of the Red Cross, '[a] court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country'.[62] However, it seems clear that if the courts of the occupying power were regularly constituted under international law, the trials held before them are not inherently defective. This can be seen in Article 66 of the fourth Geneva Convention which acknowledges the right of the occupying power to subject accused persons 'to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country'.

The *actus reus* of the war crime of deprivation of the right of fair and regular trial consists of depriving one or more persons 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.

The *mens rea* requires that the accused person acted intentionally and with knowledge that the person allegedly deprived of the right to fair trial was a civilian of the occupied territory.

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[60] See the authorities cited in Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Law, Vol. I: Rules, Cambridge: Cambridge University Press, 2005, p. 352, fn. 327.

[61] United States of America v. Alstötter et al. ('The Justice case'), (1948) 3 TWC 954.

[62] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Law, Vol. I: Rules, Cambridge: Cambridge University Press, 2005, p. 355.

H. *Unlawful deportation or transfer of civilians of the occupied territory*

'Deportation of civilians' is a war crime listed in the Report of the 1919 Commission on Responsibilities. It reflects a prohibition under customary law, set out in writing as early as the Lieber Code, which was adopted by President Lincoln during the Civil War: 'private citizens are no longer . . . carried off to distant parts'.[63] Curiously, the prohibition was not explicit in the Hague Regulations. Widespread outrage at German deportations of Belgians who were forced to work in slave-like conditions probably prompted the addition to the list by the Commission on Responsibilities. The Charter of the International Military Tribunal criminalizes 'deportation to slave labour or for any other purpose of civilian population of or in occupied territory'.[64] The grave breach of 'unlawful deportation or transfer or unlawful confinement' of a non-combatant civilian is set out in Article 147 of the fourth Geneva Convention. The prohibition on such deportation or transfer is found in Article 49 of the Convention: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'

No exception is allowed, for example, in the case of prisoners who are convicted of crimes perpetrated in the occupied territory that would allow them to be sent to serve their sentence on the territory of the occupying power. Nevertheless, the Israeli authorities have deported or transferred many Palestinian nationals from the Occupied Palestinian Territory to serve custodial sentences within Israel proper. The Supreme Court of Israel has held that the prohibition of deportation or transfer in Article 49 of the Convention does not apply to the deportation of selected individuals for reasons of public order and security,[65] but this is an isolated view.

The grave breach of deporting civilians is included in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court. The Elements of Crimes of the Rome Statute specify that the crime is committed by the deportation or transfer of one or more persons 'to another State or to another location'.

The *actus reus* of the offence involves the transfer of a non-combatant civilian to another State, including the occupying State, or to another

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[63] Instructions for the Government of Armies of the United States in the Field ('Lieber Code'), Art. 23.

[64] Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex, Art. VI(b).

[65] See Ruth Lapidoth, 'The Expulsion of Civilians from Areas which came under Israeli Control in 1967: Some Legal Issues', (1990) 2 *European Journal of International Law* 97, at pp. 106-108; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford: Oxford University Press, 1989, p. 46.

location within the occupied territory. The *mens rea* requires that the perpetrator act intentionally and that the perpetrator have knowledge of the fact that the person being deported or transferred is a non-combatant civilian.

I. *Unlawful transfer of populations to the occupied territory*

Article 49(6) of the fourth Geneva Convention reads: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' Violation of article 49(6) of the fourth Geneva Convention, 'when committed wilfully and in violation of the Conventions or the Protocol', is deemed a 'grave breach' by Additional Protocol I to the Geneva Conventions, adopted in 1977. The grave breach is incorporated into the Rome Statute, where the words 'directly or indirectly' have been added to the text of Additional Protocol I: 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.'[66] The word 'indirectly' is aimed at a situation where the occupying power does not actually organize the transfer of populations, but does not take effective measures to prevent this.[67]

According to the Commentary to the fourth Geneva Convention, the prohibition 'is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.'[68] In recent decades, there have been occurrences of such population transfers, widely condemned, in the Occupied Palestinian Territory and in Northern Cyprus. In 1980, the United Nations Security Council adopted a resolution declaring that 'Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East'.[69]

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[66] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 8(2)(b)(viii).

[67] Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy S. Lee, ed., The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results, The Hague/London/Boston: Kluwer Law International, 1999, pp. 79–126, at p. 113.

[68] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 283.

[69] UN Doc. S/RES/465 (1980), OP 5.

The Commentary to the Geneva Conventions notes that the words 'transfer' and 'deport' have a different meaning than they do elsewhere in article 49, in that they do not contemplate the movement of protected persons but rather nationals of the occupying Power.[70] Belligerent occupation is a temporary situation and not the prelude to annexation. For this reason, the Occupying Power must not change the demographic, social and political situation in the territory it has occupied to the social and economic detriment of the population living in the occupied territory. Discussing article 49(6) of the fourth Geneva Convention, the International Court of Justice stated that the provision 'prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory'.[71]

V. CONCLUSIONS

This opinion has examined the application of the international law of war crimes to the United States occupation of the Hawaiian Kingdom since 17 January 1893. It has identified the sources of this body of law in both treaty and custom, and described the two elements – *actus reus* and *mens rea* – with respect to the relevant crimes.

The Elements of Crimes is one of the legal instruments applicable to the International Criminal Court. The initial draft of the Elements was prepared by the United States, which participated actively in negotiation of the final text and joined the consensus when the text was finalized. It provides a useful template for summarizing the *actus reus* and *mens rea* of international crimes. It has been relied upon in producing the following summary of the crimes discussed in this report:

General

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;

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[70] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 283.

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, para. 120.

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."

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.

Elements of the war crime of compulsory enlistment

1. The perpetrator recruited through coercion, including by means of pressure or propaganda, of nationals of an occupied territory to serve in the forces of the occupying State.
2. The perpetrator was aware 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.

Elements of the war crime of denationalization

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

Elements of the war crime of pillage

1. The perpetrator appropriated certain property.

2. The perpetrator intended to deprive the owner of 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.

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.

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

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

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

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

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

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.

25 July 2019

William A. Schabas
Professor of international law

Enclosure “3”

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU

REPORT OF SEPARATION AND RECORD OF SERVICE

REPORT OF SEPARATION AND RECORD OF SERVICE IN THE [1] ARMY NATIONAL GUARD OF HAWAII ~~AND AS A RESERVE OF THE~~ [2] _____

1. Insert either Army or Air 2. Enlisted personnel only - Insert only Army or Air Force

1. LAST NAME - FIRST NAME - MIDDLE NAME	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NUMBER
SAI DAVID KEANU	ARNGUS/HIARNG	[redacted]

4. DATE OF ENL	YR	MO	DA	5a. RANK	5b. PAY GRADE	6. DATE OF RANK	YR	MO	DA	7. DATE OF BIRTH	YR	MO	DA
		NA		CPT	03		90	01	08		64	07	13

8a. STATION OR INSTALLATION AT WHICH EFFECTED	8b. EFFECTIVE DATE	YR	MO	DA
BTRY C, 1st Bn, 487th FA, Wahiawa, HI 96786-4053		94	08	01

9. COMMAND TO WHICH TRANSFERRED	10. RECORD OF SERVICE	YRS	MOS	DAYS
USAR Control Group (Reinforcement) ARPERCEN 9700 Page Boulevard St Louis, MO 63132-5200	(a) NET SERVICE THIS PERIOD	09	10	27
	(b) PRIOR RESERVE COMPONENT SERVICE	00	03	25
	(c) PRIOR ACTIVE FEDERAL SERVICE	00	00	00
11. TERMINAL DATE OF RESERVE / MILITARY SERVICE OBLIGATION: YR NA MO DA	(d) TOTAL SERVICE FOR PAY	10	07	22

12. MILITARY EDUCATION *(Course Title, number of weeks, month and year completed)*

FA OBC, 22wks, 8709; Air Opns Off, 2wks, 9010; FA OAC, 15wks, 9012.

13. PRIMARY SPECIALITY NUMBER, TITLE AND DATE AWARDED *(Additional speciality numbers and titles)*

13E, Cannon Field Artillery, 870910.
5U, Air Opns Off, 901001.

14. HIGHEST EDUCATION LEVEL SUCCESSFULLY COMPLETED
SECONDARY / HIGH SCHOOL 12 YRS *(Gr 1-12)* COLLEGE 2 YRS

15. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED ~~THIS PERIOD~~ *(State Awards may be included)*

ARMY-SVC-RBN/ARCOTR/AR-COMP-ACHVMT-MDL-2(920904)/NTL-DEF-SVC-MDL//

16. SERVICEMAN'S GROUP LIFE INSURANCE COV
☒ YES ☐ NO
AMT $ 200,000

17. PERSONNEL SECURITY INVESTIGATION

a. TYPE	b. DATE COMPLETED
NAC	821122

18. REMARKS

Date of Apointment: 840905 ADT: 870424-870911; 900909-901219

NGB Form 22 and orders were mailed by certified mail to the individual's last known address as shown in item 19.

19. MAILING ADDRESS AFTER SEPARATION *(Street, RFD, City, County, State and Zip Code)*
[redacted]

20. SIGNATURE OF PERSON BEING SEPARATED
SOLDIER NOT AVAILABLE TO SIGN

21. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER
DONNIE L. SANDERS, CW2
Personnel Records Chief

22. SIGNATURE OF OFFICER AUTHORIZED TO SIGN
Donnie L Sanders

23. AUTHORITY AND REASON
Para 5a(3), NGR 635-100; Resignation from ARNG

24. CHARACTER OF SERVICE	25. TYPE OF CERTIFICATE USED	26. REENLISTMENT ELIGIBILITY
HONORABLE	NA	NA

27. ☐ REQUEST ☐ DECLINE COPIES OF MY NGB FORM 22 INITIALS _____

NGB FORM 22 1 FEB 83 *(Replaces NGB Form 22, dated 15 Oct 76 and NGB Form 22-1, dated 1 Jun 78, which are obsolete)*

INDIVIDUAL COPY IF REQUESTED (2)

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NO.
SAI DAVID KEANU	ARMY/ARNG/FA	[redacted]

4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM. DATE
CPT	O-3	640713	Year 00 Month 00 Day 00

7.a. PLACE OF ENTRY INTO ACTIVE DUTY	7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete
[redacted]	[redacted]

8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8.b. STATION WHERE SEPARATED
HHB 3D BN 30TH FA TRADOC TC	FORT SILL, OK

9. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE
HHS BTRY 1ST BN 487TH FA, 3949 DIAMOND HEAD ROAD, HONOLULU, HI 96816-4495	[ ] None Amount: $ 50000

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)

13E, CANNON FIELD ARTILLERY OFFICER//
NOTHING FOLLOWS

12. RECORD OF SERVICE	Year(s)	Month(s)	Day(s)
a. Date Entered AD This Period	90	09	08
b. Separation Date This Period	90	12	19
c. Net Active Service This Period	00	03	12
d. Total Prior Active Service	00	04	18
e. Total Prior Inactive Service	05	11	10
f. Foreign Service	00	00	00
g. Sea Service	00	00	00
h. Effective Date of Pay Grade	90	01	08

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

ARMY SERVICE RIBBON//ARMY RESERVE COMPONENTS OVERSEAS TRAINING RIBBON//ARMY RESERVE COMPONENTS ACHIEVEMENT MEDAL//SHARPSHOOTER (RIFLE M-16)//NOTHING FOLLOWS

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed) NONE//NOTHING FOLLOWS

15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	Yes	No	15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT	Yes	No	16. DAYS ACCRUED LEAVE PAID
	--	X		X	--	9.0

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION ... Yes X No

18. REMARKS NONE//NOTHING FOLLOWS

19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)	19.b. NEAREST RELATIVE (Name and address - include Zip Code)
[redacted]	[redacted] SAME AS 19A.

20. MEMBER REQUESTS COPY 6 BE SENT TO HI DIR. OF VET AFFAIRS	X Yes -- No	22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)
21. SIGNATURE OF MEMBER BEING SEPARATED		R. A. HOLYBEE, GS9, C; TRANSITION MG

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (Include upgrades)	
RELIEF FROM ADT	HONORABLE	
25. SEPARATION AUTHORITY	**26. SEPARATION CODE**	**27. REENTRY CODE**
SELF TERM ORDER 057-039 29 MAR 90 FAOAC-RC 3-90	NA	NA

28. NARRATIVE REASON FOR SEPARATION
COMPLETION OF PERIOD OF ADT

29. DATES OF TIME LOST DURING THIS PERIOD	30. MEMBER REQUESTS COPY 4
NONE	Initials

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES | THIS IS AN IMPORTANT RECORD SAFEGUARD IT | ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

DD FORM 1 JUL 79 214

PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, first, middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NO.
SAI, DAVID KEANU	ARMY/ ARNG/FA	[redacted]

4a. GRADE, RATE OR RANK	4b. PAY GRADE	5. DATE OF BIRTH	6. PLACE OF ENTRY INTO ACTIVE DUTY
2LT	01	640713	HONOLULU, HI

7. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8. STATION WHERE SEPARATED
D BTRY OFF STU BN TRADOC TC	FORT SILL, OK

9. COMMAND TO WHICH TRANSFERRED: THE ADJUTANT GENERAL STATE OF HAWAII
3949 DIAMOND HEAD ROAD, FT RUGERM HONOLULU, HI 96816

10. SGLI COVERAGE: AMOUNT $ 50 000 ☐ NONE

11. PRIMARY SPECIALTY NUMBER, TITLE AND YEARS AND MONTHS IN SPECIALTY *(Additional specialty numbers and titles, involving periods of one or more years)*

13E, CANNON FIELD ARTILLERY OFFICER//
NOTHING FIOLLOWS

12. RECORD OF SERVICE	YEAR(s)	MON (s)	DAY(s)
a. Date Entered AD This Period	87	04	24
b. Separation Date This Period	87	09	11
c. Net Active Service This Period	00	04	18
d. Total Prior Active Service	00	00	00
e. Total Prior Inactive Service	02	11	14
f. Foreign Service	00	00	00
g. Sea Service	00	00	00
h. Effective Date of Pay Grade	84	05	19
i. Reserve Oblig. Term. Date	90	05	09

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED *(All periods of service)*

ARMY SERVICE RIBBON// NOTHING FOLLOWS

14. MILITARY EDUCATION *(Course Title, number weeks, and month and year completed)*

NONE//NOTHING FOLLOWS

15. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	16. HIGH SCHOOL GRADUATE OR EQUIVALENT	17. DAYS ACCRUED LEAVE PAID
☐ YES XX NO	XX YES ☐ NO	11½

18. REMARKS: NONE//NOTHING FOLLOWS

19. MAILING ADDRESS AFTER SEPARATION	20. MEMBER REQUESTS COPY 6 BE SENT TO DIR. OF VET AFFAIRS
[redacted]	III ☒ YES ☐ NO

21. SIGNATURE OF MEMBER BEING SEPARATED	22. TYPED NAME, GRADE, TITLE AND SIGNATURE OF OFFICIAL AUTHORIZED TO SIGN
David Keanu Sai	W.L. NYLAND, YSG, USN, NCTIC, PERS ENOC BRANCH

SPECIAL ADDITIONAL INFORMATION *(For use by authorized agencies only)*

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE *(Includes upgrades)*	
RELIEF FROM ADT	HONORABLE	
25. SEPARATION AUTHORITY	**26. SEPARATION CODE**	**27. REENLISTMENT CODE**
SELF TERMINATING ORDERS T-02-708659 dtd 26 FEB 87 FAOBC 7-87	NA	NA

28. NARRATIVE REASON FOR SEPARATION
COMPLETION OF PERIOD OF ADT

29. DATES OF TIME LOST DURING THIS PERIOD	30. MEMBER REQUESTS COPY 4
NONE	DKS INITIALS

SERVICE - 2

Enclosure “4”

Major General Kenneth Hara
State Adjutant General
Hawaii Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

May 29, 2024

Dear Major General Hara,

We hope this letter finds you in good health and high spirits. We are writing to you on behalf of a deeply concerned group of Active and Retired law enforcement officers throughout the Hawaiian Islands, about the current governance of Hawaii and its impact on the vested rights of Hawaiian subjects under Hawaiian Law.

As you are well aware, the historical transition of Hawai'i from a sovereign kingdom to a U.S. state is fraught with significant legal and ethical issues. The overthrow of the government of the Hawaiian Kingdom in 1893 and its subsequent annexation by the United States in 1898 continue to be an illegal act. The Hawaiian Kingdom was recognized as a Sovereign State by the Permanent Court of Arbitration in The Hague, Netherlands, in *Larsen vs. Hawaiian Kingdom* (https://pca-cpa.org/en/cases/35/).

At the center of the dispute, as stated on the PCA's website on the Larsen case, was the unlawful imposition of American laws over Lance Larsen, a Hawaiian subject, that led to an unfair trial and incarceration. It was a police officer, who believed that Hawai'i was a part of the United States and that he was carrying out his lawful duties, that cited Mr. Larsen, which led to his incarceration. That police officer now knows otherwise and so do we. This is not the United States but rather the Hawaiian Kingdom as an occupied State under international law.

It is deeply troubling that the State of Hawaii has not been transitioned into a military government as mandated by international law. This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws. This very issue was brought to the attention of the Maui County Corporation Counsel by Maui Police Chief John Pelletier in 2022. In their request to Chief Pelletier, which is attached, Detective Kamuela Mawae and Patrol Officer Scott McCalister, stated:

> We are humbly requesting that either Chief John Pelletier or Deputy Chief Charles Hank III formally request legal services from Corporation Counsel to conduct a legal analysis of Hawai'i's current political status considering International Law and to assure us, and the rest of the Police Officers throughout the State of Hawai'i, that we are not violating International Law by enforcing U.S. domestic laws within what the federal lawsuit calls the Hawaiian Kingdom that continues to exist as a nation state under international law despite its government being overthrown by the United States on 01/17/1893.

Police Chief Pelletier did make a formal request to Corporation Counsel, but they did not act upon the request, which did not settle the issue and the possible liability that Police Officers face.

Your failure to initiate such a transition may be construed as a violation of the 1907 Hague Regulations and the 1949 Geneva Convention, which outlines the obligations of occupying powers. Also, your

actions, or lack thereof, deprive Hawaiian subjects of the protections and rights they are entitled to under Hawaiian Kingdom laws and international humanitarian law. According to the Geneva Convention, occupying powers are obligated to respect the laws in force in the occupied territory and protect the rights of its inhabitants. Failure to comply with these obligations constitutes a serious violation and can result in accountability for war crimes for individuals in positions of authority.

The absence of a military government perpetuates an unlawful governance structure that has deprived the rights of Hawaiian subjects which is now at 131 years. The unique status of these rights is explained at this blog article on the Council of Regency's weblog titled "It's About Law—Native Hawaiian Rights are at a Critical Point for the State of Hawai'i to Comply with the Law of Occupation" (https://hawaiiankingdom.org/blog/native-hawaiians-are-at-a-critical-point-for-the-state-of-hawaii-to-comply-with-the-law-of-occupation/). It is imperative that steps be taken to rectify these historical injustices and ensure the protection of the vested rights of Hawaiian subjects.

We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstances, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an **acting capacity** that is allowed under Hawaiian law.

We urge you to work with the Council of Regency in making sure this transition is not only lawful but is done for the benefit of all Hawaiian subjects. Please consider the gravity of this situation and take immediate action to establish a military government in Hawaii. Such a measure would align with international law and demonstrate a commitment to justice, fairness, and the recognition of the rights of Native Hawaiians.

Thank you for your attention to this critical issue. We look forward to your prompt response and to any actions you will take to address these concerns.

Sincerely,

Alika Desha
Retired Officer
Honolulu Police Department

On Behalf of:

Vic Vierra
Retired Chief of Police
Hawaii Police Dept.

David Heaukulani
Retired Assistant Chief
Honolulu Police Dept.

Karl Godsey
Retired Deputy Chief
Honolulu Police Dept.

Robert Imoto
Retired Captain
Honolulu Police Dept.

George Kaho'ohanohano
Retired Captain
Maui Police Dept.

Leslie Anderson
Retired Lieutenant
Honolulu Police Dept.

Lambert Ohia
Retired Lieutenant
Honolulu Police Dept.

Rosalie Lenchanko
Retired Lieutenant
Honolulu Police

Auggie Roback Jr.
Retired Detective
Honolulu Police Dept.

Joseph Lane
Retired Detective
Honolulu Police Dept.

Fay Tamura
Retired Sergeant
Honolulu Police Dept.

Mike Wong
Retired Sergeant
Honolulu Police Dept.

Kaena Brown (Active)
Sergeant
Maui Police Dept.

Leland Pa
Retired Officer
Hawaii Police Dept.

David Brown
Retired Officer
Honolulu Police Dept.

Scott McCallister (Active)
Police Officer
Maui Police Dept.

Nicholas Krau (Active)
Lieutenant
Maui Police Dept.

Kamuela Mawae (Active)
Detective
Maui Police Dept.

Jill Kaui
Retired Detective
Honolulu Police Dept.

Rollins Rabara
Retired Sergeant
Hawaii Police Dept.

John Ayat
Retired Sergeant
Honolulu Police Dept.

George Smith
Retired Sergeant
Honolulu Police Dept.

Kalani Miles (Active)
Police Officer
Maui Police Dept.

Gary Keawe-Aiko
Retired Officer
Honolulu Police Dept.

Adrian Hussey
Retired Officer
Honolulu Police Dept.

Bruce Heidenfeldt
Retired Reserve Officer
Hawaii Police Dept.

George Gersaba
Retired Lieutenant
Honolulu Police Dept.

Mike Lupenui
Retired Sergeant
Honolulu Police Dept.

Vernon Santos
Retired Detective
Honolulu Police Dept.

Russell Paio
Retired Sergeant
Hawaii Police Dept.

Robert Miranda
Retired Sergeant
Honolulu Police Dept.

Peter Tampon
Retired Sergeant
Honolulu Police Dept.

Duwayne Waipa
Retired Officer
Hawaii Police Dept.

Billy Roback III
Retired Officer
Maui Police Dept.

John M Veneri
Retired Officer
Honolulu Police Dept.

Larry Rutkowski
Retired Officer
Honolulu Police Dept.

CC: Brigadier General Stephen F. Logan
Hawaii Department of Defense
3949 Diamond Head Road
Honolulu, HI. 96816

Lieutenant Colonel Lloyd C. Phelps
Hawaii Department of Defense
3949 Diamond Head Road
Honolulu Hi. 96816

TO	:	JOHN PELLETIER, CHIEF OF POLICE, MAUI POLICE DEPARTMENT
THRU	:	CHARLES HANK III, DEPUTY CHIEF, MAUI POLICE DEPARTMENT
	:	RANDY ESPERANZA, ASSISTANT CHIEF, INVESTIGATIVE SERVICES BUREAU
	:	JOHN FOSTER, CAPTAIN, CRIMINAL INVESTIGATION DIVISION
	:	GARRET TIHADA, LIEUTENANT, CRIMINAL INVESTIGATION DIVISION
FROM	:	KAMUELA MAWAE, DETECTIVE, CRIMINAL INVESTIGATIONS DIVISION
	:	SCOTT MCCALISTER, OFFICER, WAILUKU PATROL
SUBJECT	:	REQUEST FOR LEGAL SERVICES REGARDING U.S. FEDERAL COURT CASE 1:21-cv-00243; HAWAIIAN KINGDOM VS U.S. AND THE STATE OF HAWAI'I

Sir, this to/thru is being sent to request legal services from Corporation Counsel regarding U.S. Federal court case 1:21-cv-00243. Said court case was initially filed on 05/20/2021 and lists the Hawaiian Kingdom as the Plaintiff and multiple U.S. officials to include President Joseph Robinette Biden Jr., as well as multiple foreign consulates operating in Hawaii as Defendants.[1]

On 04/24/2022, the Hawaiian Kingdom filed a notice of appeal regarding two orders issued by District Court Judge Leslie Kobayashi that made its way to the Ninth Circuit Court of Appeals. The *Hawaiian Kingdom v. Biden et al.* case was not terminated but is still pending. On 05/20/2022, the Hawaiian Kingdom filed a motion to dismiss for forum non conveniens with the Ninth Circuit.[2] The United States filed a response to the motion on 05/25/2022.[3] On 06/02/2022, the Hawaiian Kingdom filed its reply to the United States' response.[4]

In these filings, the Hawaiian Kingdom draws the court's attention to a State of Hawai'i case, *State of Hawai'i v. Lorenzo*, that came before the Intermediate Court of Appeals in 1994. The Hawaiian Kingdom argues that this case has been used by the federal courts and is known as

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[1] Amended Complaint, Hawaiian Kingdom v. Biden et al. (https://hawaiiankingdom.org/pdf/Amended_Complaint_and_Exhibits_1_&_2%20_(Filed_2021-08-11).pdf).
[2] Motion to Dismiss for Forum Non Conveniens (https://hawaiiankingdom.org/pdf/Dkt_10-1_HK_Motion_to_Dismiss_(Filed_2022-05-20)_with_Exhibits.pdf).
[3] United States Response (https://hawaiiankingdom.org/pdf/%5bDkt_11%5d_Federal_Appellees_Response_to_Appellants_Response_(Filed_2022-05-25).pdf).
[4] Hawaiian Kingdom Reply to the United States Response (https://hawaiiankingdom.org/pdf/22-15637_DktEntry_12-1_to_12-9_HK_Reply%20(Efiled%202022-06-02).pdf).

the *Lorenzo* principle that acknowledges the continued existence of the Hawaiian Kingdom and that it also renders the State of Hawai'i and the County governments as unlawful.

On 02/07/2022, while not acting under official capacity as a law enforcement officer, I emailed State Representative Troy Hashimoto informing him of my concerns regarding any possible ramifications that the lawsuit may bring. Said email was subsequently forwarded to Corporation Council Attorney Moana Lutey who responded by informing me that if Corporation Council is to look into this matter, a request for legal services would have to be submitted by "A1 or A2."

International Law Expert and Acting Minister of Interior of the Hawaiian Kingdom, Dr. David Keanu Sai, has conducted presentations providing information regarding the Federal complaint and the continued existence of the Hawaiian Kingdom as an independent nation state, however one under prolonged belligerent occupation by the United States of America at the international level to include the Maui County Council and the Maui SHOPO chapter board. Dr. Sai further stated that we as police officers could be committing war crimes by enforcing U.S. domestic law on Hawaiian soil. Dr. Sai is also the Head of the Royal Commission of Inquiry along with Professor Federico Lenzerini from the University of Siena as Deputy Head.[5] The Commission's first preliminary report was on the material elements of war crimes and ascertaining the *mens rea*.[6] The Commission's latest preliminary report is on the *Lorenzo* doctrine[7] that is being used in the federal lawsuit that acknowledges the Hawaiian Kingdom's continued existence as a State and why the State of Hawai'i is unlawful. The *Lorenzo* doctrine stems from a 1994 appellate case of *State of Hawai'i v. Lorenzo*.

We are humbly requesting that either Chief John Pelletier or Deputy Chief Charles Hank III formally request legal services from Corporation Counsel to conduct a legal analysis of Hawai'i's current political status considering International Law and to assure us, and the rest of the Police Officers throughout the State of Hawaii, that we are not violating International Law by enforcing U.S. domestic laws within what the federal lawsuit calls the Hawaiian Kingdom that continues to exist as a nation state under international law despite its government being overthrown by the United States on 01/17/1893.

Respectfully Submitted,

Kamuela MAWAE, #13010
06/15/2022 @ 1630 hours

Scott McCALISTER, #15531

[5] Hawaiian Kingdom Royal Commission of Inquiry (https://hawaiiankingdom.org/royal-commission.shtml).
[6] Royal Commission of Inquiry, *Preliminary Report—The Material Elements of War Crimes and Ascertaining the Mens Rea* (May 24, 2020) (https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Mens_Rea.pdf).
[7] Royal Commission of Inquiry, *Preliminary Report—The Lorenzo doctrine on the Continuity of the Hawaiian Kingdom as a State* (June 7, 2022) (https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Lorenzo_Doctrine.pdf).

Clear Form

Received: July 13, 2022

REQUEST FOR LEGAL SERVICES

DATE: 7/13/2022

From: Chief John Pelletier

Department/Division: MPD

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Keola Whittaker

Subject: Hawaiian Kingdom v. U.S. and the State of Hawaii, Case No.: 1:21-cv-00243

Background Data:

MPD requests research and a legal analysis on whether MPD is in violation of any federal and/or international by enforcing laws against the "Hawaiian Kingdom" as stated in the lawsuit.

Work Requested:

- ☐ FOR APPROVAL AS TO FORM AND LEGALITY
- ✓ OTHER: Legal Research

Requestor's signature	Contact Person: Angela Andrade (Telephone Extensions: 6304 Email: angela.andrade@mpd.net

- ☐ ROUTINE (WITHIN 15 WORKING DAYS)
- ✓ PRIORITY (WITHIN 10 WORKING DAYS)
- ☐ RUSH (WITHIN 5 WORKING DAYS)
- ☐ URGENT (WITHIN 3 WORKING DAYS)
- ☐ SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): _____

REASON:

↓ FOR CORPORATION COUNSEL'S RESPONSE ↓

ASSIGNED TO: KRW	ASSIGNMENT NO. 2022-1092	BY: GMR

TO REQUESTOR: [ ] *APPROVED* [ ] *DISAPPROVED* [X] *OTHER (SEE COMMENTS BELOW)*
[ ] *RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS*
AS NOTED:

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): Thank you for forwarding this letter. We will keep it on file. There is no need for any MPD personell to respond to the request.

DEPARTMENT OF THE CORPORATION COUNSEL

Date July 15, 2022

By _____

(Rev. 10/2011)

Enclosure “15”

H.E. DAVID KEANU SAI, PH.D.
Head, Royal Commission of Inquiry
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: http://hawaiiankingdom.org/royal-commission

August 7, 2024

Brigadier General Stephen F. Logan
State of Hawai‘i Deputy Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: stephen.f.logan3.mil@army.mil

Via electronic mail

Re: Your duty to establish a military government by 12 noon on August 12, 2024

Brigadier General Logan:

As you are aware, yesterday, I notified the Commander of the 29th Infantry Brigade and the Commanders of its component battalions apprising them as to the circumstances of their possible implication, of performing the duty to establish a military government of Hawai‘i, should you fail to perform your duty. I closed the letter with:

> As senior Commanders in the chain of command of the Army National Guard, I implore you all to take this matter seriously and to demand, from the Attorney General or the JAG, a legal opinion that concludes there is no duty on you to establish a military government because the Hawaiian Kingdom does not continue to exist, and that this is the territory of the United States and the State of Hawai‘i under international law. With the legal opinion in hand, there is no duty to perform. Without it, there is the military duty to perform, and failure to perform would constitute the war crime by omission.

The demand for a legal opinion, by you, of the Attorney General, Anne E. Lopez, or of the JAG, LTC Lloyd Phelps, is not outside your duties as a military officer. Your duty is to adhere to the rule of law. According to section 4-106, FM 3-07:

> The rule of law is fundamental to peace and stability. A safe and secure environment maintained by a civilian law enforcement system must exist and operate in accordance with internationally recognized standards and with respect for internationally recognized human rights and freedoms. Civilian organizations are responsible for civil law and order. However, Army forces may need to provide limited support.

According to the *Handbook for Military Support to Rule of Law and Security Sector Reform* (2016), the most frequently used definition of the rule of law "in the US government is one put forth by the UN."[1]

United Nations Definition of the Rule of Law

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

Demanding a legal opinion that refutes, with irrefutable evidence and law, the continued existence of the Hawaiian Kingdom as a State, under international law, is not a political act but rather an act to 'ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.' Under international law, legal title to territory is State sovereignty and it is a jurisdictional matter. As the Permanent Court of International Justice, in the *Lotus* case, stated:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [treaty].

[1] *Handbook for Military Support to Rule of Law and Security Sector Reform* I-3 (2016).

In other words, without a treaty, where the Hawaiian Kingdom ceded its sovereignty to the United States, the United States and the State of Hawai‘i have no sovereignty over the Hawaiian Islands. However, if the Attorney General is confident, that the State of Hawai‘i is lawfully the 50th state of the United States, she would have no problem providing you a legal opinion that the Hawaiian Kingdom ceases to exist under international law. To have instructed you, and Major General Hara, to simply ignore the call to perform a military duty, the Attorney General revealed that she has no legal basis for her instruction to you. To quote Secretary of State Walter Gresham regarding the status of the provisional government, he stated to President Grover Cleveland:

> The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act.[2]

The same can be said of the Attorney General, whose office is a direct successor of the lawless provisional government. An Attorney General, conscious of her lawful status, does not thus act.

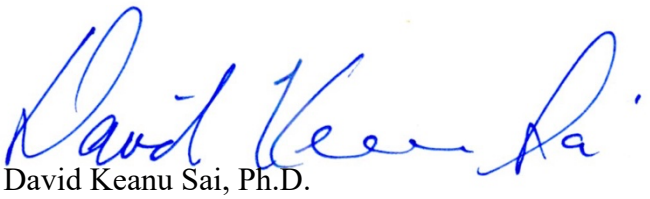
The call upon you, to perform your military duty, is not an attack on you and on the men and women you command in the Hawai‘i National Guard. It is a call upon you because of the respect the I have, as a former Army Field Artillery officer, of your position as the United States theater commander in the occupied State of the Hawaiian Kingdom.

I recommend that you view a recent podcast I did with Kamaka Dias' *Keep It Aloha* (https://www.youtube.com/watch?v=PvEdNx2dynE) where I share my history and my time as a military officer, and how I got to where I am as a member of the Council of Regency. Since the podcast was posted on August 1, 2024, it has received over 6,700 views. I also recommend that you watch my presentation to the Maui County Council (https://www.youtube.com/watch?v=Hh4iVT77MG8&t=8s) on March 6, 2024, where I explain the legal basis of the American occupation and the duty of the Adjutant General to transform the State of Hawai‘i into a military government. Since the Kamehameha Schools' Kanaeokana posted the video on April 1, 2024, it has received over 16,000 views. I recommend that you also watch an award-winning documentary on the Council of Regency that premiered in 2019 at the California Film Festival (https://www.youtube.com/watch?v=CF6CaLAMh98). Since the video was posted on August 13, 2019, it has received over 42,000 views.

[2] Secretary of State Gresham to President Cleveland 462 (Oct. 18, 1893) (online at https://hawaiiankingdom.org/pdf/Gresham_Report_(10.18.1893).pdf).

Since my meeting with MG Hara on April 17, 2023, I have given him the latitude and time to do his due diligence with his JAG, LTC Phelps, who acknowledged that Hawai‘i is an occupied State. For MG Hara to simply ignore my calls on him to perform his duty is a sign of disrespect to a government official of the Hawaiian Kingdom whose conduct and action are in accordance with the rule of law. I implore you to not follow the same course MG Hara took, which led him to committing the war crime by omission.

You have until 12 noon on August 12, 2024, to perform your duty, of establishing a military government for Hawai‘i, in accordance with the Law of Armed Conflict—international humanitarian law, U.S. Department of Defense Directive 5100.01, and Army Regulations—FM 27-5 and FM 27-10. The eyes of Hawai‘i and the world are upon you.



David Keanu Sai, Ph.D.
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Enclosure “16”

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August 10, 2024

Brigadier General Stephen F. Logan
State of Hawai‘i Deputy Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816
Email: stephen.f.logan3.mil@army.mil

Via electronic mail

Re: Your duty to establish a military government by 12 noon on August 12, 2024

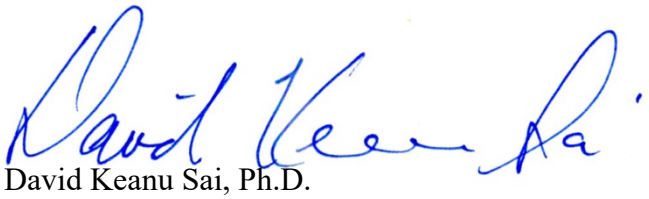
Brigadier General Logan:

As August 12, 2024 is fast approaching, the Royal Commission of Inquiry ("RCI") would like to separate the two actions you are faced with regarding your duty to establish a military government. The first action is the request by you of the Attorney General, Anne E. Lopez, to provide you with a legal opinion that concludes, with irrefutable facts and the law, that the Hawaiian Kingdom does not continue to exist as a State under international law. The second action is the performance of the duty to establish a military government if the Attorney General has not provided you with a legal opinion.

If you did notify the Attorney General to provide you with a legal opinion before 12 noon on August 12th and she has not gotten back to you by 12 noon on August 12th, then the RCI will not demand that you perform your duty to establish a military government until the Attorney General has completed that legal opinion for you. If this is the course that you have taken, the Attorney General will have to rebuke the following legal opinions regarding the continuity of the Hawaiian Kingdom as a State, and the legal standing of the Council of Regency:

- Professor Matthew Craven, University of London, SOAS, Department of Law, attached as enclosure 1.
- Professor Federico Lenzerini, University of Siena, Italy, Department of Political and International Sciences, attached as enclosure 2.

If you do not notify the RCI, by email or by letter via email prior to 12 noon on August 12, 2024, that you have requested a legal opinion from the Attorney General, and she has not completed the same, then the RCI will assume that you did not make the request. If this is the case, and you have not established a military government by 12 noon on August 12, 2024, then you will be the subject of a war criminal report for the war crime by omission.



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Enclosure “1”

CONTINUITY OF THE HAWAIIAN KINGDOM

by Dr. Matthew Craven

Reader in International Law
SOAS, University of London

Being a portion of a
Legal Brief provided for the
acting Council of Regency

http://www.HawaiianKingdom.org

July 12, 2002

A. THE CONTINUITY OF THE HAWAIIAN KINGDOM

2. *GENERAL CONSIDERATIONS*

2.1 The issue of State continuity usually arises in cases in which some element of the State has undergone some significant transformation (such as changes in its territorial compass or in its form of government). A claim as to state continuity is essentially a claim as to the continued independent existence of a State for purposes of international law in spite of such changes. It is essentially predicated, in that regard, upon an insistence that the State's legal identity has remained intact. If the State concerned retains its identity it can be considered to 'continue' and *vice versa.* Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another 'successor' state (to the extent provided by rules of succession). At its heart, therefore, the issue of State continuity is concerned with the parameters of a state's existence and demise (or extinction) in international law.

2.2 The implications of continuity in case of Hawai`i are several:

a) That authority exercised by US over Hawai`i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai`i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai`i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.

b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.

c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principles *rebus sic stantibus* or impossibility of performance.

d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third

states, and is liable for the debts of the Hawaiian kingdom incurred prior to its occupation.

2.3 Bearing in mind the consequences elucidated in c) and d) above, it might be said that a claim of state continuity on the part of Hawai`i has to be opposed as against a claim by the US as to its succession. It is apparent, however, that this opposition is not a strict one. Principles of succession may operate even in cases where continuity is not called into question, such as with the cession of a portion of territory from one state to another, or occasionally in case of unification. Continuity and succession are, in other words, not always mutually exclusive but might operate in tandem. It is evident, furthermore, that the principles of continuity and succession may not actually differ a great deal in terms of their effect. Whilst State continuity certainly denies the applicability of principles of succession and holds otherwise that rights and obligations remain intact save insofar as they may be affected by the principles *rebus sic stantibus* or impossibility of performance, there is room in theory at least for a principle of universal succession to operate such as to produce exactly the same result (under the theory of universal succession).[1] The continuity of legal rights and obligations, in other words, does not necessarily suppose the continuity of the State as a distinct person in international law, as it is equally consistent with discontinuity followed by universal succession. Even if such a thesis remains largely theoretical, it is apparent that a distinction has to be maintained between continuity of personality on the one hand, and continuity of specific legal rights and obligations on the other. The maintenance in force of a treaty, for example, in relation to a particular territory may be evidence of State continuity, but it is far from determinative in itself.

2.4 Even if it is relatively clear as to when States may be said to come into being for purposes of international law (in many cases predicated upon recognition or admission into the United Nations),[2] the converse is far from being the case.[3] Beyond the theoretical circumstance in which a body politic has dissolved (for example by submergence of the territory or the dispersal of the population), it is apparent that all cases of putative extinction will arise in cases where certain changes of a material nature have occurred – such as a change in government and change in the territorial configuration of the State. The difficulty, however, is in determining when such changes are merely incidental, leaving intact the identity of the state, and when they are to be regarded as fundamental going to the heart

[1] Cf. article 34 Vienna Convention on State Succession in Respect of Treaties (1978).
[2] See on this point Crawford J., *The Creation of States in International Law* (1979); Dugard J., *Recognition and the United Nations* (1987).
[3] Ibid, p.417.

of that identity.[4] The problem, in part, is the lack of any institution by which such an event may be marked: governments do not generally withdraw recognition even if circumstances might so warrant,[5] and there is no mechanism by which membership in international organisations may be terminated by reason of extinction. It is evident, moreover, that states are complex political communities possessing various attributes of an abstract nature which vary in space as well as time, and, as such, determining the point at which changes in those attributes are such as to affect the State's identity will inevitably call for very fine distinctions.

2.5 It is generally held, nevertheless, that there exist several uncontroversial principles that have some bearing upon the issue of continuity. These are essentially threefold, all of which assume an essentially negative form.[6] First that the continuity of the State is not affected by changes in government even if of a revolutionary nature.[7]

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[4] See generally, Marek K., *The Identity and Continuity of States in Public International Law* (2nd ed. 1968). For early recognition of this principle see Phillimore P., *Commentaries upon International Law* (1879) p. 202.

[5] See, Guggenheim P., *Traité de droit international public* (1953) p. 194. Lauterpacht notes that '[W]ithdrawal of recognition from a State is often obscured by the fact that, having regard to the circumstances, it does not take place through an express declaration announcing the withdrawal but through the act of recognition, express or implied, of the new authority.' Lauterpacht H., *Recognition in International Law*, (1947) pp. 350-351.

[6] Further principles have also been suggested, such as: i) the state does not cease to exist by reason of its entry into a personal union, Pradier-Fodéré, *Traité de droit international public Européen et Americain* (1885) s.148, p.253; ii) that the state does not expire by reason of becoming economically or politically weak, *ibid*, s. 148, p.254; iii) that the state does not cease to exist by reason of changes in its population, *ibid* p. 252; iv) that the state is not affected by changes in the social or economic system, Verzijl, *International Law in Historical Perspective*, p. 118; v) that the State is not affected by being reduced to a State of semi-sovereignty, Phillimore, supra, n. 4, p. 202. According to Vattel, the key to sovereignty was 'internal independence and sovereign authority' (Vattel E., *The Law of Nations or the Principles of Natural Law* (1758, trans Fenwick C., 1916) Bk.1, s.8)- if a state maintained these, it would not lose its sovereignty by the conclusion of unequal treaties or tributary agreements or the payment of homage. Sovereign states could be subject to the same prince and yet remain sovereign e.g Prussia and Neufchatel (*ibid,* Bk.1, s.9). The formation of confederative republic of states did not destroy sovereignty because 'the obligation to fulfill agreements one has voluntarily made does not detract from one's liberty and independence' (*ibid*, bk.1, s.10) e.g. the United Provinces of Holland and the members of the Swiss Confederation.

[7] For early versions of this principle see, Grotius, *De Iure Belli ac Pacis* Bk. II, c. xvi, p. 418. See also, Pufendorf S., *De Jure Naturae et Gentium Libri Octo* (1688, trans Oldfather C. and Oldfather W., 1934) B. VIII, c. xii, s.1, p. 1360; Rivier, *Principes du Droit des Gens*, (1896) I, p. 62; De Martens F., *Traité de Droit International* (1883) 362; Westlake J., *International Law* (1904) I, 58; Wright Q., 'The Status of Germany and the Peace Proclamation', 46 A.J.I.L. (1952) 299, p. 307; McNair A., 'Aspects of State Sovereignty' B.Y.I.L. (1949) p. 8. Jennings and Watts (Oppenheim's Inernational Law (9th ed. 1996), p. 146) declare that:

> 'Mere territorial changes, whether by increase or by dimunution, do not, so long as the identity of the State is preserved, affect the continuity of its existence or the obligations of its treaties.... Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute

Secondly, that continuity is not affected by territorial acquisition or loss,[8] and finally that it is not affected by belligerent occupation (understood in its technical sense).[9] Each of these principles reflects upon one of the key incidents of statehood – territory, government and independence – making clear that the issue of continuity is essentially one concerned with the existence of States: unless one or more of the key constituents of statehood are entirely and permanently lost, State identity will be retained. Their negative formulation, furthermore, implies that there exists a general presumption of continuity.[10] As Hall was to express the point, a State retains its identity

> 'so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.'[11]

The only exception to this general principle, perhaps, is to be found in case of multiple changes of a less than total nature, such as where a revolutionary change in government is accompanied by a broad change in the territorial delimitation of the State.[12]

2.6 If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that

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> principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired'.

See also, *US v. Curtiss Wright Export Corp. et al* 299 US (1936) 304, p. 316 (J. Sutherland): 'Rulers come and go; governments end and forms of government change; but sovereignty survives.'.

[8] Westlake, supra, n. 7, p. 59; Pradier-Fodéré, supra, n. 6, s. 148, p. 252; Hall W., *A Treatise on International Law* (4th ed. 1895) p. 23; Phillimore, supra, n. 4, I, pp. 202-3; Rivier, supra, n. 7, I, pp. 63-4; Marek, supra, n. 4, pp. 15-24 Article 26 Harvard Research Draft Convention on the Law of Treaties 1935, 29 AJIL (1935) Supp. 655. See also, *Katz and Klump v. Yugoslavia* [1925-1926] A. D. 3 (No. 24); *Ottoman Debt Arbitration* [1925-26] A. D. 3; *Roselius and Co. v. Dr Karsten and the Turkish Republic intervening*, [1925-6] A. D. (No. 26); *In re Ungarishche kriegsprodukien Aktiengesellschaft*, [1919-22] A.D. (No. 45); *Lazard Brothers and Co v. Midland Bank*, [1931-32] A.D. (No. 69). For State practice see e.g. Great Britain remained the same despite the loss of the American Colonies; France, after the loss of territory in 1814-15 and 1871; Austria after the cession of Lombardy in 1859 and Venice in 1866; Prussia after the Franco-Prussian Peace Treaty at Tilsit, 1807. See generally, Moore, J., *A Digest of International Law*, (1906), p. 248.

[9] See below, paras. .

[10] Crawford points out that 'the presumption – in practice a strong one – is in favour of the continuance, and against the extinction, of an established state', Crawford, *supra*, n. 2, p. 417.

[11] Hall, *supra*, n. 8, p. 22.

[12] See e.g. Marek, *supra*, n. 4.

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. It might be objected that formally speaking, the survival or otherwise of a State should be regarded as independent of the legitimacy of any claims to its territory on the part of other States. It is commonly recognised that a State does not cease to be such merely in virtue of the existence of legitimate claims over part or parts of its territory. Nevertheless, where those claims comprise the entirety of the territory of the State, as they do in case of Hawai`i, and when they are accompanied by effective occupation to the exclusion of the claimant, it is difficult, if not impossible, to separate the two questions. The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands.

2.7 In light of such considerations any claim to State continuity will be dependent upon the establishment of two legal facts: first that the State in question existed as a recognised entity for purposes of international law at some relevant point in history; and secondly that intervening events have not been such as to deprive it of that status. It should be made very clear, however, that the issue is not simply one of 'observable' or 'tangible facts', but more specifically of 'legally relevant facts'. It is not a case, in other words, simply of observing how power or control has been exercised in relation to persons or territory, but of determining the scope of 'authority' (understood as 'a legal entitlement to exercise power and control'). Authority differs from mere control by not only being essentially rule governed, but also in virtue of the fact that it is not always entirely dependent upon the exercise of that control. As Arbitrator Huber noted in the *Island of Palmas Case*:

> 'Manifestations of sovereignty assume... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.'[13]

Thus, whilst 'the continuous and peaceful display of territorial sovereignty' remains an important measure for determining

[13] *Island of Palmas Case (Netherlands v. United States)* 2 R.I.A.A. 829.

entitlements in cases where title is disputed (or where 'no conventional line of sufficient topographical precision exists'), it is not always an indispensable prerequisite for legal title. This has become all the more apparent since the prohibition on the annexation of territory became firmly implanted in international law, and with it the acceptance that certain factual situations will not be accorded legal recognition: *ex inuria ius non oritur.*

3. *THE STATUS OF THE HAWAIIAN KINGDOM AS A SUBJECT OF INTERNATIONAL LAW*

3.1 Whilst the Montevideo critieria[14] (or versions of) are now regarded as the definitive determinants of statehood, the criteria governing the 'creation' of states in international law in the 19th Century were somewhat less clear.[15] The rise of positivism and its rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many to posit international law less in terms of a 'universal' law of nations and more in terms of an international public law of European (and North American) States.[16] According to this view, international law was gradually extended to other portions of the globe primarily in virtue of imperialist ambition and colonial practice - much of the remainder was regarded as simply beyond the purview of international law and frequently as a result of the application of a highly suspect 'standard of civilisation'. It was not the case, therefore, that all territories governed in a stable and effective manner would necessarily be regarded as subjects of international law and much would apparently depend upon the formal act of recognition, which signalled their 'admittance into the family of nations'.[17] Thus, on the one hand commentators frequently provided impressively detailed 'definitions' of the State. Phillimore, for example, noted that 'for all purposes of international law, a state... may be defined to be a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making

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[14] Montevideo Convention on the Rights and Duties of States, Dec. 26th 1933, article 1:
> 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

[15] Doctrine towards the end of the 19th Century began to articulate those criteria. Rivier, for example, described the 'essential elements of the state' as being evidenced by 'an independent community, organised in a permanent manner on a certain territory' (Rivier, *supra*, n. 7). Hall similarly speaks about the 'marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.' *Supra*, n. 8, p. 18.

[16] See e.g., Lawrence T., *Principles of International Law* (4th ed. 1913) p. 83; Pradier-Fodéré, *Traité de droit international public Européen et Americain* (1885).

[17] Hall comments, for example, that 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired. Hall, *supra,* n. 8, p. 87.

war and peace, and of entering into all international relations with the other communities of the globe'.[18] These definitions, however, were not always intended to be prescriptive. Hall maintained, for example, that whilst States were subjected to international law 'from the moment... at which they acquire the marks of a state'[19] he later added the qualification that States 'outside European civilisation... must formally enter into the circle of law-governed countries'.[20] In such circumstances recognition was apparently critical. Given the trend to which this gave rise, Oppenheim was later to conclude in 1905, that 'a State is and becomes an international person through recognition only and exclusively'.[21]

3.2 Whatever the general position, there is little doubt that the Hawaiian Kingdom fulfilled all requisite criteria. The Kingdom was established as an identifiable, and independent, political community at some point in the early 19th Century (the precise date at which this occurred is perhaps of little importance). During the next half-Century it was formally recognised by a number of Western powers including Belgium, Great Britain,[22] France,[23] and the United States,[24] and received and dispatched diplomatic agents to more than 15 States (including Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden and Norway and the United States). Secretary of State Webster declared, for example, in a letter to Hawaiian agents in 1842 that:

> 'the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the Islands as a conquest or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.'[25]

This point was reiterated subsequently by President Tyler in a message to Congress.[26] In similar vein, Britain and France declared in a joint declaration in 1843 that they considered 'the Sandwich

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[18] Phillimore, *supra,* n. 4, I, p. 81.
[19] Hall, supra, n. 8, p. 21.
[20] *Ibid*, pp. 43-44.
[21] *International Law: A Treatise* (1905) I, p. 109.
[22] Declaration of Great Britain and France relative to the Independence of the Sandwich Islands, London, Nov. 28th, 1843.
[23] Ibid.
[24] Message from the President of the United States respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government, Dec. 19th 1842. The Apology Resolution of 1993, however, maintains that the US 'recognised the independence of the Hawaiian Kingdom, extended full and complete diplomatic recognition to the Hawaiian Government 'from 1826 until 1893'.
[25] Letter of Dec. 19th 1842, Moore's Digest, *supra*, n. 8, I, p. 476.
[26] Message of President Tyler, Dec. 30th 1842, Moore's Digest, *supra*, n. 8, I, pp. 476-7.

Islands as an independent State' and vowed 'never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed'.[27] When later in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions 'incompatible with any just regard for the Hawaiian Government as an independent State' and calling upon France to 'desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands'.[28]

3.3 In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd 1826, Dec. 20th 1849, May 4th 1870, Jan. 30th 1875, Sept. 11th 1883, and Dec. 6th 1884), Britain (Nov. 16th 1836 and July 10th 1851), the Free Cities of Bremen (Aug. 7th 1851) and Hamburg (Jan. 8th 1848), France (July 17th 1839), Austria-Hungary (June 18th 1875), Belgium (Oct. 4th 1862), Denmark (Oct. 19th 1846), Germany (March 25th 1879), France (Oct. 29th 1857), Japan (Aug. 19th 1871), Portugal (May 5th 1882), Italy (July 22nd 1863), the Netherlands (Oct. 16th 1862), Russia (June 19th 1869), Samoa (March 20th 1887), Switzerland (July 20th 1864), Spain (Oct. 29th 1863), and Sweden and Norway (July 1st 1852). The Hawaiian Kingdom, furthermore, became a full member of the Universal Postal Union on January 1st 1882.

3.4 There is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893, the moment of the first occupation of the Island(s) by American troops.[29] Indeed, this point was explicitly accepted in the *Larsen v. Hawaiian Kingdom* Arbitral Award.[30]

3.5 The consequences of Statehood at that time were several. States were deemed to be sovereign not only in a descriptive sense, but were also regarded as being 'entitled' to sovereignty. This entailed, amongst other things, the rights to free choice of government, territorial inviolability, self-preservation, free development of natural resources, of acquisition and of absolute jurisdiction over all persons and things within the territory of the State.[31] It was, however, admitted that intervention by another state was permissible in certain prescribed circumstances such as for purposes of self-preservation,

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[27] For. Rel. 1894, App. II, p. 64.
[28] Letter of June 19th 1851, For. Rel. 1894, App. II, p. 97.
[29] For confirmation of this fact see e.g. Rivier, *supra,* n. 7, I, p. 54.
[30] *Larsen v. Hawaiian Kingdom*, P.C.A. Arbitral Award, Feb. 5th 2001, para. 7.4.
[31] Phillimore, supra, n. 4, I, p. 216.

for purposes of fulfilling legal engagements or of opposing wrong-doing. Although intervention was not absolutely prohibited in this regard, it was generally confined as regards the specified justifications. As Hall remarked,

> 'The legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it.'[32]

A desire for simple aggrandisement of territory did not fall within these terms, and intervention for purposes of supporting one party in a civil war was often regarded as unlawful.[33] In any case, the right of independence was regarded as so fundamental that any action against it 'must be looked upon with disfavour'.[34]

4. *RECOGNISED MODES OF EXTINCTION*

4.1 In light of the evident existence of Hawai`i as a sovereign State for some period of time prior to 1898, it would seem that the issue of continuity turns upon the question whether Hawai`i can be said to have subsequently ceased to exist according to the terms of international law. Current international law recognises that a state may cease to exist in one of two scenarios: by means of that State's integration with another in some form of union (such as the GDR's accession to the FRG), or by its dismemberment (such as in case of the Socialist Federal Republic of Yugoslavia or Czechoslovakia).[35] As will be seen, events in Hawai`i in 1898 are capable of being construed in several ways, but it is evident that the most obvious characterisation was one of annexation (whether by cession or conquest).

4.2 The general view today is that, whilst annexation was historically a permissible mode of acquiring title to territory (as was 'discovery'), it is now regarded as illegitimate and primarily as a consequence of the general prohibition on the use of force as expressed in article 2(4) of the UN Charter. This point has since been underscored in various forms since 1945. General Assembly Resolution 2625 on Friendly Relations, for example, provides that:

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[32] Hall, supra, n. 8, p. 298.
[33] See e.g. Lawrence, *supra,* n. 14, p. 134.
[34] Hall, *supra*, n. 8, p. 298.
[35] Jennings and Watts add one further category: when a State breaks up into parts all of which become part of other states (such as Poland in 1795), *supra*, n. 8, p. 204.

> 'The territory of a State shall not be the object of acquisition by another State resulting from the threat of use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.' [36]

Practice also suggests that the creation of new States in violation of the principle is illegitimate (illustrated by the general refusal to recognise the Turkish Republic of Northern Cyprus), and that the legal personality of the State subjected to illegal invasion and annexation continues despite an overriding lack of effectiveness[37] (confirmed in case of the Iraqi invasion of Kuwait). Such a view is considered to flow not only from the fact of illegality, and from the peremptory nature of the prohibition on the use of force, but is also expressive of the more general principle *ex iniuria ius non oritur*.[38] It is also clear that where annexation takes the form of a treaty of cession, that treaty would be regarded as void if procured by the threat or use of force in violation of the UN Charter.[39]

4.3 Even if the annexation of the Hawaiian Islands would be regarded as unlawful according to accepted standards today, it does not necessarily follow that US claims to sovereignty are unfounded. It is generally maintained that the legality of any act should be determined in accordance with the law of the time when it was done, and not by reference to law as it might have become at a later date. This principle finds its expression in case of territorial title, as Arbitrator Huber pointed out in the *Island of Palmas* case,[40] in the doctrine of inter-temporal law. As far as Huber was concerned, there were two elements to this doctrine – the first of which is relatively uncontroversial, the second of which has attracted a certain amount of criticism. The first, uncontroversial, element is simply that 'a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled'.[41] In the present context,

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[36] Declaration of Principles of International Law, GA Resn. 2625. See Whiteman, *Digest of International Law* (1965), V, pp. 874-965.
[37] See, Crawford, *supra*, n. 2, p. 418.
[38] Such a principle has been recognised in e.g., *Free Zones of Upper Savoy and the District of Gex* (2nd Phase), 1930, PCIJ, Series A, No. 24; *South-Eastern Territory of Greenland*, 1932, PCIJ, Series A/B, No. 48, p. 285; *Jurisdiction of the Courts of Danzig*, 1933, PCIJ, Series B, No. 15, p. 26; *Legal Status of Eastern Greenland*, 1933, PCIJ, Series A/B, No. 53, pp. 75, 95.
[39] Article 52 Vienna Convention on the Law of Treaties 1969.
[40] *Island of Palmas (Netherlands v. United States)* 2 R.I.A.A. (1928) 829
[41] *Ibid.*

therefore, the extension of US sovereignty over Hawai`i should be analysed in terms of the terms of international law, as they existed at the relevant point(s) in time. This much cannot be disputed. The second element outlined by Huber, however, is that, notwithstanding the legitimate origins of an act creating title, the continued existence of that title – its continued manifestation – 'shall follow the conditions required by the evolution of law'. The issue in consideration, here, is whether title based upon historical discovery, or conquest, could itself survive irrespective of the fact that neither is regarded as a legitimate mode of acquisition today. Whilst some have regarded this element as a dangerous extension of the basic principle,[42] its practical effects are likely to be limited to those cases in which the State originally claiming sovereignty has failed to reinforce that title by means of effective occupation (acquisitive prescription). This was evident in case of the Island of Palmas, but is unlikely to be so in other cases – particularly in light of Huber's comment that sovereignty will inevitably have its discontinuities. In any case, it is apparent that, as Huber stressed, any defect in original title is capable of being remedied by means of a continuous and peaceful exercise of territorial sovereignty and that original title, whether defective or perfect, does not itself provide a definitive conclusion to the question.

4.4 Turning then to the law as it existed at the critical date of 1898, it was generally held that a State might cease to exist in one of three scenarios:

a) By the destruction of its territory or by the extinction, dispersal or emigration of its population (a theoretical disposition).

b) By the dissolution of the corpus of the State (cases include the dissolution of the German Empire in 1805-6; the partition of the Pays-Bas in 1831 or of the Canton of Bale in 1833).

c) By the State's incorporation, union, or submission to another (cases include the incorporation of Cracow into Austria in 1846; the annexation of Nice and Savoy by France in 1860; the annexation of Hannover, Hesse, Nassau and Schleswig-Holstein and Frankfurt into Prussia in 1886).[43]

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[42] Jessup, 22 A.J.I.L. (1928) 735.

[43] See e.g. Pradier-Fodere, *supra*, n. 7, I, p. 251; Phillimore, *supra*, n. 4, I, p. 201; de Martens *Traite de Droit International* (1883) I, pp. 367-370.

4.5 Neither a) nor b) is applicable in the current scenario. In case of c) commentators not infrequently distinguished between two processes – one of which involved a voluntary act (i.e. union or incorporation), the other of which came about by non-consensual means (i.e. conquest and submission followed by annexation).[44] It is evident that, as suggested above, annexation (or 'conquest') was regarded as a legitimate mode of acquiring title to territory[45] and it would seem to follow that in case of total annexation (i.e. annexation of the entirety of the territory of a State) the defeated State would cease to exist.

4.6 Although annexation was regarded as a legitimate means of acquiring territory, it was recognised as taking a variety of forms.[46] It was apparent, to begin with, that a distinction was typically drawn between those cases in which the annexation was implemented by Treaty of Peace, and those which resulted from an essentially unilateral public declaration on the part of the annexing power. The former would be governed by the particular terms of the treaty in question, and gave rise to a distinct type of title.[47] Since treaties were regarded as binding irrespective of the circumstances surrounding their conclusion and irrespective of the presence or absence of coercion,[48] title acquired in virtue of a peace treaty was considered to be essentially derivative (i.e. being transferred from one state to another).[49] There was little, in other words, to distinguish title acquired by means of a treaty of peace backed by force, and a voluntary purchase of territory: in each case the extent of rights enjoyed by the successor were determined by the agreement itself. In case of conquest absent an agreed settlement, by contrast, title was thought to derive simply from the fact of military subjugation and was complete 'from the time [the conqueror] proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act... his intention to retain it as part of his own territory'.[50] What was required, in other words, was that the conflict be complete (acquisition of sovereignty *durante bello* being clearly excluded) and that the conqueror declare an intention to annex.[51]

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[44] See e.g., Westlake J., 'The Nature and Extent of the Title by Conquest', 17 L.Q.R. (1901) 392.

[45] Oppenheim (*supra*, n. 31, I, p. 288) remarks that '[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory'.

[46] Halleck H., *International Law* (1861) p. 811; Wheaton H., *Elements of International Law* (1866, 8th ed.) II, c. iv, s. 165.

[47] See e.g. Lawrence, *supra*, n. 14, p. 165-6 ('Title by conquest arises only when no formal international document transfers the territory to its new possessor'.)

[48] Cf now article 52 Vienna Convention on the Law of Treaties 1969.

[49] See e.g. Rivier, *supra,* n. 7, p. 176.

[50] Baker S., *Halleck's International Law* (3rd ed. 1893) p. 468.

[51] This point was of considerable importance following the Allied occupation of Germany in 1945.

4.7 What remained a matter of some dispute, however, was whether annexation by way of subjugation should be regarded as an original or derivative title to territory and, as such, whether it gave rise to rights in virtue of mere occupation, or rather more extensive rights in virtue of succession (a point of particular importance for possessions held in foreign territory).[52] Rivier, for example, took the view that conquest involved a three stage process: a) the extinction of the state in virtue of *debellatio* which b) rendered the territory *terra nullius* leading to c) the acquisition of title by means of occupation.[53] Title, in other words, was original, and rights of the occupants were limited to those which they possessed (perhaps under the doctrine *uti possidetis de facto*). Others, by contrast, seemed to assume some form of 'transfer of title' as taking place (i.e. that conquest gave rise to a derivative title[54]), and concluded in consequence that the conqueror 'becomes, as it were, the heir or universal successor of the defunct or extinguished State'.[55] Much depended, in such circumstances, as to how the successor came to acquire title.

4.8 It should be pointed out, however, that even if annexation/ conquest was generally regarded as a mode of acquiring territory, US policy during this period was far more sceptical of such practice. As early as 1823 the US had explicitly opposed, in the form of the Monroe Doctrine, the practice of European colonization[56] and in the First Pan-American Conference of 1889 and 1890 it had proposed a resolution to the effect that 'the principle of conquest shall not... be recognised as admissible under American public law'. It had, furthermore, later taken the lead in adopting a policy of non-recognition of 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' (the 'Stimpson Doctrine') which was confirmed as a legal obligation in a resolution of the Assembly of the League of Nations in 1932. Even if such a policy was not to amount to a legally binding commitment on the part of the US not to acquire territory by use or threat of force during the latter stages of the 19th Century, there is room to argue that the doctrine of estoppel might operate to prevent the US subsequently relying upon forcible annexation as a basis for claiming title to the Hawaiian Islands.

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[52] For an early version of this idea see de Vattel E., *supra*, n. 7, bk III, ss. 193-201; Bynkershoek C., *Quaestionum Juris Publici Libri Duo* (1737, trans Frank T., 1930) Bk. I, pp. 32-46.

[53] Rivier, *supra*, n. 7, p. 182.

[54] Phillimore, *supra*, n. 4, I, p. 328.

[55] Baker, *supra*, n. 50, p. 495.

[56] 'The American continents, by the free and independent conditions which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers.'

5. *US ACQUISITION OF THE ISLANDS*

5.1 As pointed out above, the continuity of the Kingdom of Hawaii as an independent state for purposes of international law is theoretically independent of the legitimacy of claims to sovereignty over its territory on the part of other states. By the same token, the fact that the entirety of the Hawaiian Islands have been occupied, administered, and claimed as US territory for a considerable period of time, means that attention must be given to the legitimacy of the US claims as part of the process of determining Hawaiian continuity. US claims to sovereignty over the Islands would appear to be premised upon one of three grounds: a) by the original acquisition of the Islands in 1898 (by means of 'annexation' or perhaps 'cession'); b) by the confirmation of the exercise of that sovereignty by plebiscite in 1959; and c) by the continuous and effective display of sovereignty since 1898 to the present day (acquisitive prescription in the form of adverse possession). Each of these claims will be considered in turn.

5.2 *Acquisition of the Islands in 1898*

5.2.1 The facts giving rise to the subsequent occupation and control of the Hawaiian Kingdom by the US government are, no doubt, susceptible to various interpretations. It is relatively clear, however, that US intervention in the Islands first took place in 1893 under the guise of the protection of the US legation and consulate and 'to secure the safety of American life and property'.[57] US troops landed on the Island of O'ahu on 16th January and a Provisional Government was established by a group of insurgents under their protection. On the following day, and once Queen Lili`uokolani had abdicated her authority in favour of the United States, US minister Stevens formally recognised *de facto* the Provisional Government of Hawai`i. The Provisional Government then proceeded to draft and sign a 'treaty of annexation' on February 14th 1893 and dispatch it to Washington D.C. for ratification by the US Senate.

5.2.2 According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy 'was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili`uokalani which put in serious peril not only the large and preponderating interests of the United States in the Islands, but

[57] Order of Jan. 16th 1893.

all foreign interests'.[58] It was further emphasised in a report of Mr Foster to the President that the US marines had taken 'no part whatever toward influencing the course of events'[59] and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of government. This version of events was to be contradicted in several important respects shortly after.

5.2.3 Following receipt of a letter of protest sent by Queen Lili`uokalani, newly incumbent President Cleveland withdrew the Treaty of Annexation from the Senate and dispatched US Special Commissioner James Blount to Hawai`i to investigate. The investigations of Mr Blount revealed that the presence of American troops, who had landed without permission of the existing government, were 'used for the purpose of inducing the surrender of the Queen, who abdicated under protest [to the United States and not the provisional government] with the understanding that her case would be submitted to the President of the United States.'[60] It was apparent, furthermore, that the Provisional Government had been recognised when it had little other than a paper existence, and 'when the legitimate government was in full possession and control of the palace, the barracks, and the police station'.[61] On December 18th 1893, President Cleveland addressed Congress on the findings of Commissioner Blount. He emphasised that the Provisional Government did not have 'the sanction of either popular revolution or suffrage' and that it had been recognised by the US minister pursuant to prior agreement at a time when it was 'neither a government de facto nor de jure'.[62] He concluded as follows:

> 'Hawai`i was taken possession of by United States forces without the consent or wish of the Government of the Islands, or of anybody else so far as shown, except the United States Minister. Therefore, the military occupation of Honolulu by the United States... was wholly without justification, either of an occupation by consent or as an occupation necessitated by dangers threatening American life or property'.

[58] For. Rel. 1894, App. II, 198.
[59] Report of Mr Foster, Sec. of State, For. Rel. 1894, App. II, 198-205.
[60] Moore's Digest, *supra,* n . 8, I, p. 499.
[61] Ibid, pp. 498-99.
[62] Moore's Digest, *supra,* n. 8, p. 501.

Given the 'substantial wrong' that had been committed, he concluded that 'the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods'.

5.2.4 It is fairly clear then, that the position of the US government in December 1893 was that its intervention in Hawai`i was an aberration which could not be justified either by reference to US law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands 'as being neither a government *de facto* nor *de iure'*. At this stage there was an implicit acknowledgement of the fact that the US intervention not only conflicted with specific US commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that '[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors') but also with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.[63]

5.2.5 This latter interpretation of events has since been confirmed by the US government. In its Apology Resolution of 23rd November 1993 the US Congress and Senate admitted that the US Minister (John Stevens) had 'conspired with a small group of non-Hawaiian residents of the Hawaiian Kingdom, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawai`i', and that in pursuance of that conspiracy had 'caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16th 1893'. Furthermore, it is admitted that recognition was accorded to the Provisional government without the consent of the Hawaiian people, and 'in violation of treaties between the two nations and of international law', and that the insurrection would not have succeeded without US diplomatic and military intervention.

5.2.6 Despite admitting the unlawful nature of its original intervention, the US, however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili-uokolani to the throne even though she had acceded to the US proposals in that regard. Rather it left control of Hawai`i in the hands of the insurgents it had effectively put in place and who clearly did not enjoy the popular support of the Hawaiian people.[64] Following a proclamation establishing the

[63] Brownlie, International Law and the Use of Force by States (1963) pp. 46-7.
[64] See, Budnick R., *Stolen Kingdom: An American Conspiracy* (1992)

Republic of Hawai`i by the insurgents in 1894 – the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United States[65] - *de facto* recognition of the Republic was affirmed by the US[66] and a second Treaty of Annexation was signed in Washington by the incoming President McKinley. Despite further protest on the part of Queen Lili`uokalani and other Hawaiian organisations, the Treaty was submitted to the US Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, a Joint Resolution was passed by US Congress purporting to provide for the annexation of Hawai`i.[67] A proposal requiring Hawaiians to approve the annexation was defeated in the US Senate. Following that resolution, Hawai`i was occupied by US troops and subject to direct rule by the US administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

> 'by that resolution the Republic of Hawai`i as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions veseted in the United States…'.[68]

Although the Japanese minister in Washington had raised certain concerns in 1897 as regards the position of Japanese labourers emigrating to the Islands under the Hawaiian-Japanese Convention of 1888, and had insisted that 'the maintenance of the status quo' was essential to the 'good understanding of the powers having interests in the Pacific', it subsequently withdrew its opposition to annexation subject to assurances as regards the treatment of Japanese subjects.[69] No other state objected to the fact of annexation.

5.2.7 It is evident that there is a certain element of confusion as to how the US came to acquire the Islands of Hawai`i during this period of time. Effectively, two forms of justification seem to offer themselves: a) that the Islands were ceded by the legitimate government of Hawai`i to the United States in virtue of the treaty of annexation; or b) that the Islands were forcibly annexed by the United States in absence of agreement.

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[65] Article 32 Constitution of the Republic of Hawai`i.
[66] For. Rel. 1894, pp. 358-360.
[67] XC B.F.S.P. 1897-8 (1901) 1248.
[68] President McKinley, Third Annual Message, Dec. 5th 1899, Moore's Digest, *supra,* n. 8, I, p. 511.
[69] See, Moore's Digest, *supra,* n. 8, I, pp. 504-9.

5.2.8 *The Cession of Hawai`i to the United States*

5.2.8.1 The joint resolution itself speaks of the government of the Republic of Hawai`i having signified its consent 'to cede absolutely and without reserve to the United States of American all rights of sovereignty of whatsoever kind', suggesting, as some commentators have later accepted, that the process was one of voluntary merger.[70] Hawai`i brought about, according to this thesis, its own demise by means of voluntary submission to the sovereignty of the United States.[71] This interpretation was bolstered by the fact that the government of the Republic had exercised *de facto* control over the Islands since 1893 – as President McKinley was to put it: 'four years having abundantly sufficed to establish the right and the ability of the Republic of Hawai`i to enter, as a sovereign contractant, upon a conventional union with the United States'.[72] Furthermore, even if it had not been formally recognised as the *de jure* government of Hawai`i by other nations,[73] it was effectively the only government in place (the government of Queen Lili`uokolani being forced into internal exile).

5.2.8.2 Such a thesis overlooks two facts. First of all, whilst the Republic of Hawai`i had certainly sponsored the adoption of a treaty of cession, the failure by the US to ratify that instrument meant that no legally binding commitments in that regard were ever created. This is not to say that the US actions in this regard were therefore to be regarded as unlawful for purposes of international law. Even if doubts exist as to the constitutional competence of US Congress to extend the jurisdiction of the United States in the manner prescribed by the Resolution,[74] this in itself does not prevent the acts in question from being effective for purposes of international law.[75] Indeed, as suggested above it was widely recognised that, for purposes of international law, annexation need not be accomplished by means of a treaty of peace and could equally take the form of a unilateral declaration of annexation. The significance of the failure to ratify, however, does suggest that the acquisition was achieved, if at all, by unilateral act on the part of the United States rather than being governed by the terms of the bilateral

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[70] See e.g. Verzijl, *supra,* n. 6.
[71] *Ibid*, I, p. 129.
[72] Message of President McKinley to the Senate, June 16th 1987, Moore's Digest, *supra*, n. 8, I, p. 503.
[73] Some type of recognition was provided by Great Britain in 1894, however.
[74] See, Willoughby W., *The Constitutional Law of the United States* (2nd ed. 1929) I, p. 427.
[75] Article 7 of the ILC Articles on State Responsibility (2001) provides, for example, that '[t]he conduct of an organ of a State… shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

agreement. Furthermore, and in consequence, US title to the territory would have to be regarded as original rather than derivative. This point is well illustrated by the decision of the Supreme Court of India in the case of *Mastan Sahib v.Chief Commissioner Pondicherry*[76] in which it was held that Pondicherry was not to be considered as part of India, despite India's administration of the territory, until the 1954 Agreement between France and India had been ratified by France. This was the case even though both parties had signed the agreement. Similarly, albeit in a different context, the Arbitral Tribunal in the *Iloilo Claims Arbitration* took the view that the US did not fully acquire sovereignty over the Philippines despite its occupation until the date of ratification of the Peace Treaty of Paris of 1898.[77]

5.2.8.3 Doubts as to the validity of the voluntary merger/ cession thesis are also evident when consideration is given to the role played by US troops in installing and maintaining in power the Republican government in face of continued opposition on the part of the ousted monarchy. If, as was admitted by the US in 1893, intervention was unjustified and therefore undoubtedly in violation of its international obligations owed in respect of Hawai`i, it seems barely credible to suggest that it should be able to rely upon the result of that intervention (namely the installation of what was to become the Republican government) by way of justifying its claim that annexation was essentially consensual.

5.2.8.4 Central to the US thesis, in this respect, is the view that the government of the self-proclaimed Republic enjoyed the necessary competence to determine the future of Hawai`i. Notwithstanding the fact that the Republic was itself maintained in power by means of US military presence, and notwithstanding its recognition of the legitimate claims on the part of the Kingdom, the US recognised the former as a *de facto* government with which it could deal. This, despite the fact that US recognition policy during this period was 'based predominantly on the principle of effectiveness evidenced by an adequate expression of popular consent'.[78] As Secretary Seward was to indicate in 1868, revolutions 'ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanence.'[79] The US refusal, therefore, to

[76] I.L.R. (1969) 49

[77] *Iloilo Claims Arbitration* (1925) 6 R.I.A.A. 158. To similar effect see *Forest of Central Rhodope Arbitration* (Merits, 1933) 3 R.I.A.A. 1405; *British Claims in Spanish Morocco* (1924) 2 R.I.A.A. 627.

[78] Lauterpacht, *Recognition in International Law* (1947) p. 124.

[79] US Diplomatic Correspondence, 1866, II, p. 630.

recognise the Rivas Government in Nicaragua in 1855 on the basis that '[i]t appears to be no more than a violent usurpation of power, brought about by an irregular self-organised military force, as yet unsanctioned by the will or acquiescence of the people',[80] stands in marked contrast to its willingness to offer such recognition to the government of the Republic of Hawai`i in remarkably similar circumstances. Given the precipitous recognition of the government of the Republic – itself an act of unlawful intervention - it seems unlikely that the US could legitimately rely upon the fact of its own recognition as a basis for claiming that its acquisition of sovereignty over Hawai`i issued from a valid expression of consent.

5.2.9 *The Annexation of Hawai`i by the United States*

5.2.9.1 If there is some doubt as to the validity of the voluntary merger thesis, an alternative interpretation of events might be to suggest that the US came to acquire the Islands by way of what was effectively conquest and subjugation. It could plausibly be maintained that annexation of the Islands came about following the installation of a puppet government intent upon committing the future of the Islands to the US and which was visibly supported by US armed forces. According to this interpretation of events, the initial act of intervention in 1893 would simply be the beginning of an extended process of *de facto* annexation which culminated in the extension of US laws to Hawai`i in 1898. Whether or not the Republican government was the legitimate government of Hawai`i mattered little, and the apparent lack of consent of the former Hawaiian government largely irrelevant. According to this thesis the unlawful nature of the initial intervention would ultimately be wiped out by the subsequent annexation of the territory and the extinction of the Hawaiian Kingdom as an independent State (just as Britain's precipitous annexation of the Boer Republics in 1901 was subsequently rendered moot by its perfection of title under the Peace Treaty of 1902). Support for this interpretation of events comes from the fact that the Queen initially abdicated in favour of the United States, and not the Provisional Government of 1893 (although she did eventually give an oath of allegiance to the Republic in 1895) and from the persistent presence of US forces which, no doubt, reinforced the authority of the Provisional Government and subsequently the Government of the Republic.

5.2.9.2 The difficulties with this second approach are twofold. First of all, even if the Government of the Republic had been installed with the support of US troops, it is apparent that it was not

[80] Mr Buchanan to Mr Rush. Moore's Digest, *supra*, n. 8, I, p. 124.

subsequently subject to the same level of control as, for example, was exercised in relation to the regime in Manchukuo by Japan in 1931.[81] Thus, for example, the Provisional Government refused President Cleveland's request to restore the monarchy in 1893 on the basis that it would involve an inadmissible interference in the domestic affairs of Hawai`i.[82] It could not easily be construed, in other words, merely as an instrument of US government. Secondly, it is apparent that whilst the threat of force was clearly present, the annexation did not follow from the defeat of the Hawaiian Kingdom on the battlefield, and was not otherwise pursuant to an armed conflict. Most authors at the time were fairly clear that conquest and subjugation were events associated with the pursuit of war and not merely with the threat of violence. Indeed Bindschedler suggests in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

> 'unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal. It makes no difference that the territory involved may already be under the firm control of the State declaring the annexation.'[83]

The reason for this, no doubt, was the tendency to view international law as being comprised of two independent sets of rules applicable respectively in peacetime and in war (a differentiation which is no longer as sharp as it once was). A State of war had several effects at the time including not merely the activation of the laws and customs of war, but also the invalidation or suspension of existing treaty obligations.[84] This meant, in particular, that in absence of armed conflict, in other words, the US would be unable to avoid its commitments under the 1849 Treaty with Hawai`i, and would therefore be effectively prohibited from annexing the Islands by unilateral act. This, no doubt, informed President Cleveland's unwillingness to support the treaty of annexation in 1893, and meant that the only legitimate basis for pursuing annexation in the circumstances would have been by treaty of cession.

5.2.9.3 Ultimately, one might conclude that there are certain doubts, albeit not necessarily overwhelming, as to the

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[81] See, Hackworth G., *Digest of International Law*, (1940) I, pp. 333-338.
[82] Moore's Digest, *supra*, n. 8, I, p. 500.
[83] Bindschedler R., 'Annexation', in *Encylopedia of Public International Law*, III, 19, p. 20.
[84] Brownlie, *supra*, n. , pp. 26-40.

legitimacy of the US acquisition of Hawai`i in 1898 under the terms of international law as it existed at that time. It neither possessed the hallmarks of a genuine 'cession' of territory, nor that of forcible annexation (conquest). If, however, the US neither came to acquire the Islands by way of treaty of cession, nor by way of conquest, the question then remains as to whether the sovereignty of the Hawaiian Kingdom was maintained intact. The closest parallel, in this regard, is to be found in the law governing belligerent occupation.

5.2.10 *Belligerent Occupation and Occupation Pacifica*

5.2.10.1 From the time of Vattel onwards it was frequently been held that the mere occupation of foreign territory did not lead to the acquisition of title of any kind until the termination of hostilities.[85] During the course of the 19th Century, however, this became not merely a doctrinal assertion, but a firmly maintained axiom of international law.[86] Up until the point at which hostilities were at an end, the control exercised over territory was regarded as a 'belligerent occupation' subject to the terms of the laws of war. The hallmark of belligerent occupation being that the occupant enjoyed *de facto* authority over the territory in question, but that sovereignty (and territorial title) remained in the hands of the displaced government. As President Polk noted in his annual message of 1846 'by the law of nations a conquered territory is subject to be governed by the conqueror during his military possession and until there is either a treaty of peace, or he shall voluntarily withdraw from it.'[87] In such a case '[t]he sovereignty of the enemy is in such case "suspended", and his laws can "no longer be rightfully enforced" over the occupied territory and that "[b]y the surrender, the inhabitants pass under a temporary allegiance to the conqueror."'[88] The suspensory, and provisional, character of belligerent occupation was further confirmed in US case law of the time,[89] in academic doctrine[90] and in

[85] See e.g. de Vattel *supra*, n. 6, III, s. 196.
[86] Graber believes this was the case following the Franco-Prussian war. Graber D., *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (1968) 40-41.
[87] President Polk's Second Annual Message, 1846, Moore's Digest, *supra*, n. 8, I, p. 46.
[88] President Polk's Special Message, July 24th, 1848. Moore's Digest, *supra*, n. 8, I, pp. 46-7.
[89] *US v. Rice*, US Supreme Court, 1819, 4 Wheat. 246 (1819)

various Manuals on the Laws of War.[91] The general idea was subsequently recognised in Conventional form in article 43 of the 1907 Hague Regulations,[92] and in the US Military Manual of 1914.[93]

5.2.10.2 In essence, the doctrine of belligerent occupation placed certain limits on the capacity of the occupying power to acquire or dispose of territory *durante bello*. By inference, sovereignty remained in the hands of the occupied power and, as a consequence it was generally assumed that until hostilities were terminated, title to territory would not pass and the extinction of the state would not be complete. This doctrine was subsequently elaborated during the course of the First and Second World Wars to the effect that States would not be regarded as having been lawfully annexed even when the entirety of the territory was occupied and the government forced into exile, so long as the condition of war persisted, albeit on the part of allied States. The general prohibition on the threat or use of armed force in the Charter era since 1945 has further reinforced this regime to the point at which it might be said that 'effective control by foreign military force can never bring about by itself a valid transfer of sovereignty'.[94]

5.2.10.3 Until the adoption of common article 2 of the 1949 Geneva Conventions,[95] however, the doctrine of

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[90] Heffter, *Das europäische Völkerrecht de Gengenwart* (1844) pp. 287-9; Bluntschli, *Das Moderne Volkerrecht* (3rd ed. 1878) pp. 303-7.

[91] The Oxford Manual on the Laws of War on Land, 1880 provided (article 6): 'No invaded territory is regarded as conquered until the end of war; until that time the occupant exercises, in such territory, only a *de facto* power, essentially provisional in character.' See also, article 2 Brussells Code of 1874.

[92] Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907. The Brussels Declaration of 1874 provided similarly (article 2) that 'The authority of the legitimate power being suspended and 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'.

[93] Rules of Land Warfare, 1914, pp. 105-6: 'Miliatary occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty of the occupatnt, but simply the authority or power to exercise some of the rights of sovereignty'.

[94] Benvenisti E., *The International Law of Occupation* (1993) p. 5.

[95] Common Article 2 of the 1949 Geneva Conventions 75 U.N.T.S. 31 reads:

> 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

belligerent occupation applied primarily to time of war or armed conflict where military intervention met armed resistance. Indeed, the absence of resistance would not infrequently be construed either as an implicit acceptance of the fact of occupation, or as a signal that the original sovereign had been effectively extinguished in virtue of *debellatio*. It is evident, however, that by the turn of the century a notion of peacetime occupation (*occupatio pacifica*) was coming to be recognised.[96] This concept encompassed not merely occupation following the conclusion of an agreement between the parties, but also non-consensual occupation occurring outside armed conflict (but normally following the threatened use of force).[97] Practice in the early 20th Century suggests that even though the Hague Regulations were themselves limited to occupations *pendente bello*, their provisions should apply to peacetime occupations such as the British occupation of Egypt in 1914-18,[98] the Franco-Belgian occupation of the Ruhr in 1923-5[99] and the occupation of Bohemia and Moravia by Germany in 1939.[100] Indeed, the Arbitral Tribunal in the *Coenca Brothers v. Germany Arbitration Case*[101] took the view that the Allied occupation of Greece in 1915 was governed by the terms of the law of belligerent occupation notwithstanding the fact that Greece was not a belligerent at that time, but had merely invited occupation of Salonika in order to protect

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> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

It would seem that the purpose of this 'extension' of the regime of military occupation was to take account of the peculiar facts surrounding the German occupation of Czechoslovakia in 1939 and Denmark in 1940.

[96] See, Robin, *Des Occupations militaries en dehors des occupations de guerre* (1913).

[97] Llewellyn Jones F., 'Military Occupation of Alien Territory in Time of Peace', 9 Transactions of Grotius Soc. (1924) 150; Roberts A., 'What is a Military Occupation?', 55 B.Y.I.L. (1984) 249, p. 273; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) 116.

[98] Leban and Others v. Alexandria Water Co. Ltd. and Others Egypt, Mixed Court of Appeal, 25 March 1929, A.D. 1929/30, Case No. 286.

[99] See *In re Thyssen and Others* and *In re Krupp and Others*, 2 A.D. (1923-4) Case No. 191, pp. 327-8.

[100] See Judgment of Nurnberg Tribunal, p. 125; *Anglo-Czechoslovak and Prague Credit Bank v. Janssen* 12 A.D. (1943-5) Case No. 11, p. 47.

[101] 7 M.A.T., 1929, p. 683.

the Serbian State. Similarly, in the *Chevreau Case* the Arbitrator intimated that the laws of belligerent occupation would apply to the British forces occupying Persia under agreement with the latter in 1914.[102]

5.2.10.4 If the general terms of the Hague Regulations are to apply to peacetime occupations, it would seem to follow that the same limitations apply as regards the authority of the occupying State. In fact it is arguable that the rights of the pacific occupant are somewhat less extensive than those of the belligerent occupant. As Llewellyn Jones notes:

> '[i]n the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation...'.[103]

Whether or not this has significance in the present context, it is apparent that the US could not, as an occupying power, take steps to acquire sovereignty over the Hawaiian Islands. Nor could it be justified in attempting to avoid the strictures of the occupation regime by way of installing a sympathetic government bent on ceding Hawaiian sovereignty to it. This point has now been made perfectly clear in article 47 of the 1949 Geneva Convention IV which states that protected persons shall not be deprived of the benefits of the Convention 'by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory'.

5.2.10.5 It may certainly be maintained that there are serious doubts as to the United States' claim to have acquired sovereignty over the Hawaiian Islands in 1898 and that the emerging law at the time would suggest that, as an occupant, such a possibility was largely excluded. To the extent, furthermore, that US claims to sovereignty were essentially defective, one might conclude that the sovereignty of the Hawaiian Kingdom as an independent state was maintained intact. The importance of such a

[102] Chevreau Case (France v. Great Britain) 27 A.J.I.L. (1931) 159, pp. 159-60.
[103] Supra, n. , p. 159.

conclusion is of course dependent upon the validity and strength of subsequent bases for the claim to sovereignty on the part of the US.

5.3 *Acquisition of the Islands in virtue of the Plebiscite of 1959*

5.3.1 An alternative basis for the acquisition of title on the part of the US government (and hence the conclusion that the Hawaiian Kingdom has ceased to exist as a State) is the Plebiscite of 1959 exercised in pursuit of article 73 of Chapter XI of the United Nations Charter. In 1945 Hawai`i was listed as a Non-Self-Governing Territory administered by the United States together with its other overseas territories including Puerto Rico, Guam, the Philippines, American Samoa and Alaska. Article 73 of the Charter provides that:

> 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a) to ensure, with due respect for culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement...
>
> d) to transmit regularly to the Secretary-General for information purposes... statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.'

Central to this provision is the 'advancement of the peoples concerned' and the development of their 'self-government'. Unlike the United Nations Trusteeship System elaborated in Chapters XII and XIII of the UN Charter, however, Chapter XI does not stipulate clearly the criteria by which it may be determined whether a people has achieved the status of self-government or whether the competence to determine that issue lies with the organs of the United Nations or with the administering State. The United Nations General Assembly, however, declared in Resolution 334(IV) that the task of determining the scope of application of Chapter XI falls 'within the responsibility of the General Assembly'.

5.3.2 The General Assembly was to develop its policy in this respect during the subsequent decades through the adoption of the UN List of Factors in 1953 (Res. 742 (VIII)), the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 (Res. 1514 (XV)), supplemented by Resolutions 1541 (XV) (1960) and 2625 (XXV) in 1970. Central to this policy development was its elaboration of the meaning of self-determination in accordance with article 1(2) UN Charter (which provided that the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' was one of the Purposes and Principles of the United Nations). According to the General Assembly, colonial peoples must be able to 'freely determine their political status and freely pursue their economic, social and cultural development' (Resn. 1514 (XV), and Resn. 2625 (XXV)), and primarily by way of choosing between one of three alternatives: emergence as a sovereign independent State; free association with an independent State; and integration with an independent State (Resn. 1514 (XV) and Resn. 1541 (XV) principles II, VI). The most common mode of self-determination was recognised to be full independence involving the transfer of all powers to the people of the territories 'without any conditions or reservations' (Resn. 1514 (XV) principles VII, VIII and IX). In case of integration with another state, it was maintained that the people of the territory should act 'with full knowledge of the change in their status... expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage' (Resn. 1541 (XV), principle IX). A higher level

of scrutiny was generally exercised in case of integration than in respect of other forms of self-determination. Until the time in which self-determination is exercised, furthermore, 'the territory of a... Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State' (Resn. 2625 (XXV) para. VI).[104] As the ICJ subsequently noted in its Advisory Opinion in the *Namibia case*, the 'development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them'.[105] It emphasised, furthermore, in the *Western Sahara case* that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[106]

5.3.3 An initial point in question here is whether Hawai`i should have been listed as a Non-Self-Governing Territory at all for such purposes. Article 73 of the Charter refers to peoples 'who have not yet attained a full measure of self-government' – a point which is curiously inapplicable in case of Hawai`i. That being said, the regime imposed was designed, primarily, to foster decolonisation after 1945 and it was only with some reluctance that the United States agreed to include Hawai`i on the list at all. The alternative would have been for Hawai`i to remain under the control of the United States and deprived of any obvious means by which it might re-obtain its independence. The UN Charter may be seen, in that respect, as having created a general but exclusive system of entitlements whereby only those non-State entities regarded as either Non-Self-Governing or Trust Territories would be entitled to independence by way of self-determination absent the consent of the occupying power.[107] It may be emphasised, furthermore, that to regard Hawai`i as being a territory entitled to self-determination was not entirely inconsistent with its claims to be the continuing State. The substance of self-determination in its external form as a right to political independence may be precisely that which may be claimed by a State under occupation. Indeed, the General Assembly Declaration on

[104] This follows by implication from the terms of article 74 UN Charter.
[105] ICJ Rep. (1971), 31, para. 51.
[106] ICJ Rep (1975) 12, p. 32.
[107] For a review of the practice in this regard see Crawford J., 'State Practice and International Law in Relation to Secession', 69 B.Y.I.L (1998) 85.

Friendly Relations (Resn. 2625) makes clear that the right is applicable not simply in case of colonialism, but also in relation to the 'subjection of peoples to alien subjugation, domination and exploitation'. Crawford points out, furthermore, that self-determination applies with equal force to existing states taking 'the well-known form of the rule preventing intervention in the internal affairs of a State: this includes the right of the people of the State to choose for themselves their own form of government'.[108] The international community's subsequent recognition of the applicability of self-determination in case of the Baltic States, Kuwait and Afghanistan, for example, would appear merely to emphasise this point.[109] One may tolerate, in other words, the placing of Hawai`i on the list of non-self-governing territories governed by article 73 only to the extent that the entitlement to self-determination under that article was entirely consonant with the general entitlements to 'equal rights and self-determination' in articles 1(2) and 55 of the Charter.

5.3.4 Notwithstanding doubts as to the legality of US occupation/ annexation of Hawai`i, it would seem evident that any outstanding problems would be effectively disposed of by way of a valid exercise of self-determination. In general, the principle of self-determination may be said to have three effects upon legal title. First of all it envisages a temporary legal regime that may, in effect, lead to the extinction of legal title on the part of the Metropolitan State.[110] Secondly, it may nullify claims to title in cases where such claims are inconsistent with the principle. Finally, and most importantly in present circumstances, it may give rise to a valid basis for title including cases where it has resulted in free integration with another State. In this third scenario, if following a valid exercise of self-determination on the part of the Hawaiian people it was decided that Hawai`i should seek integration into the United States, this would effectively bring to a close any claims that might remain as to the continuity of the Hawaiian Kingdom.

5.3.5 Turning then to the question whether the Hawaiian people can be said to have exercised self-determination following

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[108] Crawford, *supra*, n. 2, p. 100.
[109] See Cassese A., *Self-Determination of Peoples: A Legal Reappraisal* (1995) pp. 94-5.
[110] Crawford, *supra*, n. 2, pp. 363-4; Shaw, *Title to Territory in Africa*, pp. 149 ff.

the holding of a plebiscite on June 27th 1959. The facts themselves are not in dispute. On March 18th 1959 the United States Congress established an *Act to Provide for the admission of the State of Hawai`i into the Union* setting down, in section 7(b) the terms by which this should take place. This specified that:

> 'At an election designated by proclamation of the Governor of Hawai`i ... there shall be submitted to the electors, qualified to vote in said election, for adoption or rejection, the following propositions:
>
> 1. Shall Hawai`i immediately be admitted into the Union as a State?...

An election was held on June 27th 1959 in accordance with this Act and a majority of residents voted in favour of admission into the United States. Hawai`i was formally admitted into the Union by Presidential Proclamation on August 21st 1959. A communication was then sent to the Secretary-General of the United Nations informing him that Hawai`i had, in virtue of the plebiscite and proclamation, achieved self-governance. The General Assembly then decided in Resolution 1469(XIV) that the US would no longer be required to report under the terms of article 73 UN Charter as to the situation of Hawai`i.

5.3.6 Two particular concerns may be raised in this context. First, the plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them. This was certainly an extraordinary situation when compared with other cases with which the UN was dealing at the time, and has parallels with one other notoriously difficult case, namely the Falkland Islands/ Malvinas (in which the entire population is of settler origin). There is certainly nothing in the concept of self-determination as it is known today to require an administering power to differentiate between two categories of residents in this respect, and indeed in many cases it might be treated as illegitimate.[111] By the same token, in some cases a failure to do so may well disqualify a vote where there is evidence that the administering state had encouraged settlement as a way of manipulating the

[111] See, Hannum H., 'Rethinking Self-Determination', 34 Va.J.I.L. (1993) 1, p. 37.

subsequent result.[112] This latter point seems to be even more clear in a case such as Hawai`i in which the holders of the entitlement to self-determination had presumptively been established in advance by the fact of its (prior or continued) existence as an independent State. In that case, one might suggest that it was only those who were entitled to regard themselves as nationals of the Kingdom of Hawaii (in accordance with Hawaiian law prior to 1898), who were entitled to vote in exercise of the right to self-determination.

5.3.6 A second, worrying feature of the plebiscite concerns the nature of the choice being presented to the Hawaiian people. As GA Resn. 1514 makes clear, a decision in case of integration should be made 'with full knowledge of the change in their status... expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage'. It is far from clear that much, if any, information was provided as regards the 'change in status' that would occur with integration, and there is no evidence that the alternative of full independence was presented as an option. Judged in terms of the later resolutions of the General Assembly on the issue, then, it would seem that the plebiscite falls considerably short of that which would be required for purposes of a valid exercise of self-determination.[113]

5.3.7 An important point, here, as is evident from the discussion above, is that most of the salient resolutions by which the General Assembly 'developed' the law relating to decolonisation post-dated the plebiscite in Hawai`i, and the organisation's practice in that respect changed quite radically following the establishment of the Committee of Twenty-Four in 1961 (Resn. 1700 (XVI)). Up until that point, many took the view that Non-Self-Governing Territories were merely entitled to 'self-government' rather than full political independence, and that self-determination was little more than a political principle being, at best, *de lege farenda*.[114] There was, in other words, no clear obligation as far as UN practice at the time was concerned,

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[112] Cf. the case of Israeli settlements in the Occupied Territories, Cassese, *supra,* n. 97, p. 242.

[113] Similar points have been made as regards the disputed integration of West Irian into Indonesia.

[114] See, Jennings R., *The Acquisition of Territory in International Law* (1963) pp. 69-87.

for the decision made in 1959 to conform to the requirements later spelled out in relation to other territories – practice was merely crystallising at that date. The US made clear, in fact, that it did not regard UN supervision as necessary for purposes of dealing with its Non-Self-Governing Territories such as Puerto Rico, Alaska or Hawai`i.[115] Whilst such a view was, perhaps, defensible at the time given the paucity of UN practice, it does not itself dispose of the self-determination issue. It might be said, to begin with, that in light of the subsequent development of the principle, it is not possible to maintain that the people of Hawai`i had in reality exercised their right of self-determination (as opposed to having merely been granted a measure of self-government within the Union). Such a conclusion, however, is debatable given the doctrine of inter-temporal law. More significant, however, is the fact that pre-1960 practice did not appear to be consistent with the type of claim to self-determination that would attach to independent, but occupied, States (in which one would suppose that the choice of full political independence would be the operative presumption, rebuttable only by an affirmative choice otherwise). As a consequence, there are strong arguments to suggest that the US cannot rely upon the fact of the plebiscite alone for purposes of perfecting its title to the territory of Hawai`i.

5.4 *Acquisition of Title by Reason of Effective Occupation / Acquisitive Prescription*

5.4.1 As pointed out above, it cannot definitively be supposed that the US did acquire valid title to the Hawaiian Islands in 1898, and even if it did so, the basis for that title may now be regarded as suspect given the current prohibition on the annexation of territory by use of force. In case of the latter, the second element of the doctrine of inter-temporal law as expounded by Arbitrator Huber in the *Island of Palmas case* may well be relevant. Huber distinguishes in that case between the acquisition of rights on the one hand (which must be founded in the law applicable at the relevant date) and their existence or continuance at a later point in time which must 'follow the conditions required by the evolution of the law'. One interpretation of this would be to suggest that title may be lost if a later rule of international law were to arise by reference to which the original title would no longer be lawful. Thus, it might be said that since annexation is no longer a legitimate means by which title may be established,

[115] US Department of State Bulletin, (1952) p. 270.

US annexation of Hawai`i (if it took place at all) would no longer be regarded as well founded. Apart from the obvious question as to who may be entitled to claim sovereignty in absence of the United States, it is apparent that Huber's *dictum* primarily requires that 'a State must continue to maintain a title, validly won, in an effective manner – no more no less.'[116] The US, in other words, would be entitled to maintain its claim over the Hawaiian Islands so long as it could show some basis for asserting that claim other than merely its original annexation. The strongest type of claim in this respect is the 'continuous and peaceful display of territorial sovereignty'.

5.4.2 The emphasis given to the 'continuous and peaceful display of territorial sovereignty' in international law derives in its origin from the doctrine of occupation which allowed states to acquire title to territory which was effectively *terra nullius*. It is apparent, however, and in line with the approach of the ICJ in the *Western Sahara Case*,[117] that the Islands of Hawai`i cannot be regarded as *terra nullius* for purpose of acquiring title by mere occupation. According to some, nevertheless, effective occupation may give rise to title by way of what is known as 'acquisitive prescription'.[118] As Hall maintained, '[t]itle by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.'[119] Johnson explains in more detail:

> 'Acquisitive Prescription is the means by which, under international law, legal recognition is given to the right of a State to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor...) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or

[116] Higgins R., 'Time and the Law: International Perspectives on an Old Problem', 46 I.C.L.Q. (1997) 501, p. 516.
[117] Supra n. 94.
[118] For a discussion of the various approaches to this issue see Jennings and Watts, *supra,* n. 8, pp. 705-6.
[119] Hall W., *A Treatise on International Law* (Pearce Higgins, 8th ed 1924) p. 143.

> international tribunal or – exceptionally in cases where no such action was possible – have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.'[120]

Although no case before an international court or tribunal has unequivocally affirmed the existence of acquisitive prescription as a mode of acquiring title to territory,[121] and although Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case[122] found no place for the concept in international law, there is considerable evidence that points in that direction. For example, the continuous and peaceful display of sovereignty, or some variant thereof, was emphasised as the basis for title in the *Minquiers and Ecrehos Case (France v. United Kingdom)*,[123] the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*[124] and in the *Island of Palmas Arbitration.*[125]

5.4.3 If a claim as to acquisitive prescription is to be maintained in relation to the Hawaiian Islands, various *indica* have to be considered including, for example, the length of time of effective and peaceful occupation, the extent of opposition to or acquiescence in, that occupation and, perhaps, the degree of recognition provided by third states. As Jennings and Watts confirm, however, 'no general rule [can] be laid down as regards the length of time and other circumstances which are necessary to create such a title by prescription. Everything [depends] upon the merits of the individual case'.[126] As regards the temporal element, the US could claim to have peacefully and continuously exercised governmental authority in relation to Hawai`i for over a century. This is somewhat more than was required for purposes of prescription in the *British Guiana-Venezuela Boundary Arbitration,* for example,[127] but it is clear that time alone is certainly not determinative. Similarly, in terms of the attitude of third states, it is evident that apart from the initial protest of the Japanese Government in 1897, none has opposed the extension of US jurisdiction to the Hawaiian Islands. Indeed the majority of States may be said to have acquiesced in its claim

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[120] Johnson, 27 B.Y.I.L. (1950) 332, pp. 353-4.
[121] Prescription may be said to have been recognised in the *Chamizal Arbitration*, 5 A.J.I.L. (1911) 785; the *Grisbadana Arbitration* P.C.I.J. 1909; and the *Island of Palmas Arbitration*, supra n. 13.
[122] ICJ Rep. 1960, p. 6.
[123] ICJ Rep. 1953 47
[124] ICJ Rep. 1951 116.
[125] *Supra*, n. 13.
[126] *Supra*, n. , p. 706.
[127] The arbitrators were instructed by their treaty terms of reference to allow title if based upon 'adverse holding or prescription during a period of 50 years'. 92 BFSP (1899-1900) 160.

to sovereignty in virtue of acceding to its exercise of sovereign prerogatives in respect of the Islands (for example, in relation to the policing of territorial waters or airspace, the levying of customs duties, or the extension of treaty rights and obligations to that territory). It is important, however, not to attach too much emphasis to third party recognition. As Jennings points out, in case of adverse possession '[r]ecognition or acquiescence on the part of third States... must strictly be irrelevant'.[128]

5.4.4 More difficult, in this regard, is the issue of acquiescence/ protest. In the *Chamizal Arbitration*[129] it was held that the US could not maintain a claim to the Chamizal tract by way of prescription in part because of the protests of the Mexican government. The Mexican government, in the view of the Commission, had done 'all that could be reasonably required of it by way of protest against the illegal encroachment'. Although it had not attempted to retrieve the land by force the Commission pointed out that:

> 'however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.'[130]

It would seem, in other words, that protesting in any way that might be 'reasonably required' should effectively defeat a claim of prescription.

5.4.5 The difficulty of applying such considerations in the current circumstances is evident. Although the Hawaiian Kingdom (the Queen) protested vociferously at the time, and on several separate occasions, and although this protest resulted in the refusal of the US Senate to ratify the treaty of cession, from 1898 onwards no further action was taken in this regard. The reason, of course, is not hard to find. The government of the Kingdom had been effectively removed from power and the US had *de facto*, if not *de jure*, annexed the Islands. The Queen herself survived only until 1917 and did so before a successor could be confirmed in accordance with article 22 of the 1864 Constitution. This was not a case, moreover, of the occupation of merely part of the territory of Hawai`i in which case one might have expected protests to be maintained on a continuous basis by the remaining State. In the circumstances, therefore, it is entirely

[128] Jennings, *supra,* n. 102, p. 39.
[129] US v. Mexico (1911), 5 A.J.I.L. (1911) 782.
[130] Ibid.

understandable that the Queen or her government failed to pursue the matter further when it appeared exceedingly unlikely that any movement in the position of the US government would be achieved. This is not to say, of course, that the government of the Kingdom subsequently acquiesced in the US occupation of the Islands, which of course raises the question whether a claim of acquisitive prescription may be sustained. In the view of Jennings, in cases of acquisitive prescription, 'an acquiescence on the part of the State prescribed against is of the essence of the process'.[131] If, as he suggests, some positive indication of acquiescence is to be found, there is remarkably little evidence for it. Indeed, of significance in this respect is the admission of the United States in the 'Apology Resolution' of 1993 in which it noted that 'the indigenous Hawaiian people never directly relinquished their claims to the inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum'. By the same token, the weight of evidence in favour of prescription should not be underplayed. As Jennings and Watts point out:

> 'When, to give an example, a state which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another state, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among states that the present condition of things is in conformity with international order.'[132]

The significant issue, however, is whether such considerations apply with equal ease in cases where the occupation concerned comprises the entirety of the State concerned, and where the possibilities of protest are hampered by the fact of occupation itself. It is certainly arguable that if a presumption of continuity exists, different considerations must come into play.

[131] *Supra*, n. 102, p. 39.
[132] *Supra*, n. 8, p. 707.

Enclosure “2”

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

Professor Federico Lenzerini[*]

I. INTRODUCTION

II. DOES THE REGENCY HAVE THE AUTHORITY TO REPRESENT THE HAWAIIAN KINGDOM AS A STATE THAT HAS BEEN UNDER A BELLIGERENT OCCUPATION BY THE UNITED STATES OF AMERICA SINCE 17 JANUARY 1893?

III. ASSUMING THE REGENCY DOES HAVE THE AUTHORITY, WHAT EFFECT WOULD ITS PROCLAMATIONS HAVE ON THE CIVILIAN POPULATION OF THE HAWAIIAN ISLANDS UNDER INTERNATIONAL HUMANITARIAN LAW, TO INCLUDE ITS PROCLAMATION RECOGNIZING THE STATE OF HAWAI'I AND ITS COUNTIES AS THE ADMINISTRATION OF THE OCCUPYING STATE ON 3 JUNE 2019?

IV. COMMENT ON THE WORKING RELATIONSHIP BETWEEN THE REGENCY AND THE ADMINISTRATION OF THE OCCUPYING STATE UNDER INTERNATIONAL HUMANITARIAN LAW.

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

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

> *International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*[1]

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

I. INTRODUCTION

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

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

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

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

II. DOES THE REGENCY HAVE THE AUTHORITY TO REPRESENT THE HAWAIIAN KINGDOM AS A STATE THAT HAS BEEN UNDER A BELLIGERENT OCCUPATION BY THE UNITED STATES OF AMERICA SINCE 17 JANUARY 1893?

1. In order to ascertain whether the Regency has the authority to represent the Hawaiian Kingdom *as a State*, it is preliminarily necessary to ascertain whether the Hawaiian Kingdom can actually be considered a State under international law. To this purpose, two issues need to be investigated, i.e.: a) whether the Hawaiian Kingdom was a State at the time when it was militarily occupied by the United States of America, on 17 January 1893; b) in the event that the solution to the first issue would be positive, whether the continuous occupation of Hawai'i by the United States, from 1893 to present times, has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law.

2. With respect to the first of the abovementioned issues, as acknowledged by the Arbitral Tribunal of the Permanent Court of Arbitration (PCA) in the *Larsen* case, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[4] At the time of the American occupation, the Hawaiian Kingdom fully satisfied the four elements of statehood prescribed by customary international law, which were later codified by the *Montevideo Convention on the Rights and Duties of States* in 1933[5]: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. This is confirmed by the fact that "the Hawaiian Kingdom became a full member of the Universal Postal Union on 1 January 1882, maintained more than a hundred legations and consulates throughout the world, and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States".[6]

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

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

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

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

3. Once established that the Hawaiian Kingdom was actually a State, under international law, at the time when it was militarily occupied by the United States of America, on 17 January 1893, it is now necessary to determine whether the continuous occupation of Hawai'i by the United States from 1893 to present times has led the Hawaiian Kingdom to be extinguished as an independent State and, consequently, as a subject of international law. This issue is undoubtedly controversial, and may be considered according to different perspectives. As noted by the Arbitral Tribunal established by the PCA in the *Larsen* case, in principle the question in point might be addressed by means of a careful assessment carried out through "having regard *inter alia* to the lapse of time since the annexation [by the United States], subsequent political, constitutional and international developments, and relevant changes in international law since the 1890s".[7]

4. However—beyond all speculative argumentations and the consequential conjectures that might be developed depending on the different perspectives under which the issue in point could be addressed—in reality the argument which appears to overcome all the others is that a long-lasting and well-established rule of international law exists establishing that military occupation, irrespective of the length of its duration, *cannot* produce the effect of extinguishing the sovereignty and statehood of the occupied State. In fact, the validity of such a rule has *not* been affected by whatever changes occurred in international law since the 1890s. Consistently, as emphasized by the Swiss arbitrator Eugène Borel in 1925, in the famous *Affaire de la Dette publique ottomane*,

> "[q]uels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté [...] L'occupation, par l'un des belligérants, de [...] territoire de l'autre belligérant est un pur fait. C'est un état de choses essentiellement provisoire, qui ne substitue pas légalement l'autorité du belligérant envahisseur à celle du belligérant envahi".[8]

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

[8] See *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, *Reports of International Arbitral Awards*, Volume I, 529, also available at <https://legal.un.org/riaa/cases/vol_I/529-614.pdf> (accessed on 16 May 2020), at 555 ("whatever are the effects of the occupation of a territory by the enemy before the re-establishment of peace, it is certain that such an occupation alone cannot legally determine the transfer of sovereignty [...] The occupation, by one of the belligerents, of [...] the territory of the other belligerent is

This position was confirmed by, among others, the US Military Tribunal at Nuremberg in 1948, holding that "[i]n belligerent occupation the occupying power does not hold enemy territory by virtue of any legal right. On the contrary, it merely exercises a precarious and temporary actual control".[9] Indeed, as noted, much more recently, by Yoram Dinstein, "occupation does not affect sovereignty. The displaced sovereign loses possession of the occupied territory de facto but it retains title *de jure* [i.e. "as a matter of law"]".[10] In this regard, as previously specified, this conclusion can in no way be influenced by the length of the occupation in time, as "[p]rolongation of the occupation does not affect its innately temporary nature".[11] It follows that "'precarious' as it is, the sovereignty of the displaced sovereign over the occupied territory is not terminated" by belligerent occupation.[12] Under international law, "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur",[13] which means, in the words of the famous jurist Oppenheim, that "[t]he only form in which a cession [of sovereignty] can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war".[14] Such a conclusion corresponds to "a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts".[15]

5. The United States has taken possession of the territory of Hawai'i solely through de facto occupation and unilateral annexation, without concluding any treaty with the Hawaiian Kingdom. Furthermore, it

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nothing but a pure fact. It is a state of things essentially provisional, which does not legally substitute the authority of the invading belligerent to that of the invaded belligerent").

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

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

[11] Ibid.

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

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

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

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

appears that such an annexation has taken place in contravention of the rule of *estoppel*. At it is known, in international law "the doctrine of estoppel protects legitimate expectations of States induced by the conduct of another State".[16] On 18 December 1893 President Cleveland concluded with Queen Lili'uokalani a treaty, by executive agreement, which obligated the President to restore the Queen as the Executive Monarch, and the Queen thereafter to grant clemency to the insurgents.[17] Such a treaty, which was never carried into effect by the United States, would have precluded the latter from claiming to have acquired Hawaiian territory, because it had evidently induced in the Hawaiian Kingdom the legitimate expectation that the sovereignty of the Queen would have been reinstated, an expectation which was unduly frustrated through the annexation. It follows from the foregoing that, according to a plain and correct interpretation of the relevant legal rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and a subject of international law, despite the long and effective exercise of the attributes of government by the United States over Hawaiian territory.[18] In fact, in the event of illegal annexation, "the legal existence of [...] States [is] preserved from extinction",[19] since "illegal occupation cannot of itself terminate statehood".[20] The possession of the attribute of statehood by the Hawaiian Kingdom was substantially confirmed by the PCA, which, before establishing the Arbitral Tribunal for the *Larsen* case, had to get assured that one of the parties of the arbitration was a State, as a necessary precondition for its jurisdiction to exist. In that case, the Hawaiian Kingdom was actually qualified as a "State", while the Claimant—Lance Paul Larsen—as a "Private entity."[21]

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

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

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

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

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

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

6. The conclusion according to which the Hawaiian Kingdom cannot be considered as having been extinguished—as a State—as a result of the American occupation also allows to confirm, *de plano*, that the Hawaiian Kingdom, as an independent State, has been under uninterrupted belligerent occupation by the United States of America, from 17 January 1893 up to the moment of this writing. This conclusion cannot be validly contested, even by virtue of the hypothetical consideration according to which, since the American occupation of Hawai'i has not substantially involved the use of military force, and has not encountered military resistance by the Hawaiian Kingdom,[22] it consequently could not be considered as "belligerent". In fact, a territory is considered occupied "when it is placed under the authority of the hostile army [...] The law on occupation applies to all cases of partial or total occupation, even if such occupation does not encounter armed resistance. The essential ingredient for applicability of the law of occupation is therefore the actual control exercised by the occupying forces".[23] This is consistent with the rule expressed in Article 42 of the Regulations annexed to the *Hague Convention (IV) respecting the Laws and Customs of War on Land* of 1907—affirming that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" — as well as with Article 2 common to the four Geneva Conventions of 1949, establishing that such Conventions apply "to all cases of partial or total occupation of the territory of a High Contracting Party, *even if the said occupation meets with no armed resistance*" (emphasis added).

7. Once having ascertained that, under international law, the Hawaiian Kingdom continues to exist as an independent State, it is now time to assess the legitimacy and powers of the Regency. According to the *Lexico Oxford Dictionary*, a "regency" is "[t]he office of or period of government by a regent".[24] In a more detailed manner, the *Black's Law Dictionary*, which is the most trusted and widely used legal dictionary in the United States, defines the term in point as "[t]he man or body of men intrusted with the vicarious government of a kingdom during the

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[22] It is to be noted, in this respect, that no armed resistance was opposed to the occupation despite the fact that, as acknowledged by US President Cleveland, the Queen "had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal"; see United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 1895, at 453, available at <https://hawaiiankingdom.org/pdf/Willis_to_Gresham_(12.20.1893).pdf> (accessed on 20 May 2020).

[23] See International Committee of the Red Cross, "The Law of Armed Conflict. Belligerent Occupation", Geneva, June 2002, available at <https://www.icrc.org/en/doc/assets/files/other/law9_final.pdf> (accessed on 17 May 2020), at 3.

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

minority, absence, insanity, or other disability of the king".[25] Therefore, it appears that, in consideration of the current situation of the Hawaiian Kingdom, a regency is the right body entitled to provisionally exercise the powers of the Hawaiian Executive Monarch in the absence of the latter, an absence which forcibly continues at present due to the persistent situation of military occupation to which the Hawaiian territory is subjected.

8. In legal terms, the legitimacy of the Hawaiian Council of Regency is grounded on Articles 32 and 33 of the *Hawaiian Kingdom Constitution* of 1864. In particular, Article 32 states that "[w]henever, upon the decease of the Reigning Sovereign, the Heir shall be less than eighteen years of age, the Royal Power shall be exercised by a Regent Council of Regency; as hereinafter provided". As far as Article 33 is concerned, it affirms that "[i]t shall be lawful for the King at any time when he may be about to absent himself from the Kingdom, to appoint a Regent or Council of Regency, who shall administer the Government in His name; and likewise the King may, by His last Will and Testament, appoint a Regent or Council of Regency to administer the Government during the minority of any Heir to the Throne; and should a Sovereign decease, leaving a Minor Heir, and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent of Council of Regency, who shall administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King, until he shall have attained the age of eighteen years, which age is declared to be the Legal Majority of such Sovereign".

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

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

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

III. ASSUMING THE REGENCY DOES HAVE THE AUTHORITY, WHAT EFFECT WOULD ITS PROCLAMATIONS HAVE ON THE CIVILIAN POPULATION OF THE HAWAIIAN ISLANDS UNDER INTERNATIONAL HUMANITARIAN LAW, TO INCLUDE ITS PROCLAMATION RECOGNIZING THE STATE OF HAWAI'I AND ITS COUNTIES AS THE ADMINISTRATION OF THE OCCUPYING STATE ON 3 JUNE 2019?

10. As previously ascertained, the Council of Regency actually possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom and, consequently, has the authority to represent the Hawaiian Kingdom as a State pending the American occupation and, in any case, up to the moment when it shall be possible to convene the Legislative Assembly pursuant to Article 33 of the Hawaiian Kingdom Constitution of 1864. This means that the Council of Regency is exactly in the same position of a government of a State under military occupation, and is vested with the rights and powers recognized to governments of occupied States pursuant to international humanitarian law.

11. In principle, however, such rights and powers are quite limited, by reason of the fact that the governmental authority of a government of a State under military occupation has been replaced by that of the occupying power, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant".[26] At the same time, the ousted government retains the function and the duty of, to the extent possible, preserving order, protecting the rights and prerogatives of local people and continuing to promote the relations between its people and foreign countries. In the *Larsen* case, the claimant even asserted that the Council of Regency had "an obligation and a responsibility under international law, to take steps to protect Claimant's nationality as a Hawaiian subject";[27] the Arbitral Tribunal

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

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

established by the PCA, however, did not provide a response regarding this claim. In any event, leaving aside the latter specific aspect, in light of its position the Council of Regency may to a certain extent interact with the exercise of the authority by the occupying power. This is consistent with the fact that the occupant is under an international obligation to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".[28] Indeed, as noted by the eminent jurist Robert Y. Jennings in an influential article published in 1946,[29] one of the main purposes of the law of belligerent occupation is to protect the sovereign rights of the legitimate government of the occupied territory, and the obligations of the occupying power in this regard continue to exist "even when, in disregard of the rules of international law, it claims [...] to have annexed all or part of an occupied territory".[30] It follows that, the ousted government being the entity which represents the "legitimate government" of the occupied territory, it may "attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority, or both. One way to accomplish such goals is to legislate for the occupied population".[31] In fact, "occupation law does not require an exclusive exercise of authority by the Occupying Power. It allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory".[32] While in several cases occupants have maintained the inapplicability to the occupied territory of new legislation enacted by the occupied government, for the reason that it "could undermine their authority [...] the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local law, most notably in matters of personal status".[33] The Swiss Federal Tribunal has even held that "[e]nactments by the [exiled government] are constitutionally laws of the [country] and applied *ab*

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

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

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

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

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

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

initio to the territory occupied [...] even though they could not be effectively implemented until the liberation".[34] Although this position was taken with specific regard to exiled governments, and the Council of Regency was not established *in exile* but *in situ*, the conclusion, to the extent that it is considered valid, would not substantially change as regards the Council of Regency itself.

12. It follows from the foregoing that, under international humanitarian law, the proclamations of the Council of Regency are not divested of effects as regards the civilian population of the Hawaiian Islands. In fact, considering these proclamations as included in the concept of "legislation" referred to in the previous paragraph,[35] they might even, if the concrete circumstances of the case so allow, apply retroactively at the end of the occupation, irrespective of whether or not they must be respected by the occupying power during the occupation, on the condition that the legislative acts in point do not "disregard the rights and expectations of the occupied population".[36] It is therefore necessary that the occupied government refrains "from using the national law as a vehicle to undermine public order and civil life in the occupied area".[37] In other words, in exercising the legislative function during the occupation, the ousted government is subjected to the condition of not undermining the rights and interests of the civilian population. However, once the latter requirement is actually respected, the proclamations of the ousted government—including, in the case of Hawai'i, those of the Council of Regency—may be considered applicable to local people, unless such applicability is explicitly refuted by the occupying authority, in its position of an entity bearing "the ultimate and overall responsibility for the occupied territory".[38] In this regard, however, it is reasonable to assume that the occupying power should not deny the applicability of the above proclamations when they do not undermine, or significantly interfere with the exercise of, its authority. This would be consistent with the obligation of the occupying power "to maintain the status quo ante (i.e. as it was

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

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

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

[37] Ibid., at 106.

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

before) in the occupied territory as far as is practically possible",[39] considering that local authorities are better placed to know what are the actual needs of the local population and of the occupied territory, in view of guaranteeing that the status quo ante is effectively maintained.

13. As regards, specifically, the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019,[40] it reads as follows:

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

As it is evident from a plain reading of its text, this Proclamation pursues the clear purpose of ensuring the protection of the Hawaiian territory and the people residing therein against the prejudicial effects which may arise from the occupation to which such a territory is actually subjected. Therefore, it represents a legislative act aimed at furthering the interests of the civilian population through ensuring the correct administration of their rights and of the land. As a consequence, it has the nature of an act that is equivalent, in its rationale and purpose (although not in its precise subject), to a piece of legislation concerning matters of personal status of the local

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

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

population, requiring the occupant to give effect to it.[41] It is true that the Proclamation of 3 June 2019 takes a precise position on the status of the occupying power, the State of Hawai'i and its Counties being a direct emanation of the United States of America. However, in doing so, the said Proclamation simply reiterates an aspect that is self-evident, since the fact that the State of Hawai'i and its Counties belong to the political organization of the occupying power, and that they are de facto administering the Hawaiian territory, is objectively irrefutable. It follows that the Proclamation in discussion simply restates rules already existing under international humanitarian law. In fact, the latter clearly establishes the obligation of the occupying power to preserve the sovereign rights of the occupied government (as previously ascertained in this opinion),[42] the "overarching principle [of the law of occupation being] that an occupant does not acquire sovereignty over an occupied territory and therefore any occupation must only be a temporary situation".[43] Also, it is beyond any doubts that an occupying power is bound to guarantee and protect the human rights of the local population, as defined by the international human rights treaties of which it is a party as well as by customary international law. This has been authoritatively confirmed, *inter alia*, by the International Court of Justice.[44] While the Proclamation makes reference to the duty of the State of Hawai'i and its Counties to protect the human rights of the local population "under Hawaiian Kingdom law", and not pursuant to applicable international law, this is consistent with the obligation of the occupying power to respect, to the extent possible, the law in force in the occupied territory. In this regard, respecting the domestic laws which protect the human rights of the local population undoubtedly falls within "the extent possible", because it certainly does not undermine, or significantly interfere with the exercise of, the authority of the occupying power, and is consistent with existing international obligations. In other words, the occupying

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

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

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

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

power cannot be considered "absolutely prevented"[45] from applying the domestic laws protecting the human rights of the local population, unless it is demonstrated that the level of protection of human rights guaranteed by Hawaiian Kingdom law is less advanced than human rights standards established by international law. Only in this case, the occupying power would be under a duty to ensure in favour of the local population the higher level of protection of human rights guaranteed by international law. In sum, the Council of Regency's Proclamation of 3 June 2019 may be considered as a domestic act implementing international rules at the internal level, which should be effected by the occupying power pursuant to international humanitarian law, since it does not undermine, or significantly interfere with the exercise of, its authority.

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

III. COMMENT ON THE WORKING RELATIONSHIP BETWEEN THE REGENCY AND THE ADMINISTRATION OF THE OCCUPYING STATE UNDER INTERNATIONAL HUMANITARIAN LAW.

15. As previously noted, "occupation law [...] allows for authority to be shared by the Occupying Power and the occupied government, provided the former continues to bear the ultimate and overall responsibility for the occupied territory".[46] This said, it is to be kept well in mind that belligerent occupation necessarily has a *non-consensual nature*. In fact, "[t]he absence of consent from the state whose territory is subject to the foreign forces' presence [...] [is] a precondition for the existence of a state of belligerent occupation. Without this condition, the situation would amount to a 'pacific occupation' not subject to the law of occupation".[47] At the same time, we also need to remember that the absence of armed resistance by the territorial government can in no way be interpreted as determining the existence of an implied consent to the occupation, consistently with the principle enshrined by Article 2 common to the four Geneva Conventions of 1949.[48]. On the contrary, the consent, "for the

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

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

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

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

purposes of occupation law, [...] [must] be genuine, valid and explicit".[49] It is evident that such a consent has never been given by the government of the Hawaiian Kingdom. On the contrary, the Hawaiian government opposed the occupation since its very beginning. In particular, Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, on 17 January 1893 stated that, "to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands".[50]

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

16. Despite the fact that the occupation inherently configures as a situation unilaterally imposed by the occupying power—any kind of consent of the ousted government being totally absent—there still is some space for "cooperation" between the occupying and the occupied government—in the specific case of Hawai'i between the State of Hawai'i and its Counties and the Council of Regency. Before trying to specify the characteristics of such a cooperation, it is however important to reiterate that, under international humanitarian law, the last word concerning any acts relating to the administration of the occupied territory is with the occupying power. In other words, "occupation law would allow for a vertical, but not a horizontal, sharing of authority [...] [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory".[51] This vertical sharing of authority would reflect "the hierarchical relationship between the occupying power and the local authorities, the former maintaining a form of control over the latter through a top-down approach in the allocation of responsibilities".[52]

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

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

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

[52] Ibid., at footnote 7.

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

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

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

As far as United States practice is concerned, it acknowledges that "[t]he functions of the [occupied] government—whether of a general, provincial, or local character—continue only to the extent they are sanctioned".[53] With specific regard to cooperation with the occupied government, it is also recognized that "[t]he occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions".[54]

18. Importantly, the provisions referred to in the previous paragraph exactly refer to issues related to the protection of civilian persons and of their rights, which is one of the two main aspects (together with the preservation of the sovereign rights of the Hawaiian Kingdom government) dealt with by the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019.[55] In practice, the cooperation advocated by the provisions in point may take different forms, one of which translates into the possibility for the ousted government to adopt

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

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

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

legislative provisions concerning the above aspects. As previously seen, the occupying power has, *vis-à-vis* the ensuing legislation, a duty not to oppose to it, because it normally does not undermine, or significantly interfere with the exercise of, its authority. Further to this, it is reasonable to assume that—in light of the spirit and the contents of the provisions referred to in the previous paragraph—the occupying power has a duty to cooperate in giving realization to the legislation in point, unless it is "absolutely prevented" to do so. This duty to cooperate appears to be reciprocal, being premised on both the Council of Regency and the State of Hawai'i and its Counties to ensure compliance with international humanitarian law.

19. The latter conclusion is consistent with the logical (and legally grounded) assumption that the ousted government is better placed than the occupying power in order to know what are the real needs of the civilian population and what are the concrete measures to be taken to guarantee an effective response to such needs. It follows that, through allowing the legislation in discussion to be applied—and through contributing in its effective application—the occupying power would better comply with its obligation, existing under international humanitarian law and human rights law, to guarantee and protect the human rights of the local population. It follows that the occupying power has a duty—if not a proper legal obligation—to cooperate with the ousted government to better realize the rights and interest of the civilian population, and, more in general, to guarantee the correct administration of the occupied territory.

20. In light of the foregoing, it may be concluded that the working relationship between the Regency and the administration of the occupying State should have the form of a cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory, provided that there are no objective obstacles for the occupying power to cooperate and that, in any event, the "supreme" decision-making power belongs to the occupying power itself. This conclusion is consistent with the position of the latter as "administrator" of the Hawaiian territory, as stated in the Council of Regency's Proclamation recognizing the State of Hawai'i and its Counties as the administration of the occupying State of 3 June 2019 and presupposed by the pertinent rules of international humanitarian law.

24 May 2020

Professor Federico Lenzerini

Enclosure “17”

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August 11, 2024

Brigadier General Stephen F. Logan
State of Hawai‘i Deputy Adjutant General
Department of Defense
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Honolulu, HI 96816
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Via electronic mail

Re: Your duty to establish a military government by 12 noon on August 12, 2024

Brigadier General Logan:

This is my last notification to you. According to Hawai‘i Revised Statutes §28-3, “The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department.” While you are not the head of the Department of Defense, you are implicated by the conduct of the head, Major General Kenneth Hara, in the performance of a military duty. A legal opinion is “a statement of advice by an expert on a professional matter.”

The issue of the continuity of the Hawaiian Kingdom, as a State under international law, is not a novel legal issue for the State of Hawai‘i. It has been at the center of case law and precedence, regarding jurisdictional arguments that came before the courts of the State of Hawai‘i, since 1994. One year after the United States Congress passed the joint resolution apologizing for the United States overthrow of the Hawaiian Kingdom government in 1993, an appeal was heard by the State of Hawai‘i Intermediate Court of Appeals that centered on a claim that the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Lorenzo*, the appellate court stated:

> Lorenzo appeals, arguing that the lower court erred in denying his pretrial motion (Motion) to dismiss the indictment. The essence of the Motion is that the [Hawaiian Kingdom] (Kingdom) was recognized as an independent sovereign nation by the United States in numerous bilateral treaties; the Kingdom was illegally overthrown in 1893 with the assistance of the United States; the Kingdom still exists as a sovereign nation; he is a citizen of the Kingdom; therefore, the courts of the State of Hawai'i have no jurisdiction over him. Lorenzo makes the same argument on appeal. For the reasons set forth below, we conclude that the lower court correctly denied the Motion.[1]

While the appellate court affirmed the trial court's judgment, it admitted "the court's rationale is open to question in light of international law."[2] By not applying international law, the court concluded that the trial court's decision was correct because Lorenzo "presented no factual (or legal) basis for concluding that the Kingdom [continues to exist] as a state in accordance with recognized attributes of a state's sovereign nature." Since 1994, the Lorenzo case has become a precedent case that served as the basis for denying defendants' motions to dismiss claims that the Hawaiian Kingdom continues to exist. In *State of Hawai'i v. Fergerstrom*, the appellate court stated, "[w]e affirm that relevant precedent [in *State of Hawai'i v. Lorenzo*]," [3] and that defendants have an evidentiary burden that shows the Hawaiian Kingdom continues to exist.

The Supreme Court, in *State of Hawai'i v. Armitage*, clarified the evidentiary burden that Lorenzo placed upon defendants. The court stated:

> Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the Kingdom of Hawai'i "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack jurisdiction over him or her.[4]

Unlike Lorenzo, I provided you two legal opinions, by experts in international law, in my letter to you yesterday, August 10, 2024, that provided a factual and a legal basis for concluding that the Hawaiian Kingdom 'exists as a state in accordance with recognized attributes of a state's sovereign nature,' as called for by the State of Hawai'i Intermediate Court of Appeals and the Supreme Court. These legal opinions were authored by two professors of international law, Matthew Craven, from the University of London, SOAS, Department of Law, and Federico Lenzerini, from the University of Siena, Department of Political and International Sciences.

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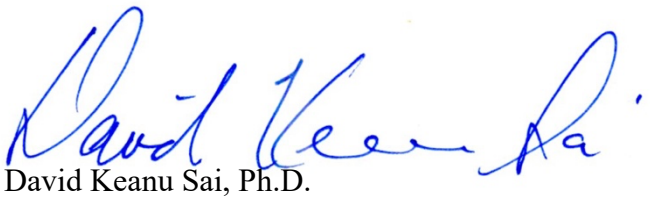
[1] *State of Hawai'i v. Lorenzo*, 77 Haw. 219, 220; 883 P.2d 641, 642 (1994).
[2] *Id*., 221, 643.
[3] *State of Hawai'i v. Fergerstrom*, 106 Haw. 43, 55; 101 P.3d 652, 664 (2004).
[4] *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).

As a result, this situation places the burden on the State of Hawai‘i Attorney General, Anne Lopez, to rebut these legal opinions pursuant to *State of Hawai‘i v. Lorenzo* and *State of Hawai‘i v. Armitage*. This would legally qualify her instruction to you to ignore the calls for performing your military duty to establish a military government.

There are two scenarios you face on this subject. The first scenario is to submit a formal letter to the Attorney General, with the approval of MG Hara as head of the Department of Defense, for a legal opinion that refutes the two legal opinions that opine that the Hawaiian Kingdom continues to exist as a State under international law. The second scenario is for MG Hara, himself, as head of the Department of Defense, to submit a similar formal letter to the Attorney General. Consequently, both scenarios will remove the element of *mens rea* of willful dereliction of duty by MG Hara, and the Royal Commission of Inquiry will also withdraw its War Criminal Report no. 24-0001.

I am making every effort to shield both you and MG Hara from committing the war crime by omission, and it boils down to a simple letter asking the right question. Should you decide to request a legal opinion of the Attorney General pursuant to §28-3, HRS, I have enclosed a sample letter to be sent to the Attorney General before 12 noon tomorrow.

If you or MG Hara have any questions, do not hesitate to contact me before 12 noon tomorrow. If I do not hear from you, by email or otherwise, that you submitted the request for a legal opinion before 12 noon tomorrow, I will assume that you did not make the request, and you will be the subject of a war criminal report for the war crime by omission.



David Keanu Sai, Ph.D.
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enclosure

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Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry
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Dear Attorney General Anne E. Lopez:

This letter is a request for a formal legal opinion regarding the continuity of the Hawaiian Kingdom as a State under international law pursuant to Hawai‘i Revised Statutes §28-3.

In 1994, in *State of Hawai‘i v. Lorenzo*, 77 Haw. 219, the Intermediate Court of Appeals stated that defendants that argue the courts have no jurisdiction over them must "present a factual or legal basis for concluding that the [Hawaiian] Kingdom existed as a State in accordance with recognized attributes of a State's sovereign nature." In 2014, the Hawai‘i Supreme Court, in *State of Hawai‘i v. Armitage*, 132 Haw. 36, restated "for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that that the Kingdom of Hawai‘i 'exists as a state in accordance with recognized attributes of a state's sovereign nature[,]' and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him or her."

In their letter to me, dated August 10, 2024, which I am enclosing, the Hawaiian Kingdom Royal Commission of Inquiry provided me with two legal opinions that 'demonstrate a factual or legal basis' that the Hawaiian Kingdom 'does exist as a state in accordance with recognized attributes of a state's sovereign nature.' I am requesting of you to provide me with a legal opinion, according pursuant to *State of Hawai‘i v. Lorenzo* and *State of Hawai‘i v. Armitage*, by refuting the legal opinions that opine that the Hawaiian Kingdom continues to exist as a State under international law.

Sincerely,