



DATE DOWNLOADED: Sat Oct 30 16:36:06 2021

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

David Keanu Sai, The Royal Commission of Inquiry, 3 HAW. J.L. & POL. 258 (2021).

ALWD 6th ed.

Sai, D. ., The Royal Commission of Inquiry, 3 Haw. J.L. & Pol. 258 (2021).

APA 7th ed.

Sai, D. (2021). The Royal Commission of Inquiry. Hawaiian Journal of Law and Politics, 3, 258-316.

Chicago 17th ed.

David Keanu Sai, "The Royal Commission of Inquiry," Hawaiian Journal of Law and Politics 3 (2021): 258-316

McGill Guide 9th ed.

David Keanu Sai, "The Royal Commission of Inquiry" (2021) 3 Haw JL & Pol 258.

AGLC 4th ed.

David Keanu Sai, 'The Royal Commission of Inquiry' (2021) 3 Hawaiian Journal of Law and Politics 258.

MLA 8th ed.

Sai, David Keanu. "The Royal Commission of Inquiry." Hawaiian Journal of Law and Politics, 3, 2021, p. 258-316. HeinOnline.

OSCOLA 4th ed.

David Keanu Sai, 'The Royal Commission of Inquiry' (2021) 3 Haw JL & Pol 258

Provided by:

William S. Richardson School of Law

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

THE ROYAL COMMISSION OF INQUIRY[†]

David Keanu Sai, Ph.D. *

- I. INTRODUCTION
- II. FROM A STATE OF PEACE TO A STATE OF WAR
- III. JUS COGENS—WAR CRIMES AND THEIR PROSECUTION UNDER UNIVERSAL JURISDICTION
- IV. THE RESTORATION OF THE HAWAIIAN KINGDOM GOVERNMENT
- V. DOCTRINE OF NECESSITY AND THE CONSTITUTIONAL ORDER OF THE STATE
- VI. LANCE LARSEN V. HAWAIIAN KINGDOM—PERMANENT COURT OF ARBITRATION
- VII. RECOGNITION OF THE HAWAIIAN KINGDOM AS A STATE BY THE PERMANENT COURT OF ARBITRATION
- VIII. UNITED STATES INVITED TO JOIN IN THE ARBITRATION
- IX. ARBITRAL PROCEEDINGS UNDER THE AUSPICES OF THE PERMANENT COURT OF ARBITRATION
- X. MEETING WITH THE RWANDAN GOVERNMENT IN BRUSSELS
- XI. EXPOSURE OF THE HAWAIIAN KINGDOM THROUGH THE MEDIUM OF ACADEMIC RESEARCH
- XII. DIRECTOR OF RUSSIA’S PIR-CENTER ACKNOWLEDGES ILLEGAL ANNEXATION BY THE UNITED STATES
- XIII. UNITED NATIONS INDEPENDENT EXPERT DR. ALFRED DEZAYAS ON HAWAI‘I

[†] This article is reproduced with permission from the author who is Head of the Royal Commission of Inquiry © and editor of *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020). There has been no change in the citation format from its original print except where needed.

* The author is an alumnus of the *Hawaiian Society of Law and Politics*. He is a Lecturer in Political Science and Hawaiian Studies at the University of Hawai‘i Windward Community College, and affiliate faculty member at the University of Hawai‘i College of Education. He is currently the Minister of the Interior, Minister of Foreign Affairs ad interim, and chairman of the Hawaiian Kingdom Council of Regency. He also served as Agent for the Hawaiian Kingdom at the Permanent Court of Arbitration, The Hague, Netherlands, in *Larsen v. Hawaiian Kingdom*, PCA case no. 1999-01. Dr. Sai received his Ph.D. and M.A. degrees in political science specializing in international relations and law from the University of Hawai‘i at Mānoa.

- XIV. RIGHTS OF PROTECTED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW
- XV. THE STATE OF HAWAI‘I AND ITS COUNTIES ARE A PRIVATE ARMED FORCE
- XVI. STATE OF HAWAI‘I V. LORENZO—THE CASE THAT BROUGHT DOWN THE STATE OF HAWAI‘I
- XVII. SAI V. TRUMP—PETITION FOR WRIT OF MANDAMUS
- XVIII. STATE OF HAWAI‘I OFFICIAL REPORTS WAR CRIMES
- XIX. NATIONAL LAWYERS GUILD CALLS UPON THE UNITED STATES TO IMMEDIATELY COMPLY WITH INTERNATIONAL HUMANITARIAN LAW IN ITS ILLEGAL OCCUPATION OF THE HAWAIIAN ISLANDS
- XX. UNLAWFUL PRESENCE OF FOREIGN CONSULATES
- XXI. RECOGNITION OF THE STATE OF HAWAI‘I AND ITS COUNTIES AS GOVERNMENTS UNDER INTERNATIONAL LAW
- XXII. LIST OF WAR CRIMES UNDER CUSTOMARY LAW COMMITTED IN THE HAWAIIAN KINGDOM
- XXIII. CONCLUSION

I. INTRODUCTION

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.”¹ This invasion coerced Queen Lili‘uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior power of the United States military, whereby she stated:

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

¹ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95*, 451 (1895) (hereafter “Executive Documents”) (online at [https://hawaiiankingdom.org/pdf/Cleveland's_Message_\(12.18.1893\).pdf](https://hawaiiankingdom.org/pdf/Cleveland's_Message_(12.18.1893).pdf)).

which I claim as the constitutional sovereign of the Hawaiian Islands.²

President Cleveland initiated a presidential investigation on 11 March 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on 29 March after which he “directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels.”³ His last report was dated 17 July 1893, and on 18 October 1893, Secretary of State Gresham notified the President:

The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

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

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.⁴

On 18 December 1893, President Cleveland delivered a manifesto⁵ to the Congress on his investigation into the overthrow of the Hawaiian Kingdom Government. The President concluded that the “military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation

² *Id.*, 586.

³ *Id.*, 568.

⁴ *Id.*, 462-463.

⁵ *Manifesto* is defined as a “formal written declaration, promulgated by ...the executive authority of a state or nation, proclaiming its reasons and motives for ...important international action.” Black’s Law 963 (6th ed., 1990).

necessitated by dangers threatening American life and property.”⁶ He also determined “that the provisional government owes its existence to an armed invasion by the United States.”⁷ Finally, the President admitted that by “an act of war... the Government of a feeble but friendly and confiding people has been overthrown.”⁸

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

Five years later, at the height of the Spanish-American War, President Cleveland’s successor, William McKinley, signed a congressional joint resolution of annexation on 7 July 1898, unilaterally seizing the Hawaiian Islands. The legislation of every State, including the United States of America and its Congress, are not sources of international law. In *The Lotus* case, the Permanent Court of International Justice stated that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”⁹ According to Judge Crawford, derogation of this principle will not be presumed.¹⁰

Furthermore, as long as occupation continues, the Occupying State cannot “annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts.”¹¹ Since 1898, the United States has unlawfully imposed its municipal laws throughout the territory of the Hawaiian Kingdom, which is the war crime of usurpation of sovereignty.

Despite the United States’ admitted illegality of its overthrow of the Hawaiian government, it did not affect the continued existence of the

⁶ *Id.*, 452.

⁷ *Id.*, 454.

⁸ *Id.*

⁹ *Lotus*, PCIJ Series A, No. 10, 18 (1927).

¹⁰ James Crawford, *The Creation of States in International Law* 41 (2nd ed., 2006).

¹¹ Jean S. Pictet, *Commentary—The Geneva Conventions of 12 August 1949* 275 (1958).

Hawaiian Kingdom as a State. In the sixteenth century, French jurist and political philosopher Jean Bodin stressed the importance that “a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state.”¹² Nineteenth century political philosopher Frank Hoffman also emphasizes that a government “is not a State any more than a man’s words are the man himself,” but “is simply an expression of the State, an agent for putting into execution the will of the State.”¹³ Quincy Wright, a twentieth century American political scientist, also concluded that, “international law distinguishes between a government and the state it governs.”¹⁴ Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003, whereby the former has been a recognized sovereign State since 1919, and the latter since 1932.

Stark parallels can be drawn between what the United States did to the Hawaiian Kingdom and what Iraq did to Kuwait in 1990, commonly referred to as the First Gulf War. Just as Iraq, without justification, invaded Kuwait and overthrew the Kuwaiti government on 2 August 1990, and then unilaterally announced it annexed Kuwaiti territory on 8 August 1990, the United States did the same to the Hawaiian Kingdom and its territory. Where Kuwait was under a belligerent occupation by Iraq for 7.5 months, the Hawaiian Kingdom has been under a belligerent occupation by the United States for 127 years. Unlike Kuwait, the Hawaiian Kingdom did not have the United Nations Security Council to draw attention to the illegality of Iraq’s invasion and annexation of Kuwaiti territory.¹⁵

¹² Jean Bodin, *Six Books of the Commonwealth* 56 (1955).

¹³ Frank Sargent Hoffman, *The Sphere of the State or the People as a Body-Politic* 19 (1894).

¹⁴ Quincy Wright, “The Status of Germany and the Peace Proclamation,” 46(2) *Am. J. Int’l L.* 299, 307 (Apr. 1952).

¹⁵ United Nations Security Council Resolution 662 (9 August 1990). In its resolution, the Security Council stated: “*Gravely alarmed* by the declaration by Iraq of a “comprehensive and eternal merger” with Kuwait, *Demanding* once again that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990, *Determined* to bring the occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait, *Determined also* to restore the authority of the legitimate Government of Kuwait, 1. *Decides* that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void; 2. Calls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation; 3. Demands that Iraq rescind its actions purporting to annex Kuwait; 4. *Decides* to keep this item on its agenda and to continue its efforts to put an early end to the occupation.”

II. FROM A STATE OF PEACE TO A STATE OF WAR

Fundamental to deciphering the Hawaiian situation is to discern between a state of peace and a state of war. “Traditional international law,” states Judge Greenwood, “was based upon a rigid distinction between the state of peace and the state of war.”¹⁶ This bifurcation provides the proper context by which certain rules of international law would or would not apply. The laws of war—*jus in bello*, otherwise known today as international humanitarian law, are not applicable in a state of peace. Inherent in the rules of *jus in bello* is the co-existence of two legal orders, being that of the occupying State and that of the occupied State. As an occupied State, the continuity of the Hawaiian Kingdom has been maintained for the past 127 years by the positive rules of international law, notwithstanding the absence of effectiveness, which is required during a state of peace.¹⁷

The failure of the United States to comply with international humanitarian law, for over a century, has created a humanitarian crisis of unimaginable proportions where war crimes have since risen to a level of *jus cogens*. At the same time, the obligations have *erga omnes* characteristics—flowing to all States. The international community’s failure to intercede, as a matter of *obligatio erga omnes*, is explained by the United States deceptive portrayal of Hawai‘i as an incorporated territory. As an international wrongful act, States have an obligation to not “recognize as lawful a situation created by a serious breach ... nor render aid or assistance in maintaining that situation,”¹⁸ and States “shall cooperate to bring to an end through lawful means any serious breach [by a State of an obligation arising under a peremptory norm of general international law].”¹⁹

III. JUS COGENS—WAR CRIMES AND THEIR PROSECUTION UNDER UNIVERSAL JURISDICTION

Jus cogens norms are defined as those “peremptory norms” that “are nonderogable and enjoy the highest status within international law.”²⁰

¹⁶ Christopher Greenwood, “Scope of Application of Humanitarian Law,” in Dieter Fleck, ed., *The Handbook of the International Law of Military Operations* 45 (2nd ed., 2008).

¹⁷ Crawford, 34; Krystyna Marek, *Identity and Continuity of States in Public International Law* 102 (2nd ed., 1968).

¹⁸ *Articles of Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001*, vol. II, Article 41(2) (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

¹⁹ *Id.*, Article 41(1).

²⁰ *Committee of United States Citizens in Nicaragua, et al., v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); see also *Vienna Convention on the Law of Treaties* art. 53, May 23,

Such norms come first from “customary international law,” which is a body of law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”²¹ After a norm or rule has been incorporated into customary international law, it may become a *jus cogens*, or peremptory, norm if there is “further recognition by the international community as a whole that this is a norm from which no derogation is permitted.”²² Once a norm has become *jus cogens*, it is incapable of being derogated by any State, and if a treaty or agreement conflicts with the norm, it is void.²³

Since the atrocities of the Second World War, the development of the concept of *jus cogens* norms has corresponded with a shift in international law that went from “the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States.”²⁴

As such, *jus cogens* norms have developed as an expression of the international community’s recognition that all States are obligated to respect certain fundamental rights of individuals. It is clear that war crimes are not only international crimes along with crimes against humanity, genocide, and aggression,²⁵ but “are *jus cogens*” as well.²⁶ In particular, the prohibition of war crimes is an “old norm which [has] acquired the character of *jus cogens*.”²⁷ There is also a sufficient legal basis for concluding that war crimes are part of *jus cogens*.²⁸ According to the

1969, 1155 U.N.T.S. 331 (defining a *jus cogens* norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

²¹ *Comm. of U.S. Citizens*, at 940 (quoting Restatement Third §102(2)).

²² *Id.*

²³ Vienna Convention art. 53; *Comm. of U.S. Citizens*, at 940.

²⁴ Wilfred Jenks, *The Common Law of Mankind* 17 (1958).

²⁵ Terje Einarsen, *The Concept of Universal Crimes in International Law* 21 (2012).

²⁶ M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes,” 59(4) *Law and Contemporary Problems* 63, 68 (1996).

²⁷ Grigory I. Tunkin, “Jus Cogens in Contemporary International Law,” 3 *U. Tol. L. Rev.* 107, 117 (1971).

²⁸ The 1993 International Tribunal For the Former Yugoslavia and the 1994 International Tribunal for Rwanda statutes include the Statute of the International Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., at 1, U.N. Doc. S/RES/827 (1993) and the Statute for the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., at 1, U.N. Doc. S/RES/955 (1994), and address Genocide, Crimes Against Humanity, and War Crimes. The 1996 Code of Crimes includes these three crimes plus

International Criminal Tribunal for the Former Yugoslavia, international crimes, which includes war crimes, are “universally condemned wherever they occur,”²⁹ because they are “peremptory norms of international law or jus cogens.”³⁰

Since 1898 when the United States began to usurp its authority by imposing its legislation and administrative measures within Hawaiian territory, much has evolved in customary international law. In particular, usurpation of sovereignty was made a war crime by the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* established at the Paris Peace Conference in 1919 in the aftermath of the First World War. The Commission provided examples of the war crime of usurpation of sovereignty during the First World War that bore a striking resemblance to the American occupation of Hawai‘i. In the case of the occupation of the Serbian State “Serbian law, courts and administration [were] ousted”³¹ by Bulgaria, and taxes were “collected under [the] Bulgarian fiscal regime [and not the Serbian fiscal regime].” Another example the Commission provided was when “Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organization, etc.”³²

According to Schabas, usurpation of sovereignty is recognized as a war crime under customary international law.³³ In the Hawaiian situation, he states that “the usurpation of sovereignty would appear to have been total since the beginning of the twentieth century,”³⁴ and that it is not an instantaneous act or event but rather a continuous offense that “consists of

Aggression. See Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), revised by U.N. Doc. A/ CN.4L.532/Corr.1 and U.N. Doc. A/CN.4L.532/Corr.3; Crimes Against U.N. Personnel, in M. Cherif Bassiouni, *International Criminal Law Conventions* (1997).

²⁹ ICTY, *Prosecutor, v. Furundzija*, Case No. IT-95-17/1, Judgment, 156 (10 Dec. 1998).

³⁰ ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, para. 520 (14 Jan. 2000).

³¹ 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.

³² *Id.*

³³ William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020), 155-157, 167 (online at: [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

³⁴ *Id.*, 157.

discrete acts.”³⁵ As such, the *actus reus* of the offense of usurpation of sovereignty occurs where 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.”³⁶ And the *mens rea* would consist of where the “perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.”³⁷ “There is no requirement for a legal evaluation by the perpetrator,” explains Schabas, “as to the existence of an armed conflict or its character as international or non-international. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international [but]...only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict.”³⁸

From a human rights standpoint, “implications arising from such a crime are determined by the fact that it usually hinders the effective exercise by the citizens of the occupied State of the right to participate in government, provided for by Article 25 [International Covenant on Civil and Political Rights] and Article 23 [American Convention on Human Rights].”³⁹ Lenzerini explains:

Even supposing that the citizens of the country to which sovereignty has been usurped are given the formal opportunity to participate in the government installed on their territory by the occupied State, this would hardly comply with the requirement, inherent in the right in point, that all citizens shall enjoy the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. In fact, it is reasonable to maintain that in most cases the representatives “freely chosen” by the citizens of the occupied State would be part of the political organization of the latter, and not of the government imposed by the occupying power.⁴⁰

What was once recognized as a delict or violation of international law by the State in 1898 has risen today to the level of an international crime where criminal culpability falls upon persons and not the State. In the

³⁵ *Id.*

³⁶ *Id.*, 167.

³⁷ *Id.*, 168.

³⁸ *Id.*, 167.

³⁹ Federico Lenzerini, “International Human Rights Law and Self-Determination of Peoples Related to the United States Occupation of the Hawaiian Kingdom,” in David Keanu Sai (ed.) *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020), 208 (online at: [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁴⁰ *Id.*

words of the International Military Tribunal, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁴¹ The passage of time will not remove the stain of criminal culpability for persons who commit war crimes because there is no statute of limitation.⁴² However, enquiry into the commission of war crimes can last up to “80 years, bearing in mind the age of criminal responsibility.”⁴³

The prosecution of war crimes, being international crimes, is recognized as obligatory upon all States of the international community under the doctrine of universal jurisdiction, which is the “prosecution of crimes committed by foreigners in a foreign land.”⁴⁴ Feldman argues that universal jurisdiction “rests not on the notion that some wrongs are so grave that they must be unlawful, but rather on the proposition that actually existing legal systems must address grave wrongs that come before them if they are to justify their existence.”⁴⁵

A valid assertion of universal jurisdiction “as the sole basis for the prosecution of international crimes requires a conclusion that the state of the perpetrator’s nationality, or of the crime’s commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.”⁴⁶ Arguing, in the context of universal jurisdiction, that a state’s right to “exclusive jurisdiction over matters that concern only those within its territorial borders...rests on the state’s satisfactory performance of the requisite political functions.”⁴⁷ Duff sees “an international court [or domestic court] with universal jurisdiction as a safeguard or fallback for cases with which, for whatever reason, the national courts cannot be expected to deal adequately.”⁴⁸ In other words, the “principle of universal

⁴¹ *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

⁴² As a *jus cogens*—peremptory norm, customary international law prohibits any statute of limitation for war crimes. See also GA Res. 3 (I); GA Res. 170 (II); GA Res. 2583 (XXIV); GA Res. 2712 (XXV); GA Res. 2840 (XXVI); GA Res. 3020 (XXVII); and GA Res. 3074 (XXVIII).

⁴³ Schabas, 155.

⁴⁴ Einarsen, 23.

⁴⁵ Noah Feldman, “Cosmopolitan Law,” 116 *Yale L. J.* 1022, 1065 (2007).

⁴⁶ Anthony Sammons, “The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts,” 21 *Berkeley J. Int’l L.* 111, 115 (2003).

⁴⁷ Andrew Altman & Christopher Heath Wellman, “A Defense of International Criminal Law,” 115 *Ethics* 35, 46 (2004).

⁴⁸ R. A. Duff, *Criminal Responsibility, Municipal and International* 25 (unpublished manuscript) (online at <http://www.trinitinture.com/documents/duff.pdf>).

jurisdiction in the sense of a competence for all states to extradite or prosecute (*aut dedere, aut judicare*) a suspected perpetrator of grave international crimes undoubtedly forms part of general international law.”⁴⁹

IV. THE RESTORATION OF THE HAWAIIAN KINGDOM GOVERNMENT

The gravity of the Hawaiian situation has been heightened by North Korea’s announcement that “all of its strategic rocket and long range artillery units are assigned to strike bases of the U.S. imperialist aggressor troops in the U.S. mainland and on Hawaii,” which is an existential threat.⁵⁰ As the Hawaiian Kingdom has been subjected to a prolonged occupation by the United States for the past 127 years, wherein the United States has not complied with the rules of *jus in bello*—laws of occupation, awareness of the occupation by a few Hawaiian subjects prompted the restoration of the government of the Hawaiian Kingdom under Hawaiian municipal laws. This was done to address the illegal nature of the occupation and to seek compliance with international law.

On 10 December 1995, the author and Donald A. Lewis (“Lewis”), both being Hawaiian subjects, formed a general partnership in compliance with an *Act to Provide for the Registration of Co-partnership Firms* (1880).⁵¹ This partnership was named the Perfect Title Company (“PTC”) and functioned as a land title abstracting company.⁵² According to Hawaiian law, co-partnerships were required to register their articles of agreement with the Interior Department’s Bureau of Conveyances, and for the Minister of the Interior, it was his duty to ensure that co-partnerships maintain their compliance with the statute. However, due to the failure of the United States to administer Hawaiian Kingdom law, there was no government, whether established by the United States President or a restored Hawaiian Kingdom government *de jure*, to ensure the company’s compliance to the co-partnership statute.

⁴⁹ Einarsen, 65.

⁵⁰ Choe Sang-Hun, *North Korea Calls Hawaii and U.S. Mainland Targets*, New York Times (26 Mar. 2013) (online at <http://www.nytimes.com/2013/03/27/world/asia/north-korea-calls-hawaii-and-us-mainland-targets.html>). Legally speaking, the armistice agreement of 27 July 1953 did not bring the state of war to an end between North Korea and South Korea because a peace treaty is still pending. The significance of North Korea’s declaration of war of 30 March 2013, however, has specifically drawn the Hawaiian Islands into the region of war because it has been targeted as a result of the United States prolonged occupation.

⁵¹ *An Act to Provide for the Registration of Co-partnership Firms* (1880) (online at http://hawaiiakingdom.org/pdf/1880_Co-Partnership_Act.pdf).

⁵² Perfect Title Company’s articles of agreement (10 Dec. 1995) (online at [http://hawaiiakingdom.org/pdf/PTC_\(12.10.1995\).pdf](http://hawaiiakingdom.org/pdf/PTC_(12.10.1995).pdf)).

The partners of PTC intended to establish a legitimate co-partnership in accordance with Hawaiian Kingdom law and in order for the title company to exist as a legal co-partnership firm, the Hawaiian Kingdom government had to be reestablished in an acting capacity. An acting official is “not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to which he himself does not claim title.”⁵³ Hawaiian law did not assume that the entire Hawaiian government would be made vacant, and, consequently, the law did not formalize provisions for the reactivation of the government in extraordinary circumstances. Therefore, notwithstanding the prolonged occupation of the Hawaiian Kingdom since 17 January 1893, a deliberate course of action was taken to re-activate the Hawaiian government by and through its executive branch, as officers *de facto*, under the common law doctrine of necessity.

The Hawaiian Kingdom’s 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances, which is under the administration of the Ministry of the Interior. This same Bureau of Conveyances is now under the State of Hawai‘i’s Department of Land and Natural Resources, which was formerly the Interior Department of the Hawaiian Kingdom. The Minister of the Interior holds a seat of government as a member of the Cabinet Council, together with the other Cabinet Ministers—Minister of Foreign Relations, Minister of Finance and the Attorney General. Article 43 of the 1864 Hawaiian constitution, as amended, provides that, “[e]ach member of the King’s Cabinet shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks.” Necessity dictated that in the absence of any “deputies or clerks” of the Interior department, the partners of a registered co-partnership could assume the duty of the same because of the current state of affairs.

Therefore, it was reasonable for the partners of this registered co-partnership to assume the office of the Registrar of the Bureau of Conveyances in the absence of the same; then assume the office of the Minister of Interior in the absence of the same; then assume the office of the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General; and, finally assume the office constitutionally vested in the Cabinet as a Regency, in accordance with Article 33 of the 1864 Hawaiian constitution, as amended.⁵⁴ A regency is a person or body of persons “intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the [monarch].”⁵⁵ In the Hawaiian situation it was in the absence of the monarch.

⁵³ Black’s Law, 26.

⁵⁴ “Hawaiian Constitution” (1864). Part III, 219.

⁵⁵ Black’s Law, 1282.

On 15 December 1995, with the specific intent of assuming the “seat of Government,” the partners of PTC formed a second partnership called the Hawaiian Kingdom Trust Company (“HKTC”).⁵⁶ The partners intended that this registered partnership would serve as a provisional surrogate for the Hawaiian government by explicitly stating in its articles of agreement:

The company will serve in the capacity of acting for and on behalf [of] the Hawaiian Kingdom government, hereinafter referred to as the absentee government, and also act as a repository for those who enter into the trust of the same. The company has adopted the Hawaiian constitution of 1864 and the laws lawfully established in the administration of the same.⁵⁷

Therefore, and in light of the aforementioned ascension process, HKTC would serve, by necessity, as officers *de facto*, in an acting capacity, for the Registrar of the Bureau of Conveyances, the Minister of Interior, the Cabinet Council, and ultimately for the Council of Regency. Article 33 of the 1864 Constitution, as amended, provides, “should a Sovereign decease...and having made no last Will and Testament, the Cabinet Council... shall be a Council of Regency.” Queen Lili‘uokalani’s last will and testament could not be accepted into probate under Hawaiian law since the government, which would include the probate courts, was not restored since 17 January 1893.

Furthermore, the only heir to the throne after her death on 11 November 1917, was Prince Jonah Kuhio Kalaniana‘ole who died on 7 January 1922. According to Article 22 of the 1864 Constitution, in order to be a successor to the throne, “the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King’s life, [but] should there be no such appointment and proclamation, and the Throne should become vacant, then the Cabinet Council, immediately after the occurring of such vacancy, shall cause a meeting of the Legislative Assembly, who shall elect by ballot some native Alii of the Kingdom as Successor to the Throne; and the Successor so elected shall become a new *Stirps* for a Royal Family.” Filling the vacancy after the death of Prince Jonah Kuhio Kalaniana‘ole would be the Cabinet Council that serves as a Council of Regency in accordance with Article 33 of the 1864 Constitution. When the occupation comes to an end, the Council of Regency “shall cause a meeting of the Legislative Assembly.”

The purpose of the HKTC was twofold; first, to ensure PTC complies with the co-partnership statute, and, second, to provisionally serve as an acting government of the Hawaiian Kingdom. What became apparent was the impression of a conflict of interest, whereby the duty to comply and the duty to ensure compliance was vested in the same two partners of those

⁵⁶ Hawaiian Kingdom Trust Company articles of agreement (15 Dec. 1995) (online at [http://hawaiiankingdom.org/pdf/HKTC_\(12.15.1995\).pdf](http://hawaiiankingdom.org/pdf/HKTC_(12.15.1995).pdf)).

⁵⁷ *Id.*

two companies. Therefore, in order to avoid this apparent conflict of interest, the partners of both PTC and HKTC, reasoned that an *acting* Regent, having no interests in either company, should be appointed to serve as a *de facto* officer of the Hawaiian government. Since the HKTC assumed to represent the interests of the Hawaiian government in an acting capacity, the trustees would make the appointment.

The assumption by Hawaiian subjects, through the offices of constitutional authority in government, to the office of Regent, as enumerated under Article 33 of the Hawaiian Constitution, was a *de facto* process born out of necessity. Cooley defines an officer *de facto* “to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law,” but rather “comes in by claim and color of right.”⁵⁸ In *Carpenter v. Clark*, the Michigan Court stated the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned.”⁵⁹ In *The King v. Ah Lin*, the Hawaiian Kingdom Supreme Court stated “the doctrine...as to officers *de facto* is sustained by a long line of authorities in England and America, and we have found none questioning it.”⁶⁰

In a meeting of the HKTC, it was agreed that the author would be appointed to serve as *acting* Regent but could not retain an interest in either of the two companies prior to the appointment because of a conflict of interest. In that meeting, it was also decided and agreed upon that Nai‘a-Ulumaimalu, a Hawaiian subject, would replace the author as trustee of HKTC and partner of PTC. This plan was to maintain the standing of the two partnerships under the 1880 Co-partnership Act, and not have either partnership lapse into sole proprietorships.

To accomplish this, the author would relinquish, by a deed of conveyance in both companies, his entire one-half (50%) interest to Lewis, after which, Lewis would convey a redistribution of interest to Nai‘a-Ulumaimalu, then the former would hold a ninety-nine percent (99%) interest in the two companies and the latter a one percent (1%) interest in the same. In order to have these two transactions take place simultaneously, without affecting the standing of the two partnerships, both deeds of conveyance took place on the same day but did not take effect until the following day, on 28

⁵⁸ Thomas Cooley, *A Treatise on the Law of Taxation* 185 (1876).

⁵⁹ *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

⁶⁰ *The King v. Ah Lin*, 5 Haw. 59, 61 (1883).

February 1996.⁶¹ On 1 March 1996, the Trustees of HKTC appointed the author as *acting* Regent.⁶²

On the same day, the author, as *acting* Regent, proclaimed himself, as the successor of the HKTC.⁶³ On 15 May 1996, the Trustees conveyed by deed, all of its right, title and interest acquired by thirty-eight deeds of trust, to the author, then as *acting* Regent, and stipulated that the company would be dissolved in accordance with the provisions of its deed of general partnership on or about 30 June 1996.⁶⁴

On 28 February 1997, a proclamation by the *acting* Regent announcing the restoration of the provisional Hawaiian government was printed in the Honolulu Sunday Advertiser on 9 March 1997.⁶⁵ The international law of occupation allows for an occupied State's government and the occupying State to co-exist within the same territory. According to Marek, "it is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the [occupying] State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the [occupying] State and that of the occupied State... is not one of delegation, but of co-existence."⁶⁶

On 7 September 1999, the *acting* Regent, commissioned Peter Umialiloa Sai, a Hawaiian subject, as *acting* Minister of Foreign Affairs, and Mrs. Kau'i P. Goodhue, later to be known as Mrs. Kau'i P. Sai-Dudoit, a Hawaiian subject, as *acting* Minister of Finance.⁶⁷ On 9 September 1999, the *acting* Regent commissioned Gary Victor Dubin, Esquire, a Hawaiian

⁶¹ Deed from David Keanu Sai to Donald A. Lewis (27 Feb. 1996) (online at http://hawaiiakingdom.org/pdf/Sai_to_Lewis_Deed.pdf), Deed of Donald A. Lewis to Nai'a-Ulumaimalu's (27 Feb. 1996) (online at http://hawaiiakingdom.org/pdf/Nai%E2%80%98a_to_Lewis_Deed.pdf).

⁶² Notice of appointment of Regent by Hawaiian Kingdom Trust Company (1 Mar. 1996) (online at http://hawaiiakingdom.org/pdf/HKTC_Appt_Regent.pdf).

⁶³ Hawaiian Kingdom Trust Company's notice of proclamation no. 1 by the Regent (1 Mar. 1996) (online at [http://hawaiiakingdom.org/pdf/Proc_\(3.1.1996\).pdf](http://hawaiiakingdom.org/pdf/Proc_(3.1.1996).pdf)).

⁶⁴ Deed from Hawaiian Kingdom Trust Company to Regent (15 May 1996) (online at http://hawaiiakingdom.org/pdf/HKTC_Deed_to_Regent.pdf).

⁶⁵ Proclamation by the Regent, Honolulu Advertiser newspaper (28 Feb. 1997) (online at https://hawaiiakingdom.org/pdf/Proc_Restoration_of_Monarchical_Government.pdf); Part III, 227-228.

⁶⁶ Marek, 91.

⁶⁷ Hawaiian Minister of Foreign Affairs commission—Peter Umialiloa Sai (5 Sep. 1999) (online at http://hawaiiakingdom.org/pdf/Umi_Sai_Min_Foreign_Affairs.pdf), and the Hawaiian Minister of Finance commission—Kau'i P. Goodhue (Sep. 5, 1999) (online at http://hawaiiakingdom.org/pdf/Kau_i_Min_of_Finance.pdf).

denizen, as *acting* Attorney General.⁶⁸ Dubin resigned on 21 July 2013, and was replaced by Dexter Ka‘iama, Esquire, on 11 August 2013.⁶⁹ The *acting* Council of Regency (“Council of Regency”) was established on 26 September 1999, by resolution whereby the author would resume the office of *acting* Minister of the Interior and serve as Chairman of the Council.⁷⁰

His Excellency Peter Umialiloa Sai died on 17 October 2018, and, thereafter, by proclamation of the Council of Regency on 11 November 2019, the author was designated “to be Minister of Foreign Affairs *ad interim* while remaining as Minister of the Interior and Chairman of the Council of Regency.”⁷¹ According to Justice Harris of the Hawaiian Kingdom Supreme Court, where there is “a vacancy occurring, by death or otherwise,” the Council of Regency, serving in the absence of the Monarch, can “delegate the authority to act for the time being, to another Ministerial officer” as *ad interim*.⁷² Justice Harris further explained that the ministers are “not subordinate to the other, nor do we see that the duties of one in any way interfere with the duties of the other,” and, therefore, “one person [can hold] two appointments [because the] two offices are not declared by the Constitution or statute to be incompatible.”⁷³

V. DOCTRINE OF NECESSITY AND THE CONSTITUTIONAL ORDER OF THE STATE

The establishment of the Council of Regency, as officers *de facto*, was a political act of self-preservation, not revolution, and was grounded upon the legal doctrine of limited necessity. Under British common law, deviations from a State’s constitutional order “can be justified on grounds of necessity.”⁷⁴ De Smith also states, that “State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising with- in the constitutional

⁶⁸ Hawaiian Attorney General commission—Gary V. Dubin (9 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Dubin_Att_General.pdf).

⁶⁹ Hawaiian Attorney General commission—Dexter Ke‘eaumoku Ka‘iama (11 Aug. 2013) (online at https://www.hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf).

⁷⁰ Privy Council Resolution establishing a Council of Regency (26 Sep. 1999) (online at http://hawaiiankingdom.org/pdf/Council_of_Regency_Resolution.pdf).

⁷¹ Council of Regency, Proclamation of Minister of Foreign Affairs *ad interim* (11 Nov. 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Minister_Foreign_Affairs_Ad_interim.pdf); Part III, 235.

⁷² *Rex v. C.W. Kanaau*, 3 Haw. 669, 670 (1876).

⁷³ *Id.*, 670-671.

⁷⁴ Stanley A. de Smith, *Constitutional and Administrative Law* 80 (1986).

order [and to] this extent it has been recognized as an implied exception to the letter of the constitution.”⁷⁵

According to Oppenheimer, “a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country.”⁷⁶ In *Madzimbamuto v. Lardner-Burke*, Lord Pearce stated there are certain limitations to the principle of necessity, “namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful... Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign.”⁷⁷ National courts, to include the Supreme Court of the United States,⁷⁸ have consistently held that emergency action cannot justify a subversion of a State’s constitutional order. The doctrine of necessity provides the necessary parameters and limits of emergency action. The governing principles of necessity were stated in *Mitchell v. Director of Public Prosecutions*:

- (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
- (ii) there must be no other course of action reasonably available;
- (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
- (iv) it must not impair the just rights of citizens under the Constitution;
- (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.⁷⁹

The Council of Regency, serving as the provisional government of the Hawaiian Kingdom, was established *in situ* and not *in exile*. The Hawaiian government was established in accordance with the Hawaiian constitution and the doctrine of necessity to serve in the absence of the executive monarch. By virtue of this process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley,

⁷⁵ *Id.*

⁷⁶ F.W. Oppenheimer, “Governments and Authorities in Exile,” 36 *Am. J. Int’l. L.* 568, 581 (1942).

⁷⁷ See *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 732 (1969). See also *Chandrika Persaud v. Republic of Fiji* (Nov. 16, 2000); and *Mokotso v. HM King Moshoeshoe II*, LRC (Const) 24, 132 (1989).

⁷⁸ *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868).

⁷⁹ *Mitchell v. Director of Public Prosecutions*, L.R.C. (Const) 35, 88–89 (1986).

A provisional government is supposed to be a government de facto for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.⁸⁰

During the Second World War, like other governments formed during foreign occupations of their territory, the Hawaiian government did not receive its mandate from the Hawaiian legislature, but rather by virtue of Hawaiian constitutional law as it applies to the Cabinet Council.⁸¹ Although Article 33 provides that Cabinet Council “shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately [and] shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are constitutionally vested in the King,” the convening of the Legislative Assembly was impossible in light of the prolonged occupation. The impossibility of convening the Legislative Assembly during the occupation did not prevent the Cabinet from becoming the Council of Regency because of the operative word “shall,” but only prevents the Legislature from electing a Regent or Regency.

Therefore, the Council was established in similar fashion to the Belgian Council of Regency after King Leopold was captured by the Germans during World War II. As the Belgian Council was established under Article 82 of its 1821 Constitution, as amended, in exile, the Hawaiian Council was established under Article 33 of its 1864 Constitution, as amended, not in exile but *in situ*. As Oppenheimer explained:

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

⁸⁰ Thomas M. Cooley, “Grave Obstacles to Hawaiian Annexation,” *The Forum*, 389, 390 (1893).

⁸¹ The policy of the Hawaiian government is threefold: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and, third, prepare for an effective transition to a de jure government when the occupation ends. The Strategic Plan of the Hawaiian government is online at http://hawaiiakingdom.org/pdf/HK_Strategic_Plan.pdf.

emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.⁸²

The existence of the restored government *in situ* was not dependent upon diplomatic recognition by foreign States, but rather operated on the presumption of recognition these foreign States already afforded the Hawaiian government as of 1893. The Council of Regency was not a new government like the Czech government established in exile in London during World War II, but rather the successor of the same government of 1893 formed under and by virtue of its constitutional provisions. It is a government restored in accordance with the municipal laws of the Hawaiian Kingdom as these laws existed prior to the unlawful overthrow of the *de jure* government on 17 January 1893. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.⁸³ The Council of Regency was not established through “extra-legal changes in government” but rather through existing laws of the kingdom.

VI. LARSEN V. HAWAIIAN KINGDOM—PERMANENT COURT OF ARBITRATION

The first allegation of the war crime of usurpation of sovereignty,⁸⁴ was made the subject of an arbitral dispute in *Lance Larsen vs. Hawaiian*

⁸² F.E. Oppenheimer, “Governments and Authorities in Exile,” 36 *Am. J. Int’l L.* 568, 569 (1942).

⁸³ M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* 26 (1997).

⁸⁴ Memorial of Lance Paul Larsen (22 May 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, at para. 62-64, “Despite Mr. Larsen’s efforts to assert his nationality and to protest the prolonged occupation of his nation, [on] 4 October 1999, Mr. Larsen was illegally imprisoned for his refusal to abide by the laws of the State of Hawaii by State of Hawaii. At this point, Mr. Larsen became a political prisoner, imprisoned for standing up for his rights as a Hawaiian subject against the United States of America, the occupying power in the prolonged occupation of the Hawaiian islands. . . . While in prison, Mr. Larsen did continue to assert his nationality as a Hawaiian subject, and to protest the unlawful imposition of American laws over his person by filing a Writ of Habeas [sic] Corpus with the Circuit Court of the Third Circuit, Hilo Division, State of Hawaii. . . . Upon release from incarceration, Mr. Larsen was forced to pay additional fines to the State of Hawaii in order to avoid further imprisonment for asserting his rights as a Hawaiian subject,” (online at http://www.alohaquest.com/arbitration/memorial_larsen.htm).

Article 33, 1949 Geneva Convention, IV, “Pillage is prohibited. Reprisals against protected persons and their property are prohibited;” Article 147, 1949 Geneva Convention, IV, “Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: . . . unlawful confinement of a protected person, . . . wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention;” see also International Criminal Court, *Elements of War Crimes* (2011), at 16 (Article 8 (2) (a) (vi)—War crime of denying a fair trial), 17 (Article 8 (2) (a) (vii)-2—War Crime of unlawful confinement), and 26 (Article 8 (2) (b) (xvi)—War Crime of pillaging).

Kingdom at the Permanent Court of Arbitration (“PCA”), whereby the claimant alleged that the Council of Regency was legally liable “for allowing the unlawful imposition of American municipal laws” over him within Hawaiian territory.⁸⁵ The war crime of usurpation of sovereignty 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.”⁸⁶

In order to ensure that the dispute is international, the PCA must possess jurisdiction, as an institution, first,⁸⁷ before it can form *ad hoc* tribunals. The jurisdiction of the PCA is distinguished from the subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties. International disputes, capable of being accepted under the PCA’s institutional jurisdiction, include disputes between: any two or more States; a State and an international organization (i.e. an intergovernmental organization); two or more international organizations; a State and a private party; and an international organization and a private entity.⁸⁸ 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 Power under Article 47 of the Hague Convention for the Pacific Settlement of International Disputes, I (“Convention, I”) in its annual reports from 2001 to 2011.⁸⁹ Oral hearings were held at the PCA on 7, 8 and 11 December 2000.

VII. RECOGNITION OF THE HAWAIIAN KINGDOM AS A STATE BY THE PERMANENT COURT OF ARBITRATION

Article 93 of Convention I provides that ratification to the treaty is open to all “Powers,” an old term which eventually can be taken to mean open to ‘all States.’⁹⁰ Should a State decide to ratify the treaty, Article 97 provides that the State shall deposit its ratification with the “Netherlands Government, and duly certified copies of which shall be sent, through diplomatic channel, to the Contracting [States].” However, access to the

⁸⁵ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at <https://pca-cpa.org/en/cases/35/>).

⁸⁶ Schabas, 157.

⁸⁷ United Nations, *United Nations Conference on Trade and Development: Dispute Settlement* 15 (2003).

⁸⁸ *Id.*

⁸⁹ *Annual Reports of the PCA* (online at <https://pca-cpa.org/en/about/annual-reports/>).

⁹⁰ Gentian Zyberi, “Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration,” 5(3) *ESIL Reflections* 1, 5 (2016) (online at <https://esil-sedi.eu/fr/esil-reflection-membership-in-international-treaties-of-contested-states-the-case-of-the-permanent-court-of-arbitration/>).

jurisdiction of the PCA, which is a separate issue of the subject of ratification, is not limited to Contracting States but also to non-Contracting States. Article 47 of Convention I reads, “[t]he jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting [States] or between Contracting [States] and non-Contracting [States], if the parties are agreed on recourse to this Tribunal.”

Under Article 43 of Convention I, the “International Bureau serves as registry for the Court [and] it has charge of the archives and conducts all the administrative business.” Opening the Court to “non-Contracting [States]” is an administrative decision by the International Bureau and in order for non-Contracting States to have access to the “jurisdiction of the Permanent Court” they must exist as a State in accordance with recognized attributes of a State’s sovereign nature.⁹¹ While the government of the Hawaiian Kingdom was unlawfully overthrown by “an act of war,” committed by the United States, Hawaiian statehood remained intact along with its permanent population and defined territory. In other words, the Hawaiian Kingdom was not claiming to be a new State but rather exists as an independent State since the nineteenth century.

As an intergovernmental organization, the Permanent Court, through its International Bureau, was vested with the authority by the “Contracting Powers” under Article 47 to grant access to the jurisdiction of the Permanent Court to non-Contracting States. In determining whether or not a State exists in accordance with Article 47, the International Bureau must rely on the rules of customary international law as it relates to an existing State under belligerent occupation.⁹² There is no evidence that the United States, being a Contracting State, protested the International Bureau’s recognition of the Hawaiian Kingdom as a State in accordance with Article 47. Furthermore, the International Bureau recognized the Council of Regency as the government agent for the Hawaiian Kingdom.

VIII. UNITED STATES INVITED TO JOIN IN THE ARBITRATION

Before the *Larsen* tribunal was formed on 9 June 2000, Mr. Tjaco T. van den Hout, Secretary General of the PCA, spoke with the author, as agent for the Hawaiian Kingdom, over the telephone and recommended that the Hawaiian government provide an invitation to the United States to join in

⁹¹ Article 1, 1933 *Montevideo Convention on the Rights and Duties of States* defines a State “as a person of international law [that] possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

⁹² “Military occupation, whether during war or after an armistice, does not terminate statehood, *e.g.* Germany’s occupation of European states during World War II, or the allies’ occupation of Germany and Japan after the war.” Restatement (Third) of Foreign Relations Law of the United States §201, Reporters’ note 3 (1987).

the arbitration. The Hawaiian government agreed with the recommendation, which resulted in a conference call meeting on 3 March 2000 in Washington, D.C., between the author, Larsen's counsel, Mrs. Ninia Parks, and John Crook from the State Department. The meeting was reduced to a formal note and mailed to Crook in his capacity as legal adviser to the State Department, and a copy of the note was submitted by the Council of Regency to the PCA Registry for record that the United States was invited to join in the arbitral proceedings.⁹³ The note was signed off by the author as "Acting Minister of Interior and Agent for the Hawaiian Kingdom."

Under international law, this note served as an offering instrument that contained the following text:

[T]he reason for our visit was the offer by the...Hawaiian Kingdom, by consent of the Claimant [Larsen], by his attorney, Ms. Ninia Parks, for the United States Government to join in the arbitral proceedings presently instituted under the auspices of the Permanent Court of Arbitration at The Hague, Netherlands. ... [T]he State Department should review the package in detail and can get back to the Acting Council of Regency by phone for continued dialogue. I gave you our office's phone number..., of which you acknowledged. I assured you that we did not need an immediate answer, but out of international courtesy the offer is still open, notwithstanding arbitral proceedings already in motion. I also advised you that Secretary-General van den Hout of the Permanent Court of Arbitration was aware of our travel to Washington, D.C. and the offer to join in the arbitration. As I stated in our conversation he requested that the dialogue be reduced to writing and filed with the International Bureau of the Permanent Court of Arbitration for the record, and you acknowledged.

Thereafter, the PCA's Deputy Secretary General, Phyllis Hamilton, informed the author that the United States, through its embassy in The Hague, notified the PCA, by *note verbale*, that the United States declined the invitation to join the arbitral proceedings. Instead, the United States requested permission from the Hawaiian government to have access to the pleadings and records of the case. The Hawaiian government consented to this request. The PCA, represented by the Deputy Secretary General, served as an intermediary to secure an agreement between the Hawaiian Kingdom and the United States.

According to Wilmanns, "[l]egally there is no difference between a formal note, a *note verbale* and a memorandum. They are all communications which become legally operative upon the arrival at the addressee. The legal effects depend on the substance of the note, which may relate to any

⁹³ "Letter confirming telephone conversation with U.S. State Department relating to arbitral proceedings at the Permanent Court of Arbitration, 3 Mar. 2000, (online at [http://hawaiiakingdom.org/pdf/State_Dpt_Ltr_\(3.3.2000\).pdf](http://hawaiiakingdom.org/pdf/State_Dpt_Ltr_(3.3.2000).pdf)).

field of international relations.”⁹⁴ And as “a rule, the recipient of a note answers in the same form. However, an acknowledgment of receipt or provisional answer can always be given in the shape of a *note verbale*, even if the initial note was of a formal nature.”⁹⁵

The offer by the Secretary General to have the Hawaiian government provide the United States an invitation to join in the arbitral proceedings, and the Hawaiian government’s acceptance of this offer, also constitutes an international agreement by exchange of *notes verbales* between the PCA and the Hawaiian Kingdom. “[T]he growth of international organizations and the recognition of their legal personality has resulted in agreements being concluded by an exchange of notes between such organizations and states.”⁹⁶

The United States’ request to have access of the arbitral records, in lieu of the invitation to join in the arbitration, and the Hawaiian government’s consent to that request constitutes an international agreement by exchange to *notes verbales*. According to Assche, “the exchange of two *notes verbales* constituting an agreement satisfies the definition of the term ‘treaty’ as provided by Article 2(1)(a) of the Vienna Convention.”⁹⁷ Altogether, the exchange of *notes verbales* on this subject matter, between the Hawaiian Kingdom, the PCA, and the United States of America, constitutes a multilateral agreement of the *de facto* recognition of the restored Hawaiian government.

IX. ARBITRAL PROCEEDINGS UNDER THE AUSPICES OF THE PERMANENT COURT OF ARBITRATION

In 2001, Bederman and Hilbert reported in the *American Journal of International Law*:

At the center of the PCA proceedings was...that the Hawaiian Kingdom continues to exist and that the Hawaiian 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 Hawaii. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any

⁹⁴ Johst Wilmanns, “Note,” in 9 *Encyclopedia of Public International Law* 287 (1986).

⁹⁵ *Id.*

⁹⁶ J.L. Weinstein, “Exchange of Notes,” 20 *Brit. Y.B. Int’l L.* 205, 207 (1952).

⁹⁷ Cendric van Assche, “1969 Vienna Convention,” *The Vienna Conventions on the Law of Treaties, A Commentary*, Vol. I, Corten & Klein, eds., vol. 1 261 (2011).

international law violations that the United States had committed against him.⁹⁸

The Tribunal concluded that it did not possess subject matter jurisdiction in the case because of the indispensable third-party rule. The Tribunal explained:

It follows that the Tribunal cannot determine whether the respondent [the Hawaiian Kingdom] has failed to discharge its obligations towards the claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the *Monetary Gold* principle precludes the Tribunal from doing. As the International Court of Justice explained in the *East Timor* case, “the Court 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.”⁹⁹

The Tribunal, however, stated:

At one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for fact-finding, both as between States and otherwise.¹⁰⁰

The Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.¹⁰¹

Part III of each of the Hague Conventions of 1899 and 1907 provide for International Commissions of Inquiry. The PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry.¹⁰²

Under the indispensable third-party rule, *Larsen* was prevented from maintaining his suit against the Council of Regency “for allowing the unlawful imposition of American municipal laws,” because the Tribunal

⁹⁸ David Bederman & Kurt Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii,” 95 *Am. J. Int’l L.* 927, 928 (2001).

⁹⁹ *Larsen v. Hawaiian Kingdom*, 119 Int’l L. Rep. 566, 596 (2001) (“Larsen Award”).

¹⁰⁰ *Id.*, 597.

¹⁰¹ *Id.*

¹⁰² *Id.*, n. 28.

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

X. MEETING WITH THE RWANDAN GOVERNMENT IN BRUSSELS

After the last day of the *Larsen* hearings were held at the PCA on 11 December 2000,¹⁰³ the Council was called to an urgent meeting by Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned to Belgium. Ambassador Bihozagara had been attending a hearing before the International Court of Justice on 8 December 2000, (*Democratic Republic of the Congo v. Belgium*),¹⁰⁴ where he became aware of the Hawaiian arbitration case taking place in the hearing room of the PCA.

The following day, the Council, which included the author as Agent, and two Deputy Agents, Peter Umialiloa Sai, *acting* Minister of Foreign Affairs, and Mrs. Kau'i P. Sai-Dudoit, formerly known as Kau'i P. Goodhue, *acting* Minister of Finance, met with Ambassador Bihozagara in Brussels.¹⁰⁵ In that meeting, the Ambassador explained that since he accessed the pleadings and records of the *Larsen* case on 8 December from the PCA's secretariat, he had been in communication with his government in Kigali. This prompted our meeting where the Ambassador conveyed to the author, as Chairman of the Council and agent in the *Larsen* case, that his government was prepared to bring to the attention of the United Nations General Assembly the prolonged occupation of the Hawaiian Kingdom by the United States and to place our situation on the agenda. The author requested a short break from the meeting in order to consult with the other members of the Council who were present.

After careful deliberation, the Council of Regency decided that it could not, in good conscience, accept this offer. The Council of Regency felt the timing was premature because Hawai'i's population remained ignorant of Hawai'i's profound legal position due to institutionalized denationalization—*Americanization* by the United States since the early twentieth century. On behalf of the Council, the author graciously thanked the Ambassador for his government's offer but stated that the Council first needed to address over a century of denationalization through *Americanization*. After exchanging salutations, the meeting ended, and the Council returned that afternoon to The Hague. The meeting also constituted recognition of the restored Hawaiian government.

¹⁰³ Video of the oral hearings in *Larsen v. Hawaiian Kingdom* (7, 8, 11 Dec. 2000) (online at <https://www.youtube.com/watch?v=tmpXy2okJlg&t=10s>).

¹⁰⁴ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order, I.C.J. Rep. 182 (8 Dec. 2000).

¹⁰⁵ David Keanu Sai, "A Slippery Path towards Hawaiian Indigeneity," 10 *J. L. & Soc. Challenges* 69, 130-131 (2008).

Since the *Larsen* case, the following States have also provided recognition of the Hawaiian government. On 5 July 2001, China, as President of the United Nations Security Council, recognized the Hawaiian government when it accepted the Hawaiian government's complaint submitted by the author, as agent for the Hawaiian Kingdom, in accordance with Article 35(2) of the United Nations Charter.¹⁰⁶ Article 35(2) provides that a "State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter." Also, by exchange of *notes*, through email, Cuba recognized the Hawaiian government when on 10 November 2017, the Cuban government received the author, as Ambassador-at-large for the Hawaiian Kingdom, at the Cuban embassy in The Hague, Netherlands.¹⁰⁷

XI. EXPOSURE OF THE HAWAIIAN KINGDOM THROUGH THE MEDIUM OF ACADEMIC RESEARCH

The decision by the Council to forego Rwanda's invitation was made in line with section 495—*Remedies of Injured Belligerent*, United States Army FM-27-10, which states, "[i]n the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: *a.* Publication of the facts, with a view to influencing public opinion against the offending belligerent."¹⁰⁸ After the *Larsen* case, the policy of the Council would be threefold: *first*, exposure of the prolonged occupation; *second*, ensure that the United States complies with international humanitarian law; and, *third*, prepare for an effective transition to a *de jure* government when the occupation ends.

The United States' belligerent occupation rests squarely within the regime of the law of occupation in international humanitarian law. The application of the regime of occupation law "does not depend on a decision taken by an international authority,"¹⁰⁹ and "the existence of an armed conflict is an

¹⁰⁶ David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 *Haw. J.L. & Pol.* 46, 74 (2004).

¹⁰⁷ Email notes between the Hawaiian Ambassador-at-large and the Cuban Embassy in The Hague (Nov. 2017) (online at http://hawaiiakingdom.org/pdf/Cuban_Embassy_Corresp.pdf).

¹⁰⁸ "United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare), though not a source of law like a statute, prerogative order or decision of a court, is a very authoritative publication." *Trial of Sergeant-Major Shigeru Ohashi and Six Others*, 5 *Law Reports of Trials of Law Criminals (United Nations War Crime Commission)* 27 (1949).

¹⁰⁹ C. Ryngaert and R. Franssen, "EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of Front Polisario before EU courts," 2(1) *Europe and the World: A law review* 8 (2018).

objective test and not a national ‘decision.’”¹¹⁰ According to Article 42 of the 1907 Hague Regulations, a State’s territory is considered occupied when it is “actually placed under the authority of the hostile army.”

Article 42 has three requisite elements: first, the presence of a foreign State’s forces; second, the exercise of authority over the occupied territories by the foreign State or its proxy; and, third, the non-consent by the occupied State. U.S. President Grover Cleveland’s 1893 manifesto to the Congress, which is Annexure 1 in the *Larsen v. Hawaiian Kingdom Award*,¹¹¹ and the continued U.S. presence today, without a treaty of peace, firmly meets all three elements of Article 42. Hawai‘i’s people, however, have become denationalized and the history of the Hawaiian Kingdom has been, for all intents and purposes, obliterated within three generations since the United States’ takeover.

The Council deemed it their duty to explain to Hawai‘i’s people that before the PCA could facilitate the formation of the *Larsen* tribunal, it had to ensure that it possessed jurisdiction as an institution. This jurisdiction required that the Hawaiian Kingdom be a “State.”¹¹² This finding authorized the Hawaiian Kingdom’s access to the PCA pursuant to Article 47 of the Hague Convention, I, as a non-Contracting State to the convention. This acknowledgement is significant on two levels, first, the Hawaiian Kingdom had to currently exist as a State under international law, otherwise the PCA would not have accepted the dispute to be settled through international arbitration, and, second, the PCA explicitly recognized the Council of Regency as the government of the Hawaiian Kingdom.

History of the illegal overthrow and purported annexation of the Hawaiian Islands is provided not only in the pleadings of the *Larsen* case,¹¹³ but also in a 2002 legal opinion by Matthew Craven, Professor of Law from the University of London, SOAS, titled *Continuity of the Hawaiian Kingdom*. Craven wrote the legal opinion for the Council of Regency as part of the latter’s focus on exposure of the Hawaiian Kingdom’s legal status under international law, through academic research, after the Council of Regency returned from The Hague in 2000. Craven’s memo was also referenced in Judge Crawford’s seminal book, *The Creation of States in International*

¹¹⁰ Stuart Casey-Maslen, ed., *The War Report 2012* ix (2013).

¹¹¹ *Larsen Award*, 598-610.

¹¹² United Nations, *United Nations Conference on Trade and Development, Dispute Settlement—Permanent Court of Arbitration 15* (2003) (online at https://unctad.org/en/Docs/edmmisc232add26_en.pdf).

¹¹³ *Larsen v. Hawaiian Kingdom Arbitration Log Sheet* (online at <http://www.alohaquest.com/arbitration/log.htm>).

Law. Judge Crawford wrote, “Craven offers a critical view on the plebiscite affirming the integration of Hawaii into the United States.”¹¹⁴

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 Crawford, “[t]here is a presumption that the State continues to exist, with its rights and obligations ... despite a period in which there is ... no effective, government.”¹¹⁵ Crawford further concludes that “[b]elligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”¹¹⁶

“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.”¹¹⁷ Craven’s opinion is premised on the theory that once recognition of a new State is granted it “is incapable of withdrawal”¹¹⁸ by the recognizing States and that “recognition estops [precludes] the State which has recognized the title from contesting its validity at any future time.”¹¹⁹ Therefore, because the “Hawaiian Kingdom existed as an independent State [and] recognized as such by the United States of America,”¹²⁰ the United States is precluded “from contesting its validity at any future time” unless it has extinguished Hawaiian statehood in accordance with international law.

¹¹⁴ Crawford, 623, n. 83.

¹¹⁵ *Id.*, 34. If one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.

¹¹⁶ *Id.* Crawford also stated, the “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.” *Id.*, n. 157.

¹¹⁷ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai (ed.) *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020), 128 (online at: [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

¹¹⁸ Lassa Oppenheim, *International Law* 137 (3rd ed., 1920).

¹¹⁹ Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” 51(2) *Am. J. Int’l L.* 308, 316 (1957).

¹²⁰ Larsen Award, 581.

In his legal opinion, Craven interrogated modes of extinction by which, under international law, the United States could provide rebuttable evidence that the Hawaiian State was indeed extinguished. Notwithstanding the imposition of United States municipal laws, he found no such evidence under international law to support a claim that the United States extinguished Hawaiian statehood. As such, Craven cited implications regarding the continuity of the Hawaiian Kingdom.

The implications of continuity in case of Hawai'i are several:

- a) That authority exercised by US over Hawai'i is not one of sovereignty i.e. that the US has no legally protected 'right' to exercise that control and that it has no original claim to the territory of Hawai'i or right to obedience on the part of the Hawaiian population. Furthermore, the extension of US laws to Hawai'i, apart from those that may be justified by reference to the law of (belligerent) occupation would be contrary to the terms of international law.
- b) That the Hawaiian people retain a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government.
- c) That the treaties of the Hawaiian Kingdom remain in force as regards other States in the name of the Kingdom (as opposed to the US as a successor State) except as may be affected by the principle *rebus sic stantibus* or impossibility of performance.
- d) That the Hawaiian Kingdom retains a right to all State property including that held in the territory of third states, and is liable for the debts of the Hawaiian Kingdom incurred prior to its occupation.¹²¹

Regarding the implication that "the Hawaiian people retain a right to self-determination," Lenzerini notes:

Based on the postulation...that the Hawaiian Kingdom was occupied by the United States in 1893 and that it has remained in the same condition since that time, it may be concluded that the potential implications on such a situation arising from the applicable international legal rules on human rights and self-determination are remarkable. [Therefore,] an adequate legal basis would exist for claiming in principle the international responsibility of the United States of America—as occupying Power—for violations of both internationally recognized human rights to the prejudice of individuals and of the right of the Hawaiian people to freely exercise self-determination.¹²²

¹²¹ Craven, 126.

¹²² Lenzerini, 215.

In order to carry into effect the Council of Regency's policy, it was decided that since the author already had a bachelor's degree from the University of Hawai'i at Mānoa and was familiar with what they have been instructing on Hawai'i's history, he would enter the University of Hawai'i at Mānoa political science department and secure a master's degree specializing in international relations. Then the author would acquire a Ph.D. with specific focus on the continuity of the Hawaiian Kingdom as an independent and sovereign State that has been under a prolonged occupation. Through this policy, the Council of Regency has been able to effectively shift the discourse to belligerent occupation.

The Council of Regency's objective was to engage over a century of denationalization through the medium of academic research and publications, both peer and law review. As a result, awareness of the Hawaiian Kingdom's political status has grown exponentially with multiple masters theses, doctoral dissertations, and publications written on the subject. What the world knew before the *Larsen* case has been drastically transformed to the present. This transformation was the result of academic research in spite of the continued American occupation.

This scholarship prompted a well-known historian in Hawai'i, Tom Coffman, to change the subtitle of his book in 2009, which Duke University republished in 2016, from *The Story of America's Annexation of the Nation of Hawai'i* to *The History of the American Occupation of Hawai'i*. Coffman explained:

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 its 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 definition of international law there was no annexation, we are left 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 Hawai'i, the might of the United States does not make it right.¹²³

Furthermore, in 2016, Japan's Seijo University's Center for Glocal Studies published an article by Dennis Riches titled *This is not America: The*

¹²³ Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* xvi (2016).

*Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation.*¹²⁴ At the center of this article was the continuity of the Hawaiian Kingdom, the Council of Regency, and the commission war crimes. Riches, who is Canadian, wrote:

[The history of the Baltic States] is a close analog of Hawai‘i because the occupation by a superpower lasted over several decades through much of the same period of history. The restoration of the Baltic States illustrates that one cannot say too much time has passed, too much has changed, or a nation is gone forever once a stronger nation annexes it. The passage of time doesn’t erase sovereignty, but it does extend the time which the occupying power has to neglect its duties and commit a growing list of war crimes.

Additionally, school teachers, throughout the Hawaiian Islands, have also been made aware of the American occupation through course work at the University of Hawai‘i and they are teaching this material in the middle schools and the high schools. This exposure led the Hawai‘i State Teachers Association (“HSTA”), which represents public school teachers throughout Hawai‘i, to introduce a resolution—New Business Item 37 at the 2017 annual assembly of the National Education Association (“NEA”) in Boston, Massachusetts. On 4 July 2017, the resolution passed. The NEA represents 3.2 million public school teachers, administrators, and faculty and administrators of universities throughout the United States. The resolution stated:

The NEA will publish an article that documents the illegal overthrow of the Hawaiian Monarchy in 1893, the prolonged illegal occupation of the United States in the Hawaiian Kingdom, and the harmful effects that this occupation has had on the Hawaiian people and resources of the land.¹²⁵

As a result, three articles were published by the NEA: first, *The Illegal Overthrow of the Hawaiian Kingdom Government* (2 April 2018);¹²⁶ second, *The U.S. Occupation of the Hawaiian Kingdom* (1 October 2018);¹²⁷ and, third, *The Impact of the U.S. Occupation on the Hawaiian*

¹²⁴ Dennis Riches, “This is not America: The Acting Government of the Hawaiian Kingdom Goes Global with Legal Challenges to End Occupation,” *Center for Global Studies*, Seijo University 81, 89 (2016).

¹²⁵ NEA New Business Item 37 (2017) (online at <https://ra.nea.org/business-item/2017-nbi-037/>).

¹²⁶ Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NEA Today (2 Apr. 2018) (online at <http://neatoday.org/2018/04/02/the-illegal-overthrow-of-the-hawaiian-kingdom-government/>).

¹²⁷ Keanu Sai, *The U.S. Occupation of the Hawaiian Kingdom*, NEA Today (1 Oct. 2018) (online at <http://neatoday.org/2018/10/01/the-u-s-occupation-of-the-hawaiian-kingdom/>).

People (13 October 2018).¹²⁸ Awareness of the Hawaiian Kingdom's situation has reached countless classrooms across the United States. These publications by the NEA was the Council's crowning jewel for its policy to engage denationalization through *Americanization*.

XII. DIRECTOR OF RUSSIA'S PIR-CENTER ACKNOWLEDGES ILLEGAL ANNEXATION BY THE UNITED STATES

This exposure also prompted the director of Russia's PIR-CENTER, on 4 October 2018, to admit that Hawai'i was illegally annexed by the United States. This acknowledgement occurred at a seminar entitled "Russian America: Hawaiian Pages 200 Years After" held at the PIR-CENTER, Institute of Contemporary International Studies, Diplomatic Academy of the Russian Foreign Ministry, in Moscow. The topic of the seminar was the restoration of Fort Elizabeth, a Russian fort built on the island of Kaua'i in 1817.

Leading the seminar was Dr. Vladimir Orlov, director of the PIR-CENTER. Notable participants included Deputy Foreign Minister Sergej Ryabkov, Head of the Department of Euro-pean Cooperation and specialist on nuclear and other disarmament negotiations, and Russian Ambassador to the United States, Anatoly Antonov. In a report to the Hawaiian Minister of Foreign Relations, it was noted that Dr. Orlov stated that the "annexation of Hawai'i by the US was of course illegal and everyone knows it."

XIII. UNITED NATIONS INDEPENDENT EXPERT DR. ALFRED DEZAYAS ON HAWAII

This educational exposure also prompted United Nations Independent Expert, Dr. Alfred deZayas, to send a communication, dated 25 February 2018, to members of the State of Hawai'i Judiciary stating that the Hawaiian Kingdom is an occupied State and that the 1907 Hague Convention, IV, and the 1949 Geneva Convention, IV, must be complied with.¹²⁹ In that communication, 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

¹²⁸ Keanu Sai, *The Impact of the U.S. Occupation on the Hawaiian People NEA Today* (13 Oct. 2018) (online at <http://neatoday.org/2018/10/13/us-occupation-of-hawaii/>).

¹²⁹ *Letter from U.N. Independent Expert Dr. deZayas to Members of the Judiciary of the State of Hawai'i* (25 Feb. 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

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 Independent Expert clearly stated the application of “the Hague and Geneva Conventions” requires the administration of Hawaiian Kingdom law, not United States law, in Hawaiian territory. The United States’ noncompliance to international humanitarian law has created the façade of an incorporated territory of the United States called the State of Hawai‘i. As a *de facto* proxy for the United States that maintains effective control over Hawaiian territory, the State of Hawai‘i is a non-State actor. *The War Report 2017* refers to such entities as an armed non-state actor (ANSA) “operating in another state when that support is so significant that the foreign state is deemed to have ‘overall control’ over the actions of the ANSA.”¹³⁰ Whether by proxy or not, the United States is the occupying State and “as the right of an occupant in occupied territory is merely a right of administration, he may [not] annex it.”¹³¹

The ICRC Commentary on Article 47 also emphasize, “[i]t will be well to note that the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty.”¹³² Therefore, according to the ICRC, “an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims to have annexed all or part of an occupied territory.”¹³³ As there is no treaty of peace between the Hawaiian Kingdom and the United States, the belligerent occupation continues.

To understand what the UN Independent Expert called a “fraudulent annexation,” attention is drawn to the floor of the United States Senate on 4 July 1898, where Senator William Allen of Nebraska stated:

The Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or

¹³⁰ Annyssa Bellal, *The War Report: Armed Conflicts in 2017* 22 (2018) (online at <https://www.geneva-academy.ch/joomla-tools-files/docman-files/The%20War%20Report%202017.pdf>).

¹³¹ Oppenheim, *International Law*, vol. II, 237 (6th ed., 1921).

¹³² Pictet, 276.

¹³³ *Id.*, 276.

operation beyond the territorial limits of the government in which they are promulgated. In other words, the Constitution and statutes can not reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property therein.¹³⁴

Two years later, on 28 February 1900, during a debate on senate bill no. 222 that proposed the establishment of the Territory of Hawai‘i, Senator Allen reiterated, “I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void.”¹³⁵ In response, Senator John Spooner of Wisconsin, a constitutional lawyer, dismissively remarked, “that is a political question, not subject to review by the courts.”¹³⁶ Senator Spooner explained, “[t]he Hawaiian Islands were annexed to the United States by a joint resolution passed by Congress. I reassert...that that was a political question and it will never be reviewed by the Supreme Court or any other judicial tribunal.”¹³⁷

Senator Spooner never argued that congressional laws have extra-territorial effect. Instead, he said this issue would never see the light of day because United States courts would not review it due to the *political question* doctrine. This is strictly an American doctrine concerning issues that are so politically charged that federal courts could choose not to hear the issue. The doctrine allows federal courts to invoke a political question if the issue before the court challenges the way in which the executive uses its power in foreign relations. It is a doctrine invoked by American courts where the question before the court is deemed political and not legal, and therefore the courts should refuse to hear the case. It is a controversial doctrine in the United States. This exchange between the two Senators is also illuminating as it reveals an intent to conceal an internationally wrongful act. The Territory of Hawai‘i is the predecessor of the State of Hawai‘i.

It would take another ninety years before the U.S. Department of Justice addressed this issue. In a 1988 legal opinion, the Office of Legal Counsel (“OLC”) examined the purported annexation of the Hawaiian Islands by a congressional joint resolution. Douglas Kmiec, Acting Assistant Attorney General, authored this opinion for Abraham Sofaer, legal advisor to the U.S. Department of State. After covering the limitation of congressional authority, which, in effect, confirmed the statements made by Senator Allen, the OLC found that it is “unclear which constitutional power

¹³⁴ 31 Cong. Rec. 6635 (1898).

¹³⁵ 33 Cong. Rec. 2391 (1900).

¹³⁶ *Id.*

¹³⁷ *Id.*

Congress exercised when it acquired Hawaii by joint resolution.”¹³⁸ The federal government views opinions by the OLC as authoritative, and, therefore, the 1988 legal opinion is an admission against interest and precludes the federal government from claiming that the Hawaiian Islands were annexed by a joint resolution of Congress.

XIV. RIGHTS OF PROTECTED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW

According to the International Committee of the Red Cross, the “Geneva Conventions and their Additional Protocols form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. They protect people not taking part in hostilities and those who are no longer doing so.”¹³⁹ Coverage of the Geneva Conventions also apply to occupied territories where there is no actual fighting.

Under international humanitarian law, a protected person is a legal term that refers to specific protections afforded to civilians in occupied territory whose rights are protected under the 1949 Geneva Convention, IV (“Fourth Geneva Convention”), and its Additional Protocol. According to Article 4 of the Fourth Geneva Convention, “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of [an] occupation, in the hands of [an] Occupying Power of which they are not nationals.” Protected persons also include public officials of the occupied State. As such, they “enjoy the same safeguards under the Convention as any other protected person.”¹⁴⁰

Under this definition, civilians who possess the nationality of the occupying State, while they reside in the territory of the occupied State, are not protected under the Geneva Convention. Article 147 of the Fourth Geneva Convention provides a list of grave breaches, called war crimes, which would apply to protected persons as defined under Article 4.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury

¹³⁸ Douglas W. Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea,” 12 *Op. O.L.C.*, 238, 252 (1988) (online at https://hawaiiankingdom.org/pdf/1988_Opinion_OLC.pdf).

¹³⁹ The Geneva Conventions of 1949 and their Additional Protocols, *International Committee of the Red Cross* (online at <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>).

¹⁴⁰ Pictet, 303.

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 [an occupying] 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.

Fifty years later, however, this definition of protected persons was expanded to include the citizenry of the occupying State. This was an evolution of international criminal law ushered in by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). The case was the prosecution and conviction of Duško Tadić who was a Bosnian Serb. After being arrested in Germany in 1994, he faced among other counts, twelve counts of grave breaches of the 1949 Geneva Convention, IV. On 7 May 1997, Tadić was convicted by the trial court on 11 counts that did not include the counts of grave breaches of the Geneva Convention.

In its judgment, the trial court found that Tadić was not guilty of 11 counts of grave breaches because the civilian victims possessed the same Yugoslavian citizenship as Tadić who represented the occupying Power in the war. The prosecutors appealed this decision and it was not only reversed by the Appeal Chamber of the ICTY, but it also expanded the definition of protected persons in occupied territory under international humanitarian law. The Appeals Chamber concluded:

[The] primary purpose [of Article 4] is to ensure the safeguards afforded by the [Geneva] Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not their legal characterisation as such. ... Hence, even if in the circumstances of the case the perpetrators and the victim were to be regarded as possessing the same nationality, Article 4 [Geneva Convention] would still be applicable.¹⁴¹

This decision is an important development in international criminal law and has a profound impact on the occupation of the Hawaiian Kingdom. Up until 1999, protected persons in the Hawaiian Islands excluded American citizens. But since 1999, the *Tadić* case has expanded protection to citizens of the occupying State who reside in the territory of an occupied State. The operative word is no longer nationality or citizenship, but rather allegiance that would apply to all persons in an occupied State. This distinction is not to be confused with an oath of allegiance, but rather the

¹⁴¹ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, para. 168 and 169 (15 July 1999).

law of allegiance that applies over everyone whether they signed an oath or not. Hawaiian law only requires an oath of allegiance for government employees.

Under Hawaiian Kingdom law allegiance is found in the Hawaiian Penal Code under Chapter VI for the crime of treason.¹⁴²

2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.

By expanding the scope and application of protected persons to American citizens residing in the Hawaiian Kingdom, they, along with all other nationalities of foreign States, as well as Hawaiian subjects, are all afforded equal protection under the Fourth Geneva Convention.

XV. THE STATE OF HAWAI‘I AND ITS COUNTIES ARE A PRIVATE ARMED FORCE

When the United States assumed control of its installed regime, under the new heading of the Territory of Hawai‘i in 1900, and later the State of Hawai‘i in 1959, it surpassed “its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts.”¹⁴³ The legislation of every State, including the United States by its Congress, are not sources of international law.

Since Congressional legislation has no extraterritorial effect, it cannot unilaterally establish governments in the territory of a foreign State. 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.”¹⁴⁴ 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.”¹⁴⁵

¹⁴² Chapter VI, Penal Code of the Hawaiian Kingdom (online at https://hawaiiankingdom.org/penalcode/pdf/Penal_Code.pdf).

¹⁴³ Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

¹⁴⁴ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

¹⁴⁵ *The Apollon*, 22 U.S. 362, 370 (1824).

Therefore, the State of Hawai‘i cannot claim to be a government because its only claim to authority derives from Congressional legislation that has no extraterritorial effect. As such, *jus in bello* defines the State of Hawai‘i as an organized armed group acting for and on behalf of the United States.¹⁴⁶

“[O]rganized armed groups ... are under a command responsible to that party for the conduct of its subordinates.”¹⁴⁷ According to Henckaerts and Doswald-Beck, “this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command,”¹⁴⁸ and that this “definition of armed forces builds upon earlier definitions contained in the Hague Regulations and the Third Geneva Convention which sought to determine who are combatants entitled to prisoner-of-war status.”¹⁴⁹ Article 1 of the 1907 Hague Convention, IV (“HC IV”), provides:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war.

Since the *Larsen* case, defendants that have appeared before the courts of this armed group have begun to deny the courts’ jurisdiction. In a contemptible attempt to quash this defense, the Supreme Court of the State of Hawai‘i in 2013 responded to a defendant, who “contends that the courts of the State of Hawai‘i lacked subject matter jurisdiction over his criminal prosecution because the defense proved the existence of the Hawaiian Kingdom and the illegitimacy of the State of Hawai‘i government,”¹⁵⁰ with “whatever may be said regarding the lawfulness” of its origins, “the State of Hawai‘i ... is now, a lawful government.”¹⁵¹

The courts of the State of Hawai‘i, to include its Supreme Court, are not regularly constituted under international humanitarian law. Common Article 3 of the 1949 Geneva Convention, IV (“GC IV”) provides that only

¹⁴⁶ Article 1, 1899 Hague Convention, II, and Article 1, 1907 Hague Convention, IV.

¹⁴⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I 14 (2009).

¹⁴⁸ *Id.*, 5.

¹⁴⁹ *Id.*

¹⁵⁰ *State of Hawai‘i v. Dennis Kaulia*, 128 Haw. 479, 486 (2013).

¹⁵¹ *Id.*, 487.

a “regularly constituted court” can pass judgment on an accused person.¹⁵² When a court is not regularly constituted, the proceedings that would lead to a judgment imposed by it would not only be extrajudicial but would constitute a war crime. According to Henckaerts and Doswald-Beck, a “court is regularly constituted if it has been established and organized in accordance with laws and procedures already in force in a country,”¹⁵³ which would be Hawaiian Kingdom law. In the absence of Hawaiian courts, United States military tribunals, also called Article II courts, would be lawful in territories occupied by the United States.¹⁵⁴

In addition, the absurdity of such a statement by the Court can be amplified when placed against the Louisiana Supreme Court’s 1953 decision in *King v. Moresi*. In his dissenting opinion Justice Moise stated, “[t]he maxim of law as old as Justinian—“*Quod ab initio non valet in tractu temporis non conualescit*”—That which was originally void does not by lapse of time become valid. A dead thing is dead. There can be no resurrection.”¹⁵⁵ Furthermore, Hawaiian Kingdom law states that “[w]hatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed,”¹⁵⁶ which is based on the maxim *actus regis nemini est damnosa*—the law will not work a wrong.

This fiat of the so-called highest court of the State of Hawai‘i has since been continuously invoked by prosecutors in criminal cases and plaintiffs in civil cases to avoid the undisputed and insurmountable factual and legal conclusions as to the continued existence of the Hawaiian Kingdom, as a subject of international law, and the illegitimacy of the State of Hawai‘i government. On this note, Marek explains that an occupier without title or sovereignty “must rely heavily, if not exclusively, on full and complete effectiveness.”¹⁵⁷

The laws and customs of war during occupation applies only to territories that come under the authority of either the occupier’s military and/or an occupier’s armed force, such as the State of Hawai‘i, and that the “occupation extends only to the territory where such authority has been established and can be exercised.”¹⁵⁸ According to Ferraro, “occupation—as a species of international armed conflict—must be determined solely on

¹⁵² Henckaerts and Doswald-Beck, 354.

¹⁵³ *Id.*, 355.

¹⁵⁴ David J. Bederman, “Article II Courts,” 44 *Mercer L. Rev.* 825, 826 (1992-1993).

¹⁵⁵ *King v. Moresi*, 64 So. 2d 841, 843 (1953).

¹⁵⁶ §8, *Civil Code*, Compiled Laws of the Hawaiian Kingdom (1884).

¹⁵⁷ Marek, 102.

¹⁵⁸ 1907 Hague Convention, IV, Article 42. See Part III, 320.

the basis of the prevailing facts.”¹⁵⁹ Legally speaking, effectiveness under the law of occupation does not equate to power but rather duties and obligations. As political science defines power as the ability to get someone or an entity to do something it would not normally do, the fiat by the State of Hawai‘i court is a reaction to the power of the evidence that the Hawaiian Kingdom continues to exist. This forced the court to defy the recognized maxim of law that time does not validate an illegality.

XVI. STATE OF HAWAI‘I V. LORENZO—THE CASE THAT BROUGHT DOWN THE STATE OF HAWAI‘I

One year after the United States Congress passed the joint resolution apologizing for the United States overthrow of the Hawaiian Kingdom government in 1993, an appeal was heard by the State of Hawai‘i Intermediate Court of Appeals that centered on a claim that the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Lorenzo*, the appellate court stated:

Lorenzo appeals, arguing that the lower court erred in denying his pretrial motion (Motion) to dismiss the indictment. The essence of the Motion is that the [Hawaiian Kingdom] (Kingdom) was recognized as an independent sovereign nation by the United States in numerous bilateral treaties; the Kingdom was illegally overthrown in 1893 with the assistance of the United States; the Kingdom still exists as a sovereign nation; he is a citizen of the Kingdom; therefore, the courts of the State of Hawai‘i have no jurisdiction over him. Lorenzo makes the same argument on appeal. For the reasons set forth below, we conclude that the lower court correctly denied the Motion.¹⁶⁰

While the appellate court affirmed the trial court’s judgment, it admitted “the court’s rationale is open to question in light of international law.”¹⁶¹ By not applying international law, the court concluded that the trial court’s decision was correct because Lorenzo “presented no factual (or legal) basis for concluding that the Kingdom [continues to exist] as a state in accordance with recognized attributes of a state’s sovereign nature.” Since 1994, the *Lorenzo* case became a precedent case that served as the basis for denying defendants’ motions to dismiss that claimed the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Fergerstrom*, the appellate court stated, “[w]e affirm that relevant precedent [in *State of Hawai‘i v. Lorenzo*],”¹⁶² and that defendants have an evidentiary burden that shows the Hawaiian Kingdom continues to exist.

¹⁵⁹ Tristan Ferraro, “Determining the beginning and end of an occupation under international humanitarian law,” 94 (885) *Int’l Rev. Red Cross* 133, 134 (Spring 2012).

¹⁶⁰ *State of Hawai‘i v. Lorenzo*, 77 Haw. 219, 220; 883 P.2d 641, 642 (1994).

¹⁶¹ *Id.*, 221, 643.

¹⁶² *State of Hawai‘i v. Fergerstrom*, 106 Haw. 43, 55; 101 P.3d 652, 664 (2004).

The Supreme Court, in *State of Hawai'i v. Armitage*, clarified the evidentiary burden that Lorenzo placed upon defendants. The court stated:

Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the Kingdom of Hawai'i "exists as a state in accordance with recognized attributes of a state's sovereign nature[.]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack jurisdiction over him or her.¹⁶³

What is profound is that if the appellate court did apply international law in its decision it would have confirmed the continued existence of the Hawaiian Kingdom as a State and ruled in favor of Lorenzo. As stated before, international law recognizes the difference between the State and its government, and that there is a presumption, as Crawford previously explained, that the State continues to exist despite its government being overthrown. In other words, all Lorenzo needed to provide was evidence that the Hawaiian Kingdom "did" exist as a State, which would then shift the burden on the prosecution to provide rebuttable evidence that the United States extinguished the Hawaiian State in accordance with recognized modes of extinction under international law.

The appellate court did acknowledge that Lorenzo, in fact, provided evidence in his motion to dismiss "that the [Hawaiian Kingdom] was recognized as an independent sovereign nation by the United States in numerous bilateral treaties."¹⁶⁴ In other words, the "bilateral treaties" were the evidence of Hawaiian statehood. Therefore, the appellate court erred in placing the burden on the defendant to provide evidence of the Kingdom's continued existence, when it should have determined from the trial records if the prosecution provided rebuttable evidence against the presumption of the Kingdom's continued existence as a State, which was evidenced by the "bilateral treaties." The prosecution provided no such evidence.

If, for the sake of argument, the State of Hawai'i argued before the trial court that the 1898 joint resolution of annexation extinguished Hawaiian statehood, it would be precluded from doing so under the rules of evidence because the United States Department of Justice's Office of Legal Counsel concluded in 1988 that it is "unclear which constitutional power Congress exercised when it acquired Hawaii by a joint resolution."¹⁶⁵ The opinion is an admission against interest, which is an out-of-court statement made by the federal government prior to the date of Lorenzo's trial that that would have bound the State of Hawai'i from claiming otherwise. Furthermore, a

¹⁶³ *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).

¹⁶⁴ *Lorenzo case*, 220, 642.

¹⁶⁵ Kmiec, 252.

congressional joint resolution is not a source of international law, and as such could not have affected Hawaiian statehood. According to the American Law Institute, a “rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or by derivation from general principles common to the major legal systems of the world.”¹⁶⁶

The significance of the *Lorenzo* case is that the appellate court, when international law is applied, answered its own question in the negative as to “whether the present governance system should be recognized,”¹⁶⁷ and that a “state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force.”¹⁶⁸ In other words, the State of Hawai‘i cannot be recognized as a State of the United States, which arose “as a result of a . . . use of armed force.” As stated before, President Cleveland concluded that the provisional government, which is the predecessor of the State of Hawai‘i, “owes its existence to an armed invasion by the United States.”¹⁶⁹ Therefore, a proper interpretation of *State of Hawai‘i v. Lorenzo* renders all courts of the State of Hawai‘i not regularly constituted, and that every judgment, order or decree that emanated from any court of the State of Hawai‘i is void.

As such, these decisions are subject to collateral attack, which is where a defendant has a right to impeach a decision previously made against him because the “court that rendered judgment lacked jurisdiction of the subject matter.”¹⁷⁰ While these decisions are subject to collateral attack, there is the problem as to what court is competent to receive a motion to set aside judgment because all courts of the State of Hawai‘i are not regularly constituted pursuant to *Lorenzo*. “If a person or body assumes to act as a court without any semblance of legal authority so to act and gives a purported judgment,” explains the American Law Institute, “the judgment is, of course, wholly void.”¹⁷¹ And according to Moore, “[c]ourts that act beyond . . . constraints act without power; judgments of courts lacking subject matter jurisdiction are void—not deserving of respect by other judicial bodies or by the litigants.”¹⁷² Furthermore, courts who were

¹⁶⁶ American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States*, §102 (1987).

¹⁶⁷ *Lorenzo case*, fn. 2.

¹⁶⁸ *Id.*

¹⁶⁹ Executive Documents, 454.

¹⁷⁰ Black’s Law, 1574.

¹⁷¹ American Law Institute, *Restatement of the Law Second, Judgments*, §7, comment f, 45 (1942).

¹⁷² Karen Nelson Moore, “Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments,” 66 *Cornell Law Review* 534, 537 (1981).

made aware of the American occupation prior to their decisions would have met the constituent elements of the war crime of depriving a protected person of a fair and regular trial.

XVII. SAI V. TRUMP—PETITION FOR WRIT OF MANDAMUS

On 25 June 2018, the author, on behalf of the Council of Regency, filed an emergency petition for a writ of mandamus against President Donald Trump with the United States District Court of the District of Columbia.¹⁷³

The petition sought an order from the Court to:

- a. Grant immediate mandamus relief enjoining Respondent Trump from acting in derogation of the [Hague Convention] IV, the [Geneva Convention] IV, international humanitarian laws, and customary international laws;
- b. Award Petitioner such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of Protected Persons' injuries during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, temporary and preliminary injunctions; and
- c. Enter a permanent injunction to prevent future violations of the HC IV, the GC IV, international humanitarian laws, and customary international laws by Respondent Trump.

The factual allegations of the petition were stated in paragraphs 79 through 205 under the headings *From a State of Peace to a State of War*, *The Duty of Neutrality by Third States*, *Obligation of the United States to Administer Hawaiian Kingdom laws*, *Denationalization through Americanization*, *The State of Hawai'i is a Private Armed Force*, *The Restoration of the Hawaiian Kingdom Government*, *Recognition De Facto of the Restored Hawaiian Government*, *War Crimes: 1907 Hague Convention, IV*, and *War Crimes: 1949 Geneva Convention, IV*.

On 11 September 2018, Judge Chutkan issued an order, *sua sponte*, dismissing the case as a political question.¹⁷⁴ On the very same day the U.S. Attorney for the District of Columbia filed a "Motion for Extension of Time to Answer in light of the order dismissing this action," but it was denied by minute order.¹⁷⁵ Reminiscent of Senator Spooner's statement in 1900 regarding the American courts and the political question for Hawai'i's annexation, Judge Chutkan stated, "[b]ecause Sai's claims

¹⁷³ *Sai v. Trump*, Petition for Writ of Mandamus (25 June 2018) (online at https://hawaiiankingdom.org/pdf/Petition_for_Mandamus.pdf).

¹⁷⁴ *Sai v. Trump*, Order (11 Sep. 2018) (online at: https://hawaiiankingdom.org/pdf/Order_Mandamus.pdf).

¹⁷⁵ *Sai v. Trump*, Minute Order (11 Sep. 2018) (online at https://hawaiiankingdom.org/pdf/Minute_Order_Mandamus.pdf).

involve a political question, this court is without jurisdiction to review his claims and the court will therefore DISMISS the Petition.”

When the federal court declined to hear the case because of the political question doctrine it wasn't because the case was without merit but rather “refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue.”¹⁷⁶ If the petition was without merit it would have been dismissed for “failure to state a claim upon which relief can be granted” under rule 12(b)(6) of the Federal Rules of Civil Procedure. Political questions, however, are dismissed under rule 12(b)(1) regarding subject matter jurisdiction.

In 2008, the same United States District Court for the District of Columbia, dismissed a case concerning Taiwan as a political question under Rule 12(b)(1) in *Lin v. United States*.¹⁷⁷ The federal court in its order stated that it “must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1).” When this case went on appeal, the D.C. Appellate Court underlined the modern doctrine of the political question, “[w]e do not disagree with Appellants’ assertion that we could resolve this case through treaty analysis and statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task.”¹⁷⁸

The significance in the Hawaiian Kingdom case is that the federal court accepted the allegations of facts in the petition as true but that subject matter jurisdiction lies in another branch of the United States government that being the executive branch. This may also explain why the U.S. Attorney sought to answer the petition in light of it being dismissed as a political question. From an international law perspective, the facts of the prolonged occupation are not in dispute and the petition sought to address the violations of the rights of protected persons under international humanitarian law.

The dismissal of the petition under the political question doctrine would satisfy the requirement to exhaust local remedies, which is a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.¹⁷⁹ Under this principle, the International Court of Justice in the *ELSI* case stated that “for an

¹⁷⁶ Cornell Law School, Legal Information Institute, *Political Question Doctrine* (online at https://www.law.cornell.edu/wex/political_question_doctrine).

¹⁷⁷ *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.S. 2008).

¹⁷⁸ *Lin v. United States*, 561 F.3d 506 (2009).

¹⁷⁹ Text of the Draft Articles on Diplomatic Protection (2006) 2 *Y.B. Int'l L. Comm'n* 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 1.

international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”¹⁸⁰ In the Hawaiian situation, this strict requirement must be balanced by the exception to the rule where the local remedies are “obviously futile,” “offer no reasonable prospect of success,” or “provide no reasonable possibility of effective redress.”¹⁸¹

XVIII. STATE OF HAWAI‘I OFFICIAL REPORTS WAR CRIMES

On 21 August 2018, State of Hawai‘i County of Hawai‘i Councilmember Jennifer Ruggles requested a legal opinion from the government’s attorney whether she has incurred criminal liability for committing war crimes.¹⁸² In a letter written by her attorney:

Council member Ruggles formally requests that you, in your capacity as the Office of Corporation Counsel to assure her that she is not incurring criminal liability under international humanitarian law and United States Federal law as a Council member for:

1. Participating in legislation of the Hawai‘i County Council that would appear to be in violation of Article 43 of the Hague Regulations and Article 64 of the Geneva Convention which require that the laws of the Hawaiian Kingdom be administered instead of the laws of the United States;
2. Being complicit in the collection of taxes, or fines, from protected persons that stem from legislation enacted by the Hawai‘i County Council, appear to be in violation of Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging;
3. Being complicit in the foreclosures of properties of protected persons for delinquent property taxes that stem from legislation enacted by the Hawai‘i County Council, which would appear to violate Articles 28 and 47 of the Hague Regulations and Article 33 of the Geneva Convention which prohibit pillaging, as well as in violation of Article 46 of the Hague Regulations and Articles 50 and 53 of the Geneva Convention where private property is not to be confiscated; and
4. Being complicit in the prosecution of protected persons for committing misdemeanors, or felonies, that stem from

¹⁸⁰ *Ellettronica Sicula S.P.A.* (ELSI), Judgment, I.C.J. Reports, para. 59 (1989).

¹⁸¹ Diplomatic Protection, art. 15, cmt. 2.

¹⁸² Letter from Laudig to Kamelamela (21 Aug. 2018) (online at <https://jenruggles.com/wp-content/uploads/Stephen-Laudigs-Letter-to-Corporation-Counsel-8-21-18.pdf>).

legislation enacted by the Hawai'i County Council, which would appear to violate Article 147 of the Geneva Convention where protected persons cannot be unlawfully confined, or denied a fair and regular trial by a tribunal with competent jurisdiction.

In his response letter dated 22 August 2018, Corporation Counsel Kamelamela stated:

At the Council Committee meeting held on Monday, August 21, 2018 at the West Hawai'i Civic Center, you announced that you "will be refraining from participating in the proposing and enacting of legislation" until county lawyers will assure you in writing that you will not incur "criminal liability under international humanitarian law and U.S. law."

In response to your inquiry, we opine that you will not incur any criminal liability under state, federal and international law. See Article VI, Constitution of the United States of America (international law cannot violate federal law).¹⁸³

According to Ruggles, Corporation Counsel's response was unacceptable. In a follow up letter, by her attorney, dated 28 August 2018, he concluded:

Until you provide Council member Ruggles with a proper legal opinion responding to the statement of facts in that she has not incurred criminal liability for violating the 1907 Hague Regulations and the 1949 Geneva Convention, IV, I have advised my client that she must continue to refrain from legislating. For your reference, I am attaching the aforementioned legal opinions by Deputy Assistant Attorney General John Yoo [for you] and your office.¹⁸⁴

Corporation Counsel refused to respond to this letter, which prompted Ruggles to become a whistleblower. She began sending notices to perpetrators of war crimes throughout the State of Hawai'i. Under United States federal law, war crimes are defined as violations of the 1907 Hague Regulations, the 1949 Geneva Conventions—18 U.S.C. §2441, as well as under customary international law. Her story was broadcasted on

¹⁸³ Letter from Kamelamela to Ruggles (22 Aug. 2018) (online at <http://jenruggles.com/wp-content/uploads/Kamelamela-Response-Letter-2018-08-22.pdf>).

¹⁸⁴ Letter from Laudig to Kamelamela (28 Aug. 2018) (online at http://jenruggles.com/wp-content/uploads/Laudig_Ltr_to_Corp_Counsel_8.28.2018_.pdf).

television by KGMB news,¹⁸⁵ Big Island Video News,¹⁸⁶ and published by the British news outlet *The Guardian*.¹⁸⁷

Ruggles reported war crimes committed by the Queen's Hospital, in violation of 18 U.S.C. §2441 and §1091, and war crimes committed by thirty-two Circuit Judges of the State of Hawai'i, in violation of 18 U.S.C. §2441.¹⁸⁸ She also reported additional war crimes of pillaging committed by State of Hawai'i tax collectors, in violation of §2441,¹⁸⁹ the war crime of unlawful appropriation of property by the President of the United States and the Internal Revenue Service, in violation of §2441,¹⁹⁰ and the war crime of destruction of property by the State of Hawai'i on the summit of Mauna Kea, in violation of §2441.¹⁹¹

XIX. NATIONAL LAWYERS GUILD CALLS UPON THE UNITED STATES TO
IMMEDIATELY COMPLY WITH INTERNATIONAL HUMANITARIAN LAW IN
ITS ILLEGAL OCCUPATION OF THE HAWAIIAN ISLANDS

The actions taken by Ruggles prompted the International Committee of the National Lawyers Guild, at its weekend retreat in San Francisco in March 2019, to form the Hawaiian Kingdom Subcommittee.¹⁹² Established in 1937, the National Lawyers Guild is an American bar association of lawyers and legal persons across the United States. According to the Guild's International Committee website:

The Hawaiian Kingdom Subcommittee provides legal support to the movement demanding that the U.S., as the occupier,

¹⁸⁵ KGMB News (24 Sep. 2018) (online at <https://www.youtube.com/watch?v=-YiXpiwVHr0>).

¹⁸⁶ Big Island Video News (25 Sep. 2018) (online at <http://www.bigislandvideonews.com/2018/09/25/video-jen-ruggles-holds-community-meeting-on-war-crimes/>).

¹⁸⁷ Breena Kerr, "Hawaii politician stops voting, claiming islands are 'occupied sovereign country,'" *The Guardian* (30 Nov. 2018) (online at <https://www.theguardian.com/us-news/2018/nov/29/hawaii-politician-jennifer-ruggles-sovereign-country>).

¹⁸⁸ Letter from Ruggles to Kaul (11 Oct. 2018) (online at https://jenruggles.com/wp-content/uploads/Reporting_to_FBI_10.11.18.pdf).

¹⁸⁹ Letter from Ruggles to State of Hawai'i officials (15 Nov. 2018) (online at <https://jenruggles.com/wp-content/uploads/Ltr-to-State-of-HI-re-Taxes.pdf>).

¹⁹⁰ Letter from Ruggles to Trump (28 Nov. 2018) (online at https://jenruggles.com/wp-content/uploads/Ltr_to_President_Trump.pdf).

¹⁹¹ Letter from Ruggles to Ige (3 Dec. 2018) (online at <https://jenruggles.com/wp-content/uploads/Ltr-to-Gov.-and-Sup.-Ct.pdf>).

¹⁹² "NLG launches new Hawaiian Kingdom Subcommittee," *NLG International Committee* (online at <https://nlginternational.org/2019/04/nlg-launches-new-hawaiian-kingdom-subcommittee/>).

comply with international humanitarian and human rights law within Hawaiian Kingdom territory, the occupied. This support includes organizing delegations and working with the United Nations, the International Committee of the Red Cross, and NGOs addressing U.S. violations of international law and the rights of Hawaiian nationals and other Protected Persons.¹⁹³

At its annual conference held in Durham, North Carolina, from 16-20 October 2019, a resolution was submitted by the Hawaiian Kingdom Subcommittee to be voted upon by the entire Guild's membership. The resolution stated, "that the National Lawyers Guild calls upon the United States of America immediately to begin to comply with international humanitarian law in its prolonged and illegal occupation of the Hawaiian Islands." The Guild's members were notified on 19 December 2019, that the resolution passed by a vote of 78.37%—yes, 4.61%—no, and 17.02%—abstain. The National Lawyers Guild also "supports the Hawaiian Council of Regency...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."¹⁹⁴ The resolution provided that:

The Hawaiian Kingdom Subcommittee will take the lead in implementing this resolution. The National Office will support the implementation by: sharing resources on this topic created by NLG with members and the public, link the resolution to the NLG website, email the resolution to members, circulate the resolution on social media, send the resolution to relevant press, promote and highlight the Subcommittee's work on this issue, provide logistical support for a webinar on this topic, and highlight work around the United States' immediate compliance with international humanitarian law and human rights law in its long and illegal occupation of the Hawaiian Islands in Guild Notes and NLG Review.¹⁹⁵

XX. UNLAWFUL PRESENCE OF FOREIGN CONSULATES

The first foreign agent to be appointed to the Hawaiian Kingdom was John

¹⁹³ "Hawaiian Kingdom Subcommittee," *NLG International Committee* (online at <https://nlginternational.org/hawaiian-kingdom-subcommittee/>).

¹⁹⁴ NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands, 13 Jan. 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/>).

¹⁹⁵ National Lawyers Guild Resolution "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" (2019) (online at https://www.hawaiiankingdom.org/pdf/NLG_2019_Hawaiian_Reso.pdf.)

Coffin Jones in 1820, as “Agent of the United States for Commerce and Seamen,” a position similar to a consular agent. In 1824, Great Britain appointed Richard Charlton as “Consul for the Sandwich, the Society and Friendly Islands [Tonga],” and both Jones and Charlton formed the Consular Corps for the Hawaiian Kingdom. France soon joined the Corps with its appointment of Jules Dudoit as French Consul in 1837. After Hawaiian independence was achieved in 1843, the Consular Corps grew with foreign missions from Denmark, Bremen, Prussia, Sweden and Norway, Peru, the Netherlands, the Austro-Hungarian Empire, and Japan.

In 1893, there existed five legations from France, United Kingdom, Japan, Portugal and the United States as well as fifteen consulates from the United States, Italy, Chile, Germany, Sweden and Norway, Denmark, Peru, Belgium, Netherlands, Spain, Austria-Hungary, Russia, Great Britain, Mexico and China. Italy’s consul, F.A. Schaefer, served as Dean of the Consular Corps in 1893. According to Hawaiian Kingdom law:

§458. It shall be incumbent upon all foreign consuls-general, consuls, vice-consuls, and consular agents, to present their commissions through the diplomatic agents of their several nations, if such exist, and if not, direct to the Minister of Foreign Affairs, who, if they are found to be regular, shall, unless otherwise directed by the King, give them exequatur under the seal of his department; and it shall be the duty of said minister to cause all such exequatur to be published in the Government Gazette.

§459. No foreign consul, or consular or commercial agent shall be authorized to act as such, or entitled to recover his fees and perquisites in the courts of this Kingdom, until he shall have received his exequatur.

§460. It shall be incumbent upon every diplomatic agent, coming accredited to the King, to notify the Minister of Foreign Affairs of his arrival, and to request an audience of the King, for the purpose of presenting his credentials. Said minister, upon receipt of such notice, with copy of his credentials, shall take His Majesty’s orders in regard thereto, and communicate the same to such agent.

In 1893, all foreign missions were received by the Hawaiian Kingdom government and were in good standing. The foreign missions today, however, have not been received and granted exequatur by the Hawaiian Kingdom government. Instead, they all have been granted exequatur by the United States. The granting of exequatur by the United States is an administrative measure “by the occupying power that go beyond those required by what is necessary for military purposes of the occupation.”¹⁹⁶ The granting of exequatur is an administrative function derived from the sovereignty of the Hawaiian Kingdom and not the sovereignty of the

¹⁹⁶ Schabas, 157.

United States. Once the members of the Consular Corps become aware “of the factual circumstances that established the existence of an armed conflict,” they are duty bound to not “recognize as lawful a situation created by a serious breach...nor render aid or assistance in maintaining that situation,” and “shall cooperate to bring to an end through lawful means any serious breach [by a State of an obligation arising under a peremptory norm of general international law].”

These foreign consuls include from the Americas and Africa: Brazil, Chile, Mexico and Morocco; from Asia: Bangladesh, India, Japan, Korea, Nepal, Philippines, Sri Lanka and Thailand; from Europe: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, and Switzerland; and from Oceania: Australia, Kiribati, Marshall Islands, Micronesia, New Zealand, Samoa and Tonga. The present Dean of the Consular Corps is Germany’s Denis Salle.

The Hawaiian Kingdom also maintains treaties with Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Luxembourg, the Netherlands, Portugal, Russia, Samoa, Spain, Switzerland, Sweden and Norway, and the United States, all of which have not been cancelled according to the terms of the treaties.¹⁹⁷

XXI. RECOGNITION OF THE STATE OF HAWAI‘I AND ITS COUNTIES AS GOVERNMENTS UNDER INTERNATIONAL LAW

It is recognized that a State has a centralized government that exercises effective control over a population within its defined territory. However, during belligerent occupation when an effective government of the occupied State has been overthrown, the law of occupation mandates the occupying State, once it is in effective control of territory as defined under Article 42 of the Hague Regulations, shall administer the laws of the occupied State as prescribed under Article 43. Section 358, U.S. Army Field Manual 27-10, states:

Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.

In order to administer the laws of the occupied State, the occupying State must establish a military government, which “is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions

¹⁹⁷ Part III, 236-310.

on account of the military occupation.”¹⁹⁸ As to the nature of this government, it “is immaterial whether the government over an [occupied] territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.”¹⁹⁹

In the summer of 1943 during the Second World War, British Prime Minister Winston Churchill sent a telegram to U.S. President Franklin Roosevelt regarding the President’s recognition of the French Committee of National Liberation (“FCNL”) asking, “[w]hat does recognition mean? One can recognize a man as an Emperor or as a grocer. Recognition is meaningless without a defining formula.”²⁰⁰ The FCNL was not formed in accordance with French law that stood before the German invasion of France as other governments in exile had done but was rather an organization of unified leadership established by two French generals in order to fight the Nazis. A careful examination of President Roosevelt’s recognition specifically addresses authority and not government. Talmon points out:

Thus, when on 26 August 1943 the United States recognized the [FCNL] ‘as administering those French overseas territories which acknowledges its authority’, it was pointed out that ‘this statement does not constitute recognition of a government of France or of the French Empire by the United States. It does not constitute recognition of the French Committee of National Liberation as functioning within specific limitations during the war.’²⁰¹

The FCNL eventually became the provisional government of outlying French territories that were liberated and eventually became the provisional government of the French Republic. In the Hawaiian situation, the case of recognition is reversed. The State of Hawai‘i and its County governments are not governments established in exile but rather “owes its existence to an armed invasion by the United States.” As such, the State of Hawai‘i and its predecessors—the Territory of Hawai‘i (1900-1959), the Republic of Hawai‘i (1894-1900) and the provisional government (1893-1894), have been carrying out governmental functions within the territory of the Hawaiian Kingdom without lawful authority.

According to Henkin, “[a] regime that governs in fact is a Government and

¹⁹⁸ U.S. Army FM 27-10, section 362.

¹⁹⁹ *Id.*, section 368.

²⁰⁰ Winston Churchill, *The Second World War*, v. 137 (1954).

²⁰¹ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 25 (1998).

must be treated as such.”²⁰² Through the lens of international humanitarian law, Henkin’s position on governance can be understood with more coherence. As Henkin’s theory of governance relies on effectiveness, effectiveness is at the core of Article 42 of the Hague Regulations. United States practice provides that a military government is not limited to the U.S. military, but to any armed force of the occupying State that is in effective control of occupied territory. U.S. Army Field Manual FM 27-5 provides that an “armed force in territory other than that of [the occupied State] has the duty of establishing military government when the government thereof is absent or unable to maintain order.”²⁰³ What distinguishes the U.S. military stationed in the Hawaiian Islands from the State of Hawai‘i, in light of the laws and customs of war during occupation, is that the State of Hawai‘i, as an armed force, is in effective control of the majority of Hawaiian territory. There are 118 U.S. military sites occupying 230,929 acres of the Hawaiian Islands, which is only 20% of the total acreage of Hawaiian territory.²⁰⁴

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

Whereas, in order to account for the present circumstances of the prolonged illegal occupation of the Hawaiian Kingdom and to provide a temporary measure of protection for its territory and the population residing therein, the public safety requires action to be taken in order for the State of Hawai‘i and its Counties to begin to comply with the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby recognize the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law;

And, We do hereby further proclaim that the State of Hawai‘i and its Counties shall preserve the sovereign rights of the

²⁰² Louis Henkin, *International Law: Politics, Values and Functions* 32 (1990).

²⁰³ *United States Army and Navy Manual of Military Government and Civil Affairs*, FM 27-5 2 (1943).

²⁰⁴ U.S. Department of Defense’s Base Structure Report (2012) (online at <http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf>.)

Hawaiian Kingdom government, and to protect the local population from exploitation of their persons and property, both real and personal, as well as their civil and political rights under Hawaiian Kingdom law.²⁰⁵

The State of Hawai‘i and its Counties, under the laws and customs of war during occupation, can now serve as the administrator of the “laws in force in the country,” which includes the 2014 decree of provisional laws by the Council of Regency in accordance with Article 43. “During the occupation,” according to Benvenisti, “the ousted government would often attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant’s authority or both. One way to accomplish such goals is to legislate for the occupied population.”²⁰⁶ Furthermore, the “occupant should give effect to the sovereign’s new legislation as long as it addresses those issues in which the occupant has no power to amend the local laws, most notably in matters of personal status.”²⁰⁷ The decree of 10 October 2014, stated:

Now, therefore, We, the acting Council of Regency of the Hawaiian Kingdom, serving in the absence of the Monarch and temporarily exercising the Royal Power of the Kingdom, do hereby acknowledge that acts necessary to peace and good order among the citizenry and residents of the Hawaiian Kingdom, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government, but acts in furtherance or in support of rebellion or collaborating against the Hawaiian Kingdom, or intended to defeat the just rights of the citizenry and residents under the laws of the Hawaiian Kingdom, and other acts of like nature, must, in general, be regarded as invalid and void;

And, We do hereby proclaim that from the date of this proclamation all laws that have emanated from an unlawful legislature since the insurrection began on July 6, 1887 to the present, to include United States legislation, shall be the provisional laws of the Realm subject to ratification by the Legislative Assembly of the Hawaiian Kingdom once assembled, with the express proviso that these provisional laws do not run contrary to the express, reason and spirit of the laws of the Hawaiian Kingdom prior to July 6, 1887, the

²⁰⁵ Council of Regency, Proclamation Recognizing the State of Hawai‘i and its Counties (3 June 2019) (online https://www.hawaiiakingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf).

²⁰⁶ Eyal Benvenisti, *The International Law of Occupation* 104 (2nd ed., 2012).

²⁰⁷ *Id.*

international laws of occupation and international humanitarian law, and if it be the case they shall be regarded as invalid and void;

And, We do hereby further proclaim that the currency of the United States shall be a legal tender at their nominal value in payment for all debts within this Kingdom pursuant to *An Act To Regulate the Currency* (1876).²⁰⁸

XXII. LIST OF WAR CRIMES UNDER CUSTOMARY LAW COMMITTED IN THE HAWAIIAN KINGDOM

The State of Hawai‘i, however, has yet to implement the 2014 decree of the Council of Regency. Without implementing the decree, all commercial entities created by the State of Hawai‘i, *e.g.* corporations and partnerships, and all conveyances of real estate, would simply evaporate. Until the State of Hawai‘i and its Counties begin to comply with international humanitarian law, war crimes continue to be committed with impunity.

In his legal opinion for the Royal Commission of Inquiry, Schabas identified the following war crimes being committed in the Hawaiian Kingdom together with the necessary elements that would constitute criminal culpability. This includes *mens rea* and *actus reus*.²⁰⁹

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

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international law;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”

Elements of the war crime of usurpation of sovereignty during occupation

1. The perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.

²⁰⁸ Council of Regency, Proclamation of Provisional Law (10 Oct. 2014), (online https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf).

²⁰⁹ Schabas, 167-169.

2. The perpetrator was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

Elements of the war crime of compulsory enlistment

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

Elements of the war crime of compulsory enlistment

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

Elements of the war crime of denationalization

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

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

Elements of the war crime of pillage

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

Elements of the war crime of confiscation or destruction of property

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

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

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

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

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons in the occupied State to another State or location, including the occupying State, or to another location within the occupied territory, by expulsion or coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct took place in the context of and was associated with an occupation resulting from international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of the armed conflict and subsequent occupation.

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

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

XXIII. CONCLUSION

On 19 January 2017, the Hawaiian government and Lance Larsen entered into a Special Agreement to form an international commission of inquiry. As proposed by the Tribunal, both Parties agreed to the rules provided under Part III—*International Commissions of Inquiry* (Articles 9-36), Hague Convention, I.²¹⁰ In what appears to be obstruction of these fact-finding proceedings by the PCA Secretary General, Hugo H. Siblesz, a complaint was filed in 2017 by the Council of Regency with one of the member States of the PCA's Administrative Council at its embassy in The Hague, Netherlands.²¹¹ The name of the State is being kept confidential at its request.

²¹⁰ Special Agreement (19 Jan. 2017) (online at [http://hawaiiankingdom.org/pdf/ICI_Agmt_19_17\(amended\).pdf](http://hawaiiankingdom.org/pdf/ICI_Agmt_19_17(amended).pdf)).

²¹¹ Complaint against PCA Secretary General Hugo H. Siblesz (8 Nov. 2017) (online at http://hawaiiankingdom.org/pdf/Hawaiian_Complaint_PCA_Admin_Council.pdf).

The unfortunate circumstances of these fact-finding proceedings prompted the Council of Regency to exercise its prerogative of the Crown and to not allow the unfounded actions taken by the PCA's Secretary General to compromise the sovereignty and authority of the Hawaiian Kingdom. Notwithstanding this international wrongful act by an intergovernmental organization, the Council of Regency established a Royal Commission of Inquiry ("Royal Commission") on 17 April 2019 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."²¹²

In accordance with Hawaiian administrative precedence in addressing crises, the Royal Commission 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." The author has been designated as Head of the Commission. Pursuant to Article 3—*Composition of the Royal Commission*, the author has been authorized to seek "recognized experts in various fields." According to Article 1:

2. The 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.
3. The 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.

The Royal Commission has 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

²¹² International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction- Memorandum submitted by the Secretary-General* 54 (1949).

self-determination by the Hawaiian citizenry, Professor Federico Lenzerini, University of Siena, Department of Political and International Studies.

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 writings of scholars.”²¹³ 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.”²¹⁴ 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.

The Royal Commission will provide periodic reports of its investigation of war crimes that meet the constituent elements of *mens rea* and *actus reus*, and human rights violations. These periodic reports of its investigations can be accessed at the website of the Royal Commission of Inquiry—<https://hawaiiankingdom.org/royal-commission.shtml>.

²¹³ Restatement Third, §103(2)(a).

²¹⁴ Black’s Law, 1313.