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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

HAWAIIAN KINGDOM,

Plaintiff,

v.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al.,

Defendants.

Civil No. 1:21:cv-00243-LEK-RT

HAWAIIAN KINGDOM’S RESPONSE TO DEFENDANTS DAVID YUTAKE IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR THE STATE OF HAWAII, TY NOHARA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF SECURITIES, ISAAC W. CHOY, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE DEPARTMENT OF TAXATION OF THE STATE OF HAWAII, AND STATE OF HAWAII’S MOTION TO DISMISS AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, FILED ON AUGUST 11, 2021 [ECF 262], AND THE HAWAIIAN KINGDOM’S NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO RULE 41(a)(1)(A)(i) FRCP; DECLARATION OF DAVID KEANU SAI; EXHIBITS 1-13; CERTIFICATE OF SERVICE

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I. INTRODUCTION

Today marks the 179th anniversary Great Britain and France jointly recognized the Hawaiian Kingdom as a sovereign and independent State on November 28, 1843, at the Court of London. The United States followed on July 6, 1844. Since January 17, 1893, the Hawaiian Kingdom came under belligerent occupation after Queen Lili'uokalani conditionally surrendered by "yield[ing] to the superior force of the United States."[1]

> As a subject of international law, the Hawaiian State would continue to exist despite its government being unlawfully overthrown by the United States on January 17, 1893. President Cleveland entered into a treaty, by exchange of notes, with Queen Lili'uokalani on December 18, 1893, whereby the President committed to restoring the Queen as the Executive Monarch, and, thereafter, the Queen committed to granting a full pardon to the insurgents. Political wrangling in the Congress, however, prevented President Cleveland from carrying out his obligations under the executive agreement. Five years later, the United States Congress enacted a joint resolution for the purported annexation

[1] Amended Complaint for Declaratory and Injunctive Relief [ECF 55], para. 63.

> of the Hawaiian Islands that was signed into law on July 7, 1898, by President William McKinley.[2]
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> Professor Wright, a renowned American political scientist, states that "international law distinguishes between a government and the state it governs." And Judge Crawford of the International Court of Justice clearly explains that "[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State." Crawford's conclusion is based on the "**presumption that the State continues to exist**, with its rights and obligations ... despite a period in which there is...no effective government (emphasis added)." Applying this principle to the Second Gulf War, Crawford explains, the
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> > occupation of Iraq in 2003 illustrated the difference between 'government' and 'State'; when Members of the Security Council, after adopting SC res 1511, 16 October 2003, called for the rapid "restoration of Iraq's sovereignty", they did not imply that Iraq had ceased to exist as a State but that normal governmental arrangements should be restored.[3]

When the Hawaiian Kingdom initiated these *sui generis* proceedings on May 20, 2021,[4] it sought to arrest the commission of the war crime of *usurpation of sovereignty* by having the Court "[e]njoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI'I AND ITS COUNTIES, to include the United States

[2] Amended Complaint for Declaratory and Injunctive Relief [ECF 55], para. 71.
[3] *Id*., para. 72.
[4] Complaint for Declaratory and Injunctive Relief [ECF 1].

constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea."[5] Eighteen months later, the war crime of *usurpation of sovereignty* (See, Amended Complaint, para. 129-132) is still being committed with impunity.

The basis of the complaint was the presumption that the Hawaiian Kingdom as a State continues to exist despite its government being militarily overthrown by the United States on January 17, 1893. The Hawaiian Kingdom as a State is a *juridical* fact,[6] which was acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom* in 1999.[7]

When these proceedings were initiated, the Hawaiian Kingdom, however, understood that it could not get relief until the Court transforms itself from an Article III Court into an Article II Occupation Court because it is situated in the territory of the Hawaiian Kingdom and not the United States. In its Amended Complaint, the Hawaiian Kingdom addressed this under the heading "Jurisdiction and Venue:"

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[5] Amended Complaint, para. 175(c).
[6] See Exhibit "1" [ECF 174-2], Plaintiff Hawaiian Kingdom's Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration [174].
[7] Amended Complaint, para. 96-97.

While this court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA, its jurisdiction is found as a *de facto* Article II Court. According to Professor Bederman:

> What, then, is distinctive about a court established under Article II of the Constitution? First, executive tribunals are established *without* an act of Congress or any other form of legislative concurrence. Congressional intent concerning the status of a presidential court is irrelevant because no congressional approval is needed. The fact that the President alone can create an executive court places it outside the scope of Article III of the Constitution, which demands that Congress shall establish courts inferior to the Supreme Court. Second, the executive courts are created pursuant only to the power and authority granted to the President in Article II of the Constitution. In practice, the only presidential power that would call for the creation of a court is that arising from his responsibility as Commander in Chief of the armed services and his subsequent war-making authority.

3. The authority for this Court to assume jurisdiction as a *de facto* Article II Court is fully elucidated in the *Amicus Curiae* brief previously lodged in these proceedings by virtue of the Motion for Leave to File *Amicus Curiae* Brief on July 30, 2021 [ECF 45] by the International Association of Democratic Lawyers (IADL), the National Lawyers Guild (NLG), and the Water Protector Legal Collective (WPLC). The *Amicus* brief is instructional for the Court to transition to a *de facto* Article II Court.
4. An Article II Court was established in Germany after hostilities ceased in 1945 during the Second World War. After the surrender, western Germany came under belligerent occupation by the United

States, France and Great Britain. The military occupation officially came to an end on May 5, 1955, with the entry into force of peace treaties called the Bonn Conventions between the Federal Republic of Germany and the three Occupying States. During the occupation, these Article II Courts had jurisdiction "over all persons in the occupied territory," except for Allied armed forces, their dependents, and civilian officials, for "[a]ll offenses against the laws and usages of war[,] […] [a]ll offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces, [and] [a]ll offenses under the laws of the occupied territory or any part thereof."

5. Like the Article II Court in Germany, this Court has Jurisdiction as a *de facto* Article II Court because this action arises under international humanitarian law—law of armed conflict, which include the 1907 Hague Convention, IV (1907 Hague Regulations), the 1907 Hague Convention, V, the 1949 Geneva Convention, IV (1949 Fourth Geneva Convention), and Hawaiian Kingdom law. 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.

6. The Court is authorized to award the requested declaratory and injunctive relief as a *de facto* Article II Court because it is situated within the territory of the HAWAIIAN KINGDOM that has been under a prolonged belligerent occupation by the United States of America since January 17, 1893.
7. Venue is proper because the events giving rise to this claim occurred in this District, and the Defendants are being sued in their official capacities.

When the *Amici* filed their *amicus curiae* brief in support of the Hawaiian Kingdom's Amended Complaint on October 6, 2021, they sought to assist the Court in the understanding as to why it must transform into an Article II Occupation Court given the legal and factual situation of the Hawaiian Kingdom.[8] The *Amici* stated:

> Under the concept of *void ab initio*, there are structures that have no legal effect from inception. The United States occupation of Hawai'i began with unclean hands, and this can only be remedied by a clean slate and a new beginning. Recognition of the prolonged occupation of the Hawaiian Kingdom by the United States through Declaratory Judgment is not only a redressable claim, it is long overdue and would only be consistent with what is already known to the international community and clear under international law. Additionally, granting the Hawaiian Kingdom injunctive relief would acknowledge the Kingdom's continuous sovereignty, mitigate the United States' liability for its war crimes against the Hawaiian people, and apply local law as required of an occupying power by the international law of war. Acknowledging extraterritoriality and occupation would have the practical effect of applying the laws of the Hawaiian Kingdom but as was the case with prior occupation courts, this would not nullify any prior decisions of any of the courts currently operating in Hawai'i, so long as they are not inconsistent with local law.[9]

As an Article III Court, the Court cannot claim to have jurisdiction within the territory of the Hawaiian Kingdom unless it can provide rebuttable evidence that the Hawaiian Kingdom as a State was extinguished under international law. As

[8] Brief of *Amici Curiae* International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96].
[9] *Id.*, 29.

Professor Craven stated, "[i]f 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 sovereignty, on the part of the United States."[10]

Without proffering any "reference to a valid demonstration of legal title, or sovereignty, on the part of the United States," this Court is precluded from asserting jurisdiction as an Article III Court when it is situated within the territory of the Hawaiian Kingdom and any judgment it makes is void. A judgment is void "if the court that rendered judgment lacked jurisdiction of the subject-matter, or of the parties, or acted in a manner inconsistent with due process."[11] According to Justice Story, "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity."[12] In *Pennoyer v. Neff*, the Supreme Court reiterated Justice Story's views on territorial jurisdiction. The Court stated:

> [N]o State can exercise direct jurisdiction and authority over persons or property without its territory (citation omitted). The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as

[10] Amended Complaint, para. 73.
[11] *Jalapeno Prop. Mgmt., L.L.C. v. Dukas*, 265 F.3rd 506, 516 (6th Cir. 2001) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)).
[12] *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134).

> an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.[13]

Since these proceedings began, neither the Court nor the Defendants provided any "reference to a valid demonstration of legal title, or sovereignty, on the part of the United States," and, therefore, the presumption of the Hawaiian State remains. Their arguments, to include the arguments made in the instant motion to dismiss, relies on "the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, [and] administrative law," which is the war crime of *usurpation of sovereignty*. The Amended Complaint clearly states:

> Municipal laws of the Defendant UNITED STATES OF AMERICA being imposed in the HAWAIIAN KINGDOM constitute a violation of the law of occupation, which, according to Professor Schabas, is the war crime of usurpation of sovereignty. The actus reus of the offense "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." All war crimes committed in the Hawaiian kingdom have a direct nexus and extend from the war crime of usurpation of sovereignty.[14]
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> According to Professor Schabas, the requisite elements for the following war crimes are:

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[13] *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).
[14] Amended Complaint, para. 130.

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 circumstance 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 circumstance 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 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 circumstance 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 circumstance 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.[15]

[15] *Id*., para. 131.

With regard to the last two elements of the aforementioned war crimes, Schabas states:

> 1. There is no requirement for a legal evaluation by the perpetrator as the existence of an armed conflict as 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 […].
> 3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict […].[16]

The prohibition of war crimes is an "old norm which [has] acquired the character of *jus cogens*." According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), international crimes, which include war crimes, are "universally condemned wherever they occur," because they are "peremptory norms of international law or jus cogens." *Jus cogens* norms are peremptory norms that "are nonderogable and enjoy the highest status within international law." Schabas' legal opinion is undeniably, and pursuant to *The Paquette Habana* case, a means for the determination of the rules of international criminal law.[17]

II. THE DUTY OF THE HAWAIIAN KINGDOM AS A STATE TO INVESTIGATE WAR CRIMES COMMITTED IN ITS TERRITORY

While these proceedings were underway, the United Nations Human Rights Council was made aware of the prolonged occupation of the Hawaiian Kingdom and

[16] *Id*., para. 132.
[17] *Id*., para. 133.

the commission of war crimes and human rights violations. As stated by the RCI in its War Criminal Report no. 22-0007:

> 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. 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."
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> 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. 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 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. [18]

[18] Exhibit #11, Royal Commission of Inquiry, *War Criminal Report no. 22-0007* 19-20 (November 18, 2022).

The Defendant UNITED STATES OF AMERICA is a member of the United Nations Human Rights Council and did not oppose or object to the statement made by H.E. Dr. David Keanu Sai, Ph.D., and, therefore, acquiesced to the statement by Dr. Sai. 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."[19] Since the United States "did not do so … thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui dbuisset act potuisset*."[20] Nevertheless, the war crime of *usurpation of sovereignty* continues to be committed with impunity.

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."[21] This "rule that States must investigate war crimes and prosecute the

[19] Nuno Sergio Marques Antunes, "Acquiescence," in Rudiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).
[20] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of June 15, 1962, I.C.J. Reports, p. 6, at 23.
[21] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general."[22]

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the territorial jurisdiction of the Hawaiian Kingdom, the Council of Regency, by *Proclamation* on April 17, 2019,[23] 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."[24]

In accordance with Hawaiian Kingdom administrative precedence in addressing crises by Royal Commissions of Inquiry, the RCI was established by "virtue of the prerogative of the Crown provisionally vested in [the Council of Regency] in accordance with Article 33 of the 1864 Constitution, and to ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom." His

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[22] *Id*., 608.
[23] Proclamation: Establishment of the Royal Commission of Inquiry (April 17, 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).
[24] 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 69 (1919).

Excellency, Dr. David Keanu Sai, Ph.D., has been designated as Head of the RCI, and Dr. Federico Lenzerini, Ph.D., as Deputy Head. Pursuant to Article 3—*Composition of the Royal Commission*, the Head of the RCI has been authorized to seek "recognized experts in various fields."

The RCI acquired legal opinions from the following experts in international law: on the subject of the continuity of the Hawaiian Kingdom under international law, Professor Matthew Craven from the University of London, SOAS, School of Law; on the subject of the elements of war crimes committed in the Hawaiian Kingdom since 1893, Professor William Schabas, Middlesex University London, School of Law; and on the subject of human rights violations in the Hawaiian Kingdom and the right of self-determination by the Hawaiian citizenry, Professor Federico Lenzerini, University of Siena, Italy, Department of Political and International Studies. These experts, to include the Head of the RCI, are the authors of chapters 1, 2, 3, 4, and 5 of Part II of the Royal Commission's eBook - *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*.[25]

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

According to Article 1(2), "[t]he purpose of the Royal Commission shall be to investigate the consequences of the United States' belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context. The geographical scope and time span of the investigation will be sufficiently broad and be determined by the head of the Royal Commission."

Article 1(3) provides, "[t]he results of the investigation will be presented to the Council of Regency, the Contracting Powers of the 1907 Hague Convention, IV, respecting the Laws and Customs of War on Land, the Contracting Powers of the 1949 Geneva Convention, IV, relative to the Protection of Civilian Persons in Time of War, the Contracting Powers of the 2002 Rome Statute, the United Nations, the International Committee of the Red Cross, and the National Lawyers Guild in the form of a report." All 123 countries who are State Parties to the Rome Statute that established the International Criminal Court have the first responsibility and right to prosecute war criminals that enter their territories under the principle of complementarity and universal jurisdiction.

In Restatement (Third) of Foreign Relations Law of the United States, it recognizes that when "determining whether a rule has become international law,

substantial weight is accorded to...the writing of scholars."[26] According to Black's Law, United States courts have acknowledged that the "various Restatements have been a formidable force in shaping the disciplines of the law covered [and] they represent the fruit of the labor of the best legal minds in the diverse fields of law covered."[27] The Restatement drew from Article 38(1)(d) of the Statute of the International Court of Justice, which provides that "the teachings of the most highly qualified publicists of the various nations [are] subsidiary means for the determination of rules of [international law]." These "writings include treatises and other writings of authors of standing." Professors Craven, Schabas, and Lenzerini are "authors of standing" and their legal opinions are "sources" of the rules of international law.

At its website,[28] the RCI recently published the following War Criminal Reports:

> War Criminal Report no. 22-0002 finding Derek Kawakami, as Mayor of the County of Kaua'i, and Arryl Kaneshiro, as Chair of the Kaua'i County Council, guilty of the war crime of *usurpation of sovereignty* (November 17, 2022). Exhibit 1.
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> War Criminal Report no. 22-0002-1 finding Matthew M. Bracken and Mark L. Bradbury guilty of being accomplices to the war crime of

[26] Restatement (Third) Foreign Relations Law of the United States §103(2)(c) (1987).
[27] Black's Law 1313 (6th ed. 1990).
[28] Royal Commission of Inquiry website at https://hawaiiankingdom.org/royal-commission.shtml.

usurpation of sovereignty committed by Mayor Kawakami and Chair Kaneshiro (November 20, 2022). Exhibit 2.

War Criminal Report no. 22-0003 finding Mitchell Roth, as Mayor of the County of Hawai‘i, and Maile David, as Chairwoman of the Hawai‘i County Council, guilty of the war crime of *usurpation of sovereignty* (November 17, 2022). Exhibit 3.

War Criminal Report no. 22-0003-1 finding Elizabeth A. Stance, Mark D. Disher and Dakota K. Frenz guilty of being accomplices to the war crime of *usurpation of sovereignty* committed by Mayor Roth and Chairwoman David (November 20, 2022). Exhibit 4.

War Criminal Report no. 22-0004 finding Michael Victorino, as Mayor of the County of Maui, and Alice L. Lee, as Chairwoman of the Maui County Council, guilty of the war crime of *usurpation of sovereignty* (November 17, 2022). Exhibit 5.

War Criminal Report no. 22-0004-1 finding Moana M. Lutey, Caleb P. Rowe and Iwalani Mountcastle Gasmen guilty of being accomplices to the war crime of *usurpation of sovereignty* committed by Mayor Victorino and Chairwoman Lee (November 20, 2022). Exhibit 6.

War Criminal Report no. 22-0005 finding David Yutake Ige, as Governor of the State of Hawai‘i, Ty Nohara, as Commissioner of Securities of the State of Hawai‘i, and Isaac W. Choy, as Director of the Department of Taxation of the State of Hawai‘i, guilty of the war crime of *usurpation of sovereignty* (November 18, 2022). Exhibit 7.

War Criminal Report no. 22-0005-1 finding Holly T. Shikada and Amanda J. Watson guilty of being accomplices to the war crime of *usurpation of sovereignty* committed by Governor Ige, Commissioner Nohara, and Director Choy (November 20, 2022). Exhibit 8.

War Criminal Report no. 22-0006 finding Anders G.O. Nervell, as Honorary Consul for Sweden, guilty of the war crime of *usurpation of sovereignty* (November 18, 2022). Exhibit 9.

War Criminal Report no. 22-0006-1 finding Scott I. Batterman guilty of being an accomplice to the war crime of *usurpation of sovereignty* committed by Swedish Honorary Consul Nervell (November 20, 2022). Exhibit 10.

War Criminal Report no. 22-0007 finding Joseph Robinette Biden Jr., as President of the United States, Kamala Harris, as Vice-President of the United States, Admiral John Aquilino, as Commander of U.S. Indo-Pacific Command, Charles P. Rettig, as Commissioner U.S. Internal Revenue Service, Charles E. Schumer, as U.S. Senate Majority Leader, and Nancy Pelosi, as Speaker of the U.S. House of Representatives, guilty of the war crime of *usurpation of sovereignty* (November 18, 2022). Exhibit 11.

War Criminal Report no. 22-0007-1 finding Brian M. Boynton, Anthony J. Coppolino and Michael J. Gerardi guilty of being accomplices to the war crime of *usurpation of sovereignty* committed by President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi (November 20, 2022). Exhibit 12.

War Criminal Report no. 22-0008 finding Leslie E. Kobayashi, as United States District Judge, and Rom A. Trader, as United States Magistrate Judge, guilty of the war crimes of *usurpation of sovereignty* and *deprivation of fair and regular trial* (November 23, 2022). Exhibit 13.

The RCI, in its reports, found that the pleadings of the Defendants in this case, to include the instant motion to dismiss, and the orders issued therefrom, have met

the constituent elements of *usurpation of sovereignty* and *deprivation of fair and regular trial* and *mens rea*.

III. CONCLUSION

The U.S. District Court, for the District of Hawai`i has failed and/or refuses to transform and operate as an Article II Court in defiance of the rule of law as set out in these proceedings by the Hawaiian Kingdom and affirmed in the filing of the *Amicus* Brief filed by the International Association of Democratic Lawyers, the National Lawyers Guild and the Water Protector Legal Collection. Furthermore, this Court has administered "[m]unicipal laws of the Defendant UNITED STATES OF AMERICA" in addressing all claims for relief by parties to these proceedings, in the territorial jurisdiction of the Hawaiian Kingdom, in complete disregard of international law.

Defendants, all of those seeking relief and dismissal of the Complaint and/or Amended Complaint, have invoked and asserted only "[m]unicipal laws of the Defendant UNITED STATES OF AMERICA" to serve their interest(s) and obtain their relief sought from this Court. In no instance, have any of these Defendants proffered evidence (rebuttable or otherwise) of the extinguishment of the Hawaiian Kingdom, as a State under international law. In fact, to the contrary and extreme detriment of Plaintiff, said defendants have intentionally asserted only "[m]unicipal laws of the Defendant UNITED STATES OF AMERICA" and relied on the Court's

extrajudicial review, consideration and application solely on "[m]unicipal laws of the Defendant UNITED STATES OF AMERICA" to grant the relief sought for said Defendants.

As now documented in the Reports of the RCI, these proceedings have been rendered moot, as the Hawaiian Kingdom is unable to get relief sought in its Complaint/Amended Complaint from the Defendants and this Court, and thereby subjecting Plaintiff, its Council of Regency, its national subjects and its territorial domain to ongoing suffering and damages brought upon by the continuing imposition of "[m]unicipal laws of the Defendant UNITED STATES OF AMERICA."

Accordingly, as instructed by the Council of Regency, on behalf of Plaintiff Hawaiian Kingdom, I hereby give Notice of Voluntary Dismissal of its Amended Complaint and these proceedings in a manner consistent with Rule 41(a)(1)(A)(i) FRCP.

DATED: Honolulu, Hawai'i, November 28, 2022.

Respectfully submitted,

/s/ Dexter K. Ka'iama

DEXTER K. KA'IAMA (Bar No. 4249)
Attorney General of the Hawaiian Kingdom
DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM
Attorney for Plaintiff, Hawaiian Kingdom

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM, Plaintiff, v. JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al., Defendants.	Civil No. 1:21:cv-00243-LEK-RT DECLARATION OF DAVID KEANU SAI, Ph.D.; EXHIBITS 1-13

DECLARATION OF PROFESSOR FEDERICO LENZERINI

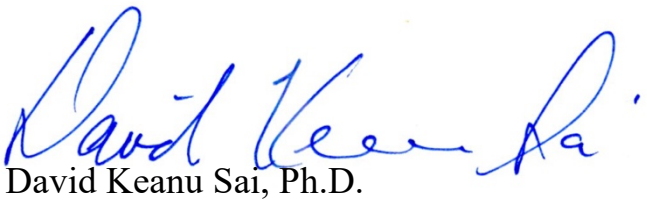
I, David Keanu Sai, declare the following:

1. I am the Head of the Royal Commission of Inquiry and the author of War Criminal Reports no. 22-0002, 22-0002-1, 22-0003, 22-0003-1, 22-0004, 22-0004-1, 22-0005, 22-0005-1, 22-0006, 22-0006-1, 22-0007, 22-0007-1, and

22-0008, which true and correct copies of the same are attached hereto as Exhibits "1" through "13."

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Hilo, Hawai'i, November 28, 2022.



David Keanu Sai, Ph.D.

Exhibit “1”

WAR CRIMINAL REPORT NO. 22-0002

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0002

GUILTY OF WAR CRIME: DEREK KAWAKAMI as Mayor of the County of Kaua‘i
ARRYL KANESHIRO as Chair of the Kaua‘i County Council

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

LOCATION OF WAR CRIME: Islands of Kaua‘i and Ni‘ihau

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 Derek Kawakami as Mayor of the County of Kaua‘i ("Mayor Kawakami") and Arryl Kaneshiro as Chair of the Kaua‘i County Council ("Chair Kaneshiro") whose jurisdiction extends over the islands of Kaua‘i and Ni‘ihau. 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*,[1] that 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.[2]

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").[3] All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are

[1] 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).
[2] 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).
[3] 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).

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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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."[8]

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

[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.
[8] *Id*., 586.

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 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 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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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.[11]

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

[9] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).
[10] 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).
[11] *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.

the breach must involve grave consequences for the victim."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] 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.

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[12] *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."

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

[14] 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.

[15] *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").

> 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.[16]

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 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."[17] 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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
[18] *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).

Nations General Assembly.[19] 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."[20]

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 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."[21]

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).
[20] 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.
[21] 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.

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.[25]

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

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[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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/).
[25] 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).

law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

> and to be administered by the ordinary tribunals, substantially as they were before the occupation.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] 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."[34] 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

[31] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[32] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[33] 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).
[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

> 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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."[38]

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

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[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.
[38] *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.

the occupation, for example.[39] 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.

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:

> 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."

[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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.[41]

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

[40] *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).
[41] 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).

Hawai‘i.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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.”[44] While there is, however, “only a requirement for the awareness of the factual circumstances,” the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.[45]

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[42] *Id*., 114.
[43] Sai, “The Royal Commission of Inquiry,” 29-33.
[44] *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).
[45] 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).

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as 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.

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

> *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.[47]

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. 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,

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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).

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

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.[52] 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."[53]

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 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

[52] 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).
[53] 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/).

Hawaiian Islands—the Hawaiian Kingdom.[54] 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.[55] 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 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.

[54] 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/).
[55] 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/).

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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Kawakami and Chair Kaneshiro, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
d. Award such additional relief as the interests of justice may require.

Preliminary to the court’s consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the “court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA.”[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)
[57] *Id*., para. 3.
[58] David J. Bederman, “Article II Courts,” 44 *Mercer Law Review* 825-879 (1992-1993).

history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, the County of Kaua'i on 1 July 2021 filed a motion to dismiss on behalf of Mayor Kawakami and Chair Kaneshiro.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledged the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

Mayor Kawakami and Chair Kaneshiro, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[64] Judge Crawford further

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[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)
[63] *Id*., 1-2.
[64] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

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."[65] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[66]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Mayor Kawakami and Chair Kaneshiro is 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, Mayor Kawakami continued to unlawfully enforce American laws throughout the islands of Kaua'i and Ni'ihau, and Chair Kaneshiro continued to unlawfully preside over the enactment American laws through County ordinances with impunity.

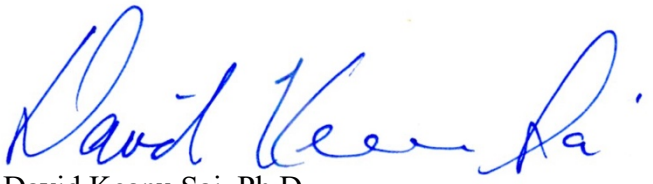
Mayor Kawakami and Chair Kaneshiro have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree. "It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result." 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."[67] 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."[68]

1. Mayor Kawakami and Chair Kaneshiro 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. Mayor Kawakami and Chair Kaneshiro 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.

[65] *Id*.
[66] 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).
[67] Black's Law 708 (6th ed. 1990).
[68] *Id*.

4. Mayor Kawakami and Chair Kaneshiro were aware of factual circumstances that established the existence of the military occupation.

As neither Mayor Kawakami nor Chair Kaneshiro 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."[69] 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."[70]



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

17 November 2022

[69] Schabas, 161.
[70] *Id.*

Exhibit “2”

WAR CRIMINAL REPORT NO. 22-0002-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0002-1

GUILTY OF WAR CRIME: MATTHEW M. BRACKEN as County Attorney for the County of Kaua‘i
MARK L. BRADBURY as Deputy County Attorney for the County of Kaua‘i

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Islands of Kaua‘i and Ni‘ihau

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry (“RCI”) on the war crime of being an accomplice to the *usurpation of sovereignty during military occupation* under “particular” customary international law addresses the actions and ommissions taken by Matthew M. Bracken (“Kaua‘i Attorney Bracken”) and Mark L. Bradbury (“Kaua‘i Deputy Attorney Bradbury”) as the County of Kaua‘i attorneys representing Derek Kawakami as Mayor of the County of Kaua‘i (“Mayor Kawakami”) and Arryl Kaneshiro as Chair of the Kaua‘i County Council (“Chair Kaneshiro”) whose jurisdiction extends over the islands of Kaua‘i and Ni‘ihau. 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*,[1] that 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.[2]

GOVERNING LAW

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

[1] 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).
[2] 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).

Time of War, 1949 ("Fourth Geneva Convention").[3] 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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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

[3] 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).
[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.

representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[8]

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 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

[8] *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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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

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

crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[11]

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."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] The Commission was especially concerned with acts perpetrated in occupied territories against non-

[11] *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.
[12] *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."
[13] *Prosecutor v.* Tadić (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).
[14] 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.
[15] *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").

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.[16]

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 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."[17] 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

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[19] 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."[20]

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 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,

[18] *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).

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

[20] 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.

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."[21]

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.

[21] 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.
[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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 Hague Regulations.[25]

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."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[25] 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).
[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

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.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-

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

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."[34] 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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

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[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.
[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

'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."[38]

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.[39] 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.

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:

> 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;

[38] *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.
[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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*

[40] *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).

Human Rights Violations in the Hawaiian Kingdom provides a comprehensive and historical narrative that rectifies this false information.[41]

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.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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."[44] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai'i and its Counties, because

[41] 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).
[42] *Id*., 114.
[43] Sai, "The Royal Commission of Inquiry," 29-33.
[44] *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).

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.[45]

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides

[45] 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).

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

> 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.[47]

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. 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

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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

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

> 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.[52] 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."[53]

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

[52] 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).
[53] 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/).

> 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.[54] 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.[55] 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[54] 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/).
[55] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

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

Notwithstanding the 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Kawakami and Chair Kaneshiro, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Kaua'i Attorney Bracken and Kaua'i Attorney Bradbury on 1 July 2021 filed a motion to dismiss on behalf of Mayor Kawakami and Chair Kaneshiro.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledged the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties,

[57] *Id*., para. 3.
[58] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)

> from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

Kaua‘i Attorney Bracken and Kaua‘i Deputy Attorney Bradbury, on behalf of Mayor Kawakami and Chair Kaneshiro, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[64] 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."[65] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[66]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by Kaua‘i Attorney Bracken and Kaua‘i Deputy Attorney Bradbury is 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, Mayor Kawakami continued to unlawfully enforce American laws throughout the islands of Kaua‘i and Ni‘ihau, and Chair Kaneshiro continued to unlawfully preside over the enactment American laws through County ordinances with impunity.

Kaua‘i Attorney Bracken and Kaua‘i Deputy Attorney Bradbury have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by Mayor Kawakami and Chair Kaneshiro. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts,

[63] *Id*., 1-2.
[64] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[65] *Id*.
[66] 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).

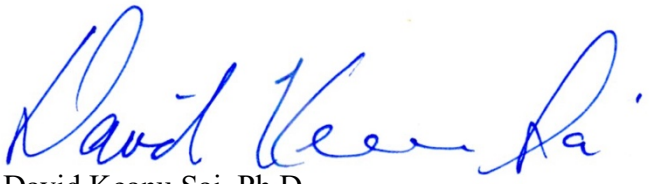
but also his awareness of the intentions of the principle."[67] The term "guilty" is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[68] It is distinguished from a criminal prosecution where "guilty" 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."[69]

Trained in law, Kauaʻi Attorney Bracken and Kauaʻi Deputy Attorney Bradbury have met the volitional element and the cognitive element of knowledge when they represented Mayor Kawakami and Chair Kaneshiro.

1. Mayor Kawakami and Chair Kaneshiro 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. Mayor Kawakami and Chair Kaneshiro 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. Mayor Kawakami and Chair Kaneshiro were aware of factual circumstances that established the existence of the military occupation.

As neither Kauaʻi Attorney Bracken nor Kauaʻi Deputy Attorney Bradbury 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."[70] 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."[71]

[67] Badar, 533.
[68] Black's Law 708 (6th ed. 1990).
[69] *Id*.
[70] Schabas, 161.
[71] *Id*.



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

20 November 2022

Exhibit “3”

WAR CRIMINAL REPORT NO. 22-0003

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0003

GUILTY OF WAR CRIME: MITCHELL ROTH as Mayor of the County of Hawai‘i
MAILE DAVID as Chair of the Hawai‘i County Council

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

LOCATION OF WAR CRIME: Island of Hawai‘i

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 Mitchell Roth as Mayor of the County of Hawai‘i ("Mayor Roth") and Maile David as Chair of the Hawai‘i County Council ("Chairwoman David") whose jurisdiction extends over 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*,[1] that 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.[2]

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").[3] 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

[1] 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).

[2] 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).

[3] 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).

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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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."[8]

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

[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.
[8] *Id*., 586.

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 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 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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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.[11]

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

[9] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).
[10] 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).
[11] *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.

the breach must involve grave consequences for the victim."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] 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.

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[12] *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."

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

[14] 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.

[15] *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").

> 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.[16]

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 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."[17] 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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
[18] *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).

Nations General Assembly.[19] 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."[20]

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 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."[21]

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).
[20] 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.
[21] 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.

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.[25]

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

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[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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/).
[25] 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).

law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

> and to be administered by the ordinary tribunals, substantially as they were before the occupation.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] 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."[34] 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

[31] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[32] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[33] 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).
[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

> 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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."[38]

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

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[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.
[38] *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.

the occupation, for example.[39] 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.

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:

> 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."

[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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.[41]

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

[40] *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).
[41] 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).

Hawai‘i.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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.”[44] While there is, however, “only a requirement for the awareness of the factual circumstances,” the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.[45]

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[42] *Id*., 114.
[43] Sai, “The Royal Commission of Inquiry,” 29-33.
[44] *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).
[45] 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).

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as 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.

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

> *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.[47]

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. 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,

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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).

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

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.[52] 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."[53]

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 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

[52] 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).
[53] 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/).

Hawaiian Islands—the Hawaiian Kingdom.[54] 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.[55] 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 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.

[54] 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/).
[55] 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/).

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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Roth and Chairwoman David, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
d. Award such additional relief as the interests of justice may require.

Preliminary to the court’s consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the “court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA.”[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)
[57] *Id*., para. 3.
[58] David J. Bederman, “Article II Courts,” 44 *Mercer Law Review* 825-879 (1992-1993).

history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, the County of Kaua'i on 1 July 2021 was the first County to file a motion to dismiss on behalf of Derek Kawakami ("Mayor Kawakami") and Arryl Kaneshiro ("Chair Kaneshiro"), in their official capacities as Mayor of the County of Kaua'i and Chair of the Kaua'i County Council, respectively, who were named as defendants.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledge the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

On 6 July 2021, Mayor Roth and Chairwoman David joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss.[64] In their memorandum in support of their joinder, Mayor Roth and Chairwoman David stated:

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[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)
[63] *Id*., 1-2.
[64] Defendants County of Hawai'i, Mitchell Roth, and Maile David's Substantive Joinder to Defendants Derek Kawakami, Arryl Kaneshiro, and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 [ECF no. 1] filed July 1, 2021 [ECF no. 15] (6 July 2021 (online at

> Plaintiff filed its Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 … alleging that: (1) the United States of America ("U.S.") unlawfully annexed the Hawaiian Islands; (2) the Kingdom of Hawai'i ("Kingdom") is, and has always been, a sovereign state; (3) the U.S. is currently occupying the Hawaiian Islands as an invading force; and (4) it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon the citizens of Kingdom.
>
> Based upon those claims, Plaintiff seeks: (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are not authorized and in opposition to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing and enforcing laws within the Hawaiian Islands, including judicial proceedings; (3) an order enjoining foreign diplomats from serving as foreign consulates within Hawaiian Islands; and (4) an award of additional relief as the interests and justice may require.[65]

Mayor Roth and Chairwoman David, in their joinder, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[66] 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."[67] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[68]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Mayor Roth and Chairwoman David is evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is "clear and unequivocal evidence of

https://hawaiiankingdom.org/pdf/[ECF_17]_HI-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-06).pdf).

[65] Memorandum in Support of Substantive Joinder 2 (6 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_17-1]_HI-County_Memo_in_Support_(Filed%202021-07-06).pdf).

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

[67] *Id*.

[68] 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).

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, Mayor Roth continued to unlawfully enforce American laws throughout the island of Hawai'i, and Chairwoman David continued to unlawfully preside over the enactment of American laws through County ordinances with impunity.

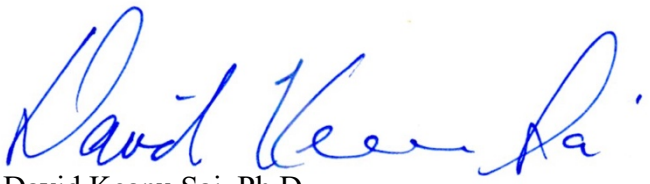
Mayor Roth and Chairwoman David have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree. "It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result." 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."[69] 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."[70]

1. Mayor Roth and Chairwoman David 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. Mayor Roth and Chairwoman David 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. Mayor Roth and Chairwoman David were aware of factual circumstances that established the existence of the military occupation.

As neither Mayor Roth nor Chairwoman David 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."[71] The offense "would today be prosecuted as the crime against humanity of

[69] Black's Law 708 (6th ed. 1990).
[70] *Id.*
[71] Schabas, 161.

persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide."[72]



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

17 November 2022

[72] *Id.*

Exhibit “4”

WAR CRIMINAL REPORT NO. 22-0003-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0003-1

GUILTY OF WAR CRIME: ELIZABETH A. STRANCE as Corporation Counsel for the County of Hawai‘i
MARK D. DISHER as Deputy Corporation Counsel for the County of Hawai‘i
DAKOTA K. FRENZ as Deputy Corporation Counsel for the County of Hawai‘i

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Island of Hawai‘i

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry ("RCI") on the war crime of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Elizabeth A. Strance ("Hawai‘i Corporation Counsel Strance"), Mark D. Disher ("Hawai‘i Deputy Corporation Counsel Disher") and Dakota K. Frenz ("Hawai‘i Deputy Corporation Counsel Frenz") as the County of Hawai‘i attorneys representing Mitchell Roth as Mayor of the County of Hawai‘i ("Mayor Roth") and Maile David as Chair of the Hawai‘i County Council ("Chairwoman David") whose jurisdiction extends over 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*,[1] that 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.[2]

GOVERNING LAW

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

[1] 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).
[2] 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).

Time of War, 1949 ("Fourth Geneva Convention").[3] 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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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

[3] 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).
[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.

representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[8]

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 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

[8] *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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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

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

crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[11]

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."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] The Commission was especially concerned with acts perpetrated in occupied territories against non-

[11] *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.
[12] *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."
[13] *Prosecutor v.* Tadić (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94 (2 October 1995).
[14] 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.
[15] *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").

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.[16]

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 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."[17] 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

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[19] 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."[20]

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 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,

[18] *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).

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

[20] 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.

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."[21]

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.

[21] 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.
[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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 Hague Regulations.[25]

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."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[25] 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).
[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

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.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-

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

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."[34] 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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

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[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.
[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

'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."[38]

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.[39] 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.

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:

> 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;

[38] *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.
[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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*

[40] *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).

Human Rights Violations in the Hawaiian Kingdom provides a comprehensive and historical narrative that rectifies this false information.[41]

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.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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."[44] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai'i and its Counties, because

[41] 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).
[42] *Id*., 114.
[43] Sai, "The Royal Commission of Inquiry," 29-33.
[44] *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).

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.[45]

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides

[45] 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).

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

> 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.[47]

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. 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

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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

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

> 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.[52] 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."[53]

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

[52] 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).
[53] 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/).

> 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.[54] 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.[55] 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[54] 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/).
[55] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

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

Notwithstanding the 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Roth and Chairwoman David, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, the County of Kaua'i on 1 July 2021 was the first County to file a motion to dismiss on behalf of Derek Kawakami ("Mayor Kawakami") and Arryl Kaneshiro ("Chair Kaneshiro"), in their official capacities as Mayor of the County of Kaua'i and Chair of the Kaua'i County Council, respectively, who were named as defendants.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledge the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the

[57] *Id*., para. 3.
[58] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)

> Kingdom; (3) an order enjoining the U.S., including the State of Hawai‘i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

On 6 July 2021, Hawai‘i Corporation Counsel Strance, Hawai‘i Deputy Corporation Counsel Disher and Hawai‘i Deputy Corporation Counsel Frenz, on behalf of Mayor Roth and Chairwoman David, joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss.[64] In their memorandum in support of their joinder, Mayor Roth and Chairwoman David stated:

> Plaintiff filed its Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 … alleging that: (1) the United States of America ("U.S.") unlawfully annexed the Hawaiian Islands; (2) the Kingdom of Hawai‘i ("Kingdom") is, and has always been, a sovereign state; (3) the U.S. is currently occupying the Hawaiian Islands as an invading force; and (4) it is unlawful for the U.S., including the State of Hawai‘i and its counties, to impose its laws upon the citizens of Kingdom.
>
> Based upon those claims, Plaintiff seeks: (1) a judicial declaration that all U.S. laws, including those of the State of Hawai‘i and its counties, are not authorized and in opposition to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai‘i and its counties, from implementing and enforcing laws within the Hawaiian Islands, including judicial proceedings; (3) an order enjoining foreign diplomats from serving as foreign consulates within Hawaiian Islands; and (4) an award of additional relief as the interests and justice may require.[65]

Hawai‘i Corporation Counsel Strance, Hawai‘i Deputy Corporation Counsel Disher and Hawai‘i Deputy Corporation Counsel Frenz, on behalf of Mayor Roth and Chairwoman David, in their joinder, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[66] Judge Crawford further concludes that "[b]elligerent occupation does not affect

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[63] *Id*., 1-2.
[64] Defendants County of Hawai‘i, Mitchell Roth, and Maile David's Substantive Joinder to Defendants Derek Kawakami, Arryl Kaneshiro, and County of Kaua‘i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 [ECF no. 1] filed July 1, 2021 [ECF no. 15] (6 July 2021 (online at https://hawaiiankingdom.org/pdf/[ECF_17]_HI-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-06).pdf).
[65] Memorandum in Support of Substantive Joinder 2 (6 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_17-1]_HI-County_Memo_in_Support_(Filed%202021-07-06).pdf).
[66] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

the continuity of the State, ever where there exists no government claiming to represent the occupied State."[67] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[68]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by Hawai'i Corporation Counsel Strance, Hawai'i Deputy Corporation Counsel Disher and Hawai'i Deputy Corporation Counsel Frenz, on behalf of Mayor Roth and Chairwoman David, is 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, Mayor Roth continued to unlawfully enforce American laws throughout the island of Hawai'i, and Chairwoman David continued to unlawfully preside over the enactment of American laws through County ordinances with impunity.

Hawai'i Corporation Counsel Strance, Hawai'i Deputy Corporation Counsel Disher and Hawai'i Deputy Corporation Counsel Frenz have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by Mayor Roth and Chairwoman David. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle."[69] 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."[70] 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."[71]

Trained in law, Hawai'i Corporation Counsel Strance, Hawai'i Deputy Corporation Counsel Disher and Hawai'i Deputy Corporation Counsel Frenz have met the volitional element and the cognitive element of knowledge when they represented Mayor Roth and Chairwoman David.

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[67] *Id*.
[68] 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).
[69] Badar, 533.
[70] Black's Law 708 (6th ed. 1990).
[71] *Id*.

1. Mayor Roth and Chairwoman David 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. Mayor Roth and Chairwoman David 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. Mayor Roth and Chairwoman David were aware of factual circumstances that established the existence of the military occupation.

As neither Hawai‘i Corporation Counsel Strance, nor Hawai‘i Deputy Corporation Counsel Disher and Hawai‘i Deputy Corporation Counsel Frenz 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.”[72] 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.”[73]

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

20 November 2022

[72] Schabas, 161.
[73] *Id.*

Exhibit “5”

WAR CRIMINAL REPORT NO. 22-0004

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0004

GUILTY OF WAR CRIME: MICHAEL VICTORINO as Mayor of the County of Maui
ALICE L. LEE as Chair of the Maui County Council

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

LOCATION OF WAR CRIME: Islands of Maui, Lānaʻi, Molokai, and Kahoʻolawe

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 Michael Victorino as Mayor of the County of Maui ("Mayor Victorino") and Alice L. Lee as Chair of the Maui County Council ("Chairwoman Lee") whose jurisdiction extends over the islands of Maui, Lānaʻi, Molokai and Kahoʻolawe. 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*,[1] that 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.[2]

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").[3] All of these treaties have been ratified by the United States. They codify obligations pre-existing under customary international law that are

[1] 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).
[2] 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).
[3] 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).

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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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."[8]

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

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[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.
[8] *Id*., 586.

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 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 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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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.[11]

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

[9] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).
[10] 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).
[11] *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.

the breach must involve grave consequences for the victim."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] 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.

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[12] *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."

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

[14] 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.

[15] *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").

> 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.[16]

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 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."[17] 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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).
[18] *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).

Nations General Assembly.[19] 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."[20]

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 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."[21]

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).
[20] 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.
[21] 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.

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.[25]

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

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[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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/).
[25] 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).

law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

> and to be administered by the ordinary tribunals, substantially as they were before the occupation.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] 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."[34] 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

[31] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[32] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[33] 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).
[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

> 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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."[38]

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

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[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.
[38] *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.

the occupation, for example.[39] 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.

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:

> 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."

[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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.[41]

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

[40] *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).
[41] 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).

Hawai‘i.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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.”[44] While there is, however, “only a requirement for the awareness of the factual circumstances,” the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because in that case the knowledge of the existing “political” situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.[45]

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[42] *Id*., 114.
[43] Sai, “The Royal Commission of Inquiry,” 29-33.
[44] *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).
[45] 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).

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as 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.

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

> *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.[47]

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. 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,

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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).

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

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.[52] 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."[53]

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 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

[52] 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).
[53] 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/).

Hawaiian Islands—the Hawaiian Kingdom.[54] 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.[55] 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 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.

[54] 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/).

[55] 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/).

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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Victorino and Chairwoman Lee, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
d. Award such additional relief as the interests of justice may require.

Preliminary to the court’s consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the “court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA.”[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)
[57] *Id*., para. 3.
[58] David J. Bederman, “Article II Courts,” 44 *Mercer Law Review* 825-879 (1992-1993).

history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, the County of Kaua'i on 1 July 2021 was the first County to file a motion to dismiss on behalf of Derek Kawakami ("Mayor Kawakami") and Arryl Kaneshiro ("Chair Kaneshiro"), in their official capacities as Mayor of the County of Kaua'i and Chair of the Kaua'i County Council, respectively, who were named as defendants.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledge the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

On 12 July 2021, Mayor Victorino and Chairwoman Lee joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss. Mayor Victorino and Chairwoman Lee stated that their joinder "is supported by all submissions, arguments and authorities relied on by Kaua'i County Defendants in support of Kaua'i County's Motion, including Kaua'i County Defendants' Memorandum in

[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)
[63] *Id*., 1-2.

Support of Motion, along with the entire record and files of this case, and such evidence as may be adduced at the hearing on this motion."[64]

Mayor Victorino and Chairwoman Lee, in their joinder, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[65] 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."[66] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[67]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Mayor Victorino and Chairwoman Lee is 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, Mayor Victorino continued to unlawfully enforce American laws throughout the islands of Maui, Lānaʻi, Molokai and Kahoʻolawe, and Chairwoman Lee continued to unlawfully preside over the enactment of American laws through County ordinances with impunity.

Mayor Victorino and Chairwoman Lee 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. "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." The term "guilty" is defined as "[h]aving committed a crime

[64] Defendants Michael Victorino, Alice L. Lee, and County of Maui's Joinder to Defendants Derek Kawakami, Arryl Kaneshiro and County of Kauaʻi's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (12 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_26]_Maui-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-12).pdf).
[65] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[66] *Id*.
[67] 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).

or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[68] 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."[69]

1. Mayor Victorino and Chairwoman Lee 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. Mayor Victorino and Chairwoman Lee 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. Mayor Victorino and Chairwoman Lee were aware of factual circumstances that established the existence of the military occupation.

As neither Mayor Victorino nor Chairwoman Lee 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."[70] 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."[71]

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

17 November 2022

[68] Black's Law 708 (6th ed. 1990).
[69] *Id.*
[70] Schabas, 161.
[71] *Id.*

Exhibit “6”

WAR CRIMINAL REPORT NO. 22-0004-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0004-1

GUILTY OF WAR CRIME: MOANA M. LUTEY as Corporation Counsel for the County of Maui
CALEB P. ROWE as Deputy Corporation Counsel for the County of Maui
IWALANI MOUNTCASTLE Gasmen as Deputy Corporation Counsel for the County of Maui

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

LOCATION OF WAR CRIME: Islands of Maui, Lānaʻi, Molokai, and Kahoʻolawe

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry ("RCI") on the war crime of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Moana M. Lutey as Corporation Counsel for the County of Maui ("Maui Corporation Counsel Lutey"), Caleb P. Rowe as Deputy Corporation Counsel for the County of Maui ("Maui Deputy Corporation Counsel Rowe"), and Iwalani Mountcastle Gasmen as Deputy Corporation Counsel ("Maui Deputy Corporation Counsel Gasmen") for the County of Maui as the County of Maui attorneys representing Michael Victorino as Mayor of the County of Maui ("Mayor Victorino") and Alice L. Lee as Chair of the Maui County Council ("Chairwoman Lee") whose jurisdiction extends over the islands of Maui, Lānaʻi, Molokai and Kahoʻolawe.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*,[1] that 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.[2]

[1] 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).
[2] 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).

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").[3] 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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] which coerced Queen Lili'uokalani, executive monarch of the

[3] 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).
[4] 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).
[5] Stuart Casey-Maslen, ed., "Armed conflicts in 2012 and their impacts," in *The War Report 2012* 7 (2013).
[6] 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).
[7] *Id*.

Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "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."[8]

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 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.

[8] *Id*., 586.

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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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

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

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.[11]

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."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] The Commission was especially concerned with acts perpetrated in occupied territories against non-

[11] *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.

[12] *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."

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

[14] 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.

[15] *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").

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.[16]

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 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."[17] 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

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[19] 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."[20]

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 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,

[18] *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).

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

[20] 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.

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."[21]

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.

[21] 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.
[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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 Hague Regulations.[25]

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."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[25] 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).
[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

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.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-

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

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."[34] 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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

[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.
[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.

'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."[38]

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.[39] 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.

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:

> 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;

[38] *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.
[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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."[40]

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 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*

[40] *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).

Human Rights Violations in the Hawaiian Kingdom provides a comprehensive and historical narrative that rectifies this false information.[41]

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.[42] 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.[43]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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."[44] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai'i and its Counties, because

[41] 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).
[42] *Id*., 114.
[43] Sai, "The Royal Commission of Inquiry," 29-33.
[44] *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).

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.[45]

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*.[46] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides

[45] 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).

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

> 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.[47]

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. 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

[47] *Id.*

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*,[48] to *Nation Within—The History of the American Occupation of Hawai'i*.[49] 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.[50]

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.[51] 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

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

> 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.[52] 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."[53]

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

[52] 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).
[53] 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/).

> 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.[54] 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.[55] 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[54] 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/).
[55] International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/).

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

Notwithstanding the 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Mayor Victorino and Chairwoman Lee, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[56] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[56] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[57] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[58] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[59] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[60]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, the County of Kaua'i on 1 July 2021 was the first County to file a motion to dismiss on behalf of Derek Kawakami ("Mayor Kawakami") and Arryl Kaneshiro ("Chair Kaneshiro"), in their official capacities as Mayor of the County of Kaua'i and Chair of the Kaua'i County Council, respectively, who were named as defendants.[61] In their memorandum in support of their motion to dismiss, Mayor Kawakami and Chair Kaneshiro acknowledge the factual circumstances that established the existence of the military occupation."[62] The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the

[57] *Id*., para. 3.
[58] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[59] *Id*., 837.
[60] *Id*., 849.
[61] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[62] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)

> Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[63]

On 12 July 2021, Maui Corporation Counsel Lutey, Maui Deputy Corporation Counsel Rowe, and Maui Deputy Corporation Counsel Gasmen, on behalf of Mayor Victorino and Chairwoman Lee joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss. They stated that their joinder "is supported by all submissions, arguments and authorities relied on by Kaua'i County Defendants in support of Kaua'i County's Motion, including Kaua'i County Defendants' Memorandum in Support of Motion, along with the entire record and files of this case, and such evidence as may be adduced at the hearing on this motion."[64]

Maui Corporation Counsel Lutey, Maui Deputy Corporation Counsel Rowe, and Maui Deputy Corporation Counsel Gasmen, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[65] 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."[66] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[67]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by Maui Corporation Counsel Lutey, Maui Deputy Corporation Counsel Rowe, and Maui Deputy Corporation Counsel Gasmen is evidence of admission to the war crime

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[63] *Id*., 1-2.
[64] Defendants Michael Victorino, Alice L. Lee, and County of Maui's Joinder to Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (12 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_26]_Maui-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-12).pdf).
[65] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[66] *Id*.
[67] 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).

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, Mayor Victorino continued to unlawfully enforce American laws throughout the islands of Maui, Lānaʻi, Molokai and Kahoʻolawe, and Chairwoman Lee continued to unlawfully preside over the enactment of American laws through County ordinances with impunity.

Maui Corporation Counsel Lutey, Maui Deputy Corporation Counsel Rowe, and Maui Deputy Corporation Counsel Gasmen have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by Mayor Victorino and Chairwoman Lee. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle."[68] 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."[69] 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."[70]

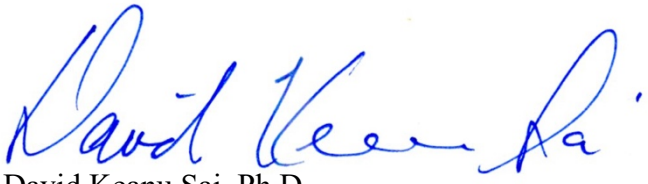
Trained in law, Maui Corporation Counsel Lutey, Maui Deputy Corporation Counsel Rowe, and Maui Deputy Corporation Counsel Gasmen have met the volitional element and the cognitive element of knowledge when they represented Mayor Victorino and Chairwoman Lee.

1. Mayor Victorino and Chairwoman Lee 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. Mayor Victorino and Chairwoman Lee 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. Mayor Victorino and Chairwoman Lee were aware of factual circumstances that established the existence of the military occupation.

As neither Maui Corporation Counsel Lutey nor Maui Deputy Corporation Counsel Rowe and Maui Deputy Corporation Counsel Gasmen 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

[68] Badar, 533.
[69] Black's Law 708 (6th ed. 1990).
[70] *Id.*

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."[71] 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."[72]



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

20 November 2022

[71] Schabas, 161.
[72] *Id.*

Exhibit “7”

WAR CRIMINAL REPORT NO. 22-0005

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0005

GUILTY OF WAR CRIME: DAVID YUTAKE IGE as Governor of the State of Hawai‘i
TY NOHARA as Commissioner of Securities of the State of Hawai‘i
ISAAC W. CHOY as Director of the Department of Taxation of the State of Hawai‘i

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

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 of *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by David Yutake Ige as Governor of the State of Hawai‘i ("Governor Ige"), Ty Nohara as Commissioner of Securities of the State of Hawai‘i ("Commissioner Nohara"), and Isaac W. Choy as Director of the Department of Taxation of the State of Hawai‘i ("Director Choy") whose jurisdiction extends over 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] that 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]

[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).

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]

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

[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 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) (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).
[8] *Id*.

Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "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]

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 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.

[9] *Id*., 586.

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."

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

[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).

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 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-

[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").

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.

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

[17] Commission of Responsibilities, 17-18
[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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 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,

[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.

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 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.

[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 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 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

[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).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).

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 also 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 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 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-

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

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 Hawai'i, 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 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

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[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.

'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 Power 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:

> 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;

[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.

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 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*

[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).

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 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 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

[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).

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*
>
> *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

[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).

> 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. 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

[48] *Id.*

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:

> 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

[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).

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

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

[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/).

> 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[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/).

> 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Governor Ige, Commissioner Nohara, and Director Choy who were named as defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Governor Ige, Commissioner Nohara, and Director Choy filed a motion to dismiss on 10 November 2022.[62] In their motion to dismiss, Governor Ige, Commissioner Nohara, and Director Choy acknowledged the factual circumstances that established the existence of the military occupation. In their memorandum in support of their motion to dismiss, they stated:

> On May 20, 2021, Plaintiff, Hawaiian Kingdom ("Plaintiff"), filed its Complaint seeking an order from this Court granting declaratory and injunctive relief against multiple international, federal and state governmental defendants. ECF No. 1 Plaintiff is seeking, among other relief, an order (1) declaring that all laws of the United States and the State of Hawaii, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; and (2) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawaii, and enjoining the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."

[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[60] *Id*., 837.
[61] *Id*., 849.
[62] Defendants David Yutake Ige, in his official capacity as Governor of the State of Hawai'i, Ty Nohara, in her official capacity as Commissioner of Securities, Isaac W. Choy, in his official capacity as the Director of the Department of Taxation of the State of Hawai'i, and State of Hawaii's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief, filed on August 11, 2021 (10 November 2022) [ECF 262] (online at https://hawaiiankingdom.org/pdf/[ECF_262]_SOH's_Motion_to_Dismiss_(Filed_2022-11-10).pdf).

> Plaintiff filed its Amended Complaint on August 11, 2021. ECF No. 55 Relevant to the State Defendants, the relief requested in the Amended Complaint was an order (1) declaring that all laws of the United States and the State of Hawai'i, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; (2) declaring that the Supremacy Clause prohibits the State of Hawai'i from interfering with the United States' "explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM;" and (3) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawai'i, and enjoining the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."[63]

Governor Ige, Commissioner Nohara, and Director Choy, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for his dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[64] 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."[65] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[66]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Governor Ige, Commissioner Nohara, and Director Choy is 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, Governor Ige, Commissioner Nohara, and Director Choy continued to enforce American laws throughout the islands of Hawai'i, Maui, Molokini, Kaho'olawe, Molokai, Lāna'i, O'ahu, Kaua'i, Lehua, Ni'ihau,

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[63] Memorandum in Support of Motion [ECF 262-1] (10 November 2022), 4-5 (online at https://hawaiiankingdom.org/pdf/[ECF_262-1]_Memo_in_Support%20_Filed_2022-11-10).pdf). .
[64] James Crawford, The Creation of States in International Law 34 (2nd ed. 2006).
[65] *Id*.
[66] 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).

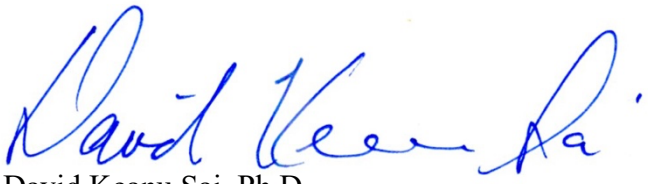
Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll with impunity.

Governor Ige, Commissioner Nohara, and Director Choy 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. “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.” 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.”[67] 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.”[68]

1. Governor Ige, Commissioner Nohara, and Director Choy 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. Governor Ige, Commissioner Nohara, and Director Choy was 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. Governor Ige, Commissioner Nohara, and Director Choy was aware of factual circumstances that established the existence of the military occupation.

As neither Governor Ige, Commissioner Nohara, nor Director Choy are heads of State, they have no claim to immunity from criminal jurisdiction and is 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.”[69] 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.”[70]

[67] Black’s Law 708 (6th ed. 1990).
[68] *Id*.
[69] Schabas, 161.
[70] *Id*.



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

18 November 2022

Exhibit “8”

WAR CRIMINAL REPORT NO. 22-0005-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0005-1

GUILTY OF WAR CRIME: HOLLY T. SHIKADA as Attorney General of the State of Hawai‘i
AMANDA J. WESTON as Deputy Attorney General of the State of Hawai‘i

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

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 of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Holly T. Shikada as Attorney General of the State of Hawai‘i ("Hawai‘i Attorney General Shikada") and Amanda J. Weston as Deputy Attorney General of the State of Hawai‘i ("Hawai‘i Deputy Attorney General Weston") as the State of Hawai‘i attorneys representing David Yutake Ige as Governor of the State of Hawai‘i ("Governor Ige"), Ty Nohara as Commissioner of Securities of the State of Hawai‘i ("Commissioner Nohara"), and Isaac W. Choy as Director of the Department of Taxation of the State of Hawai‘i ("Director Choy") whose jurisdiction extends over 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] that 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]

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[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).

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]

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

[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 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) (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).
[8] *Id*.

Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "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]

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 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.

[9] *Id*., 586.

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."

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

[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).

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 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-

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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").

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.

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

[17] Commission of Responsibilities, 17-18
[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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 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,

[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.

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 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.

[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 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 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

[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).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).

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 also 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 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 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-

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

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 Hawai'i, 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 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

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[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.

'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 Power 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:

> 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;

[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.

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 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*

[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).

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 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 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

[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).

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*
>
> *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

[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).

> 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. 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

[48] *Id.*

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:

> 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

[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).

> 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 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

[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/).

> 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[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/).

> 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Governor Ige, Commissioner Nohara, and Director Choy, who were named defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Hawai'i Attorney General Shikada and Hawai'i Deputy Attorney General Weston, on behalf of Governor Ige, Commissioner Nohara, and Director Choy, filed a motion to dismiss on 10 November 2022.[62] In their motion to dismiss, Hawai'i Attorney General Shikada and Hawai'i Deputy Attorney General Weston, on behalf of Governor Ige, Commissioner Nohara, and Director Choy, acknowledged the factual circumstances that established the existence of the military occupation. In their memorandum in support of their motion to dismiss, they stated:

> On May 20, 2021, Plaintiff, Hawaiian Kingdom ("Plaintiff"), filed its Complaint seeking an order from this Court granting declaratory and injunctive relief against multiple international, federal and state governmental defendants. ECF No. 1 Plaintiff is seeking, among other relief, an order (1) declaring that all laws of the United States and the State of Hawaii, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; and (2) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawaii, and enjoining the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."

[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[60] *Id*., 837.
[61] *Id*., 849.
[62] Defendants David Yutake Ige, in his official capacity as Governor of the State of Hawai'i, Ty Nohara, in her official capacity as Commissioner of Securities, Isaac W. Choy, in his official capacity as the Director of the Department of Taxation of the State of Hawai'i, and State of Hawaii's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief, filed on August 11, 2021 (10 November 2022) [ECF 262] (online at https://hawaiiankingdom.org/pdf/[ECF_262]_SOH's_Motion_to_Dismiss_(Filed_2022-11-10).pdf).

> Plaintiff filed its Amended Complaint on August 11, 2021. ECF No. 55 Relevant to the State Defendants, the relief requested in the Amended Complaint was an order (1) declaring that all laws of the United States and the State of Hawai'i, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; (2) declaring that the Supremacy Clause prohibits the State of Hawai'i from interfering with the United States' "explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM;" and (3) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawai'i, and enjoining the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."[63]

Hawai'i Attorney General Shikada and Hawai'i Deputy Attorney General Weston, on behalf of Governor Ige, Commissioner Nohara, and Director Choy, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. 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 right and obligations … despite a period in which there is … no effective government."[64] 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."[65] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[66]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by Hawai'i Attorney General Shikada and Hawai'i Deputy Attorney General Weston is 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, Governor Ige, Commissioner Nohara, and Director Choy continued to enforce American laws throughout the islands of Hawai'i, Maui, Molokini, Kaho'olawe, Molokai, Lāna'i,

[63] Memorandum in Support of Motion [ECF 262-1] (10 November 2022), 4-5 (online at https://hawaiiankingdom.org/pdf/[ECF_262-1]_Memo_in_Support%20_Filed_2022-11-10).pdf). .
[64] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[65] *Id*.
[66] 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).

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 with impunity.

Hawai‘i Attorney General Shikada and Hawai‘i Deputy Attorney General Weston have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by Governor Ige, Commissioner Nohara, and Director Choy. “The required *mens rea* for accomplice liability ‘is a form of two-dimensional fault’ because ‘it concerns not merely the defendant’s awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle.”[67] 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.”[68] 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.”[69]

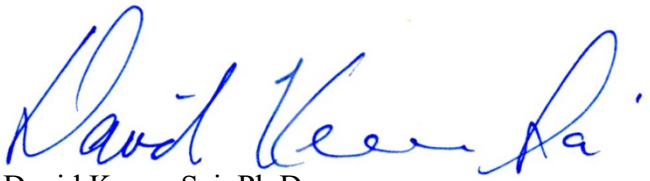
Trained in law, Hawai‘i Attorney General Shikada and Hawai‘i Deputy Attorney General Weston have met the volitional element and the cognitive element of knowledge when they represented Governor Ige, Commissioner Nohara, and Director Choy.

1. Governor Ige, Commissioner Nohara, and Director Choy 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. Governor Ige, Commissioner Nohara, and Director Choy was 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. Governor Ige, Commissioner Nohara, and Director Choy was aware of factual circumstances that established the existence of the military occupation.

As neither Hawai‘i Attorney General Shikada nor Hawai‘i Deputy Attorney General Weston 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

[67] Badar, 533.
[68] Black’s Law 708 (6th ed. 1990).
[69] *Id.*

destruction of the national identity and national consciousness of the population."[70] 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."[71]



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

20 November 2022

[70] Schabas, 161.
[71] *Id.*

Exhibit “9”

WAR CRIMINAL REPORT NO. 22-0006

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0006

GUILTY OF WAR CRIME: ANDERS G.O. NERVELL as Honorary Consul of Sweden

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

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 of *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Anders G.O. Nervell as Honorary Consul of Sweden ("Sweden's Honorary Consul Nervell") whose authority extends over 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] that has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

For the purposes of this report, the relevant treaties are the Hague Convention II on the Laws and Customs of War, 1899; Hague Convention (IV) on the Laws and Customs of War, 1907 ("1907 Hague Regulations"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949 ("Fourth Geneva Convention").[4] All of these treaties have been ratified by the

[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).
[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*

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]

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, "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]

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) (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).

[8] *Id*.

[9] *Id*., 586.

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

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

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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]

[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).
[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.

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 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.

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[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").

> 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.

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.

[17] Commission of Responsibilities, 17-18
[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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 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

[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.

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 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]

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[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/).
[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).

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 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.

[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).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).

> … 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 also 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 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 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:

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[32] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[33] Eyal Benvenisti, The International Law of Occupation 19 (1993).
[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/.

> 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 Hawai'i, 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 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]

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[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.
[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.

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 Power 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:

> 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."

[40] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

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 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

[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).
[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).

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 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 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]

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[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).
[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).

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*
>
> *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.

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

> *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. 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,

[48] *Id.*

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:

> 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).

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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).

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 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

[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/).

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 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.

[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/).

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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Sweden's Honorary Consul Nervell who was named as a defendant. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)
[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).

history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Sweden's Honorary Consul Nervell filed a motion to dismiss on 21 September 2021.[62] In his motion to dismiss, Sweden's Honorary Consul Nervell acknowledged the factual circumstances that established the existence of the military occupation. The motion to dismiss stated, "[i]rrespective of whether the Kingdom of Hawai'i exists, and accordingly where there is any actual plaintiff before this Court, under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, T.I.A.S. No. 6820 …, this Court lacks jurisdiction over Mr. Nervell, as the pleading asserts claims related exclusively to his role as Honorary Consul."[63]

Sweden's Honorary Consul Nervell, in his pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, he argued jurisdictional grounds for his dismissal before a court that doesn't have jurisdiction in the first place. His basis to serve as the Honorary Consul of Sweden in the Hawaiian Islands is by an exequatur, being an administrative measure, granted to him by the United States by virtue of the 1783 United States-Swedish Treaty of Amity and Commerce and the Establishment of Consular Relations, 1818. This granting of the exequatur and the imposition of this administrative measure is in violation of the 1852 Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the Kingdoms of Sweden and Norway (1852).[64] Article XII provides:

> It shall be free for each of the two contracting parties to appoint consuls for the protection of trade, to reside in the territories of the other party; but before any consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and either of the contracting parties may except from the residence of consuls such particular places as either of them may judge fit to be excepted. The diplomatic agents and consuls of the Hawaiian Islands, in the dominions of His Swedish and Norwegian Majesty, shall enjoy whatever privileges, exemptions and immunities are or shall be granted there to agents of the same rank belonging to the most favored nation; and, in like manner, the diplomatic agents and consuls of His Swedish and Norwegian Majesty in the Hawaiian Islands shall enjoy whatever privileges, exemptions or immunities are or may be

[60] *Id*., 837.
[61] *Id*., 849.
[62] Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief as to Anders G.O. Nervell [ECF 74] (21 September 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_74]_Nervell_Motion_to_Dimiss_(Filed_2021-09-21).pdf).
[63] *Id*., 2.
[64] Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the Kingdoms of Sweden and Norway (1852) (online at https://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf).

> granted there to the diplomatic agents and consuls of the same rank belonging to the most favored nation.[65]

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 right and obligations … despite a period in which there is … no effective government."[66] 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."[67] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[68]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading of Sweden's Honorary Consul Nervell is 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, Sweden's Honorary Consul Nervell continued to unlawfully serve as Sweden's Consul throughout 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 with impunity.

Sweden's Honorary Consul Nervell has met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and is 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." 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."[69] It is distinguished from a criminal prosecution where "guilty" is used by "an accused

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

[67] *Id*.

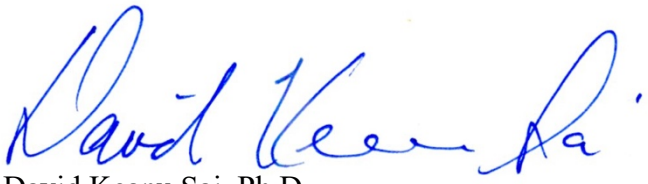
[68] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

[69] Black's Law 708 (6th ed. 1990).

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."[70]

1. Sweden's Honorary Consul Nervell 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. Sweden's Honorary Consul Nervell was 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. Sweden's Honorary Consul Nervell was aware of factual circumstances that established the existence of the military occupation.

As Sweden's Honorary Consul Nervell has no claim to immunity from criminal jurisdiction and is subject to prosecution by foreign States under universal jurisdiction, that includes Sweden, if he is 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."[71] 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."[72]



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

18 November 2022

[70] *Id.*
[71] Schabas, 161.
[72] *Id.*

Exhibit “10”

WAR CRIMINAL REPORT NO. 22-0006-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0006-1

GUILTY OF WAR CRIME: SCOTT I. BATTERMAN attorney for Anders G.O. Nervell as Honorary Counsel of Sweden

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

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 of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Scott I. Batterman ("Batterman") as the attorney representing Anders G.O. Nervell as Honorary Counsel of Sweden ("Sweden's Honorary Consul Nervell") whose authority extends over 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] that has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

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

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

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]

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, "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

[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 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) (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 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 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 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 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

[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).

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 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-

[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").

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.

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

[17] Commission of Responsibilities, 17-18
[18] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

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 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,

[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.

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 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.

[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 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 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

[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).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).

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 also 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 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 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-

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

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 Hawai'i, 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 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

[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.

'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 Power 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:

> 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;

[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.

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 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*

[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).

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 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 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

[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).

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*
>
> *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

[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).

> 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. 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

[48] *Id.*

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:

> 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

[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).

> 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 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

[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/).

> 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[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/).

> 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against Sweden's Honorary Consul Nervell who was named as a defendant. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Batterman, on behalf of Sweden's Honorary Consul Nervell, filed a motion to dismiss on 21 September 2021.[62] In his motion to dismiss, Batterman, on behalf of Sweden's Honorary Consul Nervell, acknowledged the factual circumstances that established the existence of the military occupation. The motion to dismiss stated, "[i]rrespective of whether the Kingdom of Hawai'i exists, and accordingly where there is any actual plaintiff before this Court, under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, T.I.A.S. No. 6820 …, this Court lacks jurisdiction over Mr. Nervell, as the pleading asserts claims related exclusively to his role as Honorary Consul."[63]

Batterman, on behalf of Sweden's Honorary Consul Nervell, in his pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, he argued jurisdictional grounds for his client's dismissal before a court that doesn't have jurisdiction in the first place. Nervell's basis to serve as the Honorary Consul of Sweden in the Hawaiian Islands is by an exequatur, being an administrative measure, granted to him by the United States by virtue of the 1783 United States-Swedish Treaty of Amity and Commerce and the Establishment of Consular Relations, 1818. This granting of the exequatur and the imposition of this administrative measure is in violation of the 1852 Treaty of Friendship, Commerce and

[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[60] *Id*., 837.
[61] *Id*., 849.
[62] Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief as to Anders G.O. Nervell [ECF 74] (21 September 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_74]_Nervell_Motion_to_Dimiss_(Filed_2021-09-21).pdf).
[63] *Id*., 2.

Navigation between the Hawaiian Kingdom and the Kingdoms of Sweden and Norway (1852).[64] Article XII provides:

> It shall be free for each of the two contracting parties to appoint consuls for the protection of trade, to reside in the territories of the other party; but before any consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and either of the contracting parties may except from the residence of consuls such particular places as either of them may judge fit to be excepted. The diplomatic agents and consuls of the Hawaiian Islands, in the dominions of His Swedish and Norwegian Majesty, shall enjoy whatever privileges, exemptions and immunities are or shall be granted there to agents of the same rank belonging to the most favored nation; and, in like manner, the diplomatic agents and consuls of His Swedish and Norwegian Majesty in the Hawaiian Islands shall enjoy whatever privileges, exemptions or immunities are or may be granted there to the diplomatic agents and consuls of the same rank belonging to the most favored nation.[65]

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 right and obligations … despite a period in which there is … no effective government."[66] 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."[67] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[68]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by Batterman is 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, Sweden's Honorary Consul Nervell continued to unlawfully serve as Sweden's Consul throughout the islands of Hawai'i, Maui, Molokini,

[64] Treaty of Friendship, Commerce and Navigation between the Hawaiian Kingdom and the Kingdoms of Sweden and Norway (1852) (online at https://hawaiiankingdom.org/pdf/Sweden_Norway_Treaty.pdf).
[65]
[66] James Crawford, The Creation of States in International Law 34 (2nd ed. 2006).
[67] *Id*.
[68] 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).

Kahoʻolawe, Molokai, Lānaʻi, Oʻahu, Kauaʻi, Lehua, Niʻihau, Kaʻula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll with impunity.

Batterman has met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and is guilty *dolus directus* of the first degree committed by Sweden's Honorary Consul Nervell. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle."[69] 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."[70] 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."[71]

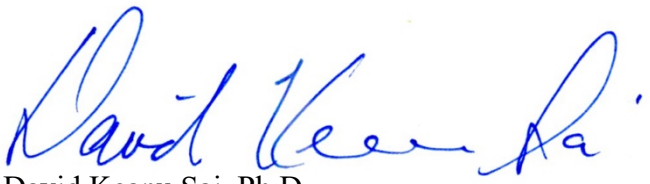
Trained in law, Batterman has met the volitional element and the cognitive element of knowledge when he represented Sweden's Honorary Consul Nervell.

1. Sweden's Honorary Consul Nervell 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. Sweden's Honorary Consul Nervell was 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. Sweden's Honorary Consul Nervell was aware of factual circumstances that established the existence of the military occupation.

As Batterman is not a head of State, he 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 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."[72] The offense

[69] Badar, 533.
[70] Black's Law 708 (6th ed. 1990).
[71] *Id.*
[72] Schabas, 161.

"would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide."[73]



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

20 November 2022

[73] *Id.*

Exhibit “11”

WAR CRIMINAL REPORT NO. 22-0007

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0007

GUILTY OF WAR CRIME: JOSEPH ROBINETTE BIDEN JR. as President of the United States
KAMALA HARRIS as Vice-President of the United States
ADMIRAL JOHN AQUILINO as Commander U.S. Indo-Pacific Command
CHARLES P. RETTIG, Commissioner U.S. Internal Revenue Service
CHARLES E. SCHUMER as U.S. Senate Majority Leader
NANCY PELOSI as Speaker of the U.S. House of Representatives

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

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 of *usurpation of sovereignty during military occupation* under “particular” customary international law addresses the actions and ommissions taken by Joseph Robinette Biden Jr. as President of the United States (“President Biden”), Kamala Harris as Vice-President of the United States (“Vice-President Harris”), Admiral John Aquilino as Commander U.S. Indo-Pacific Command (“Admiral Aquilino”), Charles P. Rettig, Commissioner U.S. Internal Revenue Service (“Commissioner Rettig”), Charles E. Schumer as U.S. Senate Majority Leader (“Senator Schumer”), and Nancy Pelosi as Speaker of the U.S. House of Representatives (“Representative Pelosi”) whose jurisdiction extends over 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] that has

[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).

been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

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

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 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,

[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."

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[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 also 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 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 Hawai'i, 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 involving the status of a lack of

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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.

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 Power 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:

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

[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.

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 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-

[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).

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 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 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

[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).

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
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> [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*
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> *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

[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).

> 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,
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> 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. 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

[48] *Id.*

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:

> 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

[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).

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

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

[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/).

> 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

[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/).

> 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi who were named as defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi filed a motion to dismiss on 14 January 2022.[62] In their motion to dismiss, President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi acknowledged the factual circumstances that established the existence of the military occupation. In their memorandum in support of their motion to dismiss, they stated:

> Plaintiff Hawaiian Kingdom avers that it is the legitimate sovereign government of the Hawaiian Islands, and that its Council of Regency has the authority to act on behalf of all Hawaiian subjects and resident aliens on the islands. First Amended Compl., ECF No. 55, at ¶¶ 1–2. It believes that Hawaii is "not within the territory of" the United States, id. ¶ 3, and that this Court is not an Article III court, but an "Article II Court" located on foreign soil, id. ¶¶ 4–5. As such, Plaintiff's first amended complaint asserts this Court has jurisdiction to hear Plaintiff's various claims of violations of "international humanitarian law" by the federal government ("Defendants"),1 as well as state, local, and consular officials, and authority to award declaratory and injunctive that would recognize the Hawaiian Kingdom's sovereignty and nullify the authority of the United States over Hawaii. Id. ¶¶ 6–7; see also id. at pgs. 96–97 (prayer for relief). Plaintiff seeks to support

[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[60] *Id*., 837.
[61] *Id*., 849.
[62] Federal Government Defendants' Cross-Motion to Dismiss the First Amended Complaint (14 January 2022) [ECF 188] (online at https://hawaiiankingdom.org/pdf/[ECF_188]_US_Motion_to_Dismiss_(Filed_2022-01-14).pdf).

> its assertions about sovereignty with a legal opinion authored by an Italian scholar, Federico Lenzerini, which Plaintiff has moved the Court to judicially notice per Civil Rule 44.1. ECF No. 174.[63]
>
> Plaintiff's claims and assertions lack merit. The United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959. Hawaii Admission Act, Pub. L. 86-4, 73 Stat. 4 (1959). This Court, the Ninth Circuit, and the courts of the state of Hawaii have repeatedly "rejected arguments asserting Hawaiian sovereignty" distinct from its identity as a part of the United States. Hawaiian Kingdom v. United States, Civ. No. 11-00657 JMS-KSC, 2013 WL 12184696, at *2 (D. Hi. Nov. 15, 2013) (collecting cases), aff'd, Hawaiian Kingdom v. United States, 633 F. App'x 392 (9th Cir. 2016). Plaintiff's claims are subject to dismissal on numerous grounds, but principally because this Court lacks jurisdiction to entertain claims premised on Plaintiff's challenge to the sovereignty of the United States.[64]

President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they admit that Hawai'i was annexed in 1898 under American law and that Hawai'i became a state of American union in 1959 under an American, which is admission of the war crime of *usurpation of sovereignty under military occupation*. 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 right and obligations … despite a period in which there is … no effective government."[65] 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."[66] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[67]

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[63] Federal Government Defendants' Memorandum in Opposition to Plaintiff's Motion for Judicial Notice and in Support of Defendants' Cross-Motion to Dismiss First Amended Complaint [ECF 181-1] (14 January 2022), 1-2 (online at https://hawaiiankingdom.org/pdf/[ECF_188-1]_Memo_in_Opp-Support_(Filed_2022-01-14).pdf).
[64] Federal Government Defendants' Memorandum in Opposition to Plaintiff's Motion for Judicial Notice and in Support of Defendants' Cross-Motion to Dismiss First Amended Complaint [ECF 181-1] (14 January 2022), 1-2 (online at https://hawaiiankingdom.org/pdf/[ECF_188-1]_Memo_in_Opp-Support_(Filed_2022-01-14).pdf).
[65] James Crawford, The Creation of States in International Law 34 (2nd ed. 2006).
[66] *Id*.
[67] 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).

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

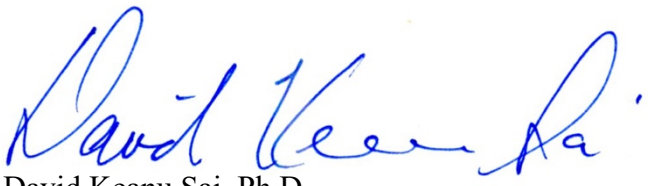
The pleading of President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi is evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is "clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom." At the time of their admissions to the date of this report, President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi continue to enact and enforce American laws throughout 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 with impunity.

President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi 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. "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." 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."[68] 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."[69]

1. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi 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. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi was 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. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi was aware of factual circumstances that established the existence of the military occupation.

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

With the exception of President Biden as head of State, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi have no claim to immunity from criminal jurisdiction and is 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."[70] 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."[71]



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

18 November 2022

[70] Schabas, 161.
[71] *Id.*

Exhibit “12”

WAR CRIMINAL REPORT NO. 22-0007-1

Accomplice to 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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0007-1

GUILTY OF WAR CRIME: BRIAN M. BOYNTON as Acting Assistant Attorney General of the United States
ANTHONY J. COPPOLINO as Deputy Branch Director of the United States
MICHAEL J. GERARDI as Trial Attorney, U.S. Department of Justice

WAR CRIME COMMITTED: *Accomplice to the usurpation of sovereignty during military occupation*

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 of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Brian M. Boynton as Acting Assistant Attorney General of the United States ("U.S. Acting Assistant Attorney General Boynton"), Anthony J. Coppolino as Deputy Branch Director of the United States (U.S. Deputy Branch Director Coppolino") and Michael J. Gerardi as Trial Attorney, U.S. Department of Justice ("U.S. Trial Attorney Gerardi") as the United States attorneys representing Joseph Robinette Biden Jr. as President of the United States ("President Biden"), Kamala Harris as Vice-President of the United States ("Vice-President Harris"), Admiral John Aquilino as Commander U.S. Indo-Pacific Command ("Admiral Aquilino"), Charles P. Rettig, Commissioner U.S. Internal Revenue Service ("Commissioner Rettig"), Charles E. Schumer as U.S. Senate Majority Leader ("Senator Schumer"), and Nancy Pelosi as Speaker of the U.S. House of Representatives ("Representative Pelosi") whose jurisdiction extends over 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*

[1] See Section 1, Article XV—State Boundaries; Capital; Flag; Language and Motto, State of Hawai‘i Constitution.

Kingdom,[2] that has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

GOVERNING LAW

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

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[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).

[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).

"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, "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]

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 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;

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[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) (online at http://libweb.hawaii.edu/digicoll/annexation/blount.php).
[8] *Id.*
[9] *Id.*, 586.

> (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 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

[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).

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 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

[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.

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 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

[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

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 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

[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.

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 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]

[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/).

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 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,

[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.

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 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 also 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 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.

[29] Treaty of Versailles (1919), preamble.
[30] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).
[32] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

> 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 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

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

because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

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. 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 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 Power 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*.

[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.

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:

> 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 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 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

[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).
[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.

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 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

[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).
[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).

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

[…] *Dolus eventualis*

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as 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]

[48] *Id.*

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. 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

[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.

> 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:

> 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:

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[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).
[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/).

> 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 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

[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/).

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 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief against President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi who were named as defendants. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai'i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[57] The complaint sought the Court to:

> a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI'I and its Counties, to include the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i

[57] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;

b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI'I and its Counties, to include the United States constitution, State of Hawai'i constitution, Federal and State of Hawai'i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA's military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and
d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[58] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[59] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[60] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[61]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, U.S. Acting Assistant Attorney General Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi, on behalf of President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi, filed a motion to dismiss on 14 January 2022.[62] In their motion to dismiss, U.S. Acting Assistant Attorney General

[58] *Id*., para. 3.
[59] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[60] *Id*., 837.
[61] *Id*., 849.
[62] Federal Government Defendants' Cross-Motion to Dismiss the First Amended Complaint (14 January 2022) [ECF 188] (online at https://hawaiiankingdom.org/pdf/[ECF_188]_US_Motion_to_Dismiss_(Filed_2022-01-14).pdf).

Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi, on behalf of President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi, acknowledged the factual circumstances that established the existence of the military occupation. In their memorandum in support of their motion to dismiss, they stated:

> Plaintiff Hawaiian Kingdom avers that it is the legitimate sovereign government of the Hawaiian Islands, and that its Council of Regency has the authority to act on behalf of all Hawaiian subjects and resident aliens on the islands. First Amended Compl., ECF No. 55, at ¶¶ 1–2. It believes that Hawaii is "not within the territory of" the United States, id. ¶ 3, and that this Court is not an Article III court, but an "Article II Court" located on foreign soil, id. ¶¶ 4–5. As such, Plaintiff's first amended complaint asserts this Court has jurisdiction to hear Plaintiff's various claims of violations of "international humanitarian law" by the federal government ("Defendants"),1 as well as state, local, and consular officials, and authority to award declaratory and injunctive that would recognize the Hawaiian Kingdom's sovereignty and nullify the authority of the United States over Hawaii. Id. ¶¶ 6–7; see also id. at pgs. 96–97 (prayer for relief). Plaintiff seeks to support its assertions about sovereignty with a legal opinion authored by an Italian scholar, Federico Lenzerini, which Plaintiff has moved the Court to judicially notice per Civil Rule 44.1. ECF No. 174.[63]
>
> Plaintiff's claims and assertions lack merit. The United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959. Hawaii Admission Act, Pub. L. 86-4, 73 Stat. 4 (1959). This Court, the Ninth Circuit, and the courts of the state of Hawaii have repeatedly "rejected arguments asserting Hawaiian sovereignty" distinct from its identity as a part of the United States. Hawaiian Kingdom v. United States, Civ. No. 11-00657 JMS-KSC, 2013 WL 12184696, at *2 (D. Hi. Nov. 15, 2013) (collecting cases), aff'd, Hawaiian Kingdom v. United States, 633 F. App'x 392 (9th Cir. 2016). Plaintiff's claims are subject to dismissal on numerous grounds, but principally because this Court lacks jurisdiction to entertain claims premised on Plaintiff's challenge to the sovereignty of the United States.[64]

U.S. Acting Assistant Attorney General Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi, on behalf of President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they admit that Hawai‘i was annexed in 1898 under American law and that Hawai‘i

[63] Federal Government Defendants' Memorandum in Opposition to Plaintiff's Motion for Judicial Notice and in Support of Defendants' Cross-Motion to Dismiss First Amended Complaint [ECF 181-1] (14 January 2022), 1-2 (online at https://hawaiiankingdom.org/pdf/[ECF_188-1]_Memo_in_Opp-Support_(Filed_2022-01-14).pdf).
[64] Federal Government Defendants' Memorandum in Opposition to Plaintiff's Motion for Judicial Notice and in Support of Defendants' Cross-Motion to Dismiss First Amended Complaint [ECF 181-1] (14 January 2022), 1-2 (online at https://hawaiiankingdom.org/pdf/[ECF_188-1]_Memo_in_Opp-Support_(Filed_2022-01-14).pdf).

became a state of American union in 1959 under an American, which is admission of the war crime of *usurpation of sovereignty under military occupation*. 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 right and obligations … despite a period in which there is … no effective government."[65] 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."[66] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[67]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The pleading written by U.S. Acting Assistant Attorney General Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi is 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, President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi continue to enact and enforce American laws throughout 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 with impunity.

U.S. Acting Assistant Attorney General Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle."[68] The term "guilty" is defined as "[h]aving committed a crime or other

[65] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[66] *Id*.
[67] 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).
[68] Badar, 533.

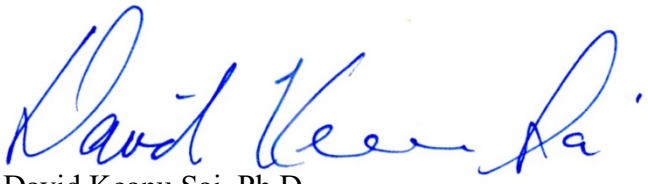
breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[69] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[70]

Trained in law, U.S. Acting Assistant Attorney General Boynton, U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi have met the volitional element and the cognitive element of knowledge when they represented President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi.

1. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi 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. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi was 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. President Biden, Vice-President Harris, Admiral Aquilino, Commissioner Rettig, Senator Schumer, and Representative Pelosi was aware of factual circumstances that established the existence of the military occupation.

As neither U.S. Acting Assistant Attorney General Boynton nor U.S. Deputy Branch Director Coppolino and U.S. Trial Attorney Gerardi 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."[71] 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."[72]

[69] Black's Law 708 (6th ed. 1990).
[70] *Id*.
[71] Schabas, 161.
[72] *Id*.



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

20 November 2022

Exhibit “13”

WAR CRIMINAL REPORT NO. 22-0008

The War Crimes of Usurpation of Sovereignty during Occupation and *Deprivation of Fair and Regular Trial*

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.
HEAD, ROYAL COMMISSION OF INQUIRY

HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0008

GUILTY OF WAR CRIME: LESLIE E. KOBAYASHI as United States District Judge
ROM A. TRADER as United States Magistrate Judge

WAR CRIMES COMMITTED: *Usurpation of sovereignty during military occupation* and *Deprivation of fair and regular trial*

LOCATION OF WAR CRIME: Island O'ahu

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 and the war crime of *deprivation of fair and regular trial* addresses the actions and ommissions taken by Leslie E. Kobayashi as United States District Judge ("District Judge Kobayashi") and Rom A. Trader as United States Magistrate Judge ("Magistrate Judge Trader") whose jurisdiction extends over 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*,[1] that 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.[2]

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").[3] All of these treaties have been ratified by the

[1] 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).

[2] 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).

[3] 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*

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."[4] 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."[5]

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."[6] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[7] 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, "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."[8]

Kingdom 151 (2020) (online at https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf).

[4] 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).

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

[6] 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).

[7] *Id*.

[8] *Id*., 586.

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 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 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.[9] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[10] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia 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.[11]

[9] See the examples provided in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 568-603 (2005).
[10] 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).
[11] *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.

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."[12] 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.[13] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[14] 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 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."[15] 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.

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[12] *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."

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

[14] 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.

[15] 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").

> 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.[16]

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 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."[17] 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.

[16] Commission of Responsibilities, 17-18
[17] *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

Statutory limitation of war crimes is prohibited by customary international law.[18] The prohibition of statutory limitation for war crimes has been proclaimed in several resolutions of the United Nations General Assembly.[19] 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."[20]

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 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

[18] *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).

[19] United Nations General Assembly Resolutions 3 (I), 170 (II), 2583 (XXIV), 2712 (XXV), 2840 (XXVI), 3020 (XXVII), and 3074 (XXVIII).

[20] 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.

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."[21]

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."[22] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[23] 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*.[24]

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 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.[25]

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[21] 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.
[22] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[23] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[24] 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/).
[25] 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).

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."[26] 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.[27]

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.[28]

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."[29] 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."[30] 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

[26] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[27] Commission of Responsibilities, Annex II, 58-79.
[28] Treaty of Versailles (1919), preamble.
[29] United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).
[30] *The Apollon*, 22 U.S. 362, 370 (1824).

> 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.[31]

Usurpation of sovereignty during military occupation is prohibited by the rules of *jus in bello* and also 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 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.[32]

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."[33] 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."[34] According to Bederman and Hilbert:

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[31] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[32] Eyal Benvenisti, The International Law of Occupation 19 (1993).
[33] 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).
[34] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

> 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].[35]

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.[36] 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."[37] 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 Hawai'i, 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 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."[38]

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[35] 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).
[36] 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).
[37] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.
[38] *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.

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.[39] 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.

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.

Deprivation of Fair and Regular Trial

Willful *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,[40] including the well-known *Justice trial* of Nazi jurists by a United States Military Tribunal.[41] There does 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."[42] 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

[39] Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.
[40] See the authorities cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, vol. I, 352, fn. 327 (2005).
[41] *United States of America v. Alstötter et al.,* 3 TWC 954 (1948).
[42] Henckaerts and Louise Doswald-Beck, 355.

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.

This report has examined the application of the international law on the war crimes of *usurpation of sovereignty during military occupation* and *deprivation of fair and regular trial* 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 war crimes of *usurpation of sovereignty during military occupation* and *deprivation of fair and regular trial*.

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:

> With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation* and *deprivation of fair and regular trial*:
>
> 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.

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 a military occupation.
3. 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."[43]

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 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

[43] *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).

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.[44]

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.[45] 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.[46]

Given most situations where the existence of a military occupation would be manifestly apparent, the Hawaiian situation presents a lacunae or space that needs to be filled that will satisfy the element of awareness of factual circumstances that established the existence of the 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."[47] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records,

[44] 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).
[45] *Id*., 114.
[46] Sai, "The Royal Commission of Inquiry," 29-33.
[47] *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).

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.[48]

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*.[49] According to Professor Badar:

> […] *Dolus directus* of the first degree
>
> [T]his form of mens rea (*dolus directus* of the first degree) is the gravest aspect of culpability in which the volition part dominates. It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result. Dolus directus of the first degree is also defined as a 'purpose-bound will'. It is irrelevant in this type of intent whether the intended result is the defendant's final goal or just a necessary interim goal in order to achieve the final one.
>
> […] *Dolus directus* of the second degree
>
> In this form of intent, the perpetrator foresees the consequence of his conduct as being certain or highly probable. This secondary consequence is not the perpetrator's primary purpose. It may be undesired lateral consequence of the envisaged behaviour, but because the perpetrator acts indifferently with regard to the second consequence, he is deemed to have desired this later result. Yet in case of *dolus directus* of the second degree, the cognitive element (knowledge) dominates, whereas the volition element is weak. It is not required that the perpetrator desires to bring about the side effect in question; knowledge is sufficient. In such cases, the perpetrator may be indifferent or may even regret the result. Thus, the distinction between first and second degree *dolus directus* depends on the absence or presence of desire to achieve the objective elements of the crime at issue.
>
> […] *Dolus eventualis*
>
> *Dolus eventualis* as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear

[48] 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).

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

> 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.[50]

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. 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*

[50] *Id.*

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*,[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]

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:

> 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

[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.
[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).

> 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.[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

[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/).

> 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.[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 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.[58] 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 Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

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[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/).

[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/).

> 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 refused to comply and continued to commit war crimes with impunity, in particular, the war crime of *usurpation of sovereignty during military occupation*. As a result, the Council of Regency filed a complaint for declaratory and injunctive relief that District Judge Kobayashi and Magistrate Judge Trader presided over. The complaint was filed on 21 May 2021 in the United States District Court for the District of Hawai‘i and assigned case no. 1:21-cv-00243 for *Hawaiian Kingdom v. Biden et al*.[59] The complaint sought the Court to:

a. Declare that all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations are unauthorized by, and contrary to, the Constitution and Treaties of the United States;
b. Enjoin Defendants from implementing or enforcing all laws of the Defendants UNITED STATES OF AMERICA and the STATE OF HAWAI‘I and its Counties, to include the United States constitution, State of Hawai‘i constitution, Federal and State of Hawai‘i statutes, County ordinances, common law, case law, administrative law, and the maintenance of Defendant UNITED STATES OF AMERICA’s military installations across the territory of the HAWAIIAN KINGDOM, to include its territorial sea;
c. Enjoin Defendants who are or agents of foreign diplomats from serving as foreign consulates within the territorial jurisdiction of the HAWAIIAN KINGDOM until they have presented their credentials to the HAWAIIAN KINGDOM Government and received exequaturs; and

[59] Complaint, *Hawaiian Kingdom v. Biden et al.*, case no. 1:21-cv-00243 (online at https://hawaiiankingdom.org/pdf/HK_v_Biden_et_al_Complaint_(2021)_with_Exhibits.pdf.)

d. Award such additional relief as the interests of justice may require.

Preliminary to the court's consideration of the complaint, the Hawaiian Kingdom requested the court to transform from an Article III Court into an Article II Occupation Court, since the "court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA."[60] Article III Courts are federal courts that operate within the territory of the United States by judicial authority under Article III of the U.S. Constitution, whereas Article II Occupation Courts are federal courts that are established under the executive authority President under Article II of the U.S. Constitution in territories that are occupied by the United States military.[61] According to Bederman, there are twelve instances in the history of the United States where Article II Occupation Courts were established during the Mexican War, the Civil War, the Spanish-American War, and the Second World War.[62] "Executive courts were a phenomenon closely associated with the occupation of enemy territory by American troops."[63]

Without the federal court possessing subject matter jurisdiction as an Article II Occupation Court, Kaua'i Attorney Bracken and Kaua'i Attorney Bradbury on 1 July 2021 filed a motion to dismiss on behalf of Derek Kawakami as Mayor of the County of Kaua'i ("Mayor Kawakami") and Arryl Kaneshiro as Chair of the Kaua'i County Council ("Chair Kaneshiro").[64] In their memorandum in support of their motion to dismiss, they acknowledged the factual circumstances that established the existence of the military occupation."[65] On The memorandum stated:

> On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon citizens of the Kingdom.
>
> Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai'i and its counties,

[60] *Id*., para. 3.
[61] David J. Bederman, "Article II Courts," 44 *Mercer Law Review* 825-879 (1992-1993).
[62] *Id*., 837.
[63] *Id*., 849.
[64] Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Motion_to_Dismiss_(Filed_2021-07-01).pdf).
[65] Kaua'i's Memorandum in Support of Motion (1 July 2021) (online at https://hawaiiankingdom.org/pdf/Kauai-Memo_in_Support_(Filed_2021-07-01).pdf.)

> from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.[66]

On 6 July 2021, Mayor Mitchell Roth and Chairwoman Maile David joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss.[67] In their memorandum in support of their joinder, they stated:

> Plaintiff filed its Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 … alleging that: (1) the United States of America ("U.S.") unlawfully annexed the Hawaiian Islands; (2) the Kingdom of Hawai'i ("Kingdom") is, and has always been, a sovereign state; (3) the U.S. is currently occupying the Hawaiian Islands as an invading force; and (4) it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon the citizens of Kingdom.
>
> Based upon those claims, Plaintiff seeks: (1) a judicial declaration that all U.S. laws, including those of the State of Hawai'i and its counties, are not authorized and in opposition to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai'i and its counties, from implementing and enforcing laws within the Hawaiian Islands, including judicial proceedings; (3) an order enjoining foreign diplomats from serving as foreign consulates within Hawaiian Islands; and (4) an award of additional relief as the interests and justice may require.[68]

On 12 July 2021, Mayor Michael Victorino and Chairwoman Alice L. Lee also joined Mayor Kawakami and Chair Kaneshiro's motion to dismiss. They stated that their joinder "is supported by all submissions, arguments and authorities relied on by Kaua'i County Defendants in support of Kaua'i County's Motion, including Kaua'i County Defendants' Memorandum in Support of Motion, along with the entire record and files of this case, and such evidence as may be adduced at the hearing on this motion."[69]

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[66] *Id*., 1-2.

[67] Defendants County of Hawai'i, Mitchell Roth, and Maile David's Substantive Joinder to Defendants Derek Kawakami, Arryl Kaneshiro, and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 [ECF no. 1] filed July 1, 2021 [ECF no. 15] (6 July 2021 (online at https://hawaiiankingdom.org/pdf/[ECF_17]_HI-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-06).pdf).

[68] Memorandum in Support of Substantive Joinder 2 (6 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_17-1]_HI-County_Memo_in_Support_(Filed%202021-07-06).pdf).

[69] Defendants Michael Victorino, Alice L. Lee, and County of Maui's Joinder to Defendants Derek Kawakami, Arryl Kaneshiro and County of Kaua'i's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief filed on May 20, 2021 (12 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_26]_Maui-County_Joinder_in_Motion_to_Dismiss_(Filed%202021-07-12).pdf).

On 23 July 2021, the Hawaiian Kingdom filed its response to all three Counties' motion to dismiss.[70] In its response, the Hawaiian Kingdom stated:

> As its operation and administration occurs within the territory of the Hawaiian Kingdom, this Honorable Court is compelled by international and U.S. constitutional law to first transform itself from an Article III Court to an Article II Court before it may lawfully assert subject-matter jurisdiction to address any of the issues raised by Defendants' motion to dismiss [ECF 15] and substantive joinders [ECF 17 & 26]. Moreover, this lawful Article II transformation will then authorize this Court to address and grant the relief demanded in Plaintiff's Complaint.
>
> A judgment is void "if the court that rendered judgment lacked jurisdiction of the subject-matter, or of the parties, or acted in a manner inconsistent with due process." According to Justice Story, "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity […]." In *Pennoyer v. Neff*, the Supreme Court reiterated Story's views on territorial sovereignty. The Court stated:
>
> > [N]o State can exercise direct jurisdiction and authority over persons or property without its territory (citation omitted). The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.[71]

Before the Counties could reply, the Hawaiian Kingdom dismissed all three Counties, their mayors and chairs of their County Councils from the suit on 3 August 2021, to include the City and County of Honolulu that did not join in the motion to dismiss.[72] On 11 August 2021, the Hawaiian Kingdom filed an amended complaint renaming the original defendants, with the exception of the four Counties.[73]

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[70] Plaintiff's Response to: (1) Defendant's Motion to Dismiss Complaint filed July 1, 2021 [ECF 15] and (2) Defendants' Substantive Joinders filed July 6, 2021 [ECF 17] and July 12, 2021 [ECF 26], [ECF 37] (23 July 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_50]_Notice_of_Voluntary_Dismissal_(Filed_2021-08-03).pdf).
[71] *Id*., 1-2.
[72] Notice of Voluntary Dismissal of Defendants Rich Blangiardi, in his official capacity as Mayor of the City & County of Honolulu; Mitch Roth, in his official capacity as Mayor of the County of Hawai'i; Michael Victorino, in his official capacity as Mayor of the County of Maui, Derek Kawakami, in his official capacity as Mayor of the County of Kaua'i; Tommy Waters, in his official capacity as Chair and Presiding Office of the County Council for the City and County of Honolulu; Maile David, in her official capacity as Chair of the Hawai'i County Council; Alice L. Lee, in her official capacity as Chair of the Maui County Council; Arryl Kaneshiro in his official capacity as Chair of the Kaua'i County Council; City and County of Honolulu; County of Hawai'i; County of Maui, and the County of Kaua'i [ECF 50] (3 August 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_50]_Notice_of_Voluntary_Dismissal_(Filed_2021-08-03).pdf).
[73] Amended Complaint for Declaratory and Injunctive Relief [ECF 55] (11 August 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_55]_Amended_Complaint_and_Exhibits_1_&_2%20_(Filed_2021-08-11).pdf).

On 17 August 2021, the IADL, the NLG, and the Water Protector Legal Collective—non-governmental organizations with expertise in International Law and Human Rights Law filed a motion for leave to file amended *amicus curiae* brief.[74] The *amici* submitted their "brief to explain how the international norms and judicial precedent in Article II occupation courts support the Plaintiff's request for Declaratory Judgment and Injunctive Relief."[75] Magistrate Judge Trader filed an order granting motion for leave to file amended amicus curiae brief on 30 September 2021,[76] and on 6 October 2021, the *amici* filed their brief.[77]

In the Hawaiian Kingdom's amended complaint and after the Court granted leave for the filing of the IADL, NLG and WPLC *amicus curiae* brief, District Judge Kobayashi and Magistrate Judge Trader were both aware that the Court was operating unlawfully as an Article III Court within the territorial jurisdiction of the Hawaiian Kingdom. The *amici* stated:

> Under the concept of *void ab initio*, there are structures that have no legal effect from inception. The United States occupation of Hawai'i began with unclean hands, and this can only be remedied by a clean slate and a new beginning. Recognition of the prolonged occupation of the Hawaiian Kingdom by the United States through Declaratory Judgment is not only a redressable claim, it is long overdue and would only be consistent with what is already known to the international community and clear under international law. Additionally, granting the Hawaiian Kingdom injunctive relief would acknowledge the Kingdom's continuous sovereignty, mitigate the United States' liability for its war crimes against the Hawaiian people, and apply local law as required of an occupying power by the international law of war. Acknowledging extraterritoriality and occupation would have the practical effect of applying the laws of the Hawaiian Kingdom but as was the case with prior occupation courts, this would not nullify any prior decisions of any of the courts currently operating in Hawai'i, so long as they are not inconsistent with local law.[78]

Notwithstanding the Court lacking jurisdiction as an Article II Occupation Court, District Judge Kobayashi and Magistrate Judge Trader knowingly imposed administrative measures and internal laws, to include caselaw, as an Article III Court. Under international law, District Judge Kobayashi and Magistrate Judge Trader are prohibited from "invok[ing] the provisions of its internal law as

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[74] Motion for Leave to File Amended *Amicus Curiae* Brief [ECF 56] (17 August 2021) (online at https://hawaiiankingdom.org/pdf/[ECF%2056]_Motion_for_Leave_to_File_Amended%20Amicus_(Filed_2021-08-17).pdf).
[75] *Id*., 1.
[76] Order Granting Motion for Leave to File Amended *Amicus Curiae* Brief [ECF 90] (30 September 2021) (online at https://hawaiiankingdom.org/pdf/[ECF%2090]_Order_Granting_Motion_for_Leave_to_File_Amicus_Brief_(Filed%202021-09-30).pdf).
[77] Brief of Amici Curiae International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96] (6 October 2021) (online at https://hawaiiankingdom.org/pdf/[ECF%2096]_Brief_of_Amici_Curiae_(Filed%202021-10-06).pdf).
[78] *Amicus* brief, 29.

justification for its failure to perform a treaty."[79] The Hague Regulations and the Fourth Geneva Convention oblige the United States to provisionally administer the laws of the Hawaiian Kingdom and not the laws of the United States.

Following the Counties' motion to dismiss, the next motion to dismiss without the Court possessing subject matter jurisdiction as an Article II Occupation Court, was filed by Scott I. Batterman, attorney for Anders G.O. Nervell as Honorary Counsel of Sweden, on 21 September 2021.[80] In his motion to dismiss, Batterman, on behalf of the Honorary Consul Sweden, acknowledged the factual circumstances that established the existence of the military occupation. The motion to dismiss stated, "[i]rrespective of whether the Kingdom of Hawai'i exists, and accordingly where there is any actual plaintiff before this Court, under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, T.I.A.S. No. 6820 …, this Court lacks jurisdiction over Mr. Nervell, as the pleading asserts claims related exclusively to his role as Honorary Consul."[81]

In its response filed on 19 October 2021, the Hawaiian Kingdom maintained that the Court lacks jurisdiction because "its operation and administration occurs within the territory of the Hawaiian Kingdom, [and] is compelled by international U.S. constitutional law to first transform itself from an Article III Court to a de facto Article II Court before it may lawfully assert subject-matter and personal jurisdiction to address any of the issues raised in Defendant's motion to dismiss [ECF 74]."[82]

In her 30 March 2022 order granting in part and denying in part Defendant Nervell' motion to dismiss, District Judge Kobayashi stated:

> The operative complaint in this action is Plaintiff's Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"). [Dkt. no. 55.] Plaintiff alleges Nervell is "Sweden's Honorary Consul to Hawai`i." [Amended Complaint at ¶ 45.] Plaintiff further alleges Nervell "violated international humanitarian laws," and "violated the sovereign interests of" Plaintiff because Nervell "receive[d] exequaturs" from the United States rather than from Plaintiff. See id. at ¶¶ 171, 174. Plaintiff seeks to enjoin Nervell from "serving as [a] foreign consulate[] . . . until [he has] presented [his] credentials to [Plaintiff] and received exequaturs." [Id. at ¶ 175.d.] Nervell seeks dismissal of the claim against him with

[79] Article 27, Vienna Convention on the Law of Treaties (23 May 1969). Although the United States has not ratified the Vienna Convention on the Law of Treaties, it considers many of its provisions as customary international law on the law of treaties.
[80] Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief as to Anders G.O. Nervell [ECF 74] (21 September 2021) (online at https://hawaiiankingdom.org/pdf/[ECF_74]_Nervell_Motion_to_Dimiss_(Filed_2021-09-21).pdf).
[81] *Id*., 2.
[82] Plaintiff's Response to Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief as to Anders G.O. Nervell Filed September 21, 2021 [ECF 74] [ECF 129], 1 (19 October 2021) (online at https://hawaiiankingdom.org/pdf/[ECF%20129]_Response_to_Nervell_MTD_(Filed%202021-10-19).pdf).

prejudice on the ground that the Court does not have jurisdiction over him as an Honorary Consul of Sweden.

Plaintiff argues that "[b]efore the Court can address the substance of [Nervell's] motion to dismiss it must first transform itself into an Article II Court . . . ." [Mem. in Opp. at 19–20.4] Plaintiff bases this argument on the proposition that the Hawaiian Kingdom is a sovereign and independent state. See id. at 4. This district has uniformly rejected such a proposition. See, e.g., U.S. Bank Tr., N.A. v. Fonoti, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295, at *10 (D. Hawai`i June 29, 2018) ("'[T]here is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'" (some alterations in Fonoti) (quoting State v. French, 77 Hawai`i 222, 228, 883 P.2d 644, 650 (Ct. App. 1994))), report and recommendation adopted, 2018 WL 3431923 (July 16, 2018). Plaintiff's request for the Court to "transform itself into an Article II Court" is therefore denied.

Plaintiff asserts its claim against Nervell in his official capacity as Honorary Consul of Sweden to Hawai`i. See Amended Complaint at ¶ 45; see also id. at pg. 3 (case caption). Nervell argues that, because Plaintiff's claim is against him in his official capacity, the Court does not possess jurisdiction over him, pursuant to the Vienna Convention. [Motion at 2—3.] The Court agrees.

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against . . . consuls or vice consuls of foreign states . . . ." 28 U.S.C. § 1351(1). However, the Vienna Convention provides that consular officials enjoy some immunities from § 1351. See Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1027 (9th Cir. 1987) ("[T]he district court does not have jurisdiction over [a consular official] if he is protected by consular immunity."). For instance, "[u]nder article 43 of the Vienna Convention, consular officials are subject to the jurisdiction of the receiving state except 'in respect of acts performed in the exercise of consular functions.'" Id. (quoting 21 U.S.T. at 104). Honorary consular officials, regardless of whether they are citizens of the receiving state, are also immune from jurisdiction of the receiving state for acts performed in the exercise of consular functions. See Foxgord v. Hischemoeller, 820 F.2d 1030, 1032-33 (9th Cir. 1987) (explaining some of the different immunities for career consuls, honorary consuls who are not citizens or permanent residents of the receiving state, and honorary consuls who are citizens or permanent residents of the receiving state); see also Vienna Convention, arts. 59 & 71(1), 21 U.S.T at 115, 119.

Here, neither Plaintiff nor Nervell address whether Nervell is a citizen or permanent resident of Hawai`i. However, the result is the same regardless of Nervell's citizenship or residency status because Plaintiff alleges its claim against Nervell for acts performed in the exercise of his consular functions. Specifically, Plaintiff alleges Nervell violated international law because he received exequatur from the United States rather than from the "Hawaiian Kingdom government." See Amended Complaint at ¶¶ 171, 174. As an honorary consul, Nervell "enjoy[s] . . . 'immunity from jurisdiction and personal

> inviolability in respect of official acts performed in the exercise of [his] [consular] functions . . . .'" See Foxgord, 820 F.2d at 1033 (quoting Vienna Convention, art. 71(1)). The Ninth Circuit has stated:
>
> > Article 5 of the Vienna Convention defines the term "consular function." Articles 5(a)–5(l) list twelve specific consular functions. Article 5(m), a "catch-all" provision, defines "consular function" to include "any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State." 21 U.S.T. at 82–85.
>
> Joseph, 830 F.2d at 1027. Because Plaintiff takes issue with Nervell receiving exequatur from the United States, its claim against Nervell concerns official acts performed in the exercise of Nervell's consular functions.
>
> Accordingly, the Court lacks subject matter jurisdiction over Plaintiff's claim against Nervell because Nervell is immune from suit under the Vienna Convention. Plaintiff's claim against Nervell is therefore dismissed. The dismissal is without prejudice. See Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2017) ("In general, dismissal for lack of subject matter jurisdiction is without prejudice." (citations omitted)).[83]

On 31 March 2022, District Judge Kobayashi made the following statement in her order denying plaintiff's motion for judicial notice:

> "Plaintiff . . . requests that, pursuant to [Federal Rule of Civil Procedure] 44.1, the Court take judicial notice of the civil law regarding the **juridical act** of the Permanent Court of Arbitration ('PCA') recognizing the **juridical fact** of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government." [Motion at 2 (emphases in original).] Plaintiff also asks the Court to take judicial notice of the "expert opinion of Professor Federico Lenzerini, a professor of international law at the University of Siena, Italy." [Id.] Plaintiff seeks judicial notice of the proffered material to support its contention that the Court should transform itself into an Article II court because the Hawaiian Kingdom is a sovereign and independent state. See id.; see also Amended Complaint for Declaratory and Injunctive Relief, filed 8/11/21 (dkt. no. 55), at ¶¶ 3–4, 70–75.
>
> Federal Rule of Civil Procedure 44.1 states:
>
> > A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony,

[83] Order Granting in Part and Denying in Part Defendant Nervell's Motion to Dismiss [ECF 222] 2-6 (30 March 2022) (online at https://hawaiiankingdom.org/pdf/[ECF_222]_Order_Granting_and_Denying-Nervell_Motion_to_Dismiss_(Filed%202022-03-30).pdf).

> whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.
>
> It is the Court's "prerogative under Federal Rule of Civil Procedure 44.1 to 'consider any relevant material or source, including testimony,' . . . in determining a question of foreign law." Fahmy v. Jay-Z, 908 F.3d 383, 392 n.13 (9th Cir. 2018) (citation omitted). Although "it is neither novel nor remarkable for a court to accept the uncontradicted testimony of an expert to establish the relevant foreign law[,]" Universe Sales Co., Ltd. v. Silver Castle, Ltd., 182 F.3d 1036, 1039 (9th Cir. 1999), foreign law is not relevant to the instant action. "[T]he Ninth Circuit, this district court, and Hawai`i state courts have all held that the laws of the United States and the State of Hawai`i apply to all individuals in this State." Moniz v. Hawai`i, No. CIV. 13–00086 DKW, 2013 WL 2897788, at *2 (D. Hawai`i June 13, 2013) (citations omitted). Moreover, "'[t]here is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'" U.S. Bank Tr., N.A. v. Fonoti, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295, at *10 (D. Hawai`i June 29, 2018) (quoting Hawaii v. French, 77 Haw. 222, 228, 883 P.2d 644, 650 (Ct. App. 1994))), report and recommendation adopted, 2018 WL 3431923 (July 16, 2018). Because a question of foreign law is not before the Court, it need not consider whether it is appropriate to take judicial notice of Plaintiff's proffered material. Plaintiff's Motion is therefore denied.[84]

In her order granting the Federal Defendants' cross-motion to dismiss the first amended complaint dated 9 June 2022, District Judge Kobayashi stated:

> The operative complaint in this action is Plaintiff's Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), filed on August 11, 2021. [Dkt. no. 55.] Plaintiff alleges it is an independent and sovereign state and it "continue[s] to exist despite its government being unlawfully overthrown by the United States on January 17, 1893." [Id. at ¶ 71.] Plaintiff states this Court should be an Article II court rather than an Article III court because it "is operating within the territory of the Hawaiian Kingdom." [Id. at ¶ 3 (emphasis omitted).] Plaintiff further alleges the Federal Defendants "have exceeded their statutory authority, engaged in violating the 1907 Hague Regulations, the 1907 Hague Convention, V, and the 1949 Fourth Geneva Convention, and ha[ve] failed to comply with international humanitarian law . . . ." [Amended Complaint at ¶ 158.][85]
>
> Plaintiff bases its claims on the proposition that the Hawaiian Kingdom is a sovereign and independent state. See, e.g., Amended Complaint at ¶ 71. However, "Hawaii is a state of

[84] Order Denying Plaintiff's Motion for Judicial Notice [ECF 223] 2-4 (31 March 2022) (online at https://hawaiiankingdom.org/pdf/[ECF_223]_Order_Denying_Motion_for_Judicial_Notice_(Filed%202022-03-31).pdf).

[85] Order Granting the Federal Defendants' Cross-Motion to Dismiss the First Amended Complaint [ECF 234] 2 (9 June 2022) (online at https://hawaiiankingdom.org/pdf/[ECF]_234_Order_Granting_Fed-Defendants_Cross-Motion_to_Dismiss_(Filed_2022-06-09).pdf).

> the United States . . . . The Ninth Circuit, this court, and Hawaii state courts have rejected arguments asserting Hawaiian sovereignty." United States v. Ventura-Oliver, CRIM. NO. 11-00503 JMS, 2013 WL 12205842, at *2 (D. Hawai`i Sept. 30, 2013) (some citations omitted) (citing United States v. Lorenzo, 995 F.2d 1448, 1456 (9th Cir. 1993)); see also U.S. Bank Tr., N.A. v. Fonoti, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295, at *10 (D. Hawai`i June 29, 2018) ("'[T]here is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'" (some alterations in Fonoti) (quoting Hawaii v. French, 77 Haw. 222, 228, 883 P.2d 644, 650 (Ct. App. 1994))), report and recommendation adopted, 2018 WL 3431923 (July 16, 2018).
>
> As such, Plaintiff's claims are "so patently without merit that the claim[s] require[] no meaningful consideration." See Tijerino, 934 F.3d at 975 (citations omitted). In any event, to the extent that Plaintiff's ask the Court to declare that the Hawaiian Kingdom is a sovereign territory, the United States Supreme Court made clear over 130 years ago that "[w]ho is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . ." Jones v. United States, 137 U.S. 202, 212 (1890); see also Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). "This principle has always been upheld by" the Supreme Court. Jones, 137 U.S. at 212. Accordingly, the Court lacks subject matter jurisdiction, and Plaintiff's claims against the Federal Defendants must be dismissed.
>
> Although "[i]n general, dismissal for lack of subject matter jurisdiction is without prejudice[,]" Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2017), here Plaintiff's claims against the Federal Defendants necessarily involve a political question beyond the jurisdiction of the Court. Thus, no amendment could cure the defects with Plaintiff's claims against the Federal Defendants. See Hoang v. Bank of Am., N.A., 910 F.3d 1096, 1102 (9th Cir. 2018) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." (citation and quotation marks omitted)). Dismissal is therefore with prejudice.[86]

In his order denying Plaintiff's motion to schedule an evidentiary hearing in accordance with the *Lorenzo* principle, Magistrate Judge Trader stated:

> On September 1, 2022, Plaintiff filed an *Opposition to State Defendants' Motion to Vacate Defaults [ECF 241] on Jurisdictional Grounds* ("Opposition"), *and Plaintiff's Motion to Schedule an Evidentiary Hearing in Accordance with the Lorenzo Principle* ("Motion for Evidentiary Hearing). ECF No. 253. Plaintiff's filing contains an *Opposition* and a *Motion*

[86] *Id*., 5-7.

for Evidentiary Hearing. The Court shall address only the *Motion for Evidentiary Hearing* in this order. The *Opposition* will be addressed in the order regarding Defendants David Yutaka Ige, in his official capacity as Governor of the State of Hawaii, Ty Nohara, in her official capacity as Commissioner of Securities, Isaac W. Choy, in his official capacity as the director of the Department of Taxation of the State of Hawaii, and State of Hawaii's (collectively "Defendants") *Motion to Vacate Defaults Against Them, Entered on January 19, 2022 [ECF 197, 200, 198, 199 and [sic] Respectively]* ("Motion to Set Aside"), filed on August 12, 2022.

The *Motion for Evidentiary Hearing* requests that this Court hold an evidentiary hearing on the *Motion to Set Aside*. Plaintiff cites to *State of Hawaii v. Lorenzo*, 77 Hawaii 219, 883 P.2d 641 (Ct. App. 1994), and *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993), as the main legal authority in support of its request. However, neither case relate to the issue of whether the Court should conduct an evidentiary hearing on the *Motion to Set Aside*.

In *State of Hawaii v. Lorenzo*, defendant Anthony Lorenzo was found guilty of failing to render assistance after being involved in automobile accident, driving without a license, and negligent injury. *State of Hawaii v. Lorenzo*, 77 Hawaii at 220, 883 P.2d at 642. The issue was whether the lower court erred in denying defendant's motion to dismiss the indictment when it determined Plaintiff's claim that he is subject solely to the Hawaiian Kingdom's jurisdiction is without merit. *Id.* Defendant Lorenzo argued that the Kingdom of Hawaii is recognized as an independent sovereign nation by the United States and that he is a citizen of the Kingdom. *Id.* Therefore, defendant Lorenzo argued that the courts of the State of Hawaii have no jurisdiction over him. *Id.* The appellate court in *State of Hawaii v. Lorenzo* concluded that defendant Lorenzo failed to present any factual or legal basis that the Hawaiian Kingdom exists as a state. *Id*. at 221, 883 P.2d at 643. As result, the appellate court found that defendant Lorenzo's argument that he is subject solely to the Hawaiian Kingdom's jurisdiction is meritless and affirmed the lower court's ruling. *Id*.

In *United States v. Lorenzo*, there were fifteen (15) defendants charged with various violations in a seventy-nine-count indictment related to their use of a tax protest method known as the redemption scheme. *United States v. Lorenzo*, 995 F.2d 1448, 1451 (9th Cir. 1993). On appeal, the Ninth Circuit addressed the issues of (1) whether the U.S. Attorney's Office should have been disqualified from prosecuting the case, (2) whether the government engaged in purposeful discrimination during the jury selection process; (3) whether the district court erred by refusing to instruct the jury that jury could consider the defendants' good faith to negate willful elements; (4) whether the district court abused its discretion by allowing victims to testify to their feelings or reactions upon receiving false 1099 forms; (5) whether the district court had jurisdiction when two defendants claimed to be nationals of the Hawaiian Kingdom; (6) whether the district court erred when it determined that one of the appellants made a knowing and intelligent waiver of counsel; (7) whether the conviction of two appellants was a violation of the Double Jeopardy Clause of the Fifth Amendment; (8) whether there was sufficient evidence to show that one of the

> appellants agreed to commit an offense; and (9) whether the district court erred in its application of the Sentencing Guidelines. The Ninth Circuit affirmed the district court's rulings.
>
> Although both the *State of Hawaii v. Lorenzo* and *United States v. Lorenzo* touch upon the argument raised by the defendants in these cases of whether the Hawaii courts have jurisdiction when defendants are allegedly Hawaiian Kingdom nationals, neither case provide any shred of support for Plaintiff's argument in this case that the Court should hold an evidentiary hearing on the *Motion to Set Aside*. Even when citing *State of Hawaii v. Lorenzo* and *United States v. Lorenzo*, Plaintiff makes no argument in support of why these cases support its proposition that the Court should hold an evidentiary hearing on the *Motion to Set Aside*.
>
> Rule 7.1(d) of the Local Rules of Practice for the United States District Court for the District of Hawaii ("LR") provides that a Motion to Set Aside should be decided without a hearing: "The following shall be decided without a hearing: motions to … set aside or vacate a judgment or order …" LR7.1(d). Further, LR7.1(c) provides the court with discretion to decide all matters without a hearing. See LR7.1(c) ("[u]less specifically required, the court may decide all matters, including motions, petitions, and appeals, without a hearing").
>
> The Court finds that pursuant to LR7.1(c) & (d), Plaintiff's request for an evidentiary hearing is **DENIED**. The Court shall rule on the *Motion to Set Aside* without a hearing.[87]

In their orders, District Judge Kobayashi and Magistrate Judge Trader provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist. Instead, and in violation of international humanitarian law, they imposed judicial administrative rules and caselaw that denied the Hawaiian Kingdom of fair and regular trial within its own territory. 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 right and obligations … despite a period in which there is … no effective government."[88] 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."[89] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of

[87] Order Denying Plaintiff's Motion to Schedule an Evidentiary Hearing in accordance with the *Lorenzo* principle [ECF 259] 1-4 (31 October 2022) (online at https://hawaiiankingdom.org/pdf/[ECF_259]_Order_Denying_HK's_Motion_to_Schedule_Evidentiary_Hearing_(Filed_2022-10-31).pdf).
[88] James Crawford, The Creation of States in International Law 34 (2nd ed. 2006).
[89] *Id*.

legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[90]

GUILTY OF THE WAR CRIME OF USURPATION OF SOVEREIGNTY DURING MILITARY OCCUPATION

The filed orders by District Judge Kobayashi and Magistrate Judge Trader constitute evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and by imposition of legislative and administrative measures resulted in the commission of the war crime of *deprivation of fair and regular trial*. These orders are "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, District Judge Kobayashi and Magistrate Judge Trader continue to unlawfully impose legislative and administrative measures, to include caselaw, in *Hawaiian Kingdom v. Biden et al.* with impunity thereby depriving the Hawaiian Kingdom of fair and regular trial.

Both District Judge Kobayashi and Magistrate Judge Trader have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and *deprivation of fair and regular trial*, and, therefore, 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." 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."[91] 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."[92]

Elements of the war crime of *usurpation of sovereignty during military occupation*:

1. District Judge Kobayashi and Magistrate Judge Trader 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. District Judge Kobayashi and Magistrate Judge Trader 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.

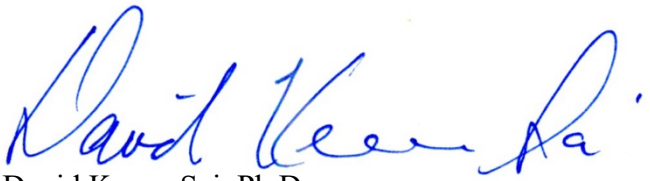
[90] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).
[91] Black's Law 708 (6th ed. 1990).
[92] *Id*.

4. District Judge Kobayashi and Magistrate Judge Trader were aware of factual circumstances that established the existence of the military occupation.

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

1. District Judge Kobayashi and Magistrate Judge Trader 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 a military occupation.
3. District Judge Kobayashi and Magistrate Judge Trader were aware of factual circumstances that established the existence of the military occupation.

Neither District Judge Kobayashi nor Magistrate Judge Trader are heads of State, and, therefore, 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. In particular, 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."[93] 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."[94]



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

23 November 2022

[93] Schabas, 161.
[94] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2022, I electronically filed the foregoing document by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by said CM/ECF system.

DATED: Kailua, HI, November 28, 2022.

/s/ Dexter K. Kaʻiama
Dexter K. Kaʻiama
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Hawaiian Kingdom