WAR CRIMINAL REPORT NO. 22-0009

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

THE ROYAL COMMISSION OF INQUIRY:

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

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

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

HAWAIIAN KINGDOM

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GUILTY OF WAR CRIMES: MARK E. RECKTENWALD, as Chief Justice, State of Hawai‘i Supreme Court
PAULA A. NAKAYAMA, as Associate Justice, State of Hawai‘i Supreme Court
SABRINA S. MCKENNA, as Associate Justice, State of Hawai‘i Supreme Court
RICHARD W. POLLACK, as Associate Justice, State of Hawai‘i Supreme Court
MICHAEL D. WILSON, as Associate Justice, State of Hawai‘i Supreme Court
TODD W. EDDINS, as Associate Justice, State of Hawai‘i Supreme Court
GLENN S. HARA, as Judge, State of Hawai‘i Third Circuit
GREG K. NAKAMURA, as Judge, State of Hawai‘i Third Circuit
CHARLES R. PRATHER, as Attorney for Deutsche Bank National Trust Company and Wells Fargo Bank
SOFIA M. HIROSANE, as Attorney for Deutsche Bank National Trust Company and Wells Fargo Bank
DARYL Y. DOBAYASHI, as Investigator for State of Hawai‘i Supreme Court Office of Disciplinary Counsel
JAMES E. EVERS, as Attorney for State of Hawai‘i Department of Commerce and Consumer Affairs
JOSIAH K. SEWELL, as Investigator for State of Hawai‘i Supreme Court Office of Disciplinary Counsel
CLIFFORD L. NAKEA, as Chairperson for State of Hawai‘i Supreme Court Disciplinary Board Chair
BRADLEY R. TAMM, as Chief Disciplinary Counsel for State of Hawai‘i Supreme Court Office of Disciplinary Counsel
ALANA L. BRYANT, as Deputy Chief Disciplinary Counsel for State of Hawai‘i Supreme Court Office of Disciplinary Counsel

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

LOCATION OF WAR CRIME: Islands Hawai‘i and O‘ahu

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry ("RCI") on the war crime of *usurpation of sovereignty during military occupation* under "particular" customary international law and the war crime of *deprivation of fair and regular trial* addresses the actions and ommissions taken by Mark E. Recktenwald, Paula A. Nakayama, Sabrina S. McKenna, Richard W. Pollack, Michael D. Wilson, Todd W. Eddins, Glenn S. Hara, Greg K. Nakamura, Charles Prather, Sofia M. Hirosane, Daryl Y. Dobayashi, James E. Evers, Josiah K. Sewell, Clifford L. Nakea, Bradley R. Tamm, and Alana L. Bryant. Perpetrators are members of the State of Hawai'i Judiciary.

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."[1] This "rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general."[2]

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*,[3] 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.[4]

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

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[1] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).
[2] *Id*., 608.
[3] 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).
[4] 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).
[5] The Royal Commission of Inquiry's governing law as to war crimes under customary international law is drawn from Professor William Schabas' legal opinion on war crimes. See William Schabas, "War Crimes Related to the

United States. 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."[6] 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."[7]

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops "supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies."[8] President Grover Cleveland determined that the invasion "upon the soil of Honolulu was … an act of war,"[9] which coerced Queen Lili'uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, "Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."[10]

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).

[6] 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).

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

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

[9] *Id*.

[10] *Id*., 586.

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

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

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

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

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

Crimes under general customary international law have been recognized in judicial decisions of both national and international criminal courts. Such recognition may take place in the context of a prosecution for such crimes, although it is relatively unusual for criminal courts, be they national or international, to exercise jurisdiction over crimes under customary law that have not been codified.[11] Frequently, crimes under customary international law are also recognized in litigation concerning the principle of legality, that is, the rule against retroactive prosecution.[12] Article 11(2) of the Universal Declaration of Human Rights states that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." Applying this provision or texts derived from it, tribunals have recognized "a penal offence, under national or international law" where the crime was not codified but rather was recognized under international law.

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

More recently, the International Criminal Tribunal for the former Yugoslavia was empowered to exercise jurisdiction over "violations of the laws or customs of war." Like the Charter of the International Military Tribunal, the Statute of the Tribunal, which was contained in Security Council Resolution 827, listed several such violations but specified that the enumeration was not limited. Two of the listed crimes are of relevance to the situation of occupation: seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. In *Prosecutor v. Brdanin* and in *Prosecutor v. Strugar*, the ICTY confirmed that the crime of willful damage to, or destruction of, cultural heritage, especially of religious character, has already been criminalized under customary international law.[13]

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

[12] 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).

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

The Appeals Chamber of the International Criminal Tribunal explained that not all violations of the laws or customs of war could amount to war crimes. In order for a violation of the laws or customs of war to incur individual criminal responsibility, the Tribunal said that the "violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[14] 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.[15] Although the Hague Conventions prohibit compelling inhabitants of an occupied territory to swear allegiance to the occupying power,[16] 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."[17] The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants. The war crimes on the list that are of particular relevance to situations of occupation include:

> Murders and massacres; systematic terrorism.
> Torture of civilians.
> Deliberate starvation of civilians.

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[14] *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."

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

[16] 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.

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

Rape.
Abduction of girls and women for the purpose of enforced prostitution.
Deportation of civilians.
Internment of civilians under inhuman conditions.
Forced labour of civilians in connection with the military operations of the enemy.
Usurpation of sovereignty during military occupation.
Compulsory enlistment of soldiers among the inhabitants of occupied territory.
Attempts to denationalize the inhabitants of occupied territory.
Pillage.
Confiscation of property.
Exaction of illegitimate or of exorbitant contributions and regulations.
Debasement of the currency, and issue of spurious currency.
Imposition of collective penalties.
Wanton destruction of religious, charitable, educational, and historic buildings and monuments.[18]

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."[19] Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes quite abstract after about 80 years, bearing in mind the age of criminal responsibility. Since the RCI's establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is nobody alive who could be subject to punishment.

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

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

War Crime of Usurpation of Sovereignty during Military Occupation

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

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

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

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."[23]

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."[24] Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.[25] 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*.[26]

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

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

The Commentary to the Fourth Geneva Convention describes Article 64 as giving "a more precise and detailed form" to Article 43 of the Hague Regulations.[27]

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[23] 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.
[24] *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).
[25] Major Harold D. Cunningham, Jr., "Civil Affairs—A Suggested Legal Approach," *Military Law Review* 115-137, 127, n. 33 (1960).
[26] 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/).
[27] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958).

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of usurpation of *sovereignty during military occupation* is a war crime under "particular" customary international law. According to the International Law Commission, "[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States."[28] 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.[29]

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.[30]

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."[31] 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."[32] The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied Spanish territories. The Court restated General Orders no. 101 issued by President McKinley to the War Department on 13 July 1898:

> The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. … Though the powers of the military occupant are absolute and supreme and immediately

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

> operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.[33]

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.[34]

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."[35] The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "Pursuant to article 47 of the 1907 Convention."[36] According to Bederman and Hilbert:

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[33] *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).
[34] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[35] 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).
[36] Permanent Court of Arbitration, Annual Reports, https://pca-cpa.org/en/about/annual-reports/.

> At the center of the PCA proceeding was the argument that … the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawai'i [and its County of Hawai'i].[37]

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.[38] 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."[39] Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the situation of Hawai'i, the *usurpation of sovereignty during military occupation* would appear to have been total since the beginning of the twentieth century. It might be argued that *usurpation of sovereignty* is a continuing offence, committed as long as the *usurpation of sovereignty* persists. Alternatively, a plausible understanding of the crime is that it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is "characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred." Therefore, it is not "an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation."[40]

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[37] 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).
[38] 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).
[39] *Larsen v. Hawaiian Kingdom*, International Law Reports, 596.
[40] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009.

The RCI views that it is an ongoing crime; the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation. The occupying power is therefore entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation, for example.[41] The occupying Power is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights.

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

Deprivation of Fair and Regular Trial

Willful *deprivation of the right of fair and regular* trial for a non-combatant civilian is a grave breach under the Fourth Geneva Convention. It is not comprised in the list of the 1919 Commission of Responsibilities. It is a war crime listed in the Statute of the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court. There are a number of examples of post-Second World War prosecutions based upon the holding of unfair trials,[42] including the well-known *Justice trial* of Nazi jurists by a United States Military Tribunal.[43] There does not appear to have been any prosecutions under this provision by international criminal tribunals in the modern period.

It would appear that the provision applies principally to the fairness of the proceedings. In this context, detailed standards are set out in a number of international instruments, most notably in Article 14 of the International Covenant on Civil and Political Rights. It is also required that the tribunal in question be independent, impartial and regularly constituted. According to the Customary Law Study of the International Committee of the Red Cross, "[a] court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country."[44] However, it seems clear that if the courts of the occupying power were regularly constituted under international law, the trials held before them are not inherently defective. This can be seen in Article 66 of the fourth Geneva Convention which acknowledges the right of the occupying power to subject accused persons "to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country."

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

The *actus reus* of the war crime of deprivation of the right of fair and regular trial consists of depriving one or more persons of fair and regular trial by denying judicial guarantees recognized under international law, including those of the Fourth Geneva Convention and the International Covenant on Civil and Political Rights.

The *mens rea* requires that the accused person acted intentionally and with knowledge that the person allegedly deprived of the right to fair trial was a civilian of the occupied territory.

Pillage

"Pillage" is a war crime included in the list of the 1919 Commission on Responsibilities.[45] It is derived from Articles 28 and 47 of the Hague Regulations. Prohibition of pillaging is also set out in Article 33 of the fourth Geneva Convention, which states "Pillage is prohibited." In the modern era, pillage is a war crime punishable by the International Criminal Court.[46] Acts of 'pillage' have been held to be comprised within 'plunder',[47] and the two terms have often been treated as if they are synonyms.[48] The Charter of the International Military Tribunal referred to 'plunder of public or private property' rather than to 'pillage'. This provision was repeated in article 3(e) of the Statute of the International Criminal Tribunal for the former Yugoslavia.[49] The Commentary to the fourth Geneva Convention explains that international law is concerned not only with 'pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay'.[50]

'Pillage' is also subject to prosecution by the International Criminal Tribunal for Rwanda.[51] The Elements of Crimes of the Rome Statute of the International Criminal Court provide important additional criteria: the perpetrator appropriated certain property; the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; the appropriation was without the consent of the owner.[52] A footnote in the Elements of Crime specifies that 'appropriations justified by military necessity cannot constitute the crime of pillaging'.

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[45] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919, pp. 17-18.
[46] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 8(2)(b)(xvi).
[47] *Prosecutor v.* Blaškić (IT-95-14-A) Judgment, 29 July 2004, para. 147; *Prosecutor v.* Delalić (IT-96-21-A), Judgment, 20 February 2001, para. 591; *Prosecutor v.* Kordić et al. (IT-95-14/2-A), Judgment, 17 December 2004, para. 77.
[48] *Prosecutor v.* Brima et al. (SCSL-04-16-T), Judgment, 20 June 2007, para. 751.
[49] UN Doc. S/RES/827 (1993).
[50] Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross, 1958, p. 226.
[51] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), annex, art. 4(f).
[52] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, paras. 1–3; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, paras. 1–3.

The war crime of pillage has been interpreted recently by various international criminal tribunals, notably the International Criminal Court. One of its Pre-Trial Chambers wrote that the war crime of pillage 'entails a somewhat large-scale appropriation of all types of property, such as public or private, movable or immovable property, which goes beyond mere sporadic acts of violation of property rights'.[53] With specific reference to the Rome Statute, which limits its jurisdiction to war crimes that are 'serious', the Pre-Trial Chamber said that 'cases of petty property expropriation' might not be within the scope of the provision. 'A determination on the seriousness of the violation is made by the Chamber in light of the particular circumstances of the case', it said.[54] Subsequently, however, a Trial Chamber of the Court discouraged the notion that there is any particular gravity threshold for the crime of pillaging.[55] The Chamber said it would determine a violation to be serious 'where, for example, pillaging had significant consequences for the victims, even where such consequences are not of the same gravity for all the victims, or where a large number of persons were deprived of their property'.[56] Judgments of the International Criminal Tribunal for the former Yugoslavia hold that 'all forms of seizure of public or private property constitute acts of appropriation, including isolated acts committed by individual soldiers for their private gain and acts committed as part of a systematic campaign to economically exploit a targeted area'.[57]

Because it must belong to an 'enemy' or 'hostile' party, 'pillaged property—whether moveable or immoveable, private or public—must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator'.[58] The same requirement is not explicitly imposed with respect to the war crime of destruction of property but the view that this is implicit finds support.[59] It is not excluded that the property that is pillaged belongs to combatants.[60] The crime of pillage occurs when the property has come under the control of the perpetrator, because it is only then that he or she can 'appropriate' the property.[61]

In *Prosecutor v. Katanga*, a Trial Chamber of the International Criminal Court said 'the pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by combatants in their own interest'.[62] There is some old authority for the view that pillage entails an element of

[53] *Prosecutor v.* Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 317.
[54] *Id*.
[55] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 908.
[56] *Id*.
[57] *Prosecutor v. Gotovina* (IT-06-90-T), Judgment, 15 April 2011, para. 1778.
[58] *Prosecutor v.* Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 329.
[59] *Id.,* fn. 430.
[60] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 907.
[61] *Prosecutor v.* Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 330.
[62] *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 905.

force or violence,[63] but this is not confirmed by recent case law. The Elements of Crimes of the Rome Statute specify that the perpetrator 'intended to deprive the owner of the property and to appropriate it for private or personal use'.[64] An accompanying footnote specifies that '[a]s indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging'.[65] The Rome Statute provision on pillage was copied into the Statute of the Special Court for Sierra Leone, and has been interpreted by one of its Trial Chambers, which explained: 'The inclusion of the words "private or personal use" excludes the possibility that appropriations justified by military necessity might fall within the definition. Nevertheless, the definition is framed to apply to a broad range of situations.'[66] The Special Court was of the view that the requirement of 'private or personal use', imposed by the Elements of Crimes applicable to the Rome Statute, was 'unduly restrictive and ought not to be an element of the crime of pillage'.[67]

The *actus reus* of pillage consists of the appropriation of property belonging to members of the civilian population without the consent of the owner. Whether the appropriation must also be for personal use of the perpetrator is a matter of debate. The *mens rea* requires that the perpetrator act with the specific intent of depriving the owner of the property without consent.

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

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

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

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[63] See Andreas Zimmermann, 'Pillage', in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, Baden-Baden: Nomos, 1999, p. 237, at 238.
[64] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2.
[65] Elements of Crimes, War Crimes, Article 8(2)(b)(xvi), War crime of pillaging, para. 2, fn. 47; Elements of Crimes, War Crimes, Article 8(2)(e)(v), War crime of pillaging, para. 2, fn. 61. See *Prosecutor v. Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 906.
[66] *Prosecutor v.* Brima et al. (SCSL-04-16-T), Judgment, 20 June 2007, para. 753.
[67] *Id.,* para. 754. Also: *Prosecutor v.* Brima et al. (SCSL-2004-16-T), Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, paras. 241–243.

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

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

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

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

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

1. The perpetrator deprived one or more persons in an occupied territory of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.
2. The conduct took place in the context of and was associated with a military occupation.
5. The perpetrator was aware of factual circumstances that established the existence of the military 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 a military occupation.
5. 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."[68]

The second common element provides that the perpetrator must be aware of factual circumstances that established the existence of a military occupation. In order to meet this particular element of awareness, which in a normal situation would be obvious, further explanation is necessary given the unique situation of the American occupation and the devastating effect of the war crime of denationalization had upon the population of the Hawaiian Kingdom since the beginning of the twentieth century. This denationalization through *Americanization* led to the false belief that the Hawaiian Islands were not under a prolonged American occupation since 17 January 1893, but rather had become an incorporated territory of the United States in 1898 during the Spanish-American War. Chapter 2 of *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* provides a comprehensive and historical narrative that rectifies this false information.[69]

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.[70] 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

[68] *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).
[69] 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).
[70] *Id*., 114.

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.[71]

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."[72] While there is, however, "only a requirement for the awareness of the factual circumstances," the RCI will satisfy this element of awareness where there exists clear and unequivocal evidence of awareness on the part of the accused of the United States occupation of the Hawaiian Kingdom, *e.g.* court records, correspondences, course curriculum, sworn declarations, etc. Also, the fact of being part of the political organization of the United States, to include the State of Hawai'i and its Counties, because in that case the knowledge of the existing "political" situation could be reasonably presumed especially in light of the 1993 Congressional joint resolution apologizing for the illegal overthrow of the Hawaiian Kingdom government on 17 January 1893.[73]

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*.[74] According to Professor Badar:

> […] *Dolus directus* of the first degree

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[71] Sai, "The Royal Commission of Inquiry," 29-33.
[72] *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).
[73] 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).
[74] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* 535-537 (2013).

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

[…] *Dolus directus* of the second degree

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

[…] *Dolus eventualis*

Dolus eventualis as a form of culpable mental state has been expressly endorsed by the jurisprudence of the two *ad hoc* Tribunals. The case law of these Tribunals made it clear that the *dolus eventualis* is sufficient to trigger the criminal responsibility for serious crimes such as extermination as a crime against humanity. A recent decision by the ICC provides further clarification of the nature of this mental state which entails criminal liability for most of the crimes under the subject matter jurisdiction of the International Criminal Court. According to the Lubanga Pre-Trial Chamber, dolus eventualis encompasses,

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

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.[75]

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

APPLICATION

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

Implementation of phase II was initiated at the University of Hawai'i at Mānoa when the author of this report entered the Political Science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications on the subject of the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,[76] to *Nation Within—The History of the American Occupation of Hawai'i*.[77] Coffman explained the change in his note on the second edition:

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[75] *Id*.
[76] Tom Coffman, Nation Within: The Story of America's Annexation of the Nation of Hawai'i (1998).
[77] Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

> I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai'i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.
>
> In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for … the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai'i, the might of the United States does not make it right.[78]

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i dated 25 February 2018.[79] Dr. deZayas stated:

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

The exposure also prompted the U.S. National Lawyers Guild ("NLG") to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.[80] 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

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[78] *Id*., xvi.
[79] Letter of Dr. Alfred deZayas to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai'i (25 February 2018) (online at https://hawaiiankingdom.org/pdf/Dr_deZayas_Memo_2_25_2018.pdf).
[80] 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).

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."[81]

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

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

On 7 February 2021, the International Association of Democratic Lawyers ("IADL"), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council ("ECOSOC") and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.[82] 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

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

strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State."

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas ("AAJ"), who is also a non-governmental organization with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council's sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.[83] In its joint letter, the AAJ also "supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State."

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

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

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*.

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[83] 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/).

State of Hawai'i v. Lorenzo

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.[84]

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."[85] 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."[86] 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],"[87] and that defendants have an evidentiary burden that shows the Hawaiian Kingdom continues to exist.

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

> Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the Kingdom of Hawai'i "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai'i lack of jurisdiction over him or her.[88]

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.

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[84] *State of Hawai'i v. Lorenzo*, 77 Haw. 219, 220; 883 P.2d 641, 642 (1994).
[85] *Id*., 221, 643.
[86] *Id*.
[87] *State of Hawai'i v. Fergerstrom*, 106 Haw. 43, 55; 101 P.3d 652, 664 (2004).
[88] *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).

International law recognizes the difference between the State and its government, and because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government,"[89] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[90] Addressing the presumption of the German State's continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

> Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state [its independence and sovereignty] did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.[91]

"If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains."[92] Evidence of "a valid demonstration of legal title, or sovereignty, on the part of the United States" would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding portions of its sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*[93] and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.[94]

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.[95] As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Annex "is to tie or bind[,] [t]o attach."[96] Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States.

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[89] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[90] *Id*.
[91] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).
[92] Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).
[93] 9 Stat. 922 (1848).
[94] 30 Stat. 1754 (1898).
[95] 30 Stat. 750 (1898).
[96] *Black's Law Dictionary* 88 (6th ed. 1990).

Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

> The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[97] International law does not permit annexation of territory of another state.[98]

Furthermore, in 1988, the United States Department of Justice's Office of Legal Counsel ("OLC") published a legal opinion that addressed, *inter alia*, the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.[99] The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[100] As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[101] and not the Congress.

The OLC further opined, "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[102] Therefore, the OLC concluded it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[103] That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by a Presidential proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the "laws of no nation can justly extend beyond its own territories."[104]

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[97] There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.
[98] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).
[99] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[100] *Id.*, 242.
[101] *Id*.
[102] *Id*.
[103] *Id.*, 262.
[104] *The Apollon*, 22 U.S. 362, 370 (1824).

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated "[t]he constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[105] Professor Willoughby also stated, "[t]he incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is…essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts."[106]

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 or the court to provide rebuttable evidence that the United States extinguished the Hawaiian State in accordance with recognized modes of extinction under international law. In fact, the appellate court did acknowledge "that the [Hawaiian Kingdom] was recognized as an independent sovereign nation by the United States in numerous bilateral treaties."[107] 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 joint resolution."[108] 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 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 deviation from general principles common to the major legal systems of the world."[109]

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[105] Kmiec, 252.
[106] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).
[107] *Lorenzo* case, 220, 642.
[108] Kmiec, 252
[109] American Law Institute, Restatement of the Law Third, The Foreign Relations Law of the United States, §102 (1987).

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,"[110] 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."[111] 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."[112] As stated by President Cleveland after completing a presidential investigation into the overthrow, that the "provisional government owes its existence to an armed invasion by the United States."[113] The State of Hawai'i is a direct successor to the provisional government.

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. "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."[114] 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."[115] Furthermore, courts who were made aware of the American occupation prior to their decisions would have met the requisite element of ascertaining *mens rea* for particular war crimes.

Dexter Ke'eaumoku Ka'iama is not only a protected person but also serves as the Attorney General of the Hawaiian Kingdom and member of the Council of Regency since 11 August 2013.[116] He was licensed to practice law in the Hawaiian Kingdom on 1 June 2013 by First Associate Justice Allen K. Hoe.[117]

Since serving as the Attorney General, Ka'iama has only provided legal representation for defendants, in both civil and criminal cases. In every case he has filed or where he provided special appearance for individuals who filed *pro se* motions to dismiss on subject matter jurisdictional grounds pursuant to *State of Hawai'i v. Lorenzo*, neither the prosecution, plaintiff, nor the court, provided any rebuttable evidence that the Hawaiian Kingdom ceases to exist as a State under

[110] *Lorenzo* case, fn. 2
[111] *Id*.
[112] *Id*.
[113] Executive documents, 454.
[114] American Law Institute, *Restatement of the Law Second, Judgements,* §7, comment f, 45 (1942).
[115] Karen Nelson Moore, "Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments," 66 Cornell Law Review 534, 537 (1981).
[116] Appointment of D.K. Ka'iama as Attorney General (11 Aug. 2013) (online at https://hawaiiankingdom.org/pdf/Kaiama_Att_General.pdf).
[117] Ka'iama License to Practice Law (1 June 2013) (online at https://hawaiiankingdom.org/pdf/Kaiama_License.pdf).

international law. And in every instance, the court merely denied the motions to dismiss without proffering any evidence.

Of significance is ejectment case *Wells Fargo Bank, N.A. v. Elaine Kawasaki*, civil no. 11-1-106, that came before Judge Glenn S. Hara of the Third Circuit Court on the island of Hawai'i. Wells Fargo Bank was represented by Charles R. Prather and Sofia M. Hirosane from the law firm RCO Hawaii, LLLC. On 18 May 2012, Kawasaki, in *pro se*, filed a motion to dismiss arguing:

> The PLAINTIFF cannot claim relief from the Circuit Court of the Third Circuit because the appropriate court with subject matter jurisdiction in the Hawaiian Islands is an Article II Court established under and by virtue of Article II of the U.S. Constitution in compliance with Article 43, 1907 Hague Convention IV (36 U.S. Stat. 2277), and pursuant to two sole-executive agreements entered into between President Cleveland and Queen Lili'uokalani as are more fully explained hereafter. Article II Courts are Military Courts established by authority of the President, being Federal Courts, which were established as "the product of military occupation." See Bederman, Article II Courts, 44 Mercer Law Review 825-879, 826 (1992-1993).[118]

Oral hearings for the motion to dismiss was held on 15 June 2012. Attorney General Ka'iama provided special appearance for Ms. Kawasaki at the oral hearings. According to the transcript:

> MR. KAIAMA: The scope of my special appearance, Your Honor, is to make argument and presentation with respect to Ms. Kawasaki's 12(b)(1) motion to dismiss challenging the subject matter jurisdiction of this court, Your Honor.[119]
>
> […]
>
> THE COURT: Okay. So here's the court's inclination, Mr. Kaiama. And in answer to the plaintiff's comment that maybe the motion may be delayed, it looks like the motion is one that challenges the subject matter jurisdiction. At least on its face. But—and any time there is a jurisdictional challenge, it can be made at any time. That's my understanding. Because if the court has no jurisdiction then whatever the court does is void. Um, so I'm treating this as a motion to dismiss for the court's lack of subject matter jurisdiction for the reasons stated. And that is that the argument is that the Kingdom of Hawaii still exists, and therefore, in essence, this court has no jurisdiction, it's the courts of the Kingdom of Hawaii. That's how I'm taking the motion. Mr. Kaiama?
>
> MR. KAIAMA: And that is essentially Ms. Kawasaki's motion and our argument.[120]

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[118] *Wells Fargo Bank, N.A. v. Elaine Kawasaki*, Kawasaki's Motion to Dismiss and Memorandum in Support, Memo, 1 (18 May 2012) (online at https://hawaiiankingdom.org/pdf/(Kawasaki)_MTD_12(b)(1).pdf).
[119] *Wells Fargo Bank, N.A. v. Elaine Kawasaki*, Transcript of Proceedings 2 (15 June 2012) (online at https://hawaiiankingdom.org/pdf/Wells_Fargo_Bank_v_Kawasaki_Transcripts.pdf).
[120] *Id*., 5-6.

[…]

MR. KAIAMA: I have now been arguing, Your Honor, this motion before judges of the courts of the circuit court and district court throughout the State of Hawaii, and nearly—and probably over 20 times, and in not one instance has the plaintiff in the cases challenged the merits of the executive agreements to show that either it's not an executive agreement or that the executive agreements have been terminated. Because we belief, respectfully, again Your Honor, they cannot.[121]

[…]

THE COURT: No, but, Mr. Kaiama, I think you failed—in my mind, what you're asking the court to do is commit suicide, because once I adopt your argument, I have no jurisdiction over anything. Not only these kinds of cases where you may claim either being […] a citizen of the kingdom, but jurisdiction of the courts evaporate. All of the courts across the state, from the supreme court down, and we have no judiciary. I can't do that.[122]

[…]

THE COURT: I think what [Mr. Kaiama is] saying is […] the argument is that if, in fact, I buy into his arguments then this court has no jurisdiction over any matter. That's his analysis, I think.

MS. HIROSANE [for Wells Fargo]: And that's […] my understanding of it too, Your Honor.

THE COURT: Okay. So the court will deny the motion to dismiss the complaint pursuant to Hawaii Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[123]

Hara's extra-judicial order led to Wells Fargo Bank's pillaging of Ms. Kawasaki's home and property by a court that possessed no jurisdiction.[124] As acknowledged by Hara, "if the court has no jurisdiction then whatever the court does is void."[125] Ms. Kawasaki was the victim of the war crime of *usurpation of sovereignty during military occupation*, *deprivation of fair and regular trial*, and *pillaging*. Notwithstanding that these proceedings were extra-judicial and unlawful; they do provide the evidence of *mens rea* by Hara, Prather, and Hirosane under international criminal law where the perpetrators were made aware of the factual circumstances of the military occupation.

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[121] *Id*., 9.
[122] *Id*., 13.
[123] *Id*., 21-22.
[124] Orders against Kawasaki (30 May 2012) (online at https://hawaiiankingdom.org/pdf/Orders_Against_Kawasaki.pdf).
[125] *Id*., Transcript, 5.

In an attempt to stop the State of Hawai‘i judiciary from unravelling, the Hawai‘i Supreme Court, in 2013, responded to a defendant’s arguments that was similar to Ms. Kawasaki. The Supreme Court stated that the defendant “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.”[126] Their response was “‘whatever may be said regarding the lawfulness’ of its origins, ‘the State of Hawai‘i […] is now, a lawful government.’”[127] While the Supreme Court provided no evidentiary basis for the State of Hawai‘i’s legitimacy, it did acknowledge the State of Hawai‘i to be unlawful. With only American case law and municipal laws to rely on, the Supreme Court then states, “[i]ndividuals claiming to be citizens of the Kingdom and not the State are not exempt from application of the State’s laws.”[128] In these proceedings, the Supreme Court was aware of the military occupation when it acknowledged that “a Motion to Dismiss Complaint […] challenging the court’s jurisdiction over the case based on the present existence of the Kingdom of Hawai‘i.”[129]

For the purposes of international criminal law and the ascertainment of *mens rea*, the *actus reus* must be accompanied by the perpetrator being “aware of factual circumstances that established the existence of the military occupation.” There is no requirement for a legal evaluation or belief of the factual circumstances, but only awareness. The motions to dismiss provided the basis of the factual circumstances, and, in every instance, the court and the parties were made aware of the military occupation of the Hawaiian Kingdom.

The Hawai‘i Supreme Court, through its Office of Disciplinary Counsel (“ODC”), sought on two occasions to punish Attorney General Ka‘iama who is also a licensed attorney for the State of Hawai‘i for representing individuals challenging the jurisdiction of State of Hawai‘i courts pursuant to *State of Hawai‘i v. Lorenzo* and applying international humanitarian law. The first complaint arose from State of Hawai‘i Judge Greg K. Nakamura and the second from State of Hawai‘i attorney James E. Evers.

As an administrative body whose hearings are conducted under the auspices of the State of Hawai‘i Supreme Court, the ODC must first possess jurisdiction over the complaints received from Nakamura and Evers and, therefore, come under the precedence of *State of Hawai‘i v. Lorenzo*. The *Lorenzo* case provided no exception for attorneys as to the question of jurisdiction especially considering the Lorenzo court’s statement “whether the present governance system should be recognized,” 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.”

[126] *State of Hawai‘i v. Kaulia*, 128 Haw. 479, 486; 291 P.3d 377, 384 (2013).
[127] *Id*., 487, 385.
[128] *Id*.
[129] *Id*., 482, 380.

Because the State of Hawai‘i was created by the Congress under *An Act To provide for the admission of the State of Hawaii into the Union*,[130] which has no extra-territorial authority, it cannot exist simultaneously with the Hawaiian Kingdom unless it becomes the administration of the occupying State under international humanitarian law. At present, the State of Hawai‘i is serving as the political subdivision of the United States in a federated system of government that has and continues to unlawfully impose American municipal laws and administrative measures within the territory of the Hawaiian Kingdom. The State of Hawai‘i has not transformed itself into an occupying power recognizable under international humanitarian law.

Nakamura presided as State of Hawai‘i Third Circuit Court Judge over ejectment case *Deutsche Bank National Trust Company v. Gumapac et al.*, civil no. 11-1-0590. Deutsche Bank National Trust Company was represented by Charles R. Prather and Sofia M. Hirosane from the law firm RCO Hawaii, LLLC.[131]

On 13 January 2012, Kale Gumapac, in *pro se*, filed a motion to dismiss on subject matter jurisdictional grounds pursuant to *State of Hawai‘i v. Lorenzo*.[132] In his memorandum in support of his motion to dismiss, Mr. Gumapac argued that the court lacked subject matter jurisdiction as a State of Hawai‘i court because the State of Hawai‘i was established by the Congress that has no extra-territorial effect beyond the borders of the United States. The proper court, he argued, would be an Article II Occupation Court. Mr. Gumapac stated:

> [I]n light of the illegal overthrow of the Hawaiian Kingdom government by the United States and its failure to administer Hawaiian Kingdom law and restore the Hawaiian Kingdom government pursuant to two sole executive agreements entered into between President Cleveland and Queen Lili‘uokalani as are more fully explained hereafter, an Article II Court established under and by virtue of Article II of the U.S. Constitution in compliance with Article 43, 1907 Hague Convention, IV (36 U.S. Stat. 2277). Article II Courts are Military Courts established by authority of the President, being Federal Courts, which were established as “the product of military occupation.” *See Bederman*, "Article II Courts," *Mercer Law Review* 44 (1992-1993): 825-879, 826. According to *United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals*, 3 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 103, 114 (1948), military tribunals “are generally based upon the occupant’s customary and conventional duty to govern occupied territory and to maintain law and order.”[133]

[130] 73 Stat. 4 (1959).
[131] *Deutsche Bank National Trust Company v. Gumapac, et al.*, Complaint for Ejectment (15 December 2011) (online at https://hawaiiankingdom.org/pdf/Deutsche_Bank_Complaint_Gumapac_12_15_2011.pdf).
[132] *Deutsche Bank National Trust Company v. Gumapac et al.*, Gumapac’s Motion to Dismiss and Memorandum in Support (13 January 2012) (online at https://hawaiiankingdom.org/pdf/(Gumapac)_MTD.pdf).
[133] *Id*., Memo, 2.

Mr. Gumapac, in his motion to dismiss, also requested the Court to take judicial notice of the following:

- *Lili'uokalani assignment*, January 17, 1893, (Exhibit "A" of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit "1" to Declaration of Defendant) comprising of an exchange of diplomatic notes acknowledging the assignment of executive power and conclusions of a Presidential investigation (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 443-464, 1895);

- *Agreement of restoration*, December 18, 1893, (Exhibit "B" of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit "1" to Declaration of Defendant) comprising an exchange of diplomatic notes that acknowledged negotiations and settlement of the illegal overthrow of the Hawaiian Kingdom government and its restoration (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 1269-1270; 1283-1284, 1895);

- Statements made on the floor of the House of Representatives by Representative Thomas Ball (Exhibit "C" of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit "1" to Declaration of Defendant) are copies from the 55th Cong. 2nd Sess., 5975-5976 (1898);

- Statements made on the floor of the Senate by Senator Augustus Bacon (Exhibit "D" of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit "1" to Declaration of Defendant) are copies from the 55th Cong., 2nd Sess., 6148-6150 (1898).

- "A Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service Library of Congress" (Exhibit "2" to Declaration of Defendant) from the United States government printing office, 2001.

- House Concurrent Resolution no. 107 (Exhibit "3" to Declaration of Defendant) is a copy from the State of Hawai'i House of Representatives, Twenty-sixth Legislature, 2011.[134]

When oral hearings were held on 14 February 2012, Attorney General Ka'iama provided special appearance for Mr. Gumapac's motion to dismiss. According to the transcript:

> MR. KAIAMA: Your Honor, respectfully, […] our motion is predicated in the […] Court's taking judicial notice of these documents and cases. My understanding is that the […] Plaintiff's counsel has provided no opposition to the Court's taking judicial notice, […] and this court, Your Honor, is familiar with […] this request having taken judicial notice I believe on two other occasions of these documents.[135]

[134] *Id*., Memo, 14-15.
[135] *Deutsche Bank National Trust Company v. Gumapac et al.*, Transcript of Proceedings 4 (14 February 2012) (online at https://hawaiiankingdom.org/pdf/Deutsche_Bank_v_Gumapac_Transcripts.pdf).

[…]

THE COURT: So is it, uh, Mister "Pray-ther"? "Pra-ther"?

MR. PRATHER [On behalf of Deutsche Bank]: "Pray-ther", Your Honor.

THE COURT: Prather, okay. You want to respond to the request?

MR. PRATHER: Your Honor, the Court can give whatever weight it wants to the documents that have been attached to the motion.

THE COURT: Okay. So the Court will take judicial notice of the document […] that were attached and for which judicial notice is requested. And Court, of course, would take judicial notice of any United States Supreme Court Decisions.

MR. KAIAMA: Okay. Thank you, Your Honor. [T]he Court having taken judicial notice [] I'll try to be brief. Our position is […] pursuant to U.S. v. Pink, U.S. v Belmont, and […] American Insurance Association vs. Garamendi […] we believ that the Court […] should dismiss the complaint. We've now met the burden as set for under Lorenzo, State of Hawai'i vs. Lorenzo. We've provided the Court now with evidence that the Kingdom of Hawaii continues to exist with attributes […] that the Court's taking judicial notice. If I may refer to […] one additional rule, Your Honor, and that is Hawaii Rule of Evidence 302, Section B. […] [A]nd that is presumptions imposing burden on producing evidence […] and I'll read for you just briefly, Your Honor. "The affect of a presumption imposed in the burden of producing evidence is to require the trier of fact to assume the existence of a presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction or presumption shall be given and the trier of fact shall determine the existence or nonexistence the presumed fact from the evidence and without regard to the presumption. Your Honor, our position is that [] the Plaintiffs cannot rely merely on the recitation of a State's […] statute […] that is in fact a presumption that we've now provided evidence […] of its nonexistence, and the Court no longer can rely on the Plaintiffs' […] presumption of that State […] statute and must […] make […] in fact what its's done now, Your Honor, it's our position respectfully, that we've now replaced the presumption and that presumption now is the presumption that the Kingdom of Hawaii continues to exist, that we've met our burden, that this Court in fact has no jurisdiction and must dismiss the complaint. […] [T]hank you, Your Honor.

THE COURT: Mr. Prather?

MR. PRATHER: Uh, I mean I believe the Court's familiar with the issues. I think we've set out our opposition in […] our written filing. I don't have much to add to [] this time other than the fact that I'm not aware of any citation to Rule 302 either in the motion or in the reply. As it stands I think our opposition's already been set forth.

> THE COURT: Okay. So [the] Court will deny the motion. Court believes it has jurisdiction pursuant to Article 6 of the Hawai'i State Constitution and H.R.S. §603-21.9.[136]

These proceedings eventually led to Deutsche Bank National Trust Company unlawfully seizing Mr. Gumapac's home and property by order of a court without subject matter jurisdiction and operating, by the Court's own admission, under American laws and administrative measures. This prompted Attorney General Ka'iama to send a letter dated 6 July 2012 to Admiral Samuel J. Locklear III, USN, Commander of U.S. Pacific Command whose headquarters is at Camp H.M. Smith on the island of O'ahu.[137] Attorney General Ka'iama stated:

> The following information is provided to you as required by Section 459(b), Department of the Army Field Manual 27-10; Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 October 1907; Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; and Title 18 U.S.C. §2441(c)(1)—Definition of War Crime.[138]

On 23 August 2013, the ODC initiated proceedings after Nakamura filed a complaint against Attorney General Ka'iama for filing a Notice of Written Protest and Demand Communicated with the U.S. Pacific Command on 13 July 2012.[139] The filing was made on behalf of Mr. Gumapac. Daryl Y. Dobayashi was assigned as the investigator. Attorney General Ka'iama was represented by Richard N. Wurdeman.

In his report, ODC investigator Dobayashi stated, "Judge Nakamura, when asked about his response when he received the Notice of Protest, answered he thought it had no legal or practical merit and to that extent, would describe or define the Notice of Protest to be frivolous."[140] Although Dobayashi stated that "disbarment, suspension or public censure would be too severe a punishment here,"[141] the Supreme Court, after considering his report "ORDERED that Respondent Kaiama is publicly censured for his misconduct,"[142] and that "Respondent Kaiama is […] cautioned that further such conduct may result in a period of suspension."[143] The Supreme Court was comprised of Justices Mark E. Recktenwald, Paula A. Nakayama, Sabrina S. McKenna, Richard W. Pollack, and Michael D. Wilson.

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[136] *Id*., 5-8.
[137] Ka'iama Letter to Admiral Locklear (6 July 2012) (online at https://hawaiiankingdom.org/pdf/Kaiama_Ltr_to_Admiral_Locklear.pdf).
[138] *Id*., 1.
[139] Notice of Written Protest and Demand Communicated with the U.S. Pacific Command (13 July 2012) (online at https://hawaiiankingdom.org/pdf/Notice_of_War_Crime.pdf).
[140] *Office of Disciplinary Counsel v. Kaiama*, Hearing Officer's Report 6 (29 April 2015) (online at https://hawaiiankingdom.org/pdf/ODC_Hearing_Officer's_Report.pdf).
[141] *Id*., 18.
[142] *Office of Disciplinary Counsel v. Kaiama*, Order of Public Censure, Supreme Court of the State of Hawai'i, SCAD-16-0000522, 6 (1 May 2017) (online at https://hawaiiankingdom.org/pdf/HI_Supreme_Crt_Order.pdf). .
[143] *Id*.

The Supreme Court attempted to portray Attorney General Ka‘iama as an incompetent lawyer. The Court stated, “Respondent Kaiama’s allegations are clearly false upon the evidence in the record, as Respondent Kaiama has not proffered any evidence the Judge in question has been convicted of war crimes by any court or tribunal.”[144] Attorney General Ka‘iama never stated that Nakamura was a convicted war criminal, but rather he was providing a protest and demand to hold to account Nakamura who was guilty of committing the war crime of *deprivation of fair and regular trial*. Surely, the Supreme Court knew that “guilty” means “[h]aving committed a crime or other breach of conduct.”[145] This is precisely why the United States Government notified the Government of Iraq in 1991 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.”

The purpose of the Supreme Court’s order of public censure served as a warning to other lawyers throughout the islands that the recital of international humanitarian law and war crimes would be met with punishment. Notwithstanding that these proceedings were extra-judicial and unlawful; they do provide the evidence of *mens rea* by Nakamura, Prather, Hirosane, Recktenwald, Nakayama, McKenna, Pollack, and Wilson, under international criminal law, where the perpetrators were made aware of the factual circumstances of the military occupation.

In an email dated 1 March 2018 from James E. Evers to Bruce Kim of the ODC, Evers sought the intervention of the ODC to prevent Attorney General Ka‘iama from providing legal representation for individuals arguing that State of Hawai‘i courts lack subject matter jurisdiction. Evers stated in his email, “His only defense, to date, is based on sovereignty, an argument the court already rejected in denying the homeowner’s motion to dismiss, which Kaiama argued.”[146] Evers was well aware of the motion to dismiss for subject matter jurisdiction and the factual circumstances of the military occupation. Evers is a lawyer employed by the State of Hawai‘i Department of Commerce and Consumer Affairs Office of Consumer Protection.

The ODC acknowledged receipt of Ever’s email on 27 November 2018. Josiah K. Sewell was assigned as the ODC investigator. On 24 January 2019, a letter was sent to Attorney General Ka‘iama from Sewell.[147] He stated:

> This is to inform you that the Office of Disciplinary Counsel (“ODC”) has received a complaint from Mr. Evers, alleging that you may have committed an ethical violation. A copy of the complaint is enclosed for your review.

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[144] *Id*., 3.
[145] Black’s Law, 708.
[146] Ever’s Letter to ODC (1 March 2018) (online at https://hawaiiankingdom.org/pdf/Evers_Ltr_to_ODC.pdf).
[147] Sewell Letter to Kaiama (24 January 2019) (online at https://hawaiiankingdom.org/pdf/Sewell_Ltr_to_Kaiama.pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

> Under the Disciplinary Board's Rules ("DBR"), we are required to "assume [] the facts to be true" and seek your response [DBR Rules 13 and 14]. Because the factual allegations have been made, we require your response before making any decision regarding early disposition, and that this stage of the investigation, we have like formed an opinion.

On 22 February 2019, William Fenton Sink, attorney for Attorney General Ka'iama, responded to Sewell's letter of 24 January 2019.[148] Sink stated:

> I represent Dexter Kaiama in the above-referenced ODC matter.
>
> The ethical claim by James F. Evers is frivolous.
>
> While I agree aspersions to Mr. Evers' character may not be helpful, I would ask you to consider the fact that Mr. Evers is an attorney who is suing Mr. Kaiama in a civil matter in his role with the State and had his filings stricken by Judge Jeffrey P. Crabtree, although with a right to refile his civil complaint against Mr. Kaiama.
>
> Mr. Evers is upset that his case got dismissed and he needs to refile if he seriously intends to proceed against Mr. Kaiama in a weak case.

In response to Sink dated 12 June 2019, Sewell stated, "I am in receipt of your response dated February 22, 2019. While the overview you provided was of some help, there are several elements to this matter that we wish to discuss with your client in more detail. I have included below a number of specific questions that require Mr. Kaiama's response in conjunction with our investigation."[149] Attorney General Ka'iama refused to comply until the ODC provide rebuttable evidence that the Hawaiian Kingdom ceases to exist as a State, which would consequently give the ODC jurisdiction over the complaint.

After a subpoena was issued by Disciplinary Board Chair Clifford L. Nakea on 22 August 2022 ordering Attorney General Ka'iama to be deposed by Assistant Disciplinary Counsel Alana L. Bryant on 26 August 2022, Attorney General Ka'iama filed a motion to dismiss subpoena on 6 September 2022 on the grounds that the ODC proceedings lacked personal jurisdiction over him pursuant to *State of Hawai'i v. Lorenzo*.[150] Nakea was the presiding officer of these proceedings. In his motion to dismiss:

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[148] Sink Letter to Sewell (22 February 2019) (online at https://hawaiiankingdom.org/pdf/Sink_Ltr_to_Sewell.pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

[149] Sewell Response to Sink (12 June 2019) (online at https://hawaiiankingdom.org/pdf/Sewell_Response_to_Sink.pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

[150] *Office of Disciplinary Counsel v. Kaiama*, ODC Proceedings, Ka'iama's Motion to Dismiss (6 September 2022) (online at https://hawaiiankingdom.org/pdf/Motion_to_Dismiss_Subpoena_ODC_Proceedings_(Filed_2022-09-

> Respondent DEXTER K. KA‘AMA (hereafter “Respondent”) respectfully moves the Disciplinary Board to schedule an evidentiary hearing for the ODC to provide rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom cease to exist as a State in light of the evidence and law in the instant motion. If the ODC is unable to proffer rebuttable evidence, the Respondent respectfully requests that this Disciplinary Board dismiss the subpoena pursuant to the HRCP 12(b)(2) and the *Lorenzo* principle. The reasons are set forth in the attached memorandum.

On that same day, Attorney General Ka‘iama also filed a motion for request of judicial notice in support of his motion to dismiss.[151]

> In accordance with Hawai‘i Rule of Evidence 201, the Respondent respectfully requests that the Board Chairman, in its consideration of Respondent’s motion for request of judicial notice in support of Repondent’s motion to dismiss subpoena dated August 22, 2022, pursuant to HRCP 12(b)(2) and the *Lorenzo* principle, and to schedule an evidentiary hearing, or in the alternative, motion for protective order, filed herewith, take judicial notice of §202, comment g, and §203, comment c of *Restatement (Third) of the Foreign Relations Law of the United States*. The Respondent also respectfully requests that this Court take judicial notice of the information contained in the exhibits attached hereto.
>
> 1. Exhibit 1 is a true and correct copy of the 1849 Treaty of Friendship, Commerce, and Navigation between the Hawaiian Kingdom and the United States, 9 Stat. 977. Article VIII states, “and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively (emphasis added).”
>
> 2. Exhibit 2 is a true and correct copy of Annex 2—*Cases Conducted under the Auspices of the PCA or with the Cooperation of the International Bureau*, Permanent Court of Arbitration’s Annual Report of 2011. On page 51, the Permanent Court of Arbitration (“PCA”) reported that Larsen – Hawaiian Kingdom arbitration was established “[p]ursuant to article 47 of the 1907 Convention (article 26 of the 1899 Convention).”
>
> 3. Exhibit 3 is a true and correct copy of the 1907 Hague Convention, I, for the Pacific Settlement of International Disputes, 36 Stat. 2199, and referred to by the PCA as the 1907 Convention. Article 47 of the 1907 Convention provides access to the PCA for non-Contracting Powers or States.

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06).pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

[151] *Id*., Motion for Judicial Notice (6 September 2022) (online at https://hawaiiankingdom.org/pdf/Request_for_Judicial_Notice_ODC_Proceedings_(Filed_2022-09-06).pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

> 4. Exhibit 4 is a true and correct copy of the PCA's case repository for *Larsen v. Hawaiian Kingdom*, which is also accessible on the PCA's website at https://pca-cpa.org/en/cases/35/. The PCA acknowledges the Hawaiian Kingdom as a "State" and the Council of Regency as its government.
>
> 5. Exhibit 5 is a true and correct copy of Professor Federico Lenzerini's legal memorandum "Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration" [ECF 174-2].
>
> 6. Exhibit 6 is a true and correct copy of Professor Federico Lenzerini's "Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom" [ECF 55-2].
>
> 7. Exhibit 7 is a true and correct copy of the Declaration of Dr. David Keanu Sai [ECF 55-1] attesting to an agreement brokered by the PCA Deputy Secretary General Phyllis Hamilton between the Council of Regency and the United States granting access to all records and pleadings in the *Larsen v. Hawaiian Kingdom* arbitral proceedings.

In complete disregard of international law and the precedent case of *State of Hawai'i v. Lorenzo*, Nakea issued an order denying the motions on 13 September 2022.[152] He concluded that "arguments over the Kingdom of Hawai'i are irrelevant."[153] To have denied the motion to dismiss, it is presumed that Chairperson Nakea read the pleadings and exhibits provided in the motion for judicial notice in support of the motion to dismiss.

On 21 September 2022, Attorney General Ka'iama filed a motion for Nakea to reconsider his order[154] but to no avail.[155] In his motion to reconsider, he explained:

> Chairperson Nakea's justification in denying Respondent's motions denies Respondent's right to due process and his right to a fair and regular hearing that affords all the protection under the law. Respondent's entry into the bar was 8 years prior to Lorenzo and the evidentiary standard that was set, which has become Hawai'i common law, and is binding on all the courts in the (current) State of Hawai'i and member of the bar, to include Chairperson Nakea. It wasn't until 2009 that the Respondent became fully aware of the

[152] *Id*., Order Denying Motions (13 September 2022) (online at https://hawaiiankingdom.org/pdf/Nakea_Order_Denying_Motions.pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.
[153] *Id*., 2.
[154] *Id*., Motion to Alter or Amend Judgment Dated September 13, 2022, Pursuant to HRCP 59(e) (21 September 2022) (online at https://hawaiiankingdom.org/pdf/Motion_to_Reconsider_(Filed_2022-09-21).pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.
[155] *Id*., Order Rejecting Reconsideration (October 5, 2022) (online at https://hawaiiankingdom.org/pdf/Nakea_Order_Rejecting_Reconsideration.pdf). Confidentiality waived by ODC when this document was filed as an exhibit with the Supreme Court under *Office of Disciplinary Counsel v. Kaiama*, SCAD-22-0000623.

> Hawaiian Kingdom's continued existence as a State under international law and his nationality as a Hawaiian subject.
>
> Respondent's first case applying Lorenzo was in 2010 in *Onewest Bank v. Tamanaha*, case no. 3RC10-1-1306, where he was one of three attorneys of record with legal counsel, Keoni K. Agard, for the defendant. Since 2010, Respondent has taken the time and energy to further research the case law and international laws on the subject of the Hawaiian Kingdom as a State and he has, since the Tamanaha case, become as proficient on this matter as any attorney within the territory of the Hawaiian Islands. According to Lorenzo, the burden of proof was placed on the Defendant in either civil or criminal proceedings, to include these proceedings. There were no exceptions to this burden, i.e., defendants or respondents that are practicing attorneys. To date, Lorenzo remains an open legal question.[156]

The denial of Attorney General Ka'iama's right to fair and regular hearing prompted him to file a petition for writ of mandamus with the Hawai'i Supreme Court on 26 October 2022 seeking a writ to mandate Nakea to hold an evidentiary hearing.[157] In support of his petition, Attorney General Ka'iama filed a motion requesting judicial notice.[158] The Supreme Court was comprised of Justices Mark E. Recktenwald, Paula A. Nakayama, Sabrina S. McKenna, Michael D. Wilson, and Todd W. Eddins.

Six days prior, however, on 20 October 2022, the ODC, by its Chief Disciplinary Counsel Bradley R. Tamm and Deputy Chief Disciplinary Counsel Bryant, filed a petition for immediate suspension of Attorney General Ka'iama from the practice of law.[159] On 30 October 2022, Attorney General Ka'iama filed a motion to dismiss the petition based on the same reasoning and facts as his motion to dismiss the subpoena before the ODC Board,[160] and a request for judicial notice.[161] In its opposition, the ODC acknowledges:

> Ka'iama's motions seek the scheduling of an evidentiary hearing for Petitioner Office of Disciplinary Counsel (ODC) to provide rebuttable evidence that the Hawaiian Kingdom ceases to exist as a State in light of the evidence cited in Ka'iama's Motion to Dismiss.

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[156] *Id*., Motion to Alter or Amend Judgment, Memo, 2.
[157] *Ka'iama v. Chairperson of the Disciplinary Board of the Hawai'i Supreme Court*, Petition for Writ of Mandamus or Extraordinary Writ Directed to the Chairperson of the Disciplinary Board of the Hawai'i Supreme Court, SCPW-22-0000634 (26 October 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_1]_Petition_or_Writ_of_Mandamus_(Efiled_2022-10-26).pdf).
[158] *Id*., Motion for Request of Judicial Notice (26 October 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_8]_Motion_for_Judicial_Notice.pdf).
[159] *Office of Disciplinary Counsel v. Ka'iama*, Petition for Immediate Suspension of Respondent from the Practice of Law Pursuant to RSCH Rule 2.11A, SCAD-22-0000623 (20 October 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_1]_Petition_for_Suspension_(Filed_2022-10-20).pdf).
[160] *Id*., Motion to Dismiss Petition for Immediate Suspension (30 October 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_7]_Motion_to_Dismiss_Petition.pdf).
[161] *Id*., Motion for Request of Judicial Notice (30 October 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_16]_Request_for_Judicial_Notice_(Efiled_2022-10-30).pdf).

> Ka‘iama asserts that this Court is mandated to dismiss the instant proceedings unless ODC provides such rebuttable evidence in an evidentiary hearing.[162]

Instead proffering rebuttable evidence, the ODC invoked the power of the Supreme Court and restates the oath of office taken by attorneys admitted to practice in the State of Hawai‘i.

> I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of Hawai‘i, and that I will at all time conduct myself in accordance with the Hawai‘i Rules of Professional Conduct. As an officer of the courts to which I am admitted to practice, I will conduct myself with dignity and civility towards judicial officers, court staff, and my fellow professionals. I will faithfully discharge my duties as attorney, counselor, and solicitor in the courts of the State to the best of my ability, giving due consideration to the legal needs of those without access to justice.[163]

The State of Hawai‘i Supreme Court would eventually deny Attorney General Ka‘iama’s petition for writ of mandamus[164] and his motion to dismiss petition for immediate suspension of practicing law.[165] To have denied the petition for a writ of mandamus and the motion to dismiss, it is presumed that the Supreme Court read the pleadings and exhibits provided in the motions for judicial notice in support of the petition for writ of mandamus and the motion to dismiss. Notwithstanding that these proceedings were extra-judicial and unlawful; they do provide the evidence of *mens rea* by Evers, Sewell, Nakea, Tamm, Bryant, Recktenwald, Nakayama, McKenna, Wilson, and Eddins under international criminal law where the perpetrators were made aware of the factual circumstances of the military occupation.

Glenn S. Hara, Charles R. Prather, Sofia M. Hirosane, and Greg K. Nakamura have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation, deprivation of fair and regular trial*, and *pillaging*, and, therefore, are guilty *dolus directus* of the first degree.

Daryl Y. Dobayashi, Mark E. Recktenwald, Paula A. Nakayama, Sabrina S. McKenna, Richard W. Pollack, Michael D. Wilson, James E. Evers, Josiah K. Sewell, Clifford L. Nakea, Bradley R. Tamm, Alana L. Bryant, and Todd W. Eddins have met the requisite elements of the war crime of *usurpation of sovereignty during military occupation* and *deprivation of fair and regular trial*, and, therefore, are guilty *dolus directus* of the first degree.

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[162] *Id*., Opposition to Motion to Dismiss and Motion to Request for Judicial Notice (3 November 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_24]_ODC_Opposition_to_Motion_to_Dismiss_&_For%20_Judicial_Notice_(2022-11-03).pdf).
[163] *Id*., 2.
[164] *Id*., Order Denying Petition for Writ of Mandamus (15 November 2022) (online at https://hawaiiankingdom.org/pdf/Order_Denying_Petition_for_Writ_of_Mandamus_(Efiled_2022-11-15).pdf).
[165] *Id*., Order Denying Motion to Dismiss (19 December 2022) (online at https://hawaiiankingdom.org/pdf/[Dkt_46]_Order_Denying_Motion_to_Dismiss_(Efiled_2022-12-19).pdf).

"It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor's 'will' is directed finally towards the accomplishment of that result." The term "guilty" is defined as "[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault."[166] 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."[167]

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

1. Hara, Prather, Hirosane, Nakamura, Dobayashi, Recktenwald, Nakayama, McKenna, Pollack, Wilson, Evers, Sewell, Nakea, Tamm, Bryant, and Eddins 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. Hara, Prather, Hirosane, Nakamura, Dobayashi, Recktenwald, Nakayama, McKenna, Pollack, Wilson, Evers, Sewell, Nakea, Tamm, Bryant, and Eddins were aware that the measures went beyond what was required for military purposes or the protection of fundamental human rights.
3. Their conduct took place in the context of and was associated with a military occupation.
4. Hara, Prather, Hirosane, Nakamura, Dobayashi, Recktenwald, Nakayama, McKenna, Pollack, Wilson, Evers, Sewell, Nakea, Tamm, Bryant, and Eddins were aware of factual circumstances that established the existence of the military occupation.

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

1. Hara, Prather, Hirosane, Nakamura, Dobayashi, Recktenwald, Nakayama, McKenna, Pollack, Wilson, Evers, Sewell, Nakea, Tamm, Bryant, and Eddins deprived one or more persons in an occupied territory of fair and regular trial by denying judicial guarantees recognized under international law, including those of the fourth Geneva Convention and the International Covenant on Civil and Political Rights.
2. The conduct took place in the context of and was associated with a military occupation.
3. Hara, Prather, Hirosane, Nakamura, Dobayashi, Recktenwald, Nakayama, McKenna, Pollack, Wilson, Evers, Sewell, Nakea, Tamm, Bryant, and Eddins were aware of factual circumstances that established the existence of the military occupation.

[166] Black's Law, 708.
[167] *Id*.

Elements of the war crime of *pillage*:

1. Hara, Prather, Hirosane, and Nakamura appropriated certain property.
2. Hara, Prather, Hirosane, and Nakamura 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 a military occupation.
5. Hara, Prather, Hirosane, and Nakamura were aware of factual circumstances that established the existence of the military occupation.

None of the perpetrators are heads of State, and, therefore, have no claim to immunity from criminal jurisdiction and are subject to prosecution by foreign States under universal jurisdiction if they are not prosecuted by the territorial State where the war crime has been committed. In particular, the severity of the war crime of *usurpation of sovereignty during military occupation* has led to, among other war crimes, the obliteration of the national consciousness of the Hawaiian Kingdom called the war crime of *denationalization*. According to Professor Schabas, "the offense of 'denationalization' consists of the imposition of legislation or administrative measures by the occupying power directed at the destruction of the national identity and national consciousness of the population."[168] 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."[169]

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

28 December 2022

[168] Schabas, 161.
[169] *Id.*