WAR CRIMINAL REPORT NO. 22-0005-1

Accomplice to the War Crime of Usurpation of Sovereignty during Occupation

THE ROYAL COMMISSION OF INQUIRY:

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

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HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 22-0005-1

GUILTY OF WAR CRIME:	HOLLY T. SHIKADA as Attorney General of the State of Hawaiʻi AMANDA J. WESTON as Deputy Attorney General of the State of Hawaiʻi
WAR CRIME COMMITTED:	*Accomplice to the usurpation of sovereignty during military occupation*
LOCATION OF WAR CRIME:	Islands of Hawaiʻi, Maui, Molokini, Kahoʻolawe, Molokai, Lānaʻi, Oʻahu, Kauaʻi, Lehua, Niʻihau, Kaʻula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll[1]

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry ("RCI") on the war crime of being an accomplice to the *usurpation of sovereignty during military occupation* under "particular" customary international law addresses the actions and ommissions taken by Holly T. Shikada as Attorney General of the State of Hawaiʻi ("Hawaiʻi Attorney General Shikada") and Amanda J. Weston as Deputy Attorney General of the State of Hawaiʻi ("Hawaiʻi Deputy Attorney General Weston") as the State of Hawaiʻi attorneys representing David Yutake Ige as Governor of the State of Hawaiʻi ("Governor Ige"), Ty Nohara as Commissioner of Securities of the State of Hawaiʻi ("Commissioner Nohara"), and Isaac W. Choy as Director of the Department of Taxation of the State of Hawaiʻi ("Director Choy") whose jurisdiction extends over the islands of Hawaiʻi, Maui, Molokini, Kahoʻolawe, Molokai, Lānaʻi, Oʻahu, Kauaʻi, Lehua, Niʻihau, Kaʻula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll. This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,[2] that has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.[3]

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

GOVERNING LAW

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

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

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[7] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[8] which coerced Queen Lili'uokalani, executive monarch of the

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

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

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

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

[8] *Id*.

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

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

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

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

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

[9] *Id*., 586.

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

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

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

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

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

property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[12]

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

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

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

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

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

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

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

combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

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

Temporal issues

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

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[18] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Since the RCI's establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or

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

the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

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

War Crime of Usurpation of Sovereignty during Military Occupation

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

The Annex to the report of the Commission on Responsibilities provides examples of acts deemed to constitute the crime of *usurpation of sovereignty during military occupation*. The Commission charged that in Poland the German and Austrian forces had "prevented the populations from organising themselves to maintain order and public security" and that they had "[a]ided the Bolshevist hordes that invaded the territories." It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany's enemies. In Serbia, the Bulgarian authorities had "[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian." It listed several other war crimes committed by Bulgaria in occupied Serbia: "Serbian law, courts and administration ousted;" "Taxes collected under Bulgarian fiscal regime;" "Serbian currency suppressed;" "Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library,

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

Serbian Legation at Sofia, French Consulate at Uskub);" "Prohibited sending Serbian Red Cross to occupied Serbia." It also charged that in Serbia the German and Austrian authorities had committed several war crimes: "The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.;" "Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna."[22]

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

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

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

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

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

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

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

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law."[30] The Court also concluded that "[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."[31] The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied Spanish territories. The Court

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[26] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).
[27] Conclusion 16—Particular customary international law, International Law Commission's Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).
[28] Commission of Responsibilities, Annex II, 58-79.
[29] Treaty of Versailles (1919), preamble.
[30] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[31] *The Apollon*, 22 U.S. 362, 370 (1824).

restated General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

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

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

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

Usurpation of sovereignty during military occupation came before the Permanent Court of Arbitration ("PCA") in 1999. In *Larsen v. Hawaiian Kingdom*, the Permanent Court of Arbitration convened an arbitral tribunal to resolve a dispute where Larsen, the claimant, alleged that the Government of the Hawaiian Kingdom, by its Council of Regency, the respondent, was liable "for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom."[34] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-

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[32] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

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

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

Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "Pursuant to article 47 of the 1907 Convention."[35] According to Bederman and Hilbert:

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

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

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

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

'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation."[39]

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

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

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

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

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

> With respect to the last two elements listed for the war crime of *usurpation of sovereignty during military occupation*:
>
> 1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

[39] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

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

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

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

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

Ascertaining the Mens Rea

The elements of war crimes describe their material scope of application as well as the accompanying mental elements. The first common element states that "[t]he conduct took place in the context of and was associated with [a military] occupation." This is to discern the conduct of war crimes from the conduct of ordinary crimes. As stated by the Appeals Chamber of the ICTY, "international humanitarian law applies from the initiation of … armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached."[41]

The second common element provides that the perpetrator must be aware of factual circumstances that established the existence of a military occupation. In order to meet this particular element of awareness, which in a normal situation would be obvious, further explanation is necessary given the unique situation of the American occupation and the devastating effect of the war crime of denationalization had upon the population of the Hawaiian Kingdom since the beginning of the twentieth century. This denationalization through *Americanization* led to the false belief that the Hawaiian Islands were not under a prolonged American occupation since 17 January 1893, but rather had become an incorporated territory of the United States in 1898 during the Spanish-American War. Chapter 2 of *The Royal Commission of Inquiry: Investigating War Crimes and*

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

Human Rights Violations in the Hawaiian Kingdom provides a comprehensive and historical narrative that rectifies this false information.[42]

In 1906, the United States, as the occupying State, implemented a policy of *Americanization* through its proxy the Territory of Hawai‘i, which was the successor of its puppet government called the provisional government who later changed its name to the so-called Republic of Hawai‘i.[43] Called *Programme for Patriotic Exercises*, the purpose of this policy was to obliterate the national consciousness of the Hawaiian Kingdom in the minds of school children throughout the islands in order to conceal the occupation in the minds of future generations. The purpose of this policy was to inculcate the children into believing they were nationals of the United States and to speak in the American English language. If the children spoke in the national language of Hawaiian, they were severely punished. Within three generations, the national consciousness and history of the Hawaiian Kingdom had become obliterated and awareness of the American occupation was erased. However, due to the decision of the Council of Regency, after returning from arbitral proceedings at the Permanent Court of Arbitration in December of 2000, to counter the effects of denationalization through academic research, publications and classroom instruction at the University of Hawai‘i at Manoa, the awareness of the American occupation soon became widespread.[44]

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

The element of awareness is not an outcome of a moral or legal conclusion on the part of the accused As the International Criminal Court's Pre-Trial Chamber stated, "it is not necessary for the perpetrator to have made the necessary value judgment to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions."[45] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai‘i and its Counties, because

[42] David Keanu Sai, "United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 97-121 (2020).
[43] *Id*., 114.
[44] Sai, "The Royal Commission of Inquiry," 29-33.
[45] *Prosecutor v. Germain Katanga et al.*, ICC Pre-Trial Chamber, Decision on the confirmation of charges, ICC-01/04-01/07, para. 305 (30 Sep. 2008).

in that case the knowledge of the existing "political" situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.[46]

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

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

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[46] Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, 107 Stat. 1510 (Public Law 103-150—Nov. 23, 1993) (online at https://hawaiiankingdom.org/pdf/1993_Apology_Resolution.pdf). See also Annexure 2, Arbitral Award, Larsen v. Hawaiian Kingdom, 119 International Law Reports 566, 610-615 (2001).
[47] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535-537 (2013).

> further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject matter jurisdiction of the International Criminal Court. According to the Lubanga Pre-Trial Chamber, dolus eventualis encompasses,
>
> Situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions, and (b) accepts such an outcome by reconciling himself of herself with it or consenting to it.
>
> *Dolus eventualis* must be distinguished from the common law notion of recklessness. The former requires not only that the perpetrator is aware of the risk, but that he accepts the possibility of its occurrence (volitive element). Unlike *dolus eventualis*, recklessness requires an affirmative aversion to the harmful side effect. This position is supported by a recent judgment of the International Criminal Tribunal for the Former Yugoslavia in which the *Orić* Trial Chamber agreed with the defense submission that intent does not include recklessness.
>
> *Dolus eventualis*, as perceived by Fletcher, is defined as 'a particular subjective posture toward the result. The tests … vary; the possibilities include everything from being indifferent to the result, to "being reconciled" with the result as a possible cost of attaining one's goal'. However, the present author is of the opinion that in the sphere of international criminal law *dolus eventualis* must be interpreted as a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence. This element of acceptance brings *dolus eventualis* within the contour of intention in its broader sense and ruled out the common law recklessness as a culpable mental state under Article 30 of the ICC Statute.[48]

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

APPLICATION

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

[48] *Id*.

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

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

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawaiʻi. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawaiʻi. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawaiʻi, the might of the United States does not make it right.[51]

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

> As a professor of international law, the former Secretary of the UN Human Rights Committee, co-author of book, The United Nations Human Rights Committee Case Law 1977-2008, and currently serving as the UN Independent Expert on the promotion of a

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[49] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawaiʻi* (1998).
[50] Tom Coffman, *Nation Within: The History of the American Occupation of Hawaiʻi* (2nd ed. 2009). Duke University Press published the second edition in 2016.
[51] *Id*., xvi.
[52] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawaiʻi (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).

> democratic and equitable international order, I have come to understand that the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[53] Among its positions statement, the "NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."[54]

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

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

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

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

> comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawaiʻi and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[55] In its resolution, the IADL also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also a non-governmental organization with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[56] In its joint letter, the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawaiʻi and its Counties comply with international humanitarian law as the administration of the Occupying State."

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

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.

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

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

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

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

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

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

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

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

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

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

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

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

Hawai‘i Attorney General Shikada and Hawai‘i Deputy Attorney General Weston, on behalf of Governor Ige, Commissioner Nohara, and Director Choy, in their pleading, provided no rebuttable evidence that the Hawaiian Kingdom ceases to exist as an occupied State. Instead, they argued jurisdictional grounds for their dismissal before a court that doesn't have jurisdiction in the first place. Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. As explained by Judge James Crawford, "[t]here is a presumption that the State continues to exist, with its right and obligations … despite a period in which there is … no effective government."[64] Judge Crawford further concludes that "[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State."[65] "If one were to speak about a presumption of continuity," explains Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[66]

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

The pleading written by Hawai‘i Attorney General Shikada and Hawai‘i Deputy Attorney General Weston is evidence of admission to the war crime of *usurpation of sovereignty during military occupation* and is "clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom." At the time of their admissions to the date of this report, Governor Ige, Commissioner Nohara, and Director Choy continued to enforce American laws throughout the islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i,

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[63] Memorandum in Support of Motion [ECF 262-1] (10 November 2022), 4-5 (online at https://hawaiiankingdom.org/pdf/[ECF_262-1]_Memo_in_Support%20_Filed_2022-11-10).pdf). .
[64] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[65] *Id*.
[66] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai's (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll with impunity.

Hawai‘i Attorney General Shikada and Hawai‘i Deputy Attorney General Weston have met the requisite elements of being an accomplice to the war crime of *usurpation of sovereignty during military occupation* and are guilty *dolus directus* of the first degree committed by Governor Ige, Commissioner Nohara, and Director Choy. "The required *mens rea* for accomplice liability 'is a form of two-dimensional fault' because 'it concerns not merely the defendant's awareness of the nature and effect of his own acts, but also his awareness of the intentions of the principle."[67] The term "guilty" is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[68] It is distinguished from a criminal prosecution where "guilty" is used by "an accused in pleading or otherwise answering to an indictment when he confesses to the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime."[69]

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

1. Governor Ige, Commissioner Nohara, and Director Choy imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.
2. Governor Ige, Commissioner Nohara, and Director Choy was aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. Governor Ige, Commissioner Nohara, and Director Choy was aware of factual circumstances that established the existence of the military occupation.

As neither Hawai‘i Attorney General Shikada nor Hawai‘i Deputy Attorney General Weston are heads of State, they have no claim to immunity from criminal jurisdiction and are subject to prosecution by foreign States under universal jurisdiction, if they are not prosecuted by the territorial State where the war crime has been committed. The severity of the war crime of *usurpation of sovereignty during military occupation* has led to, among other war crimes, the obliteration of the national consciousness of the Hawaiian Kingdom called the war crime of *denationalization*. According to Professor Schabas, "the offense of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the

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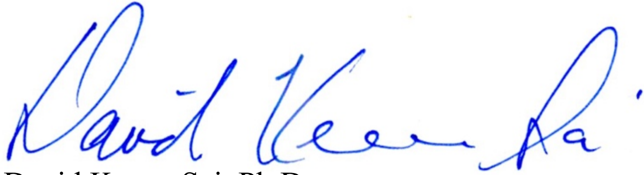
[67] Badar, 533.
[68] Black's Law 708 (6th ed. 1990).
[69] *Id*.

destruction of the national identity and national consciousness of the population."[70] The offense "would today be prosecuted as the crime against humanity of persecution and, in the most extreme cases, where physical 'denationalization' is involved, genocide."[71]



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20 November 2022

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