

WAR CRIMINAL REPORT NO. 25-0001

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

THE ROYAL COMMISSION OF INQUIRY:

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

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HAWAIIAN KINGDOM

WAR CRIMINAL REPORT No. 25-0001

GUILTY OF WAR CRIME: Brigadier General Tyson Y. Tahara as
Commander of 29th Infantry Brigade

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

LOCATION OF WAR CRIME: Islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll¹

INTRODUCTION

This war criminal report of the Royal Commission of Inquiry (“RCI”) on the war crime by omission for willful failure to obey an Army regulation and dereliction of duty addresses the willful omission to establish a military government of Hawai‘i imposed by international humanitarian law and the law of occupation upon Brigadier General Tyson Y. Tahara as Commander of 29th Infantry Brigade, State of Hawai‘i Army National Guard (“BG Tahara”). By the imposition of American laws and administrative measures, which is the war crime of usurpation of sovereignty during military occupation that has triggered secondary war crimes, BG Tahara, as the most senior commander in the Hawai‘i Army National Guard, is criminally responsible under the Army doctrine of command responsibility for war crimes for failure to stop or prevent war crimes under the doctrine of command responsibility for war crimes committed against the civilian population by the imposition of American municipal laws and administrative measures.

BG Tahara’s authority extends over 10,931 square miles, which include the islands of Hawai‘i, Maui, Molokini, Kaho‘olawe, Molokai, Lāna‘i, O‘ahu, Kaua‘i, Lehua, Ni‘ihau, Ka‘ula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisiansky, Pearl and Hermes Atoll, and Kure Atoll. This report is based upon the continued existence of the Hawaiian Kingdom as an independent State, being a *juridical* fact acknowledged by the Permanent Court of Arbitration in *Larsen v. Hawaiian Kingdom*,² which has been under a prolonged belligerent occupation by the United States since 17 January 1893, and the authority of the RCI established by proclamation of the Council of Regency on 17 April 2019.³

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

² Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration* (5 December 2021) (online at https://hawaiiankingdom.org/pdf/Lenzerini_Juridical_Fact_of_HK_and_Juridical_Act_of_PCA.pdf).

³ Royal Commission of Inquiry, *Preliminary Report: The Authority of the Council of Regency of the Hawaiian Kingdom* (27 May 2020) (online at

GOVERNING LAW

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

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

On 16 January 1893, under orders by U.S. Minister John Stevens, the city of Honolulu was invaded by a detachment of U.S. troops “supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and

https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf); 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); see also David Keanu Sai, “All States have a Responsibility to Protect its Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands,” 6(2) *International Review of Contemporary Law* 72-81 (2024).

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

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

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

medical supplies.”⁷ President Grover Cleveland determined that the invasion “upon the soil of Honolulu was [...] an act of war,”⁸ which coerced Queen Lili‘uokalani, executive monarch of the Hawaiian Kingdom, to conditionally surrender to the superior military power of the United States. The Queen proclaimed, “[n]ow, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.”⁹

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

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

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

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

⁸ *Id.*

⁹ *Id.*, 586.

(e) depriving a person protected by the Conventions or referred to in paragraph 2 or this Article of the rights of fair and regular trial.

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

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

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

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

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

¹¹ See ICRC concerning the identification of rules of customary international humanitarian law (online at <https://www.icrc.org/en/doc/assets/files/other/customary-law-rules.pdf>; and <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>).

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

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

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

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

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

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

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

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

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

Temporal issues

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

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

¹⁷ *Id.*, 17-18

Second, it is important to bear in mind that, as the judgment of the International Military Tribunal famously stated, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁸ Consequently, human longevity means that the inquiry into the perpetration of war crimes becomes abstract after 80 years, bearing in mind the age of criminal responsibility. It should also be noted that in 2022, Germany prosecuted a 97-year-old woman for Nazi war crimes.¹⁹ Since the RCI’s establishment in 2019, it serves little purpose to consider the international criminality of acts that may have taken place at the end of the nineteenth century or the early years of the twentieth century, given that there is no one alive who could be subject to punishment.

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

The Duty of the Occupant to Establish a Military Government

The state of war between the Hawaiian Kingdom and the United States was triggered by the United States’ *acts of war* committed by U.S. Marines in 1893. After completing a presidential investigation, President Grover Cleveland stated to the Congress, “[a]nd so it happened that on the 16th day of January, 1893, between four and five o’clock in the afternoon, a detachment of marines from the United States steamer Boston, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an act of war.”²³ This

¹⁸ *France et al. v. Göring et al.*, 22 IMT 411, 466 (1948).

¹⁹ Reuters, *Former concentration camp secretary, 97, convicted of Nazi war crimes* (Dec. 20, 2022) (online at [https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/#:~:text=BERLIN%2C%20Dec%202020%20\(Reuters\),for%20World%20War%20Two%20crimes.](https://www.reuters.com/world/europe/germany-convicts-97-year-old-woman-nazi-war-crimes-media-2022-12-20/#:~:text=BERLIN%2C%20Dec%202020%20(Reuters),for%20World%20War%20Two%20crimes.)).

²⁰ *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, 78 ILR 125, 135 (1984); see also *France, Assemblée nationale, Rapport d’information déposé en application de l’article 145 du Règlement par la Mission d’information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d’autres pays et l’ONU au Rwanda entre 1990 et 1994*, 286 (1999).

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

²² Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

²³ Executive Documents, 451.

invasion forced Queen Lili‘uokalani to conditionally surrender to the United States on 17 January 1893, calling upon the President to investigate the actions taken by U.S. Minister John Stevens and by the Marines, that were landed by Minister Steven’s orders, and, thereafter, to reinstate her as the Executive Monarch.

President Cleveland’s investigation led to an agreement of restoration on 18 December 1893, but it was never implemented. Unlike the German situation, where the military government, under General Eisenhower, as the Military Governor, administered German laws, after the surrender on 8 May 1945 until 23 May 1949, the United States did not administer the laws of the Hawaiian Kingdom after the surrender but rather allowed their surrogate, calling itself the provisional government, to maintain control until the United States unilaterally annexed Hawaiian territory by congressional legislation on 7 July 1898.²⁴ According to President Cleveland, the “provisional government owes its existence to an armed invasion by the United States.”²⁵ Instead of establishing a military government, the United States began to impose its municipal legislation over Hawaiian territory under *An Act To provide a government for the Territory of Hawaii* in 1900,²⁶ and *An Act To provide for the admission of the State of Hawaii into Union* in 1959.²⁷

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

Despite the prolonged nature of the occupation and 131 years of non-compliance with the law of occupation, there are two fundamental rules that prevail: (1) to protect the sovereign rights of the legitimate government of the occupied State; and (2) to protect the inhabitants of the occupied State from being exploited. From these two rules, the 1907 Hague Regulations and the Fourth Geneva Convention circumscribe the conduct and actions of a military government, notwithstanding the failure by the occupant to protect the rights of the occupied government and the inhabitants since 1893. These rights remain unaffected despite over a century of violating them.²⁹ The failure to establish a military government facilitated the violations and constitutes a war crime by omission.

²⁴ Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

²⁵ Executive Documents, 454.

²⁶ 31 Stat. 141 (1900).

²⁷ 73 Stat. 4 (1959).

²⁸ Ian Brownlie, *Principles of Public International Law* 109 (4th ed., 1990).

²⁹ David Keanu Sai, “The Sweeping Effect of Hawaiian Sovereignty and the Necessity of Military Government to Curb the Chaos,” 6 *Hawaiian Journal of Law and Politics* 23-54 (2024).

The law of occupation does not give the occupant unlimited power over the inhabitants of the occupied State. As President McKinley interpreted, this customary law of occupation that predates the 1899 and 1907 Hague Regulations during the Spanish-American War, the inhabitants of occupied territory “are entitled to security in their persons and property and in all their private rights and relations,”³⁰ and it is the duty of the commander of the occupant “to protect them in their homes, in their employments, and in their personal and religious beliefs.”³¹ Furthermore, “the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force”³² and are “to be administered by the ordinary tribunals, substantially as they were before the occupation.”³³

The United States’ practice under the law of occupation, confirms that sovereignty remains in the occupied State, because, according to Army regulations, “military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty”³⁴ through effective control of the territory of the occupied State.

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over a territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by the law of armed conflict while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, “[f]rom a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.”³⁵

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

³⁰ General Orders No. 101, 18 July 1898, *Foreign Relations of the United States, 1898*, 783. General Orders No. 101 is also reprinted in *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, para. 358 (1956).

³⁵ William E. Birkhimer, *Military Government and Martial Law* 21 (3rd ed., 1914).

initial burden.”³⁶ Military governors that preside over a military government are general officers of the Army.

Under Article 43, the authority to establish a military government is with the occupant that is physically on the ground—colloquially referred to in the Army as “boots on the ground.” Professor Eyal Benvenisti explains that “[t]his is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the ‘occupying State’ as the authority in power, but the delegates preferred to change the reference to ‘the occupant.’ This insistence on the distinct character of the occupation administration should also be kept in practice.”³⁷ This authority is triggered by Article 42, which states that a “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Only an “occupant,” which is the “army,” can establish a military government. Under international law, the occupant is an agent of the occupying State, and the responsibility for the acts of the former is attributed to the latter.

After the 1907 Hague Conference, the U.S. Army took steps to prepare for military occupations by publishing two field manuals— FM 27-5, *Civil Affairs Military Government*³⁸ and FM 27-10, *The Law of Land Warfare*.³⁹ Chapter 6 of FM 27-10 covers military occupation. Section 355 of FM 27-10 states that “[m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.”

According to the U.S. Manual for Courts-Martial United States, the duty to establish a military government may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.⁴⁰ A military government is the civilian government of the occupied State. Here follows the treaties and regulations to establish a military government in occupied territory, which is the function of the Army.

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in “[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority.”
- U.S. Department of Defense Directive 2000.13 states that “Civil affairs operations include...[e]stablish and conduct military government until civilian authority or government can be restored.”

³⁶ Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* 22 (1975).

³⁷ Eyal Benvenisti, *The International Law of Occupation* 5 (2nd ed., 2012).

³⁸ Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947).

³⁹ Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956).

⁴⁰ Department of Defense, *Manual for Courts-Martial United States*, 2024 ed., IV-28.

- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions oblige the occupant to administer the laws of the occupied State, after securing effective control of the territory, according to Article 42 of the 1907 Hague Regulations.
- Para. 2-37, Army Field Manual 41-10, states that all “commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949.”
- Para. 3, Army Field Manual 27-5, states that the “theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor [...], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority.”
- Para. 62, Army Field Manual 27-10, states that “[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory.”
- Para. 2-18, Army Field Manual 3-57, states that “DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations].”

International humanitarian law is silent on a prolonged occupation because the authors of the 1907 Hague Regulations viewed occupations to be provisional and not long term. According to Scobbie, “[t]he fundamental postulate of the regime of belligerent occupation is that it is a temporary state of affairs during which the occupant is prohibited from annexing the occupied territory. The occupant is vested only with temporary powers of administration and does not possess sovereignty over the territory.”⁴¹ The effective control by the United States, since Queen Lili‘uokalani’s conditional surrender on 17 January 1893, “can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation.”⁴²

Despite the prolonged nature of the American occupation, the law of occupation continues to apply because sovereignty was never ceded or transferred to the United States by the Hawaiian Kingdom. At a meeting of experts on the law of occupation, that was convened by the International Committee of the Red Cross in 2012, the experts “pointed out that the norms of occupation law, in particular Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, had originally been designed to regulate short-term occupations. However, the [experts] agreed that [international humanitarian law] did not set any limits to the time span of an occupation. It was

⁴¹ Iain Scobbie, “International Law and the prolonged occupation of Palestine,” *United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague*, 1 (May 20-22, 2015).

⁴² Eyal Benvenisti, *The International Law of Occupation* 6 (2nd ed., 2012).

therefore recognized that nothing under [international humanitarian law] would prevent occupying powers from embarking on a long-term occupation and that occupation law would continue to provide the legal framework applicable in such circumstances.”⁴³ They also concluded that, since a prolonged occupation “could lead to transformations and changes in the occupied territory that would normally not be necessary during short-term occupation,” there is “the need to interpret occupation law flexibly when an occupation persisted.”⁴⁴ The prolonged occupation of the Hawaiian Kingdom is, in fact, that case where drastic unlawful “transformations and changes in the occupied territory” occurred.

As the occupant in effective control of 10,931 square miles of Hawaiian territory, the State of Hawai‘i, being the civilian government of the Hawaiian Kingdom that was unlawfully seized in 1893, is obligated to transform itself into a military government in order “to protect the sovereign rights of the legitimate government of the Occupied State, and [...] to protect the inhabitants of the Occupied State from being exploited.” The military government has centralized control, headed by a military governor, and by virtue of this position the military governor has “supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority.”⁴⁵

The reasoning for the centralized control of authority is so that the military government can effectively respond to situations that are fluid in nature. Under the law of occupation, this authority by the occupant, according to Lenzerini, is to be shared with the Council of Regency, being the government of the occupied State.⁴⁶ As the last word concerning any acts relating to the administration of the occupied territory is with the occupant, “occupation law would allow for a vertical, but not a horizontal, sharing of authority [in the sense that] this power sharing should not affect the ultimate authority of the occupier over the occupied territory.”⁴⁷

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

⁴³ Report by Tristan Ferraro, legal advisor for the International Committee of the Red Cross, *Expert Meeting: Occupation and other forms of Administration of Foreign Territory* 72 (2012).

⁴⁴ *Id.*

⁴⁵ Department of the Army, Field Manual 27-5, *Civil Affairs Military Government*, para. 3 (1947).

⁴⁶ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317-333, 331 (2021).

⁴⁷ International Committee of the Red Cross, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory. Report*, Geneva, 20 (2012), online at <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf>.

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 Bolshevik hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and administration ousted;” “Taxes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate at Uskub);” “Prohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.,” “Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”⁴⁸

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.”⁴⁹ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime.⁵⁰ 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*.⁵¹

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

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

⁴⁸ Commission of Responsibilities, 38.

⁴⁹ *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

⁵⁰ Major Harold D. Cunningham, Jr., “Civil Affairs—A Suggested Legal Approach,” *Military Law Review* 115-137, 127, n. 33 (1960).

⁵¹ Australia’s War Crimes Act of 1945, *Annex—Australian Law Concerning Trials of War Criminals by Military Courts* (online at <https://www.legal-tools.org/doc/45b4ed/pdf/>).

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 1907 Hague Regulations.⁵²

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubts on its status as a crime under customary international law. Moreover, there do not appear to have been any prosecutions for that crime by international criminal tribunals. However, the war crime of *usurpation of sovereignty during military occupation* is undoubtedly a war crime under “particular” customary international law. According to the International Law Commission, “[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”⁵³ In the 1919 report of the Commission on Responsibilities, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather disagreed, *inter alia*, with the Commission’s position on the means of prosecuting Heads of State for the listed war crimes by conduct of omission.⁵⁴

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.⁵⁵ The failure by the occupant to establish a military government has allowed for the unlawful imposition of American municipal laws over Hawaiian territory.

⁵² Oscar M. Uhler, Henri Coursier, Frédéric Sordet, 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).

⁵³ Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).

⁵⁴ Commission of Responsibilities, Annex II, 58-79.

⁵⁵ Treaty of Versailles (1919), preamble.

Territorial Sovereignty of a State

United States practice views territorial sovereignty of a State as limited. According to the U.S. Supreme Court, “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens, and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.”⁵⁶ 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.”⁵⁷ The Court also acknowledged the limitation of territorial sovereignty during the Spanish-American War whereby Spanish laws would continue in force in U.S. occupied territories.⁵⁸ Furthermore, under international law, the Permanent Court of International Justice stated:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁵⁹

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

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.⁶⁰

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

⁵⁶ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

⁵⁷ *The Apollon*, 22 U.S. 362, 370 (1824).

⁵⁸ *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

⁵⁹ *Lotus case* (France v. Turkey), PCIJ Series A, No. 10, 18 (1927).

⁶⁰ Eyal Benvenisti, *The International Law of Occupation* 19 (1993).

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.”⁶¹ The PCA accepted the case as a dispute between a “State” and a “private party” and hence acknowledged the Hawaiian Kingdom to be a non-Contracting State in accordance with Article 47 of the 1907 Hague Convention. The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done “[p]ursuant to article 47 of the 1907 Convention.”⁶² According to Bederman and Hilbert:

At the center of the PCA proceeding was the argument that [...] the Hawaiian Kingdom continues to exist and that the Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States’ “unlawful imposition [over him] of [its] municipal laws” through its political subdivision, the State of Hawai‘i [and its County of Hawai‘i].⁶³

In the arbitration proceedings that followed, the Hawaiian Kingdom was not the moving party, but rather the respondent-defendant. However, in the administrative proceedings conducted by the International Bureau of the PCA, the Hawaiian Kingdom was the primary party, as a State, that allowed the dispute to be accepted under the auspices of the PCA. The United States was invited to join the arbitral proceedings, but, its denial to participate, hampered Larsen from maintaining his suit against the Hawaiian Kingdom.⁶⁴ 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.”⁶⁵ Therefore, under the indispensable third-party rule, Larsen was prevented from maintaining his suit against the Council of Regency because the Tribunal lacked subject matter jurisdiction due to the non-participation of the United States.

In the Hawaiian situation, the *usurpation of sovereignty during military occupation* would have been total since the beginning of the twentieth century. The RCI sees *usurpation of sovereignty* as a continuing offence, committed as long as the factual situation, determined by *usurpation of*

⁶¹ 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).

⁶² Permanent Court of Arbitration, Annual Reports, <https://pca-cpa.org/en/about/annual-reports/>.

⁶³ 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).

⁶⁴ 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](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁶⁵ *Larsen v. Hawaiian Kingdom*, 119 *International Law Reports*, 596.

sovereignty itself, persists. Alternatively, a plausible understanding of the crime is it consists of discrete acts. Once these acts occur, the crime has been completed. In other words, the *actus reus* of the crime is the conduct that usurps sovereignty rather than the ongoing situation involving the status of a lack of sovereignty. In this respect, an analogy might be made with the crime against humanity of enforced disappearance, where the temporal dimension has been a matter of some controversy. The Grand Chamber of the European Court of Human Rights has said that disappearance is “characterized by an on-going situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred.” Therefore, it is not “an ‘instantaneous’ act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.”⁶⁶

As an ongoing crime, the *actus reus* of the offence of *usurpation of sovereignty during military occupation* would consist of the imposition of legislation or administrative measures, by the occupying power, that go beyond those required by what is necessary for military purposes of the occupation. For example, the occupying Power is, therefore, entitled to cancel or suspend legislative provisions that concern recruiting or urging the population to resist the occupation.⁶⁷ The occupying Power is also entitled to cancel or suspend legislative provisions that involve discrimination and that are impermissible under current standards of international human rights law.

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

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

According to the Uniform Code of Military Justice (“UCMJ”), dereliction of duty comes under the failure to obey an order or regulation. There is no *mens rea* for this offense. Military law maintains obedience and discipline to ensure that servicemembers are ready to perform their mission. A negligent dereliction offense provides commanders with one means to assure that the objectives of the military mission are achieved, by holding servicemembers accountable for performance of their military duties, whether by court-martial or nonjudicial punishment, under Article 15, UCMJ.⁶⁸

⁶⁶ *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.

⁶⁷ Uhler, Coursier, Siordet, Pilloud, Boppe, Wilhelm and Schoenholzer, 336.

⁶⁸ See *United States v. Blanks*, 77 M.J. 239 (2018).

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

While the statutory enumeration of military criminal offenses found in the Uniform Code of Military Justice (UCMJ) provides general authority to prosecutors to charge serious violations of the laws and customs of war, it does not delineate any specific war crimes—and hence none are ever charged. Without specified war crime offenses, the U.S. military turns to what are often referred to as “common law crimes”—ordinary, non-war-related crimes such as murder, assault, battery, arson, theft offenses, and rape—to prosecute service members for what are more logically understood and characterized as war crimes. In the U.S. military system, the same generic murder offense used to convict a service member of murdering his or her spouse in downtown Los Angeles is used to prosecute a service member for killing a prisoner of war in U.S. custody in Iraq.⁶⁹

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

Elements and Punishment for Failure to Obey a Regulation

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

Elements and Punishment for Dereliction in the Performance of Duties

Article 92(3) of the UCMJ provides the elements of the offense for dereliction in the performance of duties: (a) that the accused had certain duties; (b) that the accused knew or reasonably should

⁶⁹ Geoffrey S. Corn and Rachel E. VanLandingham, “Strengthening American War Crimes Accountability,” 70 *American University Law Review* 309, 316 (2020).

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

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

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

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

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

- (1) The accused had command and control, or effective authority and control, over one or more subordinates;
- (2) One or more of the accused’s subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;
- (3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; and
- (4) The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.⁷⁰

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

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to

⁷⁰ Department of Defense, “Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission,” April 30, 2003 (online at <https://www.mc.mil/Portals/0/milcominstno2.pdf>).

commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.⁷¹

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

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

The superior-subordinate relationship is clear under the law of occupation because the military governor is the superior officer over all military forces and civilians in the occupied State. According to Major William Parks, when referring to Japanese General Tomoyuki Yamashita during the Second World War, “[a]s military governor, all trust, care, and confidence of the population were reposed in him. This was in addition to his duties and responsibilities as a military commander.”⁷² Although the senior commander of the State of Hawai‘i Army National Guard has failed to perform his duty of establishing a military government, and, thereby becoming a military governor, it does not relieve him of his duties as a theater commander to protect the civilian population from war crimes. Consequently, if commanders ‘know or should have known’ that war crimes are being committed and ‘take no action to prevent, stop, or punish,’ they could be held criminally liable for the war crime by omission.

The continuity of Hawaiian Statehood is a matter of customary international law, and is evidenced by two legal opinions, one by Professor Matthew Craven⁷³ and the other by Professor Federico Lenzerini.⁷⁴ Furthermore, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law as evidenced by the legal opinion of Professor William Schabas.⁷⁵ These writings are considered from “the most highly qualified publicists,” and as such, a source of customary international law. Thus, under customary international law, the Hawaiian Kingdom continues to exist and that war crimes are being committed throughout its territory.

⁷¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I: rules, Rule 153, 558 (2005).

⁷² Major William H. Parks, “Command Responsibility for War Crimes,” 62 *Military Law Review* 1, 38 (1973).

⁷³ Matthew Craven, “Continuity of the Hawaiian Kingdom,” 1 *Hawaiian Journal of Law and Politics* 508 (2004) (online at [https://hawaiiankingdom.org/pdf/1HawJLPol508_\(Craven\).pdf](https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf)).

⁷⁴ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf)).

⁷⁵ William Schabas, “Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” 3 *Hawaiian Journal of Law and Politics* 334 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol334_\(Schabas\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf)).

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

According to Professor Malcolm Shaw, “[b]ecause of the lack of supreme authorities and institutions in the international legal order, the responsibility is all the greater upon publicists of the various nations to inject an element of coherence and order into the subject as well as to question the direction and purposes of the rules.”⁷⁶ Therefore, “academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules.”⁷⁷ In the *Paquette Habana* case, the U.S. Supreme Court explained:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is* (emphasis added).⁷⁸

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

Elements and Punishment for Failure to Stop or Prevent War Crimes

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

⁷⁶ Malcolm N. Shaw QC, *International Law*, 6th ed., 113 (2008).

⁷⁷ *Id.*, 71.

⁷⁸ *The Paquette Habana*, 175 U.S., 677, 700 (1900).

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

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

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai‘i. In the book’s subtitle, the word Annexation has been replaced by the word Occupation, referring to America’s occupation of Hawai‘i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars.

⁷⁹ Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i* (1998).

⁸⁰ 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.

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.⁸¹

As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva, dated 25 February 2018, to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and Members of the Judiciary of the State of Hawai‘i.⁸² Dr. deZayas stated:

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

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁸³ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁸⁴

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

⁸¹ *Id.*, xvi.

⁸² 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).

⁸³ 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>).

⁸⁴ National Lawyers Guild, *NLG Calls Upon US to Immediately Comply with International Humanitarian Law in its Illegal Occupation of the Hawaiian Islands* (13 January 2020) (online at <https://www.nlg.org/nlg-calls-upon-us-to-immediately-comply-with-international-humanitarian-law-in-its-illegal-occupation-of-the-hawaiian-islands/>).

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai‘i and its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai‘i and its Counties into an occupying government pursuant to the Council of Regency’s proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency’s proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai‘i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai‘i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and is accredited to participate in the Human Rights Council’s sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁸⁵ In its resolution, the IADL “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”) —who is also a non-governmental organization with consultative status with the United Nations ECOSOC and is accredited as an observer in the Human Rights Council’s sessions, sent a joint letter, dated 3 March 2022, to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁸⁶ In its joint letter, the AAJ

⁸⁵ 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/>).

⁸⁶ International Association of Democratic Lawyers, *IADL and AAJ deliver joint letter on Hawaiian Kingdom to UN ambassadors* (3 March 2022) (online at <https://iadllaw.org/2022/03/iadl-and-aaj-deliver-joint-letter-on-hawaiian-kingdom-to-un-ambassadors/>).

also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

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

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

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

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

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

laws of the Hawaiian Kingdom, until a peace treaty has been entered into between the Hawaiian Kingdom and the United States.

In this meeting, the undersigned specifically stated to MG Hara that the failure to establish a military government is a war crime by omission. The undersigned then recommended to MG Hara that he should task his Staff Judge Advocate, Lieutenant Colonel Lloyd Phelps (“LTC Phelps”), to do his due diligence regarding the information provided him from this meeting. LTC Phelps’ task would then be to provide rebuttable evidence that the Hawaiian Kingdom does not continue to exist as a State under international law. The undersigned provided three weeks from the date of the letter, 1 June 2023, to complete his due diligence. Both MG Hara and the undersigned agreed that we would communicate with each other through an interlocutor, we both know, John “Doza” Enos.

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

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

It has been conveyed to me that LTC Phelps has not provided you with rebuttable evidence that the Hawaiian Kingdom has ceased to exist as a State and subject of international law. Therefore, the Hawaiian Kingdom continues to exist as a State since the nineteenth century and its current legal status is that of an occupied State.

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

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

As Judge James Crawford explains, “[t]here is a presumption that the State continues to exist, with its right and obligations [...] despite a period in which there is [...] no effective government.”⁸⁷ Judge Crawford further concludes that “[b]elligerent occupation does not affect the continuity of the State, ever where there exists no government claiming to represent the occupied State.”⁸⁸ “If one were to speak about a presumption of continuity,” explains Professor Craven, “one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.”⁸⁹

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

The insurgents, who were not held to account for their treasonous actions in 1893, were allowed by the United States to control and exploit the resources of the Hawaiian Kingdom and its inhabitants after the Hawaiian government was unlawfully overthrown by United States troops. Some of these insurgents came to be known as the Big Five, a collection of five self-serving large businesses, that wielded considerable political and economic power after 1893. The Big Five were Castle & Cooke, Alexander & Baldwin, C. Brewer & Company, American Factors (now Amfac), and Theo H. Davies & Company. One of the Big Five, Amfac, acquired an interest in Pioneer Mill Company in 1918, and in 1960 became a wholly owned subsidiary of Amfac. Pioneer Mill Company operated in West Maui with its headquarters in Lahaina. In 1885, Pioneer Mill Company was cultivating 600 of the 900 acres owned by the company and by 1910, 8,000 acres were devoted to growing sugar cane. In 1931, the Olowalu Company was purchased by Pioneer Mill Company,

⁸⁷ James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).

⁸⁸ *Id.*

⁸⁹ Matthew Craven, “Continuity of the Hawaiian Kingdom as a State under International Law,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

adding 1,200 acres of sugar cane land to the plantation. By 1935, over 10,000 acres, half-owned and half leased, were producing sugar cane for Pioneer Mill. To maintain its plantations, water was diverted, and certain lands of west Maui became dry.

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

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

The establishment of a military government would also put an end to land developers approaching victims of the fire who lost their homes to purchase their property. While land titles were incapable of being conveyed after January 17, 1893, for want of a lawful government and its notaries public, titles are capable of being remedied under Hawaiian Kingdom law and economic relief by title insurance policies. It is unfortunate that the tragedy of Lahaina has become an urgency for the State of Hawai'i to begin to comply with the law of occupation and establish a military government. To not do so is a war crime of omission.

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

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

Josh Green. This is not a valid excuse because to usurp authority is to assume the Governor has lawful authority.

All authority of the State of Hawai‘i, by virtue of American municipal laws, gives rise to war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of Hawai‘i is invalid because it never legally existed in the first place—*ex injuria jus non oritur* (law does not arise from injustice). What remains valid, however, is the authority of the State of Hawai‘i Department of Defense, which is its Army and Air National Guard. The authority of both these branches of the military continues as members of the United States Armed Forces that are situated in the occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the Army of the United States.

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

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

Notwithstanding your failure to obey an Army regulation and dereliction of duty, both being offenses under the UCMJ and the war crime by omission, you are the most senior general officer of the State of Hawai‘i Department of Defense. And despite your public announcement that you will be retiring as the Adjutant General on October 1, 2024, and resigning from the U.S. Army on November 1, 2024, you remain the theater commander over the occupied territory of the Hawaiian Kingdom. You are, therefore, responsible for establishing a military government in accordance with paragraph 3, FM 27-5. Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention imposes the obligation on the commander in occupied territory to establish a military government to administer the laws of the occupied State. Furthermore, paragraph 2-37, FM 41-10, states that “commanders are under a legal obligation imposed by international law.”

However, since paragraph 3 of FM 27-5 also states that you also have “authority to delegate authority and title, in whole or in part, to a subordinate commander” to perform the duty of establishing a military government. The RCI will consider this provision as time

sensitive to conclude willfulness, on your part, to not delegate authority and title, thereby, completing the elements necessary for the war crime by omission. Therefore, you will delegate full authority and title to Brigadier General Stephen Logan so that he can establish a Military Government of Hawai'i no later than 1200 hours on July 31, 2024. BG Logan will be guided in the establishment of a military government by the RCI's memorandum on bringing the American occupation of Hawai'i to an end by establishing an American military government (June 22, 2024), and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).

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

You currently have two conflicting duties to perform—follow the order given to you by the Attorney General or obey an Army regulation. To follow the former, you incur criminal culpability for the war crime by omission. To follow the latter, you will not incur criminal culpability. As you are aware, soldiers must obey an order from a superior, but if complying with that order would require the commission of a war crime, then the order is not lawful, and it, therefore, must be disobeyed. The question to be asked of the Attorney General is whether the State of Hawai'i is within a foreign State's territory or whether it is within the territory of the United States. If the Hawaiian Islands is within the territory of the United States, then the Attorney General's instruction can be considered a lawful order, but if the Hawaiian Islands constitute the territory of the Hawaiian Kingdom, an occupied State, then the order is unlawful, and must be disobeyed.

Because you have been made aware, and acknowledged on July 27, 2023, that the Hawaiian Kingdom continues to exist as a matter of international law, you must question the Attorney General's instruction to you. Just as I recommended to you, when we first met at the Grand Naniloa Hotel in Hilo on April 13, 2023, to have your Staff Judge Advocate refute the information I provided you regarding the presumed existence of the Hawaiian Kingdom as an occupied State under international law, I would strongly recommend you request the Attorney General to do the same.

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

On 13 July 2024, the RCI apprised MG Hara of the consequences for not delegating complete authority and title to BG Logan to establish a military government, that the RCI was aware of a letter dated 29 May 2024 from thirty-seven police officers, both active and retired, calling upon him to perform his duty, and that the RCI provided copies of two recent law articles, by the Head

and Deputy Head of the RCI, that were published in volume 6(2) of the *International Review of Contemporary Law* in June of 2024, attached herein as Enclosure 11.

The final letter the RCI sent to MG Hara was on 26 July 2024, apprising him that should he fail to perform his duty it will have a cascading effect for the Hawai'i Army National Guard and its component commands of the 29th Infantry Brigade, the 103rd Troop Command, and the 298th Regiment, Regional Training Institute, attached herein as Enclosure 12. The RCI stated:

If you are derelict in the performance of your duties, by not delegating authority to BG Logan, then you would be the subject of a war criminal report by the Royal Commission of Inquiry (RCI) for the war crime by omission. From the date of the publication of your war criminal report on the RCI's website, BG Logan will have one week to transform the State of Hawai'i into a military government.

If BG Logan is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of BG Logan's war criminal report on the RCI's website, Colonel David Hatcher II, Commander of the 29th Infantry Brigade, who is next in the chain of command below BG Logan, will have one week to transform the State of Hawai'i into a military government.

The chain of command, or what is called the order of battle, for the 29th Infantry Brigade for units in the Hawaiian Islands, is first, the 1st Squadron, 299th Cavalry Regiment, second, the 1st Battalion, 487th Field Artillery Regiment, third, the 29th Brigade Support Battalion, and fourth, the 227th Brigade Engineer Battalion. The 29th Infantry Brigade has units stationed in Alaska and Guam but since they are outside the Hawaiian territory, they do not have the military duty, as an occupant, to establish a military government in the Hawaiian Islands.

If Colonel Hatcher is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of Colonel Hatcher's war criminal report on the RCI's website, Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.

If LTC Werner is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Werner's war criminal report on the RCI's website, Lieutenant Colonel Bingham L. Tuisamatatele, Jr., Commander of 1st Battalion, 487th Field Artillery Regiment, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.

If LTC Tuisamatatele is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Tuisamatatele's war criminal report on the RCI's website, Lieutenant Colonel Joshua A. Jacobs, Commander of 29th Brigade Support Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.

If LTC Jacobs is derelict in the performance of his duties to establish a military government, then he would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of LTC Jacobs's war criminal report on the RCI's website, Lieutenant Colonel Dale R. Balsis, Commander of 227th Brigade Engineer Battalion, will assume command of the 29th Infantry Brigade and will have one week to transform the State of Hawai'i into a military government.

Should LTC Balsis be derelict in the performance of his duties to establish a military government and be the subject of a war criminal report for the war crime by omission, that will be published on the RCI's website, the sequence of events will then loop to the Executive Officers. First, with the 29th Infantry Brigade, second, with the 1st Squadron, 299th Cavalry Regiment, third, with the 1st Battalion, 487th Field Artillery Regiment, fourth with the 29th Brigade Support Battalion, and fifth with the 227th Brigade Engineer Battalion.

This looping, within the 29th Infantry Brigade's component commands, will cover all commissioned officers to include Majors, Captains, First Lieutenants and Second Lieutenants. After the commissioned officers have been exhausted in the 29th Infantry Brigade, the chain of command of commissioned officers of the 103rd Troop Command and its component commands will begin, followed by the chain of command of commissioned officers of the 298th Regiment, Regional Training Institute, and its component commands.

This sequence of events will continue by rank down the chain of command of the entire Hawai'i Army National Guard until there is someone who sees the "writing on the wall" that he/she either performs their military duty or becomes a war criminal subject to prosecution.

As of 1200 hours, on 31 July 2024, MG Hara did not delegate full authority and title to BG Logan. As such, MG Hara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. MG Hara was the subject of War Criminal Report no. 24-0001 that was published on the RCI's website on 5 August 2024.⁹⁰

⁹⁰ Royal Commission of Inquiry, War Criminal Report no. 24-0001—*Omission for willful failure to establish a military government—Kenneth Hara* (August 5, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).

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

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

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

As a war criminal, subject to prosecution by a competent tribunal, and where there is no statute of limitations, MG Hara is unfit to serve as Commander of the Hawai'i National Guard. As such, Brigadier General Stephen Logan, as the Deputy Adjutant General and Commander of the Army National Guard, must assume the chain of command, and he has until 1200 hours on August 12, 2024, to transform the State of Hawai'i into a military government. To escape criminal culpability, BG Logan must demand a legal opinion from the Attorney General or from LTC Phelps that shows, with irrefutable evidence and law, that the Hawaiian Kingdom ceases to exist a State under international law.

If BG Logan does not obtain a legal opinion, and fails to perform his military duty, he will then be the subject of a war criminal report by the RCI for the war crime by omission. After the publication of this war criminal report, Colonel Wesley K. Kawakami, Commander, 29th Infantry Brigade, will assume the chain of command and demand a similar legal opinion. If Colonel Kawakami receives no such legal opinion, he will have one week to perform his duty as the theater commander.

To speak to the severity of the situation, I am enclosing a letter to MG Hara, dated May 29, 2024, from police officers, both active and retired, from across the islands, that called upon him to perform his duties because "This failure of transition places current police officers on duty that they may be held accountable for unlawfully enforcing American laws." These police officers also stated:

We also acknowledge that the Council of Regency is our government that was lawfully established under extraordinary circumstance, and we support its effort to bring compliance with the law of occupation by the State of Hawai'i, on behalf of the United States, which will eventually bring the American occupation to a close. When this happens, our Legislative Assembly will be brought into session so that Hawaiian subjects can elect a Regency of our choosing. The Council of Regency is currently operating in an acting capacity that is allowed under Hawaiian law.

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

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

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

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

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

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

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

United Nations Definition of the Rule of Law

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

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

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

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

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the

Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act.

The same can be said of the Attorney General, whose office is a direct successor of the lawless provisional government. An Attorney General, conscious of her lawful status, does not thus act.

The call upon you, to perform your military duty, is not an attack on you and on the men and women you command in the Hawai‘i National Guard. It is a call upon you because of the respect the I have, as a former Army Field Artillery officer, of your position as the United States theater commander in the occupied State of the Hawaiian Kingdom.

I recommend that you view a recent podcast I did with Kamaka Dias’ *Keep It Aloha* (<https://www.youtube.com/watch?v=PvEdNx2dynE>) where I share my history and my time as a military officer, and how I got to where I am as a member of the Council of Regency. Since the podcast was posted on August 1, 2024, it has received over 6,700 views. I also recommend that you watch my presentation to the Maui County Council (<https://www.youtube.com/watch?v=Hh4iVT77MG8&t=8s>) on March 6, 2024, where I explain the legal basis of the American occupation and the duty of the Adjutant General to transform the State of Hawai‘i into a military government. Since the Kamehameha Schools’ Kanaeokana posted the video on April 1, 2024, it has received over 16,000 views. I recommend that you also watch an award-winning documentary on the Council of Regency that premiered in 2019 at the California Film Festival (<https://www.youtube.com/watch?v=CF6CaLAMh98>). Since the video was posted on August 13, 2019, it has received over 42,000 views.

Since my meeting with MG Hara on April 17, 2023, I have given him the latitude and time to do his due diligence with his JAG, LTC Phelps, who acknowledged that Hawai‘i is an occupied State. For MG Hara to simply ignore my calls on him to perform his duty is a sign of disrespect to a government official of the Hawaiian Kingdom whose conduct and action are in accordance with the rule of law. I implore you to not follow the same course MG Hara took, which led him to committing the war crime by omission.

You have until 12 noon on August 12, 2024, to perform your duty, of establishing a military government for Hawai‘i, in accordance with the Law of Armed Conflict—international humanitarian law, U.S. Department of Defense Directive 5100.01, and Army Regulations—FM 27-5 and FM 27-10. The eyes of Hawai‘i and the world are upon you.

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

Federico Lenzerini, from the University of Siena, Italy, Department of Political and International Sciences.

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

This is my last notification to you. According to Hawai‘i Revised Statutes §28-3, “The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department.” While you are not the head of the Department of Defense, you are implicated by the conduct of the head, Major General Kenneth Hara, in the performance of a military duty. A legal opinion is “a statement of advice by an expert on a professional matter.”

The issue of the continuity of the Hawaiian Kingdom, as a State under international law, is not a novel legal issue for the State of Hawai‘i. It has been at the center of case law and precedence, regarding jurisdictional arguments that came before the courts of the State of Hawai‘i, since 1994. One year after the United States Congress passed the joint resolution apologizing for the United States overthrow of the Hawaiian Kingdom government in 1993, an appeal was heard by the State of Hawai‘i Intermediate Court of Appeals that centered on a claim that the Hawaiian Kingdom continues to exist. In *State of Hawai‘i v. Lorenzo*, the appellate court stated:

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

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

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

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

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

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

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

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

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

As of 1200 hours, on 12 August 2024, BG Logan has not established a military government. As such, BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to

establish a military government, which is the war crime by omission. BG Logan was the subject of War Criminal Report no. 24-0002 that was published on the RCI's website on 12 August 2024.⁹¹ After War Criminal Report no. 24-0002 was published, the RCI notified Colonel Kawakami by letter, dated 12 August 2024, of the consequences upon him after BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 18. The RCI stated:

Today, August 12, 2024, the Royal Commission of Inquiry ("RCI") published its War Criminal Report no. 24-0002 finding Brigadier General Stephen Logan guilty of the war crime by omission. BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. BG Logan, in his official capacity as a senior member of the State of Hawai'i Department of Defense, has met the requisite elements for the war crime by omission, by willfully disobeying an Army regulation and by willful dereliction in his duty to establish a military government, and is, therefore, guilty of the war crime by omission. These offenses do not have the requisite element of *mens rea*.

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

Consequently, as the Commander of the 29th Infantry Brigade, you are now the theater commander. You should assume the chain of command, as the theater commander of the occupied State of Hawaiian Kingdom and perform your duty of establishing a military government by 12 noon on August 19, 2024. In my letter to BG Logan, dated August 11, 2024, I recommended that he submit a formal request to the Attorney General, Anne Lopez, for a legal opinion that refutes the legal opinions of Profession William Schabas and Professor Federico Lenzerini that the Hawaiian Kingdom continues to exist as a State under international law.

It would appear that BG Logan did not do so, which led to the publishing of War Criminal Report no. 24-0002. For you to not perform this military duty of establishing a military government of Hawai'i, you will need a legal opinion from the Attorney General

⁹¹ Royal Commission of Inquiry, War Criminal Report no. 24-0002—*Omission for willful failure to establish a military government—Stephen Logan* (August 12, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0002.pdf).

concluding that the Hawaiian Kingdom ceases to exist as a State under international law. In the absence of this legal opinion, you must perform your military duty.

If you are derelict in the performance of your duty to establish a military government, then you would be the subject of an RCI war criminal report for the war crime by omission. From the date of the publication of your war criminal report on the RCI's website, Lieutenant Colonel Fredrick J. Werner, Commander of 1st Squadron, 299th Cavalry Regiment, who is next in the chain of command below you, shall assume command of the Army National Guard. LTC Werner will have one week to transform the State of Hawai'i into a military government.

The RCI sent its final letter to Colonel Kawakami, dated 15 August 2024, attached herein as Enclosure 19. The RCI stated:

As Title 32 troops, the Army National Guard can serve under the Governor as their Commander in Chief, or, when activated for deployment to a foreign country, the President as their Commander in Chief. There is never a situation where there are two Commander in Chiefs that the Army National Guard reports to. In other words, unless activated by the President, if the Army National Guard is within the United States, then it reports to the Governor of the State they reside. If the Army National Guard is within the territory of an Occupied State, then the Commander in Chief is the President.

In my letter to Brigadier General Stephen Logan dated August 11, 2024, I brought to his attention Hawai'i Revised Statutes §28-3, "The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department." A legal opinion is "a statement of advice by an expert on a professional matter." While you are not the head of the Department of Defense, you are implicated by the conduct of its head, Major General Kenneth Hara, in the performance of a military duty in an Occupied State. Enclosed is a legal opinion dated March 17, 2014, that was requested by the head of the Department of Hawaiian Home Lands.

In my letter to BG Logan, I brought to his attention that the legal existence of the Hawaiian Kingdom, as a State, has become a precedence in Hawai'i judicial proceedings since 1994. This precedence places the burden on defendants, who were arguing the Hawaiian Kingdom continues to exist, that they must, according to the Hawai'i Supreme Court, in *State of Hawai'i v. Armitage*, "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.'"

Thus, since I provided two legal opinions that 'demonstrate a factual or legal basis' to conclude that the Hawaiian Kingdom does exist 'as a state in accordance with recognized attributes of a state's sovereign nature,' the State of Hawai'i Attorney General Anne E. Lopez must provide a legal opinion that refutes these legal opinions. If the Attorney

General is confident that the State of Hawai'i is a lawful entity and the Hawaiian Kingdom ceases to exist, then she should have no problem providing a legal opinion that explains it. This legal opinion would determine whether your Commander in Chief is the Governor or the President.

According to §28-3, only the head of the Department of Defense can request a legal opinion, but since you have been implicated by the inaction of MG Hara to make that initial request, you can make a formal request, as the Commander of the 29th Infantry Brigade, of MG Hara, to make that initial request. If you make this request to MG Hara prior to 12 noon on August 19, 2024, then you will not be derelict in your military duty, because the Royal Commission of Inquiry will then give time for MG Hara to make a formal request for a legal opinion from the Attorney General and give time for the legal opinion to be completed.

However, should you fail to make the request of MG Hara for a legal opinion from the Attorney General by 12 noon on August 19th, you will be derelict in your duty and be the subject of a war criminal report by the RCI for the war crime by omission. For your consideration, I have enclosed a sample letter to provide to MG Hara.

As of 1200 hours, on 26 August 2024, Colonel Kawakami has not established a military government. As such, Colonel Kawakami willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. Colonel Kawakami was the subject of War Criminal Report no. 24-0003 that was published on the RCI's website on 19 August 2024.⁹² After War Criminal Report no. 24-0003 was published, the RCI notified LTC Werner by letter, dated 19 August 2024, of the consequences upon him after Colonel Kawakami willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 20. The RCI stated:

Today, August 19, 2024, the Royal Commission of Inquiry ("RCI") published its War Criminal Report no. 24-0003 finding Wesley K. Kawakami guilty of the war crime by omission.⁹³ BG Logan willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. Colonel Kawakami, in his official capacity as a senior member of the State of Hawai'i Department of Defense, has met the requisite elements for the war crime by omission, by willfully disobeying an Army regulation and by willful dereliction in his duty to establish a military government, and is, therefore, guilty of the war crime by omission. These offenses do not have the requisite element of *mens rea*.

⁹² Royal Commission of Inquiry, War Criminal Report no. 24-0002—*Omission for willful failure to establish a military government—Stephen Logan* (August 12, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0002.pdf).

⁹³ Royal Commission of Inquiry, *War Criminal Report 24-0002—Brigadier General Stephen Logan* (August 12, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0003.pdf).

[...]

Consequently, as the Commander of the 1st Squadron, 299th Cavalry Regiment, you are now the theater commander. You should assume the chain of command, as the theater commander of the occupied State of Hawaiian Kingdom and perform your duty of establishing a military government by 12 noon on August 26, 2024. In my letter to Colonel Kawakami, dated August 15, 2024, I recommended that he submit a formal request to Major General Hara, as head of the Department of Defense, to request that the Attorney General, Anne Lopez, according to Hawai'i Revised Statutes §28-3, provide a legal opinion that refutes the legal opinions of Professor William Schabas and Professor Federico Lenzerini that the Hawaiian Kingdom continues to exist as a State under international law. It is a request as to a question of law, which the Attorney General is bound to answer, but a request from the head of the Department of Defense is required under §28-3.

As of 1200 hours, on 26 August 2024, LTC Werner did not establish a military government. As such, LTC Werner willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. LTC Werner was the subject of War Criminal Report no. 24-0004 that was published on the RCI's website on 2 September 2024.⁹⁴ After War Criminal Report no. 24-0004 was published, the RCI notified LTC Tuisamatatele by letter, dated 26 August 2024, of the consequences upon him after LTC Werner willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 21. The RCI stated:

Today, August 26, 2024, the Royal Commission of Inquiry ("RCI") published its War Criminal Report no. 24-0004 finding Lieutenant Colonel Fredrick J. Werner guilty of the war crime by omission. LTC Werner willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government. Therefore, his conduct, by omission, constitutes a war crime. LTC Werner, in his official capacity as a senior member of the State of Hawai'i Department of Defense, has met the requisite elements for the war crime by omission, by willfully disobeying an Army regulation and by willful dereliction in his duty to establish a military government, and is, therefore, guilty of the war crime by omission. These offenses do not have the requisite element of *mens rea*.

[...]

Consequently, as the Commander of the 1st Battalion, 487th Field Artillery Regiment, you are now the theater commander. You should assume the chain of command, as the theater commander of the occupied State of Hawaiian Kingdom and perform your duty of establishing a military government by 12 noon on September 2, 2024. In my letter to LTC Werner, dated August 19, 2024, I recommended that he submit a formal request to Major

⁹⁴ Royal Commission of Inquiry, War Criminal Report no. 24-0004—*Omission for willful failure to establish a military government— Fredrick Werner* (August 26, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0004.pdf).

General Hara, as head of the Department of Defense, to request that the Attorney General, Anne Lopez, according to Hawai'i Revised Statutes §28-3, provide a legal opinion that refutes the legal opinions of Professor William Schabas and Professor Federico Lenzerini that the Hawaiian Kingdom continues to exist as a State under international law. It is a request as to a question of law, which the Attorney General is bound to answer, but a request from the head of the Department of Defense is required under §28-3.

As of 1200 hours, on 2 September 2024, LTC Tuisamatatele did not establish a military government. As such, LTC Tuisamatatele willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. LTC Tuisamatatele was the subject of War Criminal Report no. 24-0005 that was published on the RCI's website on 2 September 2024.⁹⁵ After War Criminal Report no. 24-0005 was published, the RCI notified Lieutenant Colonel Joshua A. Jacobs by letter, dated 2 September 2024, of the consequences upon him after LTC Tuisamatatele willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 22. That LTC Jacobs must establish a military government by 1200 hours on 9 September 2024.

As of 1200 hours, on 9 September 2024, LTC Jacobs did not establish a military government. As such, LTC Jacobs willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. LTC Jacobs was the subject of War Criminal Report no. 24-0006 that was published on the RCI's website on 9 September 2024.⁹⁶ After War Criminal Report no. 24-0006 was published, the RCI notified Lieutenant Colonel Dale R. Balsis by letter, dated 9 September 2024, of the consequences upon him after LTC Jacobs willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 23. That LTC Balsis must establish a military government by 1200 hours on 16 September 2024.

As of 1200 hours, on 16 September 2024, LTC Balsis did not establish a military government. As such, LTC Balsis willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. LTC Balsis was the subject of War Criminal Report no. 24-0007 that was published on the RCI's website on 16 September 2024.⁹⁷ After War Criminal Report no. 24-0007 was published, the RCI notified Lieutenant

⁹⁵ Royal Commission of Inquiry, War Criminal Report no. 24-0005—*Omission for willful failure to establish a military government*— Fredrick Werner (September 2, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0005.pdf).

⁹⁶ Royal Commission of Inquiry, War Criminal Report no. 24-0006—*Omission for willful failure to establish a military government*— Bingham L. Tuisamatatele, Jr. (September 9, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0006.pdf).

⁹⁷ Royal Commission of Inquiry, War Criminal Report no. 24-0007—*Omission for willful failure to establish a military government*— Dale R. Balsis (September 16, 2024) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0007.pdf).

Colonel Michael I. Rosner by letter, dated 16 September 2024, of the consequences upon him after LTC Balsis willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 24. That LTC Rosner must establish a military government by 1200 hours on 23 September 2024.

The Royal Commission of Inquiry RCI was unaware, until 20 November 2024, that Brigadier General Tyson Y. Tahara had been the Commander of the Hawai‘i Army National Guard since September 7, 2024. This makes BG Tahara the most senior Army officer in the National Guard with the affirmative duty to transform the State of Hawai‘i into a military government. Prior to this, the RCI was communicating with LTC Rosner, Executive Officer, 29th Infantry Brigade, who was next in the chain of command after LTC Balsis. LTC Rosner was notified that he had until 28 November 2024, to establish a military government. However, in light of this unforeseen information, the RCI notified BG Tahara by letter, dated 20 November 2024, of the consequences upon him after LTC Balsis willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, attached herein as Enclosure 25, and that he had until 28 November 2024, to establish a military government.

On 28 November 2024, BG Tahara did not establish a military government. As such, BG Tahara willfully disobeyed an Army regulation and was willfully derelict in his duty to establish a military government, which is the war crime by omission. BG Tahara was the subject of War Criminal Report no. 25-0008 that was published on the RCI’s website on 1 January 2025.⁹⁸

GUILTY OF THE WAR CRIME BY OMISSION

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

The term “guilty,” as used in the RCI war criminal reports, is defined as “[h]aving committed a crime or other breach of conduct; justly chargeable offense; responsible for a crime or tort or other offense or fault.”⁹⁹ It is distinguished from a criminal prosecution where “guilty” is used by “an accused in pleading or otherwise answering to an indictment when he confesses to have committed

⁹⁸ Royal Commission of Inquiry, War Criminal Report no. 25-0001—*Omission for willful failure to establish a military government— Tyson Y. Tahara* (January 1, 2025) (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0008.pdf).

⁹⁹ Black’s Law 708 (6th ed. 1990).

the crime of which he is charged, and by the jury in convicting a person on trial for a particular crime.”¹⁰⁰ According to U.S. military law, BG Tahara is accountable by court-martial or nonjudicial punishment under Article 15, UCMJ. Under international criminal law, BG Tahara is subject to prosecution for the war crime by omission by a competent court or tribunal.

Elements for failure to obey a regulation:

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

Elements for dereliction in the performance of duties:

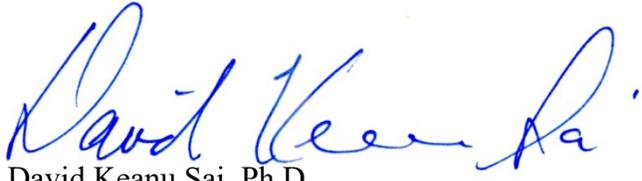
- a) That BG Tahara had certain duties (U.S. Department of Defense Directive 5100.01 and Para. 3, Army Field Manual 27-5);
- b) That BG Tahara knew or reasonably should have known of the duties; and
- c) That BG Tahara was (willfully) (through neglect or culpable inefficiency) derelict in the performance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

Elements of command responsibility for war crimes:

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

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

¹⁰⁰ *Id.*



David Keanu Sai, Ph.D.

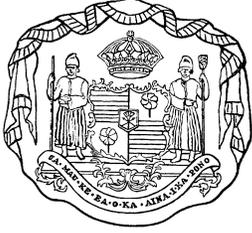
Head, *Royal Commission of Inquiry*

1 January 2025

enclosures

**For enclosures “1-24” see War
Criminal Report 24-0007**

Enclosure “25”



H.E. DAVID KEANU SAI, PH.D.

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November 20, 2024

Brigadier General Tyson Y. Tahara
Commander Hawai'i Army National Guard
Email: tyson.y.tahara.mil@army.mil

Via electronic mail

Re: Your duty to establish a military government by November 28, 2024, or be the subject of a war criminal report for the war crime by omission

Brigadier General Tahara:

It has now been over a year since the Hawai'i Army National Guard's leadership became aware that the war crime of usurpation of sovereignty during military occupation is being committed and that it is their duty to stop it by establishing a military government in accordance with U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation. To understand the severity of the situation, I strongly recommend you watch a presentation I gave to the DRIP Committee of the Maui County Council on March 6, 2024 (<https://hawaiiankingdom.org/blog/dr-keanu-sais-presentation-to-the-maui-county-councils-drip-committee-on-march-6-2024/>). This has nothing to do with the Native Hawaiian Sovereignty Movement. It is a matter of international humanitarian law, which is also called the Law of Armed Conflict.

Lieutenant Colonel Phelps, as Major General Kenneth Hara's Staff Judge Advocate, was tasked to refute the information I provided MG Hara at our meeting on April 13, 2023. He could not, which led to MG Hara admitting, on July 27, 2024, that Hawai'i is occupied. It was later revealed to me, that Attorney General Anne Lopez interfered and instructed MG Hara and Brigadier General Logan to ignore me regarding MG Hara's duty to transform the State of Hawai'i into a military government.

Major General Kenneth Hara’s willful failure to obey Army regulations, and resulting in his dereliction of duty, has led to war criminal reports for the war crime by omission on himself—War Criminal Report no. 24-0001,¹ and down the chain of command, to Brigadier General Stephen Logan—War Criminal Report no. 24-0002,² Colonel Wesley Kawakami—War Criminal Report no. 24-0003,³ Lieutenant Colonel Fredrick Werner—War Criminal Report no. 24-0004,⁴ Lieutenant Colonel Bingham Tuisamatatele, Jr.—War Criminal Report no. 24-0005,⁵ Lieutenant Colonel Joshua Jacobs—War Criminal Report no. 24-0006,⁶ and Lieutenant Colonel Dale Balsis—War Criminal Report no. 24-0007.⁷ Attorney General Lopez is the subject of War Criminal Reports no. 23-0001⁸ and 23-0001-1.⁹

The Royal Commission of Inquiry (“RCI”) was unaware, until today, that you have been the Commander of the Hawai‘i Army National Guard since September 7, 2024. This makes you the most senior Army officer in the National Guard with the affirmative duty to transform the State of Hawai‘i into a military government. Prior to this, the RCI was communicating with Lieutenant Colonel Michael Rosner, Executive Officer, 29th Infantry Brigade, who was next in the chain of command after LTC Balsis. LTC Rosner was notified that he had until November 28, 2024, to establish a military government.

The aforementioned conduct and omission to establish a military government falls directly under Department of Defense Law of War Manual, para. 18.22.1, which states, “Any person who commits an act that constitutes a crime under international law is responsible therefor and liable to punishment. International law imposes duties and liabilities on individuals as well as States, and individuals may be punished for violations of international law.” And under para. 4-24, Army Regulations 600-20, which states that “Commanders are legally responsible for war crimes they personally commit, order

¹ Royal Commission of Inquiry, War Criminal Report no. 24-0001 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).

² *Id.*, War Criminal Report no. 24-0002 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0002.pdf).

³ *Id.*, War Criminal Report no. 24-0003 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0003.pdf).

⁴ *Id.*, War Criminal Report no. 24-0004 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0004.pdf).

⁵ *Id.*, War Criminal Report no. 24-0005 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0005.pdf).

⁶ *Id.*, War Criminal Report no. 24-0006 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0006.pdf).

⁷ *Id.*, War Criminal Report no. 24-0007 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0007.pdf).

⁸ *Id.*, War Criminal Report no. 23-0001 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001.pdf).

⁹ *Id.*, War Criminal Report no. 23-0001-1 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._23-0001-1.pdf).

committed, or know or should have known about and take no action to prevent, stop, or punish.”

The Army doctrine of command responsibility for war crimes has its roots in World War II’s war criminal trials which came before U.S. military tribunals. In Japan, U.S. judges convicted General Tomoyuki Yamashita, and in Germany, convicted Field Marshal Wilhelm List, and other German generals, under the theory of command responsibility, for their subordinates’ war crimes. In the *Yamashita* case, the U.S. Supreme Court affirmed the conviction because, as a commander of Japanese forces in the Philippines, General Yamashita was under an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”¹⁰ In the occupied territory of the Philippines, General Yamashita was not only the theater commander but also its military governor. According to Major Parks in his 1973 law article *Command Responsibility for War Crimes*:

The value of the study of the *Yamashita* trial lies not in its often misstated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not), but in the legal conclusions it actually reached, *Yamashita* recognized the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the *summum jus* of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own. In the latter it became the foundation for all subsequent trials arising from World War II. In the former its value lies primarily in the general rather than the specific sense—while recognizing the duty of the commander and the violation of the law of war for failure to exercise that duty, the duty was all the more absolute in *Yamashita* because of General Yamashita’s additional responsibilities as military governor of the Philippines. As military governor, all trust, care, and confidence of the population were reposed in him. This was in addition to his duties and responsibilities as a military commander, a point refined in the *High Command and Hostages* cases which follow [in Germany].¹¹

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

¹⁰ *In Re Yamashita*, 327, U.S. 1, 16 (1946).

¹¹ Major William H. Parks, “Command Responsibility for War Crimes,” 62 *Military Law Review* 1, 37-38 (1973).

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

The doctrine of command responsibility has three elements: (1) there must be a superior-subordinate relationship; (2) the superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and (3) the superior failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator. Section 501 of U.S. Army Field Manual 27-10 states, the “commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”

For Hawai‘i’s situation, the significance of the *Yamashita* case was the role and function of a military governor and the failure or omission of General Yamashita to stop war crimes being committed against the civilian population because as ‘military governor, all trust, care, and confidence of the population were reposed in him.’ He would also have had the duty to protect the civilian population from war crimes being committed by other civilians who were not in the Japanese military. In that same vein, the theater commander, of the occupied State of the Hawaiian Kingdom, would have the same duty to protect the civilian population from war crimes being committed by American civilians that are pretending to be the lawful government here.

MG Hara, BG Logan, Colonel Kawakami, LTC Werner, LTC Tuisamatatele, Jr., LTC Jacobs, LTC Balsis, and LTC Phelps were provided information that war crimes have and continue to be committed by the federal government, the State of Hawai‘i, and the Counties. These war crimes are being committed by the imposition of American municipal laws and administrative measures within the territory of the Hawaiian Kingdom. This imposition of American laws constitutes the war crime of usurpation of sovereignty during military occupation under customary international law. This triggers secondary war crimes that include the war crime of compulsory enlistment; the war crime of denationalization; the war crime of confiscation or destruction of property; the war crime of deprivation of

fair and regular trial; the war crime of deporting civilians of the occupied territory; and the war crime of transferring populations into an occupied territory.¹²

MG Hara, BG Logan, Colonel Kawakami, LTC Werner, LTC Tuisamatatele, Jr., LTC Jacobs, LTC Balsis, and LTC Phelps were also provided legal opinions from scholars of international law in Europe, which are considered sources of international law, on the continuity of the Hawaiian Kingdom as a State under international law by Professor Matthew Craven from the University of London, SOAS,¹³ on the legitimacy of the Council of Regency by Professor Federico Lenzerini from the University of Siena, Italy,¹⁴ and on war crimes being committed in the Hawaiian Kingdom by Professor William Schabas from Middlesex University London. These legal opinions, which are considered international law, have not been refuted by the United States or the State of Hawai‘i. In his legal opinion, Professor Schabas directly cites Professor Craven’s legal opinion on the continued existence of the Hawaiian Kingdom, where he states:

This legal opinion is made at the request of the head of the Hawaiian Royal Commission of Inquiry, Dr. David Keanu Sai, in his letter of 28 May 2019, requesting of me “a legal opinion addressing the applicable international law, main facts and their related assessment, allegations of war crimes, and defining the material elements of the war crimes in order to identify mens rea and actus reus”. It is premised on the assumption that the Hawaiian Kingdom was occupied by the United States in 1893 and that it remained so since that time. Reference has been made to the expert report produced by Prof. Matthew Craven dealing with the legal status of Hawai‘i and the view that it has been and remains in a situation of belligerent occupation resulting in application of the relevant rules of international law, particularly those set out in the Hague Conventions of 1899 and 1907 and the fourth Geneva Convention of 1949. This legal opinion is confined to the definitions and application of international criminal law to a situation of occupation. The terms “Hawaiian Kingdom” and “Hawai‘i” are synonymous in this legal opinion.¹⁵

Despite the willful failure of the U.S. military, since January 17, 1893, to establish a military government in Hawai‘i, the occupant, in effective control of the territory of the Hawaiian Kingdom, is the State of Hawai‘i, not the federal government. Therefore, the State of Hawai‘i has the affirmative duty and obligation, under the law of occupation, to transform itself into a military government. By doing so, this will stop the war crimes being committed with impunity under the Army doctrine of command responsibility. Failure to

¹² William Schabas, “Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” 3 *Hawaiian Journal of Law & Politics* 334, 357-360 (2021).

¹³ Matthew Craven, “Continuity of the Hawaiian Kingdom,” 1 *Hawaiian Journal of Law & Politics* 508 (2004).

¹⁴ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law & Politics* 317 (2021).

¹⁵ Schabas, 335-336.

do so, places the criminal culpability, for the war crime by omission under the doctrine of command responsibility, on you, just as it did upon General Yamashita.

As the U.S. Supreme Court held with General Yamashita, as a military governor, he had the ‘affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect...the civilian population.’ Likewise, you, as the theater commander, must become the military governor of Hawai‘i to stop the war crimes being committed upon the civilian population whether or not the population is aware that they are victims.

MG Hara, BG Logan, Colonel Kawakami, LTC Werner, LTC Tuisamatatele, Jr., LTC Jacobs, and LTC Balsis “knew” that the war crime of usurpation of sovereignty during military occupation was being committed by the federal government, the State of Hawai‘i, and the Counties, yet they each took no action to stop it by establishing a military government. Major Michael Winn, who is chief of administrative law at U.S. Army Combined Arms Support Command at Fort Lee, Virginia, states in his article *Command Responsibility for Subordinates’ War Crimes—A Twenty-First Century Primer*, that “Commanders who fail to comply with their obligations with regard to the LOAC are at risk of an administrative reprimand or elimination. Worse, failure to comply could serve as the basis for a court-martial for dereliction of duty.”¹⁶ Major Winn then concludes:

Meeting our Nation’s obligations under the law of war does not come automatically—it requires leadership. In this era of increased focus on command responsibility for war crimes, legal advisors have an important role to play in helping their commanders prevent, stop, and punish such offenses. Accordingly, legal advisors keep their commanders on the high road of command responsibility, where they can focus on their mission—to prepare Soldiers for combat and lead them in defense of our Nation.¹⁷

Because the senior leadership of the Army National Guard committed war crimes, para. 18.22.1 and para. 4-24 renders them all unfit to lead. In your case, it is BG Logan that is unfit to be the Adjutant General. Consequently, as the most senior officer, you have a duty to assume command, as Adjutant General, under Army Regulation 600-20, paragraph 2-11, which states that the “senior officer, WO, cadet, NCO, or junior enlisted Soldier among troops at the scene of an emergency will assume temporary command and control of the Soldiers present.” *Black’s Law Dictionary* defines an emergency as a “sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing

¹⁶ Michael D. Winn, “Command Responsibility for Subordinates’ War Crimes: A Twenty-First Century Primer,” 2 *Army Lawyer* 39, 43 (2022).

¹⁷ *Id.*, 44.

necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action without time for full deliberation.”¹⁸

We are approaching November 28th, a national holiday, where Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State. This day of Hawaiian independence ushered the Hawaiian Kingdom into the *family of nations* as a subject of international law. As a government officer of the Hawaiian Kingdom and Head of the Royal Commission of Inquiry, I am giving you until November 28, 2024, to transform the State of Hawai‘i into a military government. Otherwise, you will become the subject of a war criminal report like the commanders before you. There are no statutes of limitation for war crimes.

To comply with Army regulations and directives, and to avoid criminal culpability, you must immediately obtain legal advice from LTC Phelps, your legal adviser now. I recommend that you request of LTC Phelps answers to the following two questions.

First question: Do I have a duty to assume command as Adjutant General under Army Regulation 600-20, paragraph 2-11? If yes, then go to the second question. If no, give me a legal reason why I do not have this duty.

Second question: Do I have a duty to establish a military government Under DOD Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation? If yes, then begin the mission of transforming the State of Hawai‘i into a military government by November 28, 2024. If no, give me a legal reason why I do not have this duty.

The law of occupation provides for a working relationship between the occupant, the government of the occupied State, and the population. Para. 6-24, FM 6-27, states “Military occupation of enemy territory involves a complex, trilateral set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of the occupied territory.” Appropriately, Professor Federico Lenzerini explains this relationship between the occupant and the Council of Regency in his “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom.”¹⁹ Professor Lenzerini states:

In light of the foregoing, it may be concluded that the working relationship between the Regency and the administration of the occupying State should have the form of a cooperative relationship aimed at guaranteeing the realization of the

¹⁸ Black’s Law 522 (1990).

¹⁹ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf)).

rights and interests of the civilian population and the correct administration of the occupied territory, provided that there are no objective obstacles for the occupying power to cooperate and that, in any event, the “supreme” decision-making power belongs to the occupying power itself. This conclusion is consistent with the position of the latter as “administrator” of the Hawaiian territory, as stated in the Council of Regency’s Proclamation recognizing the State of Hawai‘i and its Counties as the administration of the occupying State of 3 June 2019 and presupposed by the pertinent rules of international humanitarian law.²⁰

After serving 10 years in the Hawai‘i Army National Guard and having been the commander of Charlie Battery, 1/487th Field Artillery, I know Army regulations. And having a Ph.D. in political science specializing in international relations and law, I know international law. In my letters to MG Hara, BG Logan, Colonel Kawakami, LTC Werner, LTC Tuisamatatele, Jr., LTC Jacobs, and LTC Balsis, that included LTC Phelps, I provided the legal framework regarding occupied territory and war crimes under customary international law. Military occupations are matters of fact and not law. The law of occupation comes into play when the occupant is in effective control of occupied territory—1907 Hague Regulations (art. 42). The State of Hawai‘i is in control here and not the federal government. The law of occupation regulates the actions and conduct of U.S. military personnel within the occupied territory.

If you fail to comply with U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation, by not establishing a military government, you will be the subject of a war criminal report for the war crime by omission under the Army doctrine of command responsibility for war crimes. MG Hara, BG Logan, Colonel Kawakami, LTC Werner, LTC Tuisamatatele, Jr., LTC Jacobs, and LTC Balsis were all subjects of war criminal reports. LTC Phelps was also apprised by me that he would be the subject of this war criminal report as an accessory. I am enclosing my recent letter to LTC Phelps dated November 18, 2024. And I am enclosing my recent law article “All States have a Responsibility to Protect their Population from War Crimes—Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands,” that was published this year by the *International Review of Contemporary Law*. I caution you to not take this lightly.

I am also enclosing my *curriculum vitae* so that you see my credentials, qualifications, and publications. Of particular note, is my forthcoming chapter titled *Hawai‘i’s Sovereignty and Survival in the Age of Empire* in a book titled *Unconquered States: Non-European Powers in the Imperial Age*, which I am also enclosing. Oxford University Press, a

²⁰ *Id.*, 333, para. 20.

renowned academic publisher in England, is publishing this book. Here is the abstract for my chapter:

From archaic state to a British protectorate to a sovereign and independent state, the Hawaiian Kingdom's evolution of governance during the imperial age is unparalleled in the world. While being the first country of Oceania to become a member of the international community of states since the nineteenth century, the Hawaiian Kingdom was not able to escape the tentacles of empire, but it was able to engage foreign aggression on its own terms and ultimately survive. This chapter covers the Hawaiian Kingdom from the death of Captain James Cook, the rise of the warrior king Kamehameha I—progenitor of the kingdom, government reform, independence, the overthrow of its government by United States forces, and its continued existence as a state under international law.

In addition, a book review of my latest book “The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom”²¹ was published in the *Polish Journal of Political Science*, which I am also enclosing. In her book review, Professor Anita Budziszewska concludes:

I regard this publication as an exceptionally valuable one that systematises matters of the legal status of the Hawaiian Kingdom, taking up the key issues surrounding the often ignored topic of a difficult historical context occurring between Hawaii and the United States. The issue at stake here has been regenerated synthetically, on multiple levels, with a penetrating analysis of the regulations and norms in international law applying to Hawaii – starting from potential occupied-territory status, and moving through to multi-dimensional issues relating to both war crimes and human rights. This is one of the few books – if not the only one – to describe its subject matter so comprehensively and completely. I therefore see this work as being of exceptional value and considerable scientific importance. It may serve not only as an academic source, but also a professional source of knowledge for both practicing lawyers and historians dealing with the matter on hand. The ambition of those who sought to take up this difficult topic can only be commended.

Thus, it has now become a known fact that the Hawaiian Kingdom is an occupied State under international law. You can follow all real time updates on the Hawaiian Kingdom Blog (<https://hawaiiankingdom.org/blog/>).

²¹ David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).



David Keanu Sai, Ph.D.

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Enclosures

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Enclosure “1”



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November 18, 2024

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Via electronic mail

Re: Your duty as Staff Judge Advocate to advise Lieutenant Colonel Rosner of his duty to establish a military government

Lieutenant Colonel Phelps:

In my last communication to you, by letter dated June 22, 2024, I recommended you advise senior military leadership not to take my communications with them lightly. These communications concerned the interference of State of Hawai‘i Attorney General Anne Lopez with Major General Hara’s military duty to establish a military government in accordance with U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation. It appears senior military leadership did not take my communications with them seriously. This misguided attitude led them to commit the war crime by omission under the Army doctrine of command responsibility for war crimes.

Senior military leadership’s war crimes by omission include Major General Kenneth Hara—War Criminal Report no. 24-0001,¹ Brigadier General Stephen Logan—War Criminal Report no. 24-0002,² Colonel Wesley Kawakami—War Criminal Report no. 24-0003,³ Lieutenant Colonel

¹ Royal Commission of Inquiry, War Criminal Report no. 24-0001 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0001.pdf).

² *Id.*, War Criminal Report no. 24-0002 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0002.pdf).

³ *Id.*, War Criminal Report no. 24-0003 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0003.pdf).

Fredrick Werner—War Criminal Report no. 24-0004,⁴ Lieutenant Colonel Bingham Tuisamatatele, Jr.—War Criminal Report no. 24-0005,⁵ Lieutenant Colonel Joshua Jacobs—War Criminal Report no. 24-0006,⁶ and Lieutenant Colonel Dale Balsis—War Criminal Report no. 24-0007.⁷

As a result, Lieutenant Colonel Michael Rosner, Executive Officer of the 29th Infantry Brigade, became the most senior officer in the Hawai‘i Army National Guard. In my letter dated November 11, 2024, the Royal Commission of Inquiry notified LTC Rosner that he has until November 28, 2024, to transform the State of Hawai‘i into a Military Government. Failure to do so will render him a war criminal by omission under the Army doctrine of command responsibility for war crimes.

Customary international law is the determining factor that the Hawaiian Kingdom continues to exist as a sovereign and independent State. As a source of international law, academic scholars explain the applicable rules of customary international law on a particular subject. Therefore, the continuity of Hawaiian Statehood under customary international law was explained in two legal opinions, one by Professor Matthew Craven⁸ and the other by Professor Federico Lenzerini.⁹ In addition, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law. This fact is explained by the legal opinion of Professor William Schabas.¹⁰ The continuity of Hawaiian Statehood and the commission of war crimes throughout the Hawaiian Islands is uncontested by the United States and the State of Hawai‘i.

As the most senior legal advisor in the Army National Guard, unless you discover a rule of customary international law that concludes the Hawaiian Kingdom was extinguished as a State under international law by the United States, you are duty bound to advise commanders of their duties and responsibilities under U.S. Department of Defense Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation. As such, I am enclosing an article written by JAG officer Major Michael Winn titled “Command Responsibility for Subordinates’ War Crimes: A Twenty-First Century Primer” published in *Army Lawyer*.

Moreover, in my latest letter to LTC Rosner I recommended that he immediately request of you an answer to the following two questions.

⁴ *Id.*, War Criminal Report no. 24-0004 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0004.pdf).

⁵ *Id.*, War Criminal Report no. 24-0005 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0005.pdf).

⁶ *Id.*, War Criminal Report no. 24-0006 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0006.pdf).

⁷ *Id.*, War Criminal Report no. 24-0007 (online at https://hawaiiankingdom.org/pdf/RCI_War_Criminal_Report_no._24-0007.pdf).

⁸ Matthew Craven, “Continuity of the Hawaiian Kingdom,” 1 *Hawaiian Journal of Law and Politics* 508 (2004) (online at [https://hawaiiankingdom.org/pdf/1HawJLPol508_\(Craven\).pdf](https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf)).

⁹ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf)).

¹⁰ William Schabas, “Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” 3 *Hawaiian Journal of Law and Politics* 334 (2021) (online at [https://hawaiiankingdom.org/pdf/3HawJLPol334_\(Schabas\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf)).

First question: Do I have a duty to assume command of the Hawai‘i Army National Guard under Army Regulation 600-20, paragraph 2-11? If yes, then go to the second question. If no, give me a legal reason why I do not have this duty.

Second question: Do I have a duty to establish a military government Under DOD Directive 5100.1, U.S. Army Field Manual 6-27—chapter 6, and the law of occupation? If yes, then begin the mission of transforming the State of Hawai‘i into a military government by November 28, 2024. If no, give me a legal reason why I do not have this duty.

If LTC Rosner has not requested of you answers to these questions, then I am recommending you provide answers to him, as a matter of command responsibility, since the November 28, 2024, deadline is fast approaching. Should you fail to do so and LTC Rosner neglects to establish a military government, thereby, committing the war crime by omission, then the Royal Commission of Inquiry will view your conduct as an accessory by aiding in the commission of this war crime.

Since 2015, you were made aware of the continuity of Hawaiian Statehood and the commission of war crimes when you were the Deputy Prosecuting Attorney for the County of Maui in *State of Hawai‘i v. English et al.*, criminal no. 14-1-0819. This case was brought before Judge Joseph P. Cardoza of the Second Circuit Court and I served as an expert witness, for the defense, at an evidentiary hearing on March 5, 2015. The purpose for the evidentiary hearing was to meet the burden of proof, established by the Intermediate Court of Appeals in *State of Hawai‘i v. Lorenzo* for defendants who are contesting the subject matter jurisdiction of the court because of the unlawful overthrow of the government of the Hawaiian Kingdom, must provide a “factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state’s sovereign nature.”¹¹ My expert testimony served to meet the defendants’ burden by answering this in the affirmative.

In my testimony, I provided the factual circumstances of the United States military occupation of the Hawaiian Kingdom and the unlawful imposition of American municipal laws as to the reason why the Court did not have subject matter jurisdiction. The court’s authority extends from the 1959 Statehood Act passed by the Congress, which has no extra-territorial effect. I stated that for the Court to proceed it would violate “Article 147 [1949 Fourth Geneva Convention], unfair trial [as] a grave breach, which is considered a war crime.” When asked by Judge Cordoza, “Any cross-examination?” You responded, “Your Honor, the State has no questions of Dr. Sai. Thank you for his testimony. One Army officer to another, I appreciate your testimony.” I am enclosing the transcript of my testimony so that LTC Rosner is aware of the severity of this situation.

As you know, I have ten years of service in the Hawai‘i Army National Guard as a field artillery officer so I am well aware of Army regulations and the role of a JAG. The State of Hawai‘i is at a critical juncture as it comes face to face with customary international law and its only recourse to transform itself into a military government. Your role as a legal advisor to LTC Rosner is critical. I am hopeful that you and LTC Rosner perform your affirmative duties and responsibilities to carry out the Army mission of military government without further delay.

¹¹ *State of Hawai‘i v. Lorenzo*, 77 Haw. 219, 221; 883 P.2d 641, 643 (1994).

In closing, I am also enclosing my recent law article “The Sweeping Effect of Hawaiian Sovereignty and the Necessity of Military Government to Curb the Chaos” that was published by the *Hawaiian Journal of Law & Politics*.



David Keanu Sai, Ph.D.
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Enclosure “1”



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No. 1

Command Responsibility for Subordinates' War Crimes

A Twenty-First Century Primer

By Major Michael D. Winn

[T]he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.¹

Legal advisor, take heed—when an enlisted member or officer of your unit commits a war crime in an armed conflict, your commander may be held responsible.² Recent updates to the *Department of Defense Law of War Manual*, *The Commander's Handbook on the Law of Land Warfare*, and *Army Command Policy* confirm President Roosevelt's declaration that commanders are ultimately responsible to keep their subordinates' actions in check.³

Following World War II, German and Japanese commanders were tried for war crimes in international tribunals at Nuremberg and Tokyo.⁴ Some of these commanders were tried for war crimes they ordered their troops to commit, but other commanders were tried for war crimes they merely failed to prevent.⁵ In the seventy-five years following those prosecutions, commanders have been aware that they may be held liable for not doing enough to prevent, halt, or punish war crimes committed by their subordinates.⁶

The Vietnam War and the Global War on Terror have provided various examples of commanders running afoul of the requirements of the law of war. From the My Lai massacre to the abuses at Abu Ghraib prison to the murder of detainees during Operation Iron Triangle in Iraq, U.S. military forces have not

always lived their righteous values—and leaders have been called to account.⁷ Now, as the U.S. military shifts its focus toward large-scale combat operations (LSCO) against peer and near-peer competitors, we must be ready to apply the law of war to a higher-speed, higher-intensity operating environment.⁸ Commanders—and by extension, their legal advisors—must prepare now for the legal and leadership challenges that LSCO will entail.⁹

This article first considers the breadth of command responsibility for war crimes and summarizes the current standards in customary international law (CIL). It then explains how the international standard, first articulated by the United States in the tribunals following World War II, has made its way back into U.S. regulation and policy. Finally, the article considers commanders' affirmative duties under the 2020 update to *Army Command Policy*, highlighting both good and bad examples from recent U.S. history and offering practice tips for command legal advisors.

Definition of War Crimes

In July 2020, the Army updated Army Regulation (AR) 600-20, *Army Command Policy*.¹⁰ The new version of the regulation added

paragraph 4-24, “Command responsibility under the law of war.”¹¹ The paragraph provides:

Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control. These measures include requirements to train their Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated.¹²

This new provision on command responsibility for war crimes does not define the term “war crimes.”¹³ What then, are war crimes? Synthesizing the relevant

look to the five LOAC principles derived from CIL: military necessity, distinction, proportionality, humanity, and honor.¹⁷ A failure to comply with these principles may indicate a LOAC violation.¹⁸

Second, not all LOAC violations are war crimes.¹⁹ A LOAC violation must be *serious* to be a war crime.²⁰ An example of a non-serious LOAC violation is that of a combatant who steals bread from a civilian’s home in occupied territory to feed himself, in violation of the Hague Convention.²¹ In contrast, serious violations of the LOAC may be considered war crimes.²² For example, the U.S. War Crimes Act of 1996 criminalizes “grave breaches” of the Geneva Conventions and portions of other key international treaties.²³

Third, the actor must have acted intentionally or at least with culpable negligence—there is no such thing as a purely “accidental” war crime.²⁴ A contemporary example is the attack by a U.S. AC-130U gunship on a hospital in Kunduz, Afghanistan, in 2015.²⁵ Although at least thirty occupants of the hospital were killed, the incident was not a war crime, since the U.S. Service members involved did not know

itary leaders, including platoon leaders and noncommissioned officers (NCOs), tasked with leading troops.³⁰ Any commander or other leader who ordered or encouraged a subordinate to commit a war crime would be criminally liable as a principal for the act or omission of that subordinate.³¹ For example, during Operation Iron Triangle near Samarra, Iraq, in 2006, Staff Sergeant Ray Girouard of the 101st Airborne Division encouraged, or perhaps ordered, his squad members to kill three Iraqi detainees.³² At his court-martial, Girouard was tried as a principal for premeditated murder.³³

Command responsibility applies not only to those leaders who order or encourage their subordinates’ war crimes, but also to those leaders who fail to take appropriate action to counter such abuses.³⁴ The cases explored below demonstrate the genesis of that duty.

Genesis of the “Knew or Should Have Known” Standard

From the 1474 trial of Peter von Hagenbach by the Archduke of Austria to U.S. courts-martial during the Philippine insurgency at the turn of the twentieth century, commanders have been held criminally liable for acts committed by their subordinates.³⁵ Nonetheless, it was not until three U.S. prosecutions following World War II that the international standard for command responsibility crystallized.³⁶

In the first trial, General Tomoyuki Yamashita, commander of Japanese forces in the Philippines, was convicted by a U.S. military commission for “permitting” widespread atrocities by those forces.³⁷ Although the prosecution introduced little direct evidence that Yamashita actually knew of his troops’ actions, the panel found him liable for “crimes . . . so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused.”³⁸ In other words, Yamashita was convicted because he “must have known” of the crimes yet failed to stop them.³⁹ The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.⁴⁰

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sources, a war crime is an act or omission that is 1) a violation of the law of armed conflict (LOAC), 2) serious, 3) committed intentionally, 4) and pursuant to an armed conflict, as considered below.¹⁴

First, all war crimes are violations of the LOAC, also referred to as the law of war.¹⁵ In determining whether a LOAC violation exists for any act or omission, consider whether there has been a violation of the Geneva Conventions, the Hague Convention of 1907, or another treaty that is ratified by the United States or that reflects CIL.¹⁶ In the absence of any specific rule,

they were firing on a medical facility.²⁶

Fourth, a war crime can occur only incident to an armed conflict.²⁷ A war crime may arise during an international armed conflict,²⁸ or it may occur during a non-international armed conflict, as shown at the International Criminal Tribunal for Rwanda.²⁹ With “war crimes” defined, the next section considers what it means to have command responsibility for them.

Historical Development

Command responsibility goes beyond those in a command billet and implicates all mil-

The *Yamashita* standard for command responsibility was soon refined by two cases from Nuremberg.⁴¹ In the *Hostage Case*, a panel of U.S. judges convicted Field Marshal Wilhelm List and other German generals under a theory of command responsibility for their subordinates' murders of civilian hostages in occupied territory.⁴² Later, in the *High Command Case*, Field Marshal Wilhelm von Leeb and other German officers were tried under a similar theory of command responsibility for subordinates' war crimes on the Eastern Front.⁴³ In both cases, the judges considered whether the accused knew or *should have known* that their subordinates were engaging in war crimes and that they failed to prevent or stop the crimes.⁴⁴

The "Knew or Should Have Known" Standard and Customary International Law

The "knew or should have known" standard for command responsibility for war crimes took root in international jurisprudence.⁴⁵ In 1977, the standard was incorporated into Additional Protocol I to the Geneva Conventions in its provision for holding commanders liable for war crimes committed by subordinates.⁴⁶ Later, in the 1990s, the "knew or should have known" standard was employed by the International Criminal Tribunal for Yugoslavia (ICTY).⁴⁷ That same decade, the United States and over 150 countries negotiated the Rome Statute, which established the International Criminal Court (ICC)⁴⁸ and incorporated the concept of "knew or . . . should have known" as the standard for command responsibility for war crimes.⁴⁹ The ICC prosecutor applied it recently against a commander whose men had murdered, raped, and pillaged during an operation in Central Africa.⁵⁰

Although the United States has not ratified AP I or the Rome Statute, it accepts the command-responsibility provision in AP I as reflective of CIL.⁵¹ Customary international law is consistent practice that states follow out of "a sense of legal obligation."⁵² According to CIL, then, commanders may be responsible for failing to prevent war crimes which they knew or had reason to know their subordinates would commit.⁵³



A panel of American judges convicted Field Marshal Wilhelm List for war crimes on a theory of command responsibility. (Credit: German Federal Archive)

Current U.S. Policy on Command Responsibility for War Crimes

The Uniform Code of Military Justice (UCMJ) does not expressly incorporate the international standard of "knew or should have known."⁵⁴ Nevertheless, a U.S. commander should still be mindful of it, for the standard is both germane to multinational

operations and fully incorporated into U.S. military policy, as explained below.

To start, the standard constitutes CIL⁵⁵ and is the rule by which many of our allies and partners judge their commanders' actions.⁵⁶ A U.S. commander in a coalition operation will want to keep in mind that partner-nation commanders may be judged



"The Americans are back in Courtroom 600." Waltraut Bayerlein, the Vice President of the Higher Regional Court of Nuremberg, noted the historic nature of the return of American Service members to the courtroom that hosted the Nuremberg Trials. Lieutenant Colonel Jeremy Steward, Staff Judge Advocate for 7th Army Training Command, presides as judge for the mock-court martial held in the storied room as part of an outreach to the local German community. (Credit: Staff Sergeant Ashley Low)

based on what they "should have known."⁵⁷ Furthermore, although not common, a foreign nation may attempt to exert criminal jurisdiction over a U.S. commander.⁵⁸ For example, during the 2003 invasion of Baghdad, Iraq, a U.S. armored tank crew, believing it was under attack from enemy inside a hotel, opened fire and damaged the building.⁵⁹ A Spanish journalist at the hotel was killed.⁶⁰ Although a U.S. military investigation determined that the tank crew's actions were justified, Spanish authorities charged two U.S. officers and an NCO with murder and issued arrest warrants.⁶¹ Spain did not drop the charges until 2008.⁶² The international "knew or should have known" standard would likely come into play in any foreign prosecution against a U.S. commander.⁶³

More importantly for American commanders, however, U.S. regulation and policy have fully embraced the "knew or should have known" standard for

command responsibility for subordinates' war crimes.⁶⁴ In its section on command responsibility for subordinates' war crimes, the 2015 *Department of Defense Law of War Manual* cites to the statute defining the liability of principals under military commissions.⁶⁵ That statute includes as a principal a commander who "knew, had reason to know, or should have known" of subordinates' punishable acts.⁶⁶ Likewise, paragraph 4-24 of the 2020 version of AR 600-20 provides, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish."⁶⁷ The "knew or should have known" standard is also found in Field Manual (FM) 6-27, *The Commander's Handbook on the Law of Land Warfare*, published in 2019.⁶⁸

While all three of these recently released policies require a commander to take steps to prevent war crimes by subordinates, they

differ in how they word the commander's duty.⁶⁹ The *DoD Law of War Manual* imposes on commanders a duty to "take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."⁷⁰ The term, "necessary and reasonable measures," was adapted from language in the 1956 Army publication, FM 27-10, *Law of Land Warfare*, and was carried over to its 2019 successor, FM 6-27.⁷¹ Army Regulation 600-20 employs a seemingly stricter standard for Army commanders, requiring them to take "all feasible measures within their power to prevent and suppress" LOAC violations on the part of their troops.⁷² Regardless, there is little practical difference between "all feasible measures," from AR 600-20, and "necessary and reasonable measures," from FM 6-27.⁷³

These policies instruct that commanders may be held accountable for not taking adequate measures to "prevent or repress" violations of the law of war.⁷⁴ Command-

ers are expected to act on what they *should have* known as they take these measures.⁷⁵ Commanders who fail to comply with their obligations with regard to the LOAC are at risk of an administrative reprimand or elimination.⁷⁶ Worse, failure to comply could serve as the basis for a court-martial for dereliction of duty.⁷⁷

The Commander's Affirmative Duties and the Legal Advisor's Role

Given that commanders may be held accountable for their omissions, a responsible commander must lead proactively.⁷⁸ In regard to subordinates' war crimes, AR 600-20 reminds commanders of their three *affirmative* obligations: prevent, stop, and punish.⁷⁹ These cornerstone duties are described in turn.

Prevent

As noted earlier, AR 600-20 requires commanders "to take all feasible measures within their power to prevent or repress breaches of the law of war"⁸⁰ The regulation states that preventive measures "include requirements to train . . . Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated."⁸¹ The components of prevention, i.e., to train, report, investigate, and take corrective action, are explored below.

Train

The DoD Law of War Program demands that all military units be trained periodically on the law of war.⁸² The Army has reinforced this directive in AR 350-1, *Army Training & Leader Development*, by imposing annual training requirements on units organized under a military table of organization and equipment (MTOE)—in other words, deployable, combat-ready units.⁸³ In addition to annual training, MTOE units must also be trained in the law of war prior to deployment.⁸⁴ The commander is responsible to ensure troops receive the training, but the instruction itself may be conducted only by a judge advocate (JA) or a paralegal NCO certified by a JA.⁸⁵ Additionally, the training must be specific to the unit's designated

missions or contingency plans and should be woven into field exercises.⁸⁶

Time to train is always in short supply, especially leading up to a deployment.⁸⁷ The command legal advisor must work diligently

(CCDR).⁸⁶ The duty to report does not depend on the status of the alleged violators; they could be American, coalition, enemy, or neutral.⁸⁷ Furthermore, the standard for determining whether an incident must be

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.¹⁰⁹

with the staff to ensure LOAC training be nested within the unit's annual or pre-deployment training plan.⁸⁸ The command legal advisor or NCO should deliver the training personally,⁸⁹ but the commander must continually reinforce LOAC precepts by emphasizing respect for noncombatants.⁹⁰

A cautionary example of a commander who failed to train his subordinates adequately is Colonel (COL) Thomas Pappas, who in 2003–04 commanded the 205th Military Intelligence Brigade, with responsibility over the Soldiers who engaged in atrocities at Abu Ghraib prison in Iraq.⁹¹ Soldiers in the brigade abused Iraqi prisoners, in violation of common Article 3 of the Geneva Conventions.⁹² Colonel Pappas received general-officer non-judicial punishment, in part because of his failure to train subordinates adequately in how to interrogate prisoners the correct way.⁹³ Commanders must learn from COL Pappas's example—it is easy to deprioritize LOAC training requirements when the operational tempo is high, but the consequences may be dire for failing to train.⁹⁴

Report and Investigate

Of course, when U.S. commanders learn of a suspected war crime, they have the duty to report up the chain of command or to an appropriate investigative body, such as the U.S. Army Criminal Investigation Division (CID).⁹⁵ What may surprise some commanders, however, is that they have a duty to report *any* alleged violation of the LOAC, not just allegations of serious violations, up the chain of command to the appropriate Combatant Commander

reported is *credible information*—although a commander must report the allegation even should it fail to clear that low bar.⁹⁸

A legal advisor may want to advise the commander to err on the side of overreporting. Failure to report an alleged LOAC violation for fear of the boss's disapproval could lead to far worse results.⁹⁹ For example, immediately after the My Lai massacre during the Vietnam War, the division commander and his assistant received information that a couple dozen noncombatants had been killed under suspicious circumstances.¹⁰⁰ Nonetheless, the officers chose not to investigate the killings thoroughly, and they violated theater policy by failing to relay the information to higher headquarters.¹⁰¹ Their failure to properly investigate and report the My Lai killings, which claimed far more than a couple dozen victims, has contributed to an enduring stain on the Army's reputation.¹⁰²

When commanders learn of a reportable incident, they must direct an investigation into the incident, unless already begun by higher headquarters or an investigative agency such as CID.¹⁰³ As with the duty to report, the duty to investigate should be complied with strictly.¹⁰⁴ Commanders should err on the side of investigating too much rather than too little.¹⁰⁵

Take Corrective Action

Commanders who learn that their troops have become undisciplined—e.g., dehumanizing the enemy or disregarding LOAC training—have a duty to correct that issue.¹⁰⁶ Commanders in this situation must reinforce subordinates' understanding of

the law of war, reeducate them on how to apply it, and employ sufficient checks on the troops' conduct.¹⁰⁷ The focus in corrective action is on preventing future LOAC violations.¹⁰⁸

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.¹⁰⁹ When subordinates have a history of violence, substance abuse, or other misconduct, it should put a commander on guard about their propensity for LOAC violations, giving rise to a legal duty to take corrective action.¹¹⁰

The war in Afghanistan provides an example of when a commander *should have known* conditions were ripe for war crimes.¹¹¹ A squad leader in the 2d Infantry Division, serving in Kandahar, told his men that all Afghans were "savages."¹¹² Soldiers in the platoon began to fantasize openly about ways to kill Afghan children and other civilians, and they reveled in "trophy" photos with their kills.¹¹³ The Soldiers' behavior remained uncorrected by platoon and company leadership, even when the Soldiers shot an unarmed Afghan teenager in an open field.¹¹⁴ The platoon conducted at least four unjustified shootings of Afghans before it was reined in.¹¹⁵ An engaged commander, immediately correcting lower-level misconduct, might have prevented most or all of these war crimes.¹¹⁶ Instead, the Soldiers' actions, left unchecked, caused inestimable damage to the war effort in the minds of U.S. allies.¹¹⁷

In contrast, engaged commanders promote a climate of respect for the law of war.¹¹⁸ General Barry McCaffrey, who commanded the 24th Infantry Division in Operation Desert Storm, refused to allow Soldiers to speak of Iraqis disrespectfully, such as by disparaging their ethnicity or religion.¹¹⁹ He knew that talking of the enemy as subhuman would lead to treating the enemy as subhuman.¹²⁰ General McCaffrey ordered that any Soldier suspected of a war crime immediately be placed in handcuffs and sent to the rear.¹²¹ General McCaffrey's respect for Iraqi soldiers contributed to their willingness to surrender rather than fight.¹²²

Correcting loose talk and wrongheaded attitudes requires engaged, involved leadership by commanders.¹²³ Commanders must promote open dialogue with Soldiers, allowing them a safe place to discuss their emotions, to keep unchecked fear from leading to indiscriminate killing as was experienced at My Lai.¹²⁴ Furthermore, commanders must cultivate a culture in which subordinates are open to asking for clarification on orders and are not afraid to give the boss bad news.¹²⁵ Commanders must constantly keep their finger on the pulse of the unit and mentor their subordinate officers and NCOs to do the same.¹²⁶

Stop

The classic example of a U.S. Service member who stopped a war crime, at least in part, is Warrant Officer (WO1) Hugh Thompson, the Army aviator who intervened to save at least ten unarmed Vietnamese civilians during the My Lai massacre.¹²⁷ Although he was not a commander, Thompson displayed the behavior prescribed by *The Commander's Handbook on the Law of Land Warfare*—he investigated when he suspected a war crime was being committed, he questioned superiors as necessary, and he acted to protect the innocent.¹²⁸ Flying low over the hamlet in a light observation helicopter, Thompson, his door gunner, and crew chief saw up to one hundred bodies stacked in a ditch. Some were still alive.¹²⁹ Thompson landed and asked a platoon leader if he was going to aid the wounded, but a tense exchange followed in which the platoon leader told Thompson to mind his own business.¹³⁰ Thompson lifted off but soon saw ten civilians in a makeshift bunker, with U.S. troops closing in.¹³¹ Thompson landed again, placing his helicopter between the Soldiers and the civilians.¹³² With his gunner training his weapon toward the Soldiers, Thompson coaxed the villagers from the shelter and escorted them onto two larger helicopters which had landed nearby.¹³³ He stopped again at the ditch and rescued a living child from the stack of bodies.¹³⁴

Commanders are expected to have the courage to stop LOAC violations as soon as they learn they may be occurring.¹³⁵ Even if it means placing oneself in harm's way, as WO1 Thompson did at My Lai, a com-

mander's duty is to protect both noncombatants and the overarching strategic mission by leading from the front and intervening to stop war crimes.¹³⁶

Punish

A commander's responsibility with regard to subordinates' war crimes does not terminate once prevention of a war crime is no longer possible.¹³⁷ Commanders have a duty to punish war crimes once they learn of them, with the goal of deterring future war crimes.¹³⁸

The duty to punish means taking appropriate steps to bring a perpetrator to justice, such as by preferring or forwarding court-martial charges as appropriate.¹³⁹ The inclusion of the duty to punish in AR 600-20 should not be interpreted to mean that commanders no longer have independent discretion to dispose of misconduct in their ranks, for that would constitute unlawful command influence.¹⁴⁰ Similarly, commanders will not violate AR 600-20 should the prosecution of an accused fail for matters beyond their control or should they deem non-judicial punishment or administrative action more appropriate.¹⁴¹

Conclusion

Meeting our Nation's obligations under the law of war does not come automatically—it requires leadership.¹⁴² In this era of increased focus on command responsibility for war crimes, legal advisors have an important role to play in helping their commanders prevent, stop, and punish such offenses.¹⁴³ Accordingly, legal advisors keep their commanders on the high road of command responsibility, where they can focus on their mission—to prepare Soldiers for combat and lead them in defense of our Nation.¹⁴⁴ **TAL**

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Notes

1. See Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 9 (1973) (quoting U.S. President Theodore Roosevelt).

2. See OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 18.23.3 (12

June 2015) (C2, 13 Dec. 2016) [hereinafter DoD LoW Manual].

3. *Id.*; U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE paras. 8-29 to -31 (7 Aug. 2019) (C1, 20 Sept. 2019) [hereinafter FM 6-27]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-24 (24 July 2020) [hereinafter AR 600-20].

4. JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 139-264 (1954).

5. *See, e.g., id.* at 259 (discussing the Far East Military Tribunal); Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs. Wilhelm List et al.* (Feb. 1948), reprinted in *THE LAW OF WAR* 1303-43 (Leon Friedman, ed., 1972).

6. *See Parks, supra* note 1, at 20.

7. Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility Under International Humanitarian Law*, 18 CHI. J. INT'L L. 553, 574-75, 587-88 (2018); Raffi Khatchadourian, *The Kill Company*, NEW YORKER (June 29, 2009), <https://www.newyorker.com/magazine/2009/07/06/the-kill-company>.

8. *See* Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, ARMY LAW., Sept.-Oct. 2018, at 23, 27; Christopher M. Rein, *Weaving the Tangled Web: Military Deception in Large-Scale Combat Operations*, MIL. L. REV., Sept.-Oct. 2018, at 10, 14.

9. *See* ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY 334-41 (2012) (discussing recent historical changes to the practice of the law of war).

10. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (24 July 2020).

11. *See id.* para. 4-24.

12. *Id.*

13. *See id.* Working for the Union Army, Francis Lieber coined the term "war crime" in 1865 while examining the archives of the Confederacy in search of material implicating rebel leaders in such a crime. He did not find evidence to support a prosecution. Jessica Laird & John Fabian Witt, *Inventing the War Crime: An Internal Theory*, 60 VA. J. INT'L L. 53, 89-90 (2019).

14. *See* War Crimes Act, 18 U.S.C. § 2441; DoD LoW MANUAL, *supra* note 2, § 18.9.5; GARY D. SOLIS, THE LAW OF ARMED CONFLICT 329, 335-37 (2d ed. 2016). U.S. Army Field Manual 27-10, published in 1956 and now inactive, considered any violation of the law of war to be a war crime. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (July 1956) [hereinafter FM 27-10]. In defining "war crime," the *Department of Defense Law of War Manual* gives three options: the all-encompassing definition from Field Manual 27-10, the definition of "war crime" as a serious violation of the law of armed conflict (LOAC), and a third definition of "war crime" as a serious violation of domestic law applicable during armed conflict. This article uses the second definition of "war crime" as a serious LOAC violation, as it is the interpretation favored by the directive framing the DoD Law of War Program and is the generally accepted approach in the twenty-first century. *See* U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM para. G.2 (2 July 2020) [hereinafter DoDD 2311.01]; Oona A. Hathaway et al., *What is a War Crime?* 44 YALE J. INT'L L. 53, 55 (2019). The *Department of Defense Law of War Manual*

recognizes the third definition as antiquated, yet states it may be helpful to categorize acts such as espionage and treason, which do not fit neatly into other formalizations of war crimes. DoD LoW MANUAL, *supra* note 2, § 18.9.5.

15. *See* DoD LoW MANUAL, *supra* note 2, § 18.9.5. This article uses the terms "law of war" and "LOAC" interchangeably.

16. *See* 18 U.S.C. § 2441(c); Hathaway et al., *supra* note 14, at 68. The War Crimes Act specifically includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as a source of war-crimes law. 18 U.S.C. § 2441(c)(4).

17. OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 2.1 (12 June 2015) (C2, 13 Dec. 2016).

18. *Id.* § 2.1.2. *See, e.g.,* the conviction at the Tokyo International Military Tribunal of Japanese service members for cannibalism, which international law had never prohibited explicitly. SOLIS, *supra* note 14, at 332.

19. *See id.* § 18.9.5.2.

20. *Id.* For example, the London Charter, which established the Nuremberg International Military Tribunal, defined war crimes as "violations of the law or customs of war. Such violations shall include, but not be limited to, murder . . . deportation to slave labour . . . killing of hostages, plunder of public or private property, wanton destruction of cities . . . or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1547, 82 U.N.T.S. 280.

21. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Hathaway et al., *supra* note 14, at 88. Another example is a medic wearing a red-cross armband on the right arm rather than the left. DoD LoW MANUAL, *supra* note 2, § 18.9.5.2.

22. SOLIS, *supra* note 14, at 329-30.

23. War Crimes Act, 18 U.S.C. § 2441.

24. *See id.* § 2441(d)(1), (3) (establishing liability for intentional acts yet not for causing collateral or incidental damage). "Individual acts may constitute war crimes, and intent is not indispensable to prosecution. . . . Reckless, as well as intent, is a sufficient prosecutorial basis." SOLIS, *supra* note 14, at 330.

25. U.S. CENT. COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS 3 (n.d.), <https://www3.centcom.mil/FOIALibrary/cases/16-0061/00.%20CENTCOM%20Summary%20Memo.pdf>.

26. *Id.* "The label 'war crimes' is typically reserved for intentional acts—intentionally targeting civilians or intentionally targeting protected objects." *See also* McCarthy, *supra* note 7, at 579.

27. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); SOLIS, *supra* note 14, at 329, 335-37. The Pictet factors and *Tadić* factors provide a guide to determine when violence rises to the level of armed conflict. *See* 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1952), https://www.loc.gov/tr/frd/Military_Law/pdf/GC_1949-I.pdf; *Tadić*, Case No.

IT-94-1-T, ¶¶ 561-62. Not every crime committed during an armed conflict is a war crime; however, it must have a nexus to the battlefield. "If, for instance, a civilian merely takes advantage of the general atmosphere of lawlessness created by the armed conflict to kill a hated neighbor or to steal his property without his acts being otherwise closely connected to the armed conflict, such conduct would not generally constitute a war crime." GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 42 (2005).

28. *See, e.g.,* APPLEMAN, *supra* note 4, at 139-264 (describing the tribunals following World War II).

29. *See* S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing a UN-sanctioned international tribunal to prosecute "genocide and other serious violations of international humanitarian law" in Rwanda).

30. *See* CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 3553 (Yves Sandoz eds., 1987) [hereinafter ICRC Commentary].

31. DoD LoW MANUAL, *supra* note 2, § 18.23.1-.2. *See* 10 U.S.C. § 877.

32. Raffi Khatchadourian, *The Kill Company*, NEW YORKER (June 29, 2009), <https://www.newyorker.com/magazine/2009/07/06/the-kill-company>.

33. *Id.*; *United States v. Girouard*, 70 M.J. 5, 8 (C.A.A.F. 2011). The panel was instructed on negligent homicide as a lesser included offense of premeditated murder, and Girouard was convicted of three specifications of negligent homicide. *Girouard*, 70 M.J. at 6, 8. On appeal, the conviction was reversed for negligent homicide not being a lesser included offense of premeditated murder under the elements test. *Id.* at 9-12.

34. DoD LoW MANUAL, *supra* note 2, § 18.23.3. Moreover, as the 2020 update to AR 600-20 states, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish." AR 600-20, *supra* note 3, para. 4-24.

35. Captain Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112-17 (1972).

36. *See* SOLIS, *supra* note 14, at 423; RYAN, *supra* note 9, at 340; LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 203-04 (2002).

37. *In re Yamashita*, 327 U.S. 1, 5, 13-14 (1946).

38. Decision of the United States Military Commission at Manila (Dec. 7, 1945), reprinted in *THE LAW OF WAR*, *supra* note 5, at 1596-98. Yamashita's conviction was upheld by the U.S. Supreme Court, which confirmed that a commander is responsible under the law of war to control his subordinates. *Yamashita*, 327 U.S. at 15.

39. SOLIS, *supra* note 14, at 423.

40. Parks, *supra* note 1, at 22, 37-38.

41. SOLIS, *supra* note 14, at 423.

42. Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs. Wilhelm List et al.* (Feb. 1948), reprinted in *THE LAW OF WAR*, *supra* note 5, at 1303-43; 8 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 88-89 (1949); RYAN, *supra* note 9, at 304-07.

43. Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs.*

Wilhelm von Leeb et al. (Oct. 1948), reprinted in THE LAW OF WAR, *supra* note 5, at 1421–1470; 12 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 111–12 (1949); RYAN, *supra* note 9, at 308.

44. The “knew or should have known” standard is widely known as the *Yamashita* standard in international jurisprudence. See, e.g., Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 200 (2000). However, the standard took form at the subsequent Nuremberg trials. RYAN, *supra* note 9, at 302–08; Parks, *supra* note 1, at 87–89. One expert refers to the “knew or should have known” standard as the von Leeb–List standard. See SOLIS, *supra* note 14, at 425.

45. Parks, *supra* note 1, at 88; SOLIS, *supra* note 14, at 423.

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

47. See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

48. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/> (last visited Dec. 14, 2021). Although the United States has signed the Rome Statute, the U.S. Senate has not ratified it.

49. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

50. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, ¶¶ 29–30, 51–57 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF. Jean-Pierre Bemba Gombo, the leader of the Movement for the Liberation of the Congo and its military branch, was convicted of murder, rape, and pillaging committed by his subordinates from 2002 to 2003 in the Central African Republic. *Id.* ¶¶ 1–2, 752. The International Criminal Court Appeals Chamber held that the Trial Chamber had incorrectly determined that Bemba had failed to take “necessary and reasonable measures” while acting as a remote commander with a non-linear command structure. Prosecutor v. Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III’s Judgment pursuant to Article 74 of the Statute, ¶¶ 171, 173, 191–92 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. The Appeals Chamber overturned the conviction. *Id.*, Judgment.

51. Michael Matheson, Deputy Legal Advisor to U.S. Department of State, 6th Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, reported in 2 AM. UNIV. INT'L L. REV. 419, 428 (1987), reprinted in NAT'L SEC. L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 249–50 (2020).

52. Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 3 (1989).

53. “The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War

II.” John W. Vessey Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 app. at 85 (May 3, 1985), noted in Brian Finucane, *U.S. Recognition of a Commander’s Duty to Punish War Crimes*, 97 INT'L L. STUD. 995, 1006 (2021). See also Smidt, *supra* note 44, at 200, 213–15.

54. See Smidt, *supra* note 44, at 215–19; Major Trenton W. Powell, *Command Responsibility: How the International Criminal Court’s Jean-Pierre Bemba Gombo Conviction Exposes the Uniform Code of Military Justice*, 225 MIL. L. REV. 837, 871–79 (2017); *Instructions from the Military Judge to the Court Members in United States vs. Captain Ernest Medina*, reprinted in THE LAW OF WAR, *supra* note 5, at 1732.

55. Matheson, *supra* note 51.

56. See AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a). Most North Atlantic Treaty Organization members, for example, have ratified AP I and the Rome Statute. INT'L COMM. OF THE RED CROSS, TREATIES, STATES PARTIES AND COMMENTARIES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=47 (last visited Jan. 13, 2022); *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 13, 2022).

57. See AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a).

58. *Spain Drops US Army Murder Case*, BBC NEWS (May 13, 2008, 5:05 PM), <http://news.bbc.co.uk/2/hi/europe/7398973.stm>.

59. *Id.*

60. *Id.*

61. *Id.*

62. See *id.*

63. Smidt, *supra* note 44, at 215. The American Servicemembers’ Protection Act prohibits transferring or extraditing U.S. persons for prosecution by the International Criminal Court, but it does not and cannot foreclose prosecution by a court of a foreign nation. See 22 U.S.C. § 7423. See also SOLIS, *supra* note 14, at 330 (discussing a 2008 Italian criminal case against a U.S. Soldier stemming from a fatal shooting of an Italian officer at a checkpoint in Iraq).

64. See DoD LoW MANUAL, *supra* note 2, § 18.23.3.2 n.340; AR 600-20, *supra* note 3, para. 4-24.

65. DoD LoW MANUAL, *supra* note 2, § 18.23.3.2 n.340 (citing Military Commissions Act § 8, 10 U.S.C. § 950q (2009)).

66. 10 U.S.C. § 950q.

67. AR 600-20, *supra* note 3, para. 4-24.

68. FM 6-27, *supra* note 3, para. 8-31.

69. See DoD LoW MANUAL, *supra* note 2, § 18.23.3; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31.

70. DoD LoW MANUAL, *supra* note 2, § 18.23.3. For liability to attach, there must be “personal neglect amounting to a wanton, immoral disregard of the action of [the commander’s] subordinates amounting to acquiescence in the crimes.” *Id.* § 18.23.3.2.

71. See FM 27-10, *supra* note 14, para. 501 (requiring “necessary and reasonable steps”); FM 6-27, *supra* note 3, para. 8-31. The term is also reflected in the Rome

Statute for the International Criminal Court. Rome Statute, *supra* note 49, art. 28(a)(ii).

72. AR 600-20, *supra* note 3, para. 4-24.

73. See sources cited *supra* note 69. The *Department of Defense Law of War Manual* uses “feasible” and “reasonable” without distinction. DoD LoW MANUAL, *supra* note 2, § 5.2.3.1. But see JAMES E. BAKER, THE CENTAUR’S DILEMMA 245 (2021) (holding “all feasible measures within their power,” from AP I, to be a higher standard than “reasonable measures,” as found in the Rome Statute).

74. Sources cited *supra* note 69. The standards expressed by these sources may be higher than those found in the UCMJ. See DoD LoW MANUAL, *supra* note 2, § 18.7.

75. DoD LoW MANUAL, *supra* note 2, § 18.23.3.2; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31. The duty to “prevent or repress” violations under the “knew or should have known” standard carries with it a duty to investigate. See DoD LoW MANUAL, *supra* note 2, § 18.4.3.

76. See AR 600-20, *supra* note 3, para. 4-6a; U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-2 (8 February 2020). For example, Colonel (COL) Michael Steele, commander of 3d Brigade, 101st Airborne Division (Air Assault), received an administrative reprimand for his response to the war crimes in Operation IRON TRIANGLE. Paul von Zielbauer, *Army Says Improper Orders by Colonel Led to 4 Deaths*, N.Y. TIMES (Jan. 21, 2007), <https://www.nytimes.com/2007/01/21/world/middleeast/21abuse.html>. Colonel Steele reportedly received the reprimand for failure to report Iraqi deaths and “other details of the raid.”

77. DoD LoW MANUAL, *supra* note 2, § 18.23.3.1. “A duty may be imposed by treaty, statute, regulation, lawful order” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 18c(3)(a) (2019) [hereinafter MCM]. See Victor Hansen, *What’s Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 401–13 (2006–2007) (advocating for a new article to the Uniform Code of Military Justice to address command responsibility for war crimes).

78. See Smidt, *supra* note 44, at 197. “Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control.” FM 6-27, *supra* note 3, para. 8-29.

79. AR 600-20, *supra* note 3, para. 4-24 (codifying the three-part duty to prevent, stop, and punish war crimes helps the United States comply with its obligations under customary international law). See AP I, *supra* note 46, art. 87; Matheson, *supra* note 51.

80. U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-24 (24 July 2020).

81. *Id.*

82. DoDD 2311.01, *supra* note 14, para. 2.7.b. All training must be consistent with the *Department of Defense Law of War Manual*. *Id.* para. 2.7.b.(2).

83. U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl.F-2 (10 Dec. 2017) [hereinafter AR 350-1]. See *History of Tables of Distribution and Allowances (TDA) Units*, U.S. ARMY CTR. OF MIL. HIST. (May 30, 1995), <https://history.army.mil/html/forcestruc/tda-ip.html>.

84. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl.F-2 (10 Dec. 2017) (Law of War/Detainee Operations Training).
85. *Id.*
86. *Id.*
87. See U.S. DEP'T OF DEF., INSTR. 1322.32, PRE-DEPLOYMENT TRAINING AND THEATER-ENTRY REQUIREMENTS para. 4.1.a (10 June 2020) (C1, 25 Aug. 2021).
88. See U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS paras. 3-24, 4-42, 4-47 (8 June 2020) [hereinafter FM 1-04].
89. *Id.*; AR 350-1, *supra* note 83, tbl.F-2 (Law of War/Detainee Operations Training).
90. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, MIL. L. REV., May-June 2009, at 17, 19.
91. *Abu Ghraib US Colonel Reprimanded*, BBC NEWS (May 12, 2005, 4:59 AM), <http://news.bbc.co.uk/2/hi/americas/4539033.stm>.
92. *Id.* See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.
93. *Abu Ghraib US Colonel Reprimanded*, BBC NEWS (May 12, 2005, 4:59 AM), <http://news.bbc.co.uk/2/hi/americas/4539033.stm>.
94. See *id.*; Rielly, *supra* note 90, at 19.
95. U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM para. 4.2 (2 July 2020).
96. *Id.* paras. 4.2, G.2. (defining "reportable incident").
97. *Id.* para. 4.2.b.
98. *Id.* para. 4.2.c.
99. See SEYMOUR M. HERSH, COVER-UP 256, 265-68 (1972) (discussing the consequences faced by the division and brigade commanders for covering up the My Lai massacre).
100. 1 LIEUTENANT GENERAL WILLIAM R. PEERS, U.S. ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 10-5, 10-12 to 10-16, 10-40 to 10-41, 11-12 (1974) [hereinafter peers inquiry].
101. *Id.*; HERSH, *supra* note 99, at 206-11.
102. See W.R. PEERS, THE MY LAI INQUIRY, at xi-xii (1979); MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 23, 185 (1992). The death toll comprised at least 347 noncombatants—mostly women, children, and old men. *Id.* at 92-93.
103. DoDD 2311.01, *supra* note 14, para. 4.2.a.
104. See DoD LoW MANUAL, *supra* note 2, § 18.4.3. Thorough investigation allows a commander to fulfill duties imposed by the "knew or should have known" standard of command responsibility. See Parks, *supra* note 1, at 90.
105. See MCM, *supra* note 77, R.C.M. 303 ("[T]he immediate commander shall make . . . a preliminary inquiry . . .").
106. AR 600-20, *supra* note 3, para. 4-24; Rielly, *supra* note 90, at 19-20.
107. See DoD LoW MANUAL, *supra* note 2, § 18.4.2, 18.4.4.
108. Rielly, *supra* note 90, at 23.
109. See McCarthy, *supra* note 7, at 556. "An Army leader operates with clear expectations regarding conduct so that indiscipline does not jeopardize mission success." U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-94 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].
110. See McCarthy, *supra* note 7, at 564, 586-87 (citing Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).
111. See Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011, 2:00 AM), <https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/>.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. See McCarthy, *supra* note 7, at 556; ADP 6-22, *supra* note 109, para 1-94.
117. See Jim Frederick, *Anatomy of a War Crime: Behind the Enabling of the "Kill Team"*, TIME (Mar. 29, 2011), <https://world.time.com/2011/03/29/anatomy-of-a-war-crime-behind-the-enabling-of-the-kill-team/> (discussing "outrage" in Europe over the "Kill Team" story despite a lack of interest in it in the United States).
118. Barry R. McCaffrey, *Human Rights and the Commander*, JOINT FORCES Q., Autumn 1995, at 10, 10-11.
119. See *id.* at 12. "[I]f we train a unit to hate insurgents and kill them in combat, and the unit finds it increasingly difficult to distinguish the insurgents from the population, in the minds of the Soldiers, the population may soon become the hated enemy and thus victims of unlawful conduct." Rielly, *supra* note 90, at 20.
120. Barry R. McCaffrey, *Human Rights and the Commander*, JOINT FORCES Q., Autumn 1995, at 10, 12.
121. *Id.*
122. *Id.*
123. *Id.* at 12-13. Leaders at all levels must also police their own speech. Even offhand remarks in jest, such as, "The only good prisoner is a dead one," may be overheard and misinterpreted by Soldiers, leading to a climate of disregard for the Law of Armed Conflict. See Parks, *supra* note 1, at 78-80.
124. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, MIL. L. REV., May-June 2009, at 17, 21.
125. *Id.* at 22. These problems contributed to the My Lai massacre and the failure of investigation afterward.
126. *Id.* at 22-23. "[A] moral, ethical command climate . . . is the single most important factor in preventing civilian casualties . . . No substitute exists for ethical leadership manifested by the provision of training in garrison and throughout deployments." DEF. LEGAL POL'Y BD., U.S. DEP'T OF DEF., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 60 (2013).
127. BILTON & SIM, *supra* note 102, at 138-40.
128. See FM 6-27, *supra* note 3, paras. 8-2, -4, -7.
129. PEERS INQUIRY, *supra* note 100, at 10-9 to -10.
130. MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 23, 138 (1992).
131. *Id.*
132. *Id.* at 138-39.
133. *Id.* at 139.
134. *Id.* at 139-40.
135. Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 14 (1982); see ADP 6-22, *supra* note 109, para. 8-4 (Leaders and Courage).
136. See PEERS INQUIRY, *supra* note 100, at 10-8 to -11; DoD LoW MANUAL, *supra* note 2, § 18.2 (discussing the practical reasons for enforcing compliance with the Law of Armed Conflict).
137. See AR 600-20, *supra* note 3, para. 4-24 (listing the duty to "prevent" as just one of a commander's duties with regard to war crimes).
138. Deterrence is a key goal of punishment. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 16, 2001).
139. MCM, *supra* note 77, R.C.M. 306 (initial disposition); Parks, *supra* note 1, at 80-81.
140. See MCM, *supra* note 77, R.C.M. 306(a); 10 U.S.C. § 37(a) (command influence). International law imposes no duty to punish certain offenses a particular way. FM 6-27, *supra* note 3, para. 8-5.
141. See MCM, *supra* note 77, R.C.M. 306. If a commander took unreasonably light action against an alleged war criminal, that could constitute a violation of the commander's duty to punish. Parks, *supra* note 1, at 80-81.
142. U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE paras. 8-1 (7 Aug. 2019) (C1, 20 Sept. 2019).
143. *Id.* para. 8-7. See AR 600-20, *supra* note 3, para. 4-24 (added to AR 600-20 in 2020).
144. See Chief of Staff, U.S. Army, & Sec'y of Army, The Army Vision (n.d.), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf. Enforcing compliance with the law of war enables mission accomplishment by enhancing troop discipline, setting an example for reciprocal compliance by opposing forces, and establishing a framework for perceived legitimacy by host-nation, allied, and U.S. populations. DoD LoW MANUAL, *supra* note 2, § 18.2.



Enclosure “2”

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

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| STATE OF HAWAII, |) | |
| |) | |
| |) | Crim. No. 14-1-0819 |
| vs. |) | TRANSCRIPT OF |
| |) | PROCEEDINGS |
| |) | |
| KAIULA KALAWE ENGLISH |) | |
| |) | |
| Defendant. |) | |
| |) | |
| STATE OF HAWAII |) | |
| |) | Crim. No. 14-1-0820 |
| |) | |
| vs. |) | |
| |) | |
| ROBIN WAINUHEA DUDOIT |) | |
| |) | |
| Defendant. |) | |
| |) | |

TRANSCRIPT OF PROCEEDINGS

before the Honorable JOSEPH P. CARDOZA, Circuit Court
Judge presiding on Thursday, March 5, 2015. Defendant
English's Motion to Dismiss Criminal Complaints Pursuant
To HRPP 12(1)(b); Defendant Robin Wainuhea Dudoit's
Joinder In Defendant English's Motion to Dismiss Criminal
Complaint Pursuant To HRPP 12(1)(b).

TRANSCRIBED BY:
Beth Kelly, RPR, CSR #235
Court Reporter

Beth Kelly, CSR #235
Court Reporter

1 APPEARANCES:

2 LLOYD PHELPS, Esq. Attorney for the State
3 Deputy Prosecuting Attorney
4 County of Maui
5 Wailuku, Hawaii

6 DEXTER KAIAMA, Esq. Attorney for the Defendants
7 111 Hekili Street
8 #A1607
9 Kailua, Hawaii

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| | INDEX | | | | | |
|----|-----------|--------|-------|----------|---------|----|
| | WITNESSES | DIRECT | CROSS | REDIRECT | RECROSS | VD |
| 1 | | | | | | |
| 2 | | | | | | |
| 3 | Dr. Sai | 6 | | | | |
| 4 | | | | | | |
| 5 | | | | | | |
| 6 | | | | | | |
| 7 | | | | | | |
| 8 | | | | | | |
| 9 | | | | | | |
| 10 | | | | | | |
| 11 | | | | | | |
| 12 | | | | | | |
| 13 | | | | | | |
| 14 | | | | | | |
| 15 | | | | | | |
| 16 | | | | | | |
| 17 | | | | | | |
| 18 | | | | | | |
| 19 | | | | | | |
| 20 | | | | | | |
| 21 | | | | | | |
| 22 | | | | | | |
| 23 | | | | | | |
| 24 | | | | | | |
| 25 | | | | | | |

1 THURSDAY, MARCH 5, 2015

2 THE CLERK: Calling Criminal Numbers
3 14-1-0819, State of Hawaii versus Kaiula Kalawe English;
4 and Criminal Number 14-1-0820, State of Hawaii versus
5 Robin, Wainuhea Dudoit; for, one, defendant English's
6 motion to dismiss criminal complaints pursuant to HRPP
7 12(1)(b); and two, defendant Robin Wainuhea Dudoit's
8 joinder in defendant English's motion to dismiss criminal
9 complaint pursuant to HRPP 12(1)(b).

10 MR. PHELPS: Good morning, your Honor, Lloyd
11 Phelps appearing on behalf of the State for all matters.

12 MR. KAIAMA: Good morning, your Honor, Dexter
13 Kaiama on behalf of Kaiula English and Robin Dudoit. Mr.
14 English and Mr. Dudoit are present.

15 THE COURT: All right. Good morning,
16 Counsel. Good morning, Mr. English. Good morning, Mr.
17 Dudoit.

18 All right. This is the defendant's motion
19 and joinder. And so, Mr. Kaiama, is there anything you
20 wanted to present?

21 MR. KAIAMA: Yes, just first order of
22 business, your Honor. I just wanted to make sure, because
23 I filed Mr. Dudoit's joinder in the case --

24 THE COURT: You did?

25 MR. KAIAMA: -- to execute the same paper

1 and time for the Court. It's essentially the same motion.

2 But I just wanted it understood, and I
3 believe it is that Mr. Dudoit is bringing the exact same
4 argument and motion to dismiss as Mr. English is bringing
5 by his motion. Yes? Okay. Thank you.

6 Your Honor --

7 MR. PHELPS: State's understanding, your
8 Honor.

9 MR. KAIAMA: Okay. Yes.

10 Your Honor, actually as part of -- before we
11 make oral argument on the motion, your Honor, as I
12 understand, if this was scheduled for an evidentiary
13 hearing, I did retain and I do have an expert witness to
14 testify. And I would like to present his expert testimony
15 before we proceed with our oral argument.

16 THE COURT: All right. If you have a witness
17 to testify.

18 MR. KAIAMA: I would be calling Dr. Keanu
19 Sai.

20 THE CLERK: I'm sorry, sir. Can you please
21 stand and raise your right hand?

22 DR. DAVID KEANU SAI
23 was called as a witness by and on behalf of the Defendants
24 and after having been first duly sworn was examined and
25 testified as follows:

1 THE CLERK: So sworn. Please be seated.

2 THE COURT: You may proceed with your
3 examination of the witness.

4 MR. KAIAMA: Thank you, your Honor. Sorry, I
5 think I turned on my phone. Excuse me. Excuse me, your
6 Honor.

7 DIRECT EXAMINATION

8 BY MR. KAIAMA:

9 Q. Good morning, Dr. Sai. Would you please
10 state your name and your present occupation for the
11 record?

12 A. David Keanu Sai. I'm a lecturer at the
13 University of Hawaii, Windward Community College.

14 Q. Okay. Dr. Sai, before I ask you about your
15 testimony in this case, I'm going to ask you a few
16 questions about your qualifications. Is that okay with
17 you?

18 A. That's fine.

19 Q. Dr. Sai, can you please provide us a
20 background, your educational background from high school
21 to the present date?

22 A. I can. Well, got a high school diploma from
23 Kamehameha, 1982. An Associates Degree from New Mexico
24 Military Institute, a military college. A Bachelor's in
25 sociology from the University of Hawaii. That was 1987.

1 A Master's Degree in political science, specializing in
2 international relations, 2004. And a Ph.D. in political
3 science focusing on international relations and public
4 law, which includes international law, United States law,
5 and Hawaiian Kingdom law of the 19th century. And that
6 was 2008.

7 Q. Okay. Tell us a little bit about obtaining
8 your Ph.D., Dr. Sai. How did you go about doing that?
9 What's the requirements and what did you need to do? What
10 was the process of your getting that Ph.D.?

11 A. Well, you first need a Master's Degree. In
12 my case it was in political science specializing in
13 international relations.

14 A Ph.D. is the highest degree you can get
15 within the academy. And a Ph.D. is based upon something
16 original to contribute to the political science field and
17 law field, because my area's public law.

18 What takes place is you begin with a
19 proposal. You have to give a defense. And you have a
20 committee that -- I had a committee of six professors.

21 And you basically present what your research
22 is going to be. What they do is to ensure that this
23 research has not been done already by another Ph.D.. So
24 it's called a lit review or literature review.

25 My area that I proposed was researching

1 Hawaii's legal and political status since the 18th century
2 to the present and incorporating international relations,
3 international law, and Hawaiian Kingdom law and United
4 States law.

5 That proposal was passed. Then you have to
6 go into what is called the comprehensive exams.

7 So comprehensive exams is where each of your
8 professors, in this case, six of them, would provide two
9 questions to test my comprehension of the topic of the
10 research -- of the proposed research.

11 And they would pose two questions each. I
12 would have to answer one of the two. Each question
13 average about 30 pages. Okay.

14 You're given one week to complete from
15 Monday -- from Monday to Monday. It's a pass or fail.
16 It's not graded.

17 During that process I successfully completed
18 the comprehensive exams. And then you move to what is
19 called all-but-dissertation. That's when you begin the
20 writing of your dissertation through the research.

21 The title of my doctorate dissertation was
22 the continuity of the Hawaiian Kingdom, beginning the
23 transition from occupied to restored state or country.

24 Successfully defended that before my
25 committee. And it was submitted in time for me to

1 graduate in 2008.

2 Q. Okay. Would you be able to tell us, and just
3 for the record, who was on your committee, Dr. Sai?

4 A. My chairman was Neal Milner. He's a pretty
5 famous political pundit on Channel 4 news. His area is --
6 background is law and judicial behavior.

7 Katharina Heyer, political scientist, public
8 law.

9 John Wilson, sovereignty, goes back to the
10 Greek Polis states through Hobbes, Rousseau, political
11 science and law regarding sovereignty.

12 Then I had a Professor Avi Soifer, the Dean
13 of the Law School. His background is U.S. Constitutional
14 law.

15 I also had as an outside member, Professor
16 Matthew Craven from the University of London, who
17 teleconferenced in for my defense. His background is
18 state sovereignty and international law.

19 And then I also had as the final professor,
20 Professor Kanalu Young from Hawaiian Studies, whose
21 background was Hawaiian Chiefs. But he regrettably passed
22 away before my defense. So Professor Jon Osorio stepped
23 in from the Hawaiian Studies Department.

24 They made up my committee.

25 Q. And again, it's obvious, Dr. Sai, you did

1 pass your dissertation defense?

2 A. And that's what I want to -- ensure a clear
3 understanding. When you defend your dissertation, you're
4 not arguing your dissertation. You have to defend it
5 against the committee members who try to break it. And if
6 they're not able to break it, then you're awarded the
7 Ph.D. and that becomes your specialty.

8 Q. Okay. And it's clear in this case and it's
9 of particular interest to me that the Dean of the law
10 school was on this committee; correct?

11 A. Yes.

12 Q. Okay. And he had an opportunity to so-called
13 challenge or break your dissertation defense as well?

14 A. That's part of the academic process.

15 Q. Okay. And did he come to any conclusion
16 concerning your dissertation?

17 A. They couldn't deny what I proposed and what I
18 argued. Because if they could deny it, I wouldn't have my
19 Ph.D.. They would find a hole in the argument or the
20 research.

21 Q. Okay. Thank you, Dr. Sai.

22 Since the obtaining your dissertation
23 defense, have you had any publications that's been -- any
24 articles that have been published in, I guess, relevant
25 journals or journals of higher education?

1 A. Law review articles. One was published in
2 the University of San Francisco School of Law, Journal of
3 Law and Social Challenges. Another one at the University
4 of Hawaii, Hawaiian Journal of Law and Politics, which is
5 published on HeinOnline, which is a legal publication,
6 Hawaiian.

7 Q. I also understand and, Dr. Sai, just so you
8 know, we did provide as Exhibit 1 in the motion, your
9 curriculum vitae. And so it does provide much of the
10 information that you're testifying about, but I wanted to
11 ask you about, besides publication, I know you also
12 have -- or tell me, you've also written education
13 material?

14 A. Yes.

15 Q. Can you explain that?

16 A. Actually I have a history text that is used
17 in the high school and college levels. It's actually a
18 watered down version of my doctorate dissertation. Much
19 more user friendly for teaching the legal and political
20 history of Hawaii that begins with Kamehameha I and brings
21 it up-to-date.

22 So it is used to teach. It's part of the
23 curriculum. And it is actually required reading at the
24 University of Hawaii Maui College, the community colleges,
25 the University of Hawaii at Manoa. And I did find that

1 it's actually required reading and used in NYU, New York
2 University, and University of Massachusetts at Boston.

3 Q. Okay. And what is the name of that education
4 material, Dr. Sai?

5 A. Ua mau kea ea Sovereignty Endures.

6 Q. Thank you. In addition to publications, Dr.
7 Sai, I understand that you've made a number of
8 presentations. In fact, most recently presentations at
9 facilities or educations -- higher educational facilities.
10 Can you give me a little bit of background or other kinds
11 of presentations that you've made and what the topics of
12 those presentations were?

13 A. I've been invited quite often to present to
14 conferences, to the universities. This past April I was
15 giving guest lectures at the University of NYU, New York
16 University; Harvard; University of Massachusetts at Boston
17 and Southern Connecticut State University.

18 Other universities that I've given
19 presentations to as well span across here in Hawaii, the
20 colleges, the high schools.

21 Just recently I was invited as a guest
22 presenter in a conference at Cambridge University History
23 Department in London. And the conference is focusing on
24 non-European states in the age of imperialism.

25 Q. Very good. And, Dr. Sai, again, all of this,

1 both your publications, your educational materials, as
2 well as your presentations, is in your area of expertise;
3 correct?

4 A. Yes.

5 Q. And just for the record again, can you tell
6 us what that area of expertise is?

7 A. The continuity of the Hawaiian state under
8 international law.

9 Q. Okay. Very good. And, Dr. Sai, you have --
10 have you been qualified as an expert or to testify as an
11 expert in any other proceedings?

12 A. Yes. There was a case in Hilo, Judge
13 Freitas. Tamanaha -- it was a lender versus Tamanaha, I
14 believe. I can't recall the exact case.

15 Q. And you were qualified as an expert and you
16 were allowed to provide your expert opinion in that case
17 concerning your area of expertise?

18 A. Yes.

19 MR. KAIAMA: Your Honor, at this time we
20 would ask that Dr. Sai be qualified as an expert witness
21 to testify about matters concerning our motion to dismiss.

22 MR. PHELPS: The State has no objection, your
23 Honor.

24 THE COURT: All right. There being no
25 objection, the Court will so receive the witness as an

1 expert as offered.

2 MR. KAIAMA: Thank you, your Honor.

3 BY MR. KAIAMA:

4 Q. Dr. Sai, based on all of your research, based
5 on your background and your education and this specialty,
6 you understand that on behalf of my clients I am bringing
7 a motion to dismiss for lack of subject matter
8 jurisdiction?

9 A. Yes.

10 Q. Based on all of your research and your
11 expertise in this area, Dr. Sai, have you reached any
12 conclusions about this, and can you tell us what your
13 conclusions are?

14 A. That the Court would not have subject matter
15 jurisdiction as a result of international law.

16 Q. And if you can explain or perhaps expand on
17 that explanation and tell us why the Court does not have
18 subject matter jurisdiction in this case?

19 A. Sure. Well, it goes back to what the status
20 of Hawaii was first, not necessarily what we are looking
21 at today.

22 So when you look at Hawaii and its political
23 and legal status on November 28th, 1843 Great Britain and
24 France jointly recognized Hawaii as an independent state.

25 July 6th, 1844 Secretary of State, John C.

1 Calhoun, also recognized formally the independence of the
2 Hawaiian Kingdom.

3 Now, to determine dependence under
4 international law applies to the political independence,
5 not physically independent.

6 From that point Hawaii was admitted into the
7 Family of Nations.

8 By 1893 it had gone through government reform
9 whereby it transformed itself into a constitutional
10 monarchy that fully adopted a separation of powers since
11 1864.

12 By 1893 the Hawaiian Kingdom as a country had
13 over 90 embassies and consulates throughout the world.
14 The United States had an embassy in Honolulu. And the
15 Hawaiian Kingdom had an embassy in Washington D.C.. And
16 Hawaiian consulates throughout the United States, as well
17 as U.S. consulates throughout Hawaii.

18 So in 1893 clearly Hawaii was an independent
19 state.

20 Now, under international law there is a need
21 to discern between a government and a state. The state is
22 what was recognized as a subject of international law, not
23 its government. The government was merely the means by
24 which that recognition took place in 1843 and 1844.

25 Now, a government is the political organ of a

1 state. What that means is it exercises the authority of
2 that state. Every government is unique in its
3 geopolitical, but every state is identical under
4 international law. It has a defined boundary. It has
5 independence. It has a centralized government. And it
6 has territory -- people within its territory and the
7 ability to enter into international relations.

8 What happened in 1893 on January 17th, as
9 concluded by the United States investigation, presidential
10 investigation, is that the Hawaiian government was
11 overthrown, not the Hawaiian state. Okay.

12 Now, this is no different than overthrowing
13 the Iraqi government in 2003. By the United States
14 overthrowing the Iraqi government that did not equate to
15 the overthrow of Iraq as a state.

16 That situation is what we call an
17 international law occupation. Okay. Occupation is where
18 the sovereignty is still intact, but international law
19 mandates the occupier to conform as a proxy, a temporary
20 proxy of a government to temporarily administer those laws
21 of that particular country.

22 Now, prior to 1899, which is we're talking
23 about 1893, the illegal overthrow of the government,
24 customary international law would regulate the actions
25 taken by governments that occupy the territory of another

1 country.

2 Those customary laws are the law of
3 occupation is to maintain the status quo of the occupied
4 state. The occupier must administer the laws of the
5 occupied state and can not impose its own laws within the
6 territory of an occupied state, because sovereignty and
7 independence is still intact.

8 So by 1899, we have what is called the Hague
9 Conventions. Later 1949, the Geneva Conventions. The
10 Hague Conventions merely codified customary international
11 law, fully recognized. And 1949 again codified customary
12 international law and the gaps that may have been in the
13 Hague Conventions.

14 So when we look at 1893, it is clear the
15 government was overthrown, but it is also clear that the
16 State wasn't, because the United States did not have
17 sovereignty over Hawaii. The only way that you can
18 acquire sovereignty of another state under international
19 law is you need a treaty. Okay, whether by conquest or by
20 voluntary transfer.

21 An example of a voluntary transfer that
22 United States acquired sovereignty would be the 1803
23 Louisiana Purchase. An example of a treaty of conquest
24 where the United States acquired territory through a war,
25 1848, Treaty of Guadalupe Hidalgo, Mexican America War

1 making the Rio Grande the dividing point.

2 You didn't have that in 1893. In fact, you
3 had an attempt to do a treaty, but President Cleveland
4 withdrew that treaty in 1893 in March and investigated the
5 situation. Never resubmitted that treaty. In other
6 words, in the alternative he entered into another treaty
7 with the Queen to reinstate the Hawaiian government. And
8 that's called a sole executive agreement. That took place
9 on December 18th, 1893. All part of the record in the
10 State Department.

11 So what we have there from 1893 is a
12 situation of a governmental matter, not a state or a
13 sovereignty.

14 As we move forward into 1898 there still is
15 no treaty, but the Spanish American War breaks out and
16 that's in April of 1898. The United States is waging war
17 against the Spanish, not just in Puerto Rico and Cuba in
18 the Caribbean, but also in Guam and the Phillipines.

19 And Captain Alfred Mahan from the U.S. Naval
20 War College and General Schoffield gave testimony to the
21 House Committee on Foreign Affairs in May 1898, that they
22 should pass a law, called a joint resolution, to annex the
23 Hawaiian Islands because of necessity called war. They
24 need to seize Hawaii, as stated by those given testimony,
25 in order to protect the west coast of the United States

1 and to reinforce troops in Guam and the Phillipines.

2 The problem we run into is a joint resolution
3 of Congress has no effect beyond the borders of the United
4 States. It's a municipal legislation. It's not
5 international law.

6 That was then taken up for a vote in the
7 house. Congressmen were making points on the record that
8 this is illegal. You can not pass laws that can effect
9 the sovereignty of another country. But the argument was
10 it's necessity. We're at war.

11 On July 7th, after the House and Senate made
12 the record, but was not able to get -- what they did was
13 they passed by majority, July 6th, 1898, joint resolution
14 of annexation and then it was President McKinley on
15 June -- July 7th, 1898 that signed it into law.

16 It was that U.S. law that was used to seize
17 another country in the occupation. And the occupation of
18 Hawaii began formally on August 12th, 1898. Formal
19 ceremonies at Iolani Palace where the Hawaiian flag was
20 lowered and the American flag risen before a full regalia
21 of U.S. military in formation.

22 What has happened since then is that now
23 research is showing that there was a deliberate move to
24 basically denationalize the inhabitants in the public
25 schools that actually began formally in 1906 where they

1 began to teach within the schools American history. You
2 can not speak Hawaiian. And if you do speak Hawaiian and
3 not English, you get disciplined. We hear those stories
4 from our kupuna.

5 And that began what we call in international
6 law, attempts to denationalize the inhabitants of occupied
7 territories. Which since World War I and World War II has
8 been categorized as a war crime.

9 So what we have today is we have in 1900,
10 after 1898, in 1900 the United States Congress passed
11 another law called the Organic Act creating a government
12 for the Territory of Hawaii.

13 In that Organic Act it specifically says that
14 the Republic of Hawaii, which was called the provisional
15 government which President Cleveland called self-declared,
16 is now going to be called the Territory of Hawaii.

17 And then in 1959 the Statehood Act basically
18 stated that what was formerly the Territory of Hawaii is
19 the State of Hawaii.

20 Now, looking at the limitation of U.S. law it
21 has no effect in a foreign state. You still need a
22 treaty.

23 But what's interesting is in 1993 the United
24 States Congress passed a law apologizing for the illegal
25 overthrow of the Hawaiian Kingdom government. What was

1 important in there is that in one of the whereases it
2 stated specifically, that whereas the self-declared
3 Republic of Hawaii ceded sovereignty to the United States.

4 We have a problem there because self-declared
5 means you're not a government. Which is precisely what
6 President Cleveland, in his investigation, called its
7 predecessor the provisional government.

8 So in that genealogy, if the provisional
9 government was self-declared, then the Republic of Hawaii
10 is self-declared, then the Territory of Hawaii was
11 self-declared, then the State of Hawaii self-declared.

12 Now, I fully understand the ramifications of
13 this information and history and the applicable law. I'm
14 a retired captain from the Army, you know. So this is not
15 a political statement. But it's part of my research that
16 clearly shows that I can not find how the State of Hawaii,
17 a court, could have subject matter jurisdiction on two
18 points.

19 First, U.S. law is the Statehood Act is
20 limited to U.S. territory. Second, the State of Hawaii is
21 a successor of the Republic of Hawaii, which was admitted
22 to be self-declared in 1993 by the U.S. Congress.

23 So that's -- that's why I've come to the
24 conclusion where there is what is called a presumption of
25 continuity of the Hawaiian Kingdom as a state, not as a

1 government, but as a state under international law.

2 Q. Can you expand on that, the presumption of
3 continuity just a little bit, so that the Court
4 understands that or I can understand better what
5 continuity means in the context of international law?

6 A. Well, the word presumption is a conclusion
7 based upon facts. Assumption is a conclusion based upon
8 no facts.

9 But what is more important about the
10 presumption is that it shifts the burden. So no different
11 than there is a presumption of innocence because of the
12 fact the person has rights. You have, under international
13 law, a presumption of continuity, because the state itself
14 has rights under international law.

15 So the presumption of continuity is a very
16 well recognized principle of international law. That's
17 what preserves the State's continuity despite the fact
18 that its government was overthrown.

19 Now, there are two legal facts that need to
20 be established on the presumption of continuity of an
21 independent state. The first legal fact has to be that
22 the entity in question existed at some point in time in
23 history as an independent state. That's the first thing.

24 Now, clearly Hawaii's history shows that it
25 was an independent state, but what's more important there

1 was dictum in an arbitration award out of the permanent
2 Court of Arbitration in 2001 published in international
3 law reports out of Cambridge. Which basically says
4 paragraph 7.4, that in the 19th century the Hawaiian
5 Kingdom existed as an independent state, recognized as
6 such by the United States of America, Great Britain and
7 various other states. That right there, that dictum
8 verified and accomplished that first rule. Hawaii was an
9 independent state.

10 The second legal fact that would have to
11 apply, now that the United States which has the burden to
12 prove is that there are intervening events that have
13 deprived that state of its independence under
14 international law.

15 What we have as far as the historical record
16 from the United States of America is that all it has, as a
17 claim to Hawaii, it's not a treaty, but a joint resolution
18 of annexation, which is a U.S. law limited to U.S.
19 territory not recognized by international law. And that
20 the Statehood Act of 1959 is still a U.S. law not
21 recognized by international law.

22 So there are no intervening facts that would
23 deprive or rebut the presumption of continuity.

24 In fact, in 1988 the Office of Legal Counsel,
25 Department of Justice, in a legal opinion looked into that

1 very issue and it stated regarding the joint resolution,
2 it is therefore unclear which constitutional power
3 Congress exercised when it acquired Hawaii by joint
4 resolution. Therefore, this is not a proper precedent for
5 the United States president to follow.

6 And they made reference to the Congressional
7 records of Congressmen and Senators who was saying U.S.
8 laws have no effect beyond our borders. We can not annex
9 a foreign country by passing a joint resolution.

10 So in 1988 the Office of Legal Counsel,
11 Department of Justice, stumbled over that. Therefore,
12 there are no clear evidence that can rebut the presumption
13 of continuity. And that's why my research and my
14 expertise is in that area that the Hawaiian state
15 continues to exist under international law.

16 Q. Thank you, Dr. Sai.

17 MR. KAIAMA: I just wanted to let you know,
18 and for the record, the executive agreements that you
19 refer to between Queen Liliuokalani and President Grover
20 Cleveland has been attached to my client's motion to
21 dismiss as Exhibit 7 and 8, your Honor. So those are the
22 diplomatic records and negotiations, communications
23 between President Grover Cleveland when he comes to that
24 conclusion based on his investigation.

25 BY MR. KAIAMA:

1 Q. Dr. Sai, I also wanted you to confirm, I know
2 you spoke earlier and you testified that the joint
3 resolution, the Territorial Act, as well as the Statehood
4 Act was of Congressional Legislation, which has no force
5 and effect beyond its own territory or borders.

6 And you're referring to U.S. law. And I can
7 speak to that. But it's also true that that same rule of
8 law applies in the international realm as well; right? So
9 no country can occupy other countries by way of joint
10 resolution. That's a -- that's a common -- well, a well
11 established understanding under international as well; is
12 that correct?

13 A. International law is able to distinguish what
14 is international law and what is national law. So
15 national law's applied to states as an exercise of their
16 sovereignty.

17 International law is a law between states.
18 And between states is based upon agreements. And those
19 agreements are evidenced by treaties.

20 Q. Based on your conclusion that the continuity
21 of the Hawaiian Kingdom still exists, Dr. Sai, what are
22 the consequences of that -- of your opinion, your expert
23 opinion about that? Especially particularly with respect
24 to, respectfully, the Court's exercise of jurisdiction in
25 this case?

1 A. When we're looking at this issue within the
2 framework of international law what resonates is, number
3 one, sovereignty is still intact and it remains with the
4 state under occupation. Okay.

5 Now, that because sovereignty is still intact
6 and it's not a part of the United States, then
7 international law regulates that phenomenon or that
8 situation. And that is what we call the law of
9 occupation. And that's called the Hague Conventions of
10 1899, which was amended in 1907. And then we also have
11 the Geneva Conventions of 1949.

12 Now, specific issues regarding occupations
13 are pretty much the substance of Hague Conventions Number
14 Four of 1907, as well as Geneva Conventions Number Four
15 that deals with the civilian population during
16 occupations.

17 After World War I -- well, toward the end of
18 World War I is when war crimes began to be brought up as a
19 possible issue to be addressed with the Germans and the
20 access powers.

21 And they came up with a list of war crimes.
22 And one of those war crimes in 1919 was put out by the
23 United Nations Commission. Now, United Nations, back
24 then, I'm not talking about 1945 United Nations, but they
25 called like the United Front.

1 Attempts to denationalize inhabitants of an
2 occupied state, failure to provide a fair trial, those
3 issues, although they were not successful in prosecution
4 of individuals for war crimes after World War I because
5 there was still that issue of state immunity that people
6 were acting on behalf of the state, so they're not
7 personally liable or criminally liable. The State still
8 carried that.

9 Once World War II took place, it became a
10 foregone conclusion that individuals will be prosecuted
11 for war crimes.

12 There is a similar history that Hawaii has
13 with regard to war crimes in a country called Luxembourg.
14 In 1914 the Germans occupied Luxembourg, which was a
15 neutral country, in order to fight the French. The
16 seizure of Luxembourg under international law was not a
17 justified war, but it was called a war of aggression.
18 That led to war crimes being committed. So from 1914 to
19 1918 Germany occupied Luxembourg even when Luxembourg did
20 not resist the occupation.

21 They also did that same occupation in 1940 to
22 1945. Now 1940 to 1945 they began to attempt to
23 denationalize Luxembourgers into teaching the children
24 that they're German. They began to address the schools,
25 the curriculum.

1 What was also happening, not just in
2 Luxembourg, as a war crime was unfair trials. Germany
3 began to impose their laws and their courts within
4 occupied territories. And that became the subject of war
5 crime prosecutions by the allied states, but a prominent
6 tribunal that did prosecute war crimes for unfair trial
7 and denationalization was the Nuremberg trials.

8 And that set the stage, after the Nuremberg
9 trials, to address those loopholes in the conventional --
10 the Hague Conventions of 1907 which prompted the Geneva
11 Conventions in 1949.

12 And the Geneva Conventions specifically
13 stated as the experience -- as they acquired the
14 experience from World War II, Article 147, unfair trial is
15 a grave breach, which is considered a war crime.

16 So that's where the issue of not providing a
17 fair trial is a war crime according to the Geneva
18 Conventions and customary international law.

19 Q. Is it true, Dr. Sai, that the United States
20 is a party to that Geneva Conventions?

21 A. Yes.

22 Q. So it is obligated under the terms of Geneva
23 Conventions?

24 A. The United States acknowledges customary
25 international law and the law of occupation during the

1 Spanish American War, as evidenced by their written
2 manuals to the military. In administration of justice
3 within occupied territories came to be known as General
4 Order Number 101. Okay. Direction of the president on
5 how to administer the laws of former Spanish territory
6 until a peace treaty is signed where they can acquire the
7 territory themselves.

8 And they're also a party to the 1899 Hague
9 Conventions, the 1907 Hague Conventions, and the 1949
10 Geneva conventions.

11 Q. As part of their obligation as a contracting
12 party to those conventions, including 1949 Geneva
13 Conventions, did the United States create domestic
14 legislation that covered the commission of war crimes,
15 including deprivation of a fair and regular trial?

16 A. That would be in 1996 called the War Crimes
17 Act, which is Title 18, Section 2441, United States Code.

18 Q. Okay. You know, Dr. Sai, you answered all my
19 questions. Thank you. I appreciate it.

20 Is there -- I'll be honest, I think I covered
21 everything I need to cover, but I'm not sure. I'm not the
22 expert. Is there any other area that you would like to
23 provide us some insight that we don't have about the
24 status of Hawaii or about perhaps subject matter
25 jurisdiction?

1 A. I think there's a particular important case
2 here regarding subject matter jurisdiction. That dealt
3 with Guantanamo Bay, Gitmo. And this is a case that went
4 before the United States Supreme Court, Hamdan versus
5 Rumsfeld. Okay.

6 And basically the argument that was presented
7 by a JAG as a Public Defender was that the military
8 tribunals were not properly constituted which was a direct
9 violation of the Geneva Conventions. Therefore, his
10 client could not get a fair trial.

11 Now, these military tribunals were determined
12 by the United States Supreme Court to be illegal because
13 the United States president can not establish -- can not
14 establish military tribunals within U.S. territory because
15 that would undermine the authority of Congress which has
16 plenary power.

17 Guantanamo Bay was not foreign territory
18 where the president could create military tribunals. It
19 was actually part of the United States.

20 Now, the United States President does have
21 the authority under Article 2 to create military tribunals
22 in occupied territories. He did that in Japan after World
23 War II. In Germany after World War II, as well as after
24 World War I.

25 And these military tribunals administer the

1 laws of the occupied state. What was brought up in this
2 case with Hamdan versus Rumsfeld, the president could not
3 create a military tribunal within U.S. territory and it
4 was not justified by necessity.

5 So the Court ruled that the Court's are
6 illegal and then turned over to Congress to pass a law,
7 because it's within U.S. territory, to keep it up.

8 Now, what's important is there was a Justice
9 Robertson, I believe, of the Supreme Court. He was
10 addressing the secondary argument that people were not
11 getting a fair trial within these military tribunals. And
12 Justice Robertson, if I'm not mistaken his name, he stated
13 it is irrelevant whether or not they were given a fair
14 trial, because if they're not properly constituted, they
15 can't give a fair trial.

16 Q. Okay. And so is it fair to say, is it
17 your -- I think I understood this, but I just want to be
18 clear. The Hamdan case also stands for the president does
19 not have authority in U.S. territory, then he is the one
20 that has authority in foreign territory?

21 A. And these courts called military tribunals
22 are also referred to as Article 2 courts.

23 Q. Okay. And is that your opinion with respect
24 to Hawaii, those are the courts that should be
25 administering the laws of the Hawaiian Kingdom?

1 A. Yes.

2 Q. Okay. Thank you. And just to give you a
3 quick correction. It was actually Justice Kennedy who
4 said that.

5 A. Kennedy. My apologies.

6 Q. No. Thank you, Dr. Sai. Is there anything
7 else that you'd like to add?

8 I'd actually like to ask you about how we
9 resolve the situation, but I think that would be something
10 for --

11 A. I can quickly state to that because this
12 information is quite perplexing. All right.

13 My committee members on my doctorate
14 committee could not refute the evidence. All they asked
15 is how do you fix the problem? So Chapter Five of my
16 dissertation is how do you begin the transition in this
17 process.

18 And actually the transition is quite simple.
19 I think this issue is not hard to understand. It's just
20 hard to believe. I mean to understanding, and once you
21 understand, things can take place.

22 So what we have to ensure for myself as a
23 professional, I am not an anarchist. I'm a person to
24 maintain civility. I still am inherently a retired
25 captain.

1 There is a way to fix this problem, yeah.
2 And that is clear, but the rule of law has to apply. But
3 there is a doctrine called necessity under international
4 law that can resolve over a hundred years of noncompliance
5 to the law. And that's what I cover in Chapter Five. But
6 that's another issue.

7 Q. And perhaps one of the first places we can
8 start is with the proper courts administering the proper
9 law; is that correct?

10 A. It's really just the court administering the
11 proper law so that people have a fair trial.

12 MR. KAIAMA: Thank you, Dr. Sai. I have no
13 further questions.

14 THE COURT: Any cross-examination?

15 MR. PHELPS: Your Honor, the State has no
16 questions of Dr. Sai. Thank you for his testimony. One
17 Army officer to another, I appreciate your testimony.

18 THE WITNESS: 13 echo.

19 THE COURT: Thank you. You are excused.

20 Mr. Kaiama.

21 MR. KAIAMA: Thank you, your Honor. And I
22 will try to be brief.

23 As you can see, your Honor, we did file the
24 motion to dismiss for lack of subject matter jurisdiction
25 and I also did file a supplemental memorandum.

1 In the motion in the supplemental memorandums
2 I did provide exhibits. And the exhibits include Dr.
3 Sai's curriculum vitae, and expert opinion briefs that
4 he's written concerning much of what he's testified today.

5 Essentially our argument is this, your Honor.
6 That with the exhibits that's been presented and the
7 testimony of Dr. Sai, we now have met the requirements set
8 forth under State of Hawaii versus Lorenzo.

9 We have provided the courts now with a
10 factual and legal basis to conclude that the Hawaiian
11 Kingdom continues to exist. Because we've met that burden
12 under Lorenzo, we respectfully submit that the State has
13 failed to meet its burden that this Court has jurisdiction
14 under Nishitani versus Baker.

15 And given that we've met our burden and the
16 State, respectfully, has not met theirs, our position
17 simply, your Honor, is that the Court has no other
18 alternative but to dismiss the case for lack of subject
19 matter jurisdiction.

20 In the motion itself we did provide the Court
21 with additional arguments. We did present the Court with
22 the legal arguments as to the limits of Congressional
23 enactments, and we've provided both Supreme Court cases.
24 Curtiss-Wright versus United States Export (sic). I may
25 have said that wrong. But talking about the limits, and

1 basically confirming that the joint resolution which
2 attempted to annex the United States is not lawful and has
3 no force and effect on Hawaiian territory.

4 And because of that, neither the Organic Act
5 which formed the territory, or the Statehood Act which are
6 both Congressional legislations, also have no force and
7 effect on Hawaiian territory.

8 That being the case, your Honor, the United
9 States never lawfully acquired a sovereignty over the
10 Hawaiian territory.

11 In addition with Dr. Sai's testimony, his
12 expert testimony, we've proven or clearly established that
13 the Hawaiian Kingdom, in fact, was recognized as an
14 independent nation as of 1843 and concluded a number of
15 treaties. I believe over 90 treaties -- 46 treaties, a
16 little over 90 countries, to further affirm its position
17 as an independent nation.

18 With Dr. Sai's testimony, again once
19 independence is established, it is the burden in this case
20 of the United States or the State of Hawaii to prove that
21 that continuity has been extinguished.

22 There is no evidence, and in all honesty,
23 your Honor, in the four years that I've been arguing this
24 motion there has not been any evidence to rebut the
25 presumption of that continuity.

1 Finally, your Honor, I think it is important,
2 and I do say this in all respect, that because of the
3 evidence provided in this situation that the Court not
4 only should be -- the Court should be dismissing the case
5 for lack of subject matter jurisdiction, but also the
6 argument is that, respectfully, the Court is not lawfully
7 constituted under Hamsden -- Hamden versus Rumsfeld,
8 because it is not administering the laws of the Hawaiian
9 Kingdom.

10 Because we continue to be under a state of
11 occupation, the rule of law which applies is the law of
12 occupation. And the United States, in this case,
13 presently as the occupier, should be administering
14 Hawaiian Kingdom law.

15 By virtue of the fact that the prosecutor's
16 office and the State has brought this case and sought to
17 confer jurisdiction on the Court by Hawaii Revised
18 Statutes, that the Court's retention of jurisdiction, with
19 all respect, in light of the evidence that's been provided
20 would, in fact, deprive my clients of a fair and regular
21 trial, and would be a violation of the Geneva, the Hague,
22 and other conventions that has been testified to by Dr.
23 Sai.

24 Again, with all respect, your Honor, we think
25 we've met our burden. We do not believe, in fact we are

1 certain, that the State has not met its burden to prove
2 that this Court has jurisdiction.

3 And we would respectfully request -- I would
4 respectfully request on behalf of my clients, Kaiula
5 English and Mr. Robin Dudoit, that the Court dismiss their
6 cases for lack of subject matter jurisdiction. Thank you,
7 your Honor.

8 THE COURT: Mr. Phelps.

9 MR. PHELPS: Your Honor, the State will be
10 brief.

11 We're going to ask that obviously you deny
12 the defense motion to dismiss for lack of subject matter
13 jurisdiction. We're going to submit on the memorandum
14 that we submitted in opposition to it.

15 But the State will simply point out, we
16 appreciate Dr. Sai's testimony. It was one of more
17 impressive dissertations I've heard in awhile. And I do
18 respect some of the points he's made.

19 But the case law is fairly clear on this,
20 your Honor. This isn't a new argument. This isn't a
21 novel argument. Courts have ruled that basically
22 regardless of the legality of the overthrow of the
23 Hawaiian Kingdom, Hawaii, as it is now, is a lawful,
24 lawful state with a lawful court system and a lawful set
25 of laws.

1 That anybody who avails themselves of this
2 jurisdiction, they fall under the law, whether they want
3 to claim to be a member of a sovereign kingdom or not, the
4 law applies, your Honor. And for those reasons, we feel
5 that you have no other choice but to deny this motion,
6 your Honor.

7 I believe that the case law on this is fairly
8 clear as laid out in our memorandum. All due respect to
9 Mr. Kaiama and everybody who's here, we believe the courts
10 have spoken, and we're simply going to ask that you take
11 judicial recognition of the U.S. Constitution, the Hawaii
12 Constitution, the Hawaii Revised Statutes, every law that
13 basically this Court is mandated to follow, and deny his
14 motion -- motions, actually.

15 THE COURT: Thank you.

16 MR. PHELPS: Thank you, your Honor.

17 MR. KAIAMA: Yes, your Honor. Briefly in
18 response.

19 I know that the cases that the prosecutor
20 relies on, your Honor, as a point of order, all of those
21 cases in those decisions deal with personal immunity and
22 personal jurisdiction.

23 So the question of subject matter
24 jurisdiction has not been raised before this Court or
25 before the appellate courts or nor has it been addressed.

1 I can tell you, your Honor, that I believe in
2 2012 I did take two cases up on appeal, bringing the same
3 question before the Court and presenting the same legal
4 analysis.

5 The ICA did not address the legal analysis in
6 this case, and I don't know why. I might say they refused
7 to address it, and, in fact, in both cases issued just a
8 two page summary disposition order, really relying on the
9 Kauwila case -- Kaulia case, excuse me. And the entirety
10 of the Court's analysis or the holding in that is
11 essentially what the prosecutor said. Is that despite or
12 regardless of lawfulness of its origins, this is the proper
13 State of Hawaii.

14 Your Honor, I'm asking that this Court
15 transcend that, and actually look into the analysis, and
16 based on the analysis realize that what we're asking is
17 the predicate question. Did the United States ever
18 establish lawful acquisition of sovereignty here? And if
19 they did not, then none of this legislative enactments can
20 have any bearing on this Court.

21 And, essentially, Dr. Sai and the evidence
22 that we provided has proved that. There is no dispute
23 that the claim for statehood here of Hawaii is by way of a
24 joint resolution. That's not undisputed. That's part of
25 Congressional records.

1 It's also clear, based on the law, both the
2 Supreme Court, by testimony by representatives and
3 Congressmen in Congress at the time of 1898, and the
4 testimony of the Attorney General in 1998 as well, I
5 believe it was Douglas Kmiec, all call into question -- in
6 fact, they don't call into question, basically affirm the
7 fact that the Congress has no legislative powers beyond
8 its own borders.

9 So what I'm asking the Court, your Honor, at
10 this time, is that under its own law, Lorenzo is still the
11 prevailing case.

12 So it still requires us to present that
13 evidence for the Court to conclude relevant factual and
14 legal evidence for the Court to conclude that the Hawaiian
15 Kingdom continues to exist.

16 We've done that now. So we're presenting the
17 Court with that analysis it hasn't had before, and we're
18 asking the Court to transcend the lack of -- and I don't
19 know how to say it, but I wish to say, respectfully, the
20 lack of courage on the part of the Intermediate Courts of
21 Appeals to actually address it and to address the legal
22 analysis.

23 We're asking this Court to take a look at
24 that and, again, once the Court is required or takes a
25 look at that analysis, we assert and we firmly believe

1 that there is no other course but that my clients should
2 prevail. Thank you, your Honor.

3 THE COURT: All right. Well, before the
4 Court today is defendant English's motion to dismiss a
5 criminal complaint pursuant to Hawaii Rules of Penal
6 Procedure 12(1)(b) and the joinder that was filed by Mr.
7 Dudoit joining in Mr. English's motion.

8 And as has been outlined by Mr. Kaiama,
9 essentially the argument here, is that this Court lacks
10 subject matter jurisdiction. As has also been pointed out
11 by Mr. Kaiama in his remarks to the Court, he has brought
12 this issue to our appellate courts in the past and has not
13 achieved the result that he has sought through those
14 arguments.

15 And, of course, as I'm sure everyone would
16 acknowledge, this Court is a trial court and is subject to
17 the rulings of our appellate courts. And what our
18 appellate court has said, as has been acknowledged in Mr.
19 Kaiama's arguments, has in (inaudible) stated that
20 individuals claiming to be citizens of the Kingdom of
21 Hawaii and not the State of Hawaii are not exempt from
22 application of the laws of the State of Hawaii.

23 And Mr. Kaiama has argued on behalf of Mr.
24 English and Mr. Dudoit that he's not of the view that the
25 Court has -- the appellate courts have addressed the issue

1 that they wish to have addressed.

2 But, at any rate, these identical issues
3 having been presented in the past, and the Court having
4 ruled, and the appellate courts having ruled in a certain
5 fashion, in the Court's view, at least for purposes of a
6 trial court, resolves the question presented by the motion
7 and joinder.

8 And, respectfully, the Court is of the view
9 that based on everything that's been presented, that the
10 Court does have subject matter jurisdiction and will --
11 will ask the question though. And that is that in your
12 pleadings, although it was not discussed today, you asked
13 the Court to take judicial notice of various documents,
14 but you never said anything about it today.

15 MR. KAIAMA: Actually, your Honor, I would
16 ask -- and thank you -- I would ask, because we did make
17 the request and it's provided for in the motion itself, as
18 well as the authorities, that the Court take judicial
19 notice of the matters that were presented in the motion
20 itself.

21 And that being, and a number of those are
22 actually treaties between the Hawaiian Kingdom and United
23 States, and they are part of the Congressional records to
24 begin with.

25 And I think it's fairly clear from the law

1 that these kinds of treaties, there is a -- an obligation
2 to take judicial notice of those treaties. That
3 essentially was most of the request.

4 Now, we did also ask that the Court take --
5 request judicial notice of the Hague Conventions of 1907,
6 the Geneva Conventions of 1949. Again, those are treaties
7 that the United States is a contracting party to and it is
8 part of U.S. law and part of Congressional records
9 there. And --

10 THE COURT: Well, it -- I'm sorry, I thought
11 you were finished.

12 MR. KAIAMA: Yeah. And, finally, the other
13 parts that we did ask was that the Court take notice of
14 the agreement -- assignment agreement with Liliuokalani
15 and Grover Cleveland, as well as the restoration agreement
16 between the the United States President and the Queen.
17 Again, those are part of the Congressional records.

18 And, finally, we did ask the Court to take
19 judicial notice of particular court rulings, that being
20 Larsen versus the Hawaiian Kingdom, and that is part of
21 the international law reports, and that's stated there.
22 As well as the U.S. Supreme Court decisions in U.S. versus
23 Belmont, U.S. versus Curtiss-Wright Export Corp, and State
24 of Hawaii, which is -- State of Hawaii versus Lorenzo,
25 which is the prevailing law in Hawaii.

1 Finally, I did ask the Court to take judicial
2 notice of Dr. Sai's expert memorandum, which was attached
3 as an exhibit. I still make that request, although I am
4 aware that the courts have not necessarily granted the
5 request, but I would still make the request on behalf of
6 Mr. English and Mr. Dudoit.

7 THE COURT: The matters that you've requested
8 by way of your written presentation to the Court are set
9 forth in page 12 of the memorandum; correct?

10 MR. KAIAMA: Let me just double -- yes, I
11 believe that is correct. That is on pages -- yes, page
12 12. Yes, page 12 of the memorandum.

13 THE COURT: Yeah, okay. What's the
14 prosecution's position?

15 MR. PHELPS: No objection, your Honor.

16 THE COURT: All right. The Court will
17 take -- there being no objection, the Court will take
18 judicial notice as requested in writing on the documents
19 and the matters requested on the last paragraph of page 12
20 of the memorandum in support of motion filed on February
21 6th, 2015.

22 And having considered all of that, the Court
23 at this time is going to deny the motion and joinder to
24 dismiss the criminal complaint in these cases.

25 And I'll ask Mr. Phelps to prepare the

1 appropriate order.

2 And thank all of you, your report and
3 presentation today.

4 MR. KAIAMA: Thank you, your Honor.

5 MR. PHELPS: Thank you, your Honor.

6 THE CLERK: All rise, court stands in recess.

7 THE COURT: You know, actually we were --
8 yesterday during a pretrial, we were talking about the
9 trial date.

10 MR. KAIAMA: Yes.

11 THE COURT: And --

12 MR. KAIAMA: My clients did sign the waiver.

13 THE COURT: You've done that already?

14 MR. KAIAMA: Yes.

15 THE COURT: Okay. Thank you.

16 (At which time the above-entitled proceedings
17 were concluded.)

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C E R T I F I C A T E

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I, BETH KELLY, a Court Reporter do hereby
certify that the foregoing pages 1 through 46 inclusive
comprise a full, true and correct transcript of the
proceedings had in connection with the above-entitled
cause.

Dated this 20th day of March, 2015.

BETH KELLY, RPR, CSR #235
Court Reporter

Beth Kelly, CSR #235
Court Reporter

Enclosure “3”



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**THE SWEEPING EFFECT OF HAWAIIAN SOVEREIGNTY AND THE
NECESSITY OF MILITARY GOVERNMENT TO CURB THE CHAOS**

David Keanu Sai, Ph.D.*

- I. INTRODUCTION
- II. THE SWEEPING EFFECT OF STATE SOVEREIGNTY DURING A
PROLONGED OCCUPATION
- III. UNITED STATES PRACTICE DURING MILITARY OCCUPATION OF
FOREIGN STATES
- IV. THE DUTY TO ESTABLISH A MILITARY GOVERNMENT IN
OCCUPIED TERRITORY
- V. FROM A BRITISH PROTECTORATE TO A SOVEREIGN AND
INDEPENDENT STATE
- VI. HAWAIIAN SOVEREIGNTY UNAFFECTED BY MILITARY
OCCUPATION
- VII. THE LAW OF ARMED CONFLICT PROHIBITS ANNEXATION OF THE
OCCUPIED STATE
- VIII. RESTORATION OF THE HAWAIIAN GOVERNMENT AND THE
RECOGNITION OF THE CONTINUITY OF THE HAWAIIAN STATE BY
THE PERMANENT COURT OF ARBITRATION
- IX. AS AN AMERICAN PUPPET REGIME, THE ROLE OF THE ADJUTANT
GENERAL
- X. PREPARING FOR THE TRANSFORMATION OF THE STATE OF
HAWAI‘I INTO A MILITARY GOVERNMENT OF HAWAI‘I
- XI. EXERCISING THE CONSTITUTIONAL PREROGATIVE WITHOUT A
MONARCH

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- XII. LEGAL STATUS OF AMERICAN MUNICIPAL LAWS IN THE HAWAIIAN KINGDOM
- XIII. CUSTOMARY INTERNATIONAL LAW CONCLUDES THE HAWAIIAN KINGDOM CONTINUES TO EXIST
- XIV. CONCLUSION

I. INTRODUCTION

We are now at 131 years of an American occupation of the Hawaiian Kingdom. There are two periods since the occupation began on 17 January 1893. The first period was when the national consciousness of the Hawaiian Kingdom was effectively obliterated in the minds of the population. The second period was when the government was restored as a Regency in 1997 up until the present where the national consciousness had begun to be restored. Underlying the first and second periods, however, was the non-compliance with the law of occupation under international humanitarian law, which the military calls the law of armed conflict. So, while the national consciousness in the minds of the population has begun to change, the United States and its proxy, the State of Hawai‘i, has not changed in its unlawful authority.

If the American military in Hawai‘i complied with the international law of occupation when Queen Lili‘uokalani conditionally surrendered to the United States in 1893, the occupation would not have lasted 131 years. Consequently, everything since 1893 that derives from American authority, that would otherwise be valid within the territory of the United States, is invalid and void in Hawaiian territory because the United States has not been vested with Hawaiian sovereignty by a treaty. The only way to bring order to this calamity is by establishing a military government of Hawai‘i where the American military governor has centralized command and control allowable under the law of occupation.

This article will explain the role and function of a military government that presides over occupied territory of a State under international law. And that it is only by a military government that remedial steps can be taken, considering 131 years of illegality, that has consequently placed the entire population of the occupied State in a dire situation where their possessions and rights have evaporated because of the United States unlawful conduct and actions under the law of occupation. Despite the deliberate failure to establish a military government, international law and American military law still obliges the occupant to do so that will eventually bring the American occupation to an end by a treaty of peace between the Hawaiian Kingdom and the United States.

II. THE SWEEPING EFFECT OF STATE SOVEREIGNTY DURING A PROLONGED OCCUPATION

The bedrock of international law is the sovereignty of an independent State. Sovereignty is defined as the “supreme, absolute, and uncontrollable power by which any independent state is governed.”¹ For the purposes of international law, Wheaton explains:

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people or any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law [...], but which may be more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law [...], but may more properly be termed international law.²

In the *Island of Palmas* arbitration, which was a dispute between the United States and the Netherlands, the arbitrator explained that “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”³ And in the *S.S. Lotus* case, which was a dispute between France and Turkey, the Permanent Court of International Justice stated:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [treaty].⁴

¹ Henry Campbell Black, *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), 1396.

² Henry Wheaton, *Elements of International Law*, 8th ed., (London: Sampson Low, Son, and Company, 1866), §20.

³ *Island of Palmas Case* (Netherlands v. United States) 2 R.I.A.A. 838 (1928).

⁴ *The Case of the S.S. “Lotus,” judgment, Publications of the Permanent Court of International Justice, Collection of Judgments, Series A, No. 70, 18 (7 Sep. 1927).* Generally, on this issue see Arthur Lenhoff, “International Law and Rules on International Jurisdiction”, *Cornell Law Quarterly* 50 (1964): 5.

The permissive rule under international law that allows one State to exercise authority over the territory of another State is Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention, that mandates the occupant to establish a military government to provisionally administer the laws of the occupied State until there is a treaty of peace. For the past 131 years, there has been no permissive rule of international law that allows the United States to exercise any authority in the Hawaiian Kingdom, which makes the prolonged occupation illegal under international law.

As the arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, noted in its award, “in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”⁵ The scope of Hawaiian sovereignty can be gleaned from the Civil Code. §6 states:

The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.

Property within the territorial jurisdiction of the Hawaiian Kingdom includes both real and personal. Hawaiian sovereignty over the population, whether Hawaiian subjects or citizens or subjects of any foreign State, is expressed in the Penal Code. Under Chapter VI—Treason, the statute, which is in line with international law, states:

1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King’s government, or the adhering to the enemies thereof, giving them aid and comfort, the same being done by a person owing allegiance to this kingdom.
2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection.
3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.
4. Ambassadors and other ministers of foreign states, and their alien secretaries, servants and members of their families, do not owe allegiance to this kingdom, though resident therein, and are not capable of committing treason against this kingdom.

⁵ *Larsen v. Hawaiian Kingdom*, 119 *International Law Reports* 119 (2001): 581.

When the Hawaiian Kingdom Government conditionally surrendered to the United States forces on January 17, 1893, the action taken did not transfer Hawaiian sovereignty but merely relinquished control of Hawaiian sovereignty because of the American invasion and occupation. According to Benvenisti:

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation. [...] Because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee (emphasis added).⁶

The occupant's 'managerial powers' is exercised by a military government over the territory of the occupied State that the occupant is in effective control. The military government would need to be in effective control of the territory to effectively enforce the laws of the occupied State. Without effective control there can be no enforcement of the laws. The Hawaiian government's surrender on January 17, 1893, that transferred effective control over the territory of the Hawaiian Kingdom to the American military did not transfer Hawaiian sovereignty. U.S. Army regulations on this subject state, being "an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty (emphasis added)."⁷

When the Queen surrendered, it transferred temporary authority to the American military, the government apparatus also came under the control of the American military where the office of the Monarch would be replaced by the theater commander of U.S. forces who would be referred to as the military governor. All members of the executive and judicial branches of government would remain in place except for the legislative branch because the military governor "has supreme legislative, executive,

⁶ Eyal Benvenisti, *The International Law of Occupation*, 2nd ed. (United Kingdom: Oxford University Press 2012), 6.

⁷ U.S. Department of the Army, Field Manual 27-10, *The Law of Land Warfare* (1956), para. 358.

and judicial authority, limited only by the laws and customs of war and by directives from higher authority.”⁸

III. UNITED STATES PRACTICE DURING MILITARY OCCUPATION OF FOREIGN STATES

In a decisive naval battle off the coast of the Cuban city of Santiago de Cuba on July 3, 1898, the United States North Atlantic Squadron under the command of Rear Admiral William Sampson and Commodore Winfield Schley, defeated the Spanish Caribbean Squadron under the command of Admiral Pascual Cervera y Topete. After the surrender, the United States placed the city of Santiago de Cuba under military occupation and began to administer Spanish laws. The practice of the United States military occupying foreign territory prior to a treaty of peace can be gleaned from General Orders no. 101 issued by President William McKinley to the War Department on July 13, 1898. General Orders no. 101 stated:

The first effect of the military occupation of the enemy’s territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. ... Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation.⁹

The Battle of Santiago de Cuba facilitated negotiations for a treaty of peace, called the Treaty of Paris, that was signed on August 12, 1898.¹⁰ The Treaty of Paris came into effect on April 11, 1899, which ended the military occupation of the city of Santiago de Cuba, and Spanish law was replaced by American law.

When Japanese forces surrendered to the United States on September 2, 1945, Army General Douglas MacArthur transformed the Japanese civilian government into a military government with General MacArthur serving as the military governor. General MacArthur was ensuring the terms of the surrender were being met and he continued to administer Japanese law over the population. When the treaty of peace, called the

⁸ U.S. Department of the Army, Field Manual 27-5, *Civil Affairs Military Government* (1947), para. 3.

⁹ *Ochoa v. Hernandez*, 230 U.S. 139, 156 (1913).

¹⁰ 30 U.S. Stat. 1742 (1898)

Treaty of San Francisco, came into effect on April 28, 1952, the military occupation came to an end.

After the defeat of the Nazi regime, Germany was divided into four zones of military occupation by the United States, the Soviet Union, France and Great Britain in July of 1945. In the American sector, Army General Dwight D. Eisenhower took over the German civilian government, as its military governor, by proclaiming the establishment of the Office of Military Government United States (“OMGUS”). The United States, French, and British zones of occupation were joined together under one authority in 1949 and the OMGUS was succeeded by the Allied High Commission (“AHC”). The AHC lasted until 1955 after the Federal Republic of Germany joined the North Atlantic Treaty Organization. The American zone of occupation of West Berlin, however, lasted until October 2, 1990, after the Treaty on the Final Settlement with Respect to Germany was signed on September 12, 1990. The treaty was signed by both East and West Germany, the United States, France, Great Britain and the Soviet Union.

In all three military occupations, the sovereignty of Spain, Japan, and Germany was not affected. However, Spanish sovereignty over Cuba ended by the Treaty of Paris, but Japanese sovereignty was uninterrupted by the Treaty of San Francisco, and German sovereignty was uninterrupted by the Treaty on the Final Settlement with Respect to Germany.

IV. THE DUTY TO ESTABLISH A MILITARY GOVERNMENT IN OCCUPIED TERRITORY

There is a difference between military government and martial law. While both comprise military jurisdiction, the former is exercised over territory of a foreign State under military occupation, and the latter over loyal territory of the State enforcing it. Actions of a military government are governed by the law of armed conflict while martial law is governed by the domestic laws of the State enforcing it. According to Birkhimer, from “a belligerent point of view, therefore, the theatre of military government is necessarily foreign territory. Moreover, military government may be exercised not only during the time that war is flagrant, but down to the period when it comports with the policy of the dominant power to establish civil jurisdiction.”¹¹

The 1907 Hague Regulations assumed that after the occupant gains effective control it would establish its authority by establishing a system of direct administration. Since the Second World War, United States practice of a system of direct administration is for the Army to establish a military government to administer the laws of the occupied State pursuant to Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention. This was acknowledged by letter from U.S.

¹¹ William E. Birkhimer, *Military Government and Martial Law*, 3rd ed. (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1914), 21.

President Roosevelt to Secretary of War Henry Stimson dated November 10, 1943, where the President stated, although “other agencies are preparing themselves for the work that must be done in connection with relief and rehabilitation of liberated areas, it is quite apparent that if prompt results are to be obtained the Army will have to assume initial burden.”¹² Military governors that preside over a military government are general officers of the Army. Solidifying the role of the Army, U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in “[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority.”

Under Article 43, the authority to establish a military government is not with the Occupying State, but rather with the occupant that is physically on the ground—colloquially referred to in the Army as “boots on the ground.” Professor Benvenisti explains, this “is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the ‘occupying State’ as the authority in power, but the delegates preferred to change the reference to ‘the occupant.’ This insistence on the distinct character of the occupation administration should also be kept in practice.”¹³ This authority is triggered by Article 42 that states, territory “is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Only an “occupant,” which is the “army,” and not the Occupying State, can establish a military government.

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

According to the U.S. Manual for Court-Martial United States, it states that the duty to establish a military government may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.¹⁴ A military government is the civilian government of the Occupied State. It is not a government comprised of the military. The

¹² Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* (Washington D.C.: Center of Military History United States Army, 1975), 22.

¹³ Benvenisti, 5.

¹⁴ U.S. Department of Defense, *Manual for Courts-Martial United States*, 2024 ed., IV-28.

practice of the United States is to establish a military government after the surrender by the government of the Occupied State. Since the Second World War, it is the sole function of the Army to establish a military government to administer the laws of the occupied State until there is a treaty of peace that will bring the military occupation to an end. Here follows the treaties and regulations to establish a military government in occupied territory:

- U.S. Department of Defense Directive 5100.01 states that it is the function of the Army in “[occupied] territories abroad [to] provide for the establishment of a military government pending transfer of this responsibility to other authority.”
- U.S. Department of Defense Directive 2000.13 states that “Civil affairs operations include...[e]stablish and conduct military government until civilian authority or government can be restored.”
- Para. 11.4, Department of Defense Law of War Manual states that “Military occupation of enemy territory involves a complicated, trilateral set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of occupied territory. The fact of occupation gives the Occupying Power the right to govern enemy territory temporarily, but does not transfer sovereignty over occupied territory to the Occupying Power.”
- Article 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Conventions obliges the occupant to administer the laws of the occupied State, after securing effective control of the territory according to Article 42 of the 1907 Hague Regulations.
- Para. 2-37, Army Field Manual 41-10, states that all “commanders are under the legal obligations imposed by international law, including the Geneva Conventions of 1949.”
- Para. 3, Army Field Manual 27-5, stating the “theater command bears full responsibility for [military government]; therefore, he is usually designated as military governor [...], but has authority to delegate authority and title, in whole or in part, to a subordinate commander. In occupied territory the commander, by virtue of his position, has supreme legislative, executive, and judicial authority, limited only by the laws and customs of war and by directives from higher authority.”
- Para. 62, Army Field Manual 27-10, states that “[m]ilitary government is the form of administration by which an occupying power exercises governmental authority over occupied territory.”
- Para. 2-18, Army Field Manual 3-57, states that “DODD 5100.01 directs the Army to establish military government when occupying enemy territory, and DODD 2000.13 identifies military government as a directed requirement under [Civil Affairs Operations].”

Under the Uniform Code of Military Justice, the failure to establish a military government would invoke two offenses under Article 92. Under Article 92(1) for failure to obey order or regulation, and Article 92(3) for dereliction in the performance of duties. The maximum punishment for an Article 92(1) offense is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years. The maximum punishment for an Article 92(3) offense is bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. These two offenses also constitute the war crime by omission under international law.

V. FROM A BRITISH PROTECTORATE TO A SOVEREIGN AND INDEPENDENT STATE

In an agreement between King Kamehameha I and Captain George Vancouver on February 25, 1794, the Kingdom of Hawai‘i¹⁵ joined the international community of States as a British Protectorate.¹⁶ By 1810, the Kingdoms of Maui and Kaua‘i were consolidated under Kamehameha I whose kingdom was thereafter called the Kingdom of the Sandwich Islands. In 1829, Sandwich Islands was replaced with Hawaiian Islands. According to Captain Finch of the U.S.S. Vincennes who was attending a meeting of King Kamehameha III and the Council of Chiefs, the “Government and Natives generally have dropped or do not admit the designation of Sandwich Islands as applied to their possessions; but adopt and use that of Hawaiian; in allusion to the fact of the whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was the Chief of the principal Island of Owhyhee, or more modernly Hawaii.”¹⁷ The Kingdom of the Hawaiian Islands eventually became known as the Hawaiian Kingdom.

Government reform from an absolute to a constitutional monarchy began on October 8, 1840, when the first constitution was proclaimed by King Kamehameha III. Government reform continued, which led Great Britain and France to jointly recognize the Hawaiian Kingdom as an “independent State” on November 28, 1843.¹⁸ By this proclamation, Great Britain

¹⁵ The term Kingdom of Hawai‘i, is used to distinguish it from the Kingdom of Maui and the Kingdom of Kaua‘i that co-existed at the time.

¹⁶ George Vancouver, *A Voyage of Discovery to the North Pacific Ocean and Round the World*, vol. 3, (London: G. G. and J. Robinson, and J. Edwards, 1798), 56. “Mr. Puget, accompanied by some of the officers, immediately went on shore; there displayed the British colours, and took possession of the island in His Majesty’s name, in conformity to the inclinations and desire of *Tamaahmaah* [Kamehameha] and his subjects.”

¹⁷ “Capt. Finch’s Cruise in the U.S.S. Vincennes,” U.S. Navy Department Archives.

¹⁸ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95* (Washington: Government Printing Office, 1895), 120, (“Executive Documents”). “Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich [Hawaiian] Islands as an Independent State, and never to take

terminated its possession of external sovereignty over the Hawaiian Islands as a British Protectorate and recognized the internal sovereignty of the Hawaiian Kingdom. Both external and internal sovereignty was vested in the Hawaiian Kingdom. The United States followed and recognized the “independence” of the Hawaiian Kingdom on July 6, 1844.

While all three States recognized Hawaiian independence, it was Great Britain, being vested with the external sovereignty by cession from King Kamehameha I in 1794, that mattered. This transfer of external sovereignty by the proclamation made the Hawaiian Kingdom a successor State to Great Britain. The recognitions by France and the United States were merely political and not legally necessary for the Hawaiian Kingdom to be admitted into the Family of Nations. Thus, the legal act necessary for the United States to obtain its external sovereignty from Great Britain was the 1783 Treaty of Paris that ended the American revolution. Article 1 states:

His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof.

VI. HAWAIIAN SOVEREIGNTY UNAFFECTED BY MILITARY OCCUPATION

By orders of the U.S. resident Minister John Stevens, on January 16, 1893, a “detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu. The men upwards of 160, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies.”¹⁹ President Grover Cleveland determined, after a Presidential investigation, that this “military demonstration upon the soil of Honolulu was of itself an act of war.”²⁰ He also concluded that the overthrow of the Hawaiian Government the following day on January 17th was also an “act of war.”²¹ President Cleveland concluded:

Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the

possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed.”

¹⁹ Executive Documents, 451.

²⁰ *Id.*

²¹ *Id.*, 456.

government of the islands, or of anybody else so far as shown, except the United States Minister. Therefore the military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.²²

Because international law provides for the presumption of State continuity in the absence of its government, the burden of proof shifts as to what must be proven and by whom. 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,”²³ and belligerent occupation “does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”²⁴ Addressing the presumption of the German State’s continued existence, despite the military overthrow of the German Reich, Professor Brownlie explains:

Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence. The very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty. A similar case, recognized by the customary law for a very long time, is that of the belligerent occupation of enemy territory in time of war. The important features of “sovereignty” in such cases are the continued legal existence of a legal personality and the attribution of territory to that legal person and not to holders for the time being.²⁵

“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

²² *Id.*, 452.

²³ James Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford: Clarendon Press, 2007), 34.

²⁴ *Id.*

²⁵ Brownlie, 109.

presumption remains.”²⁶ Evidence of ‘a valid demonstration of legal title, or sovereignty, on the part of the United States’ would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*²⁷ and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.²⁸ There is no treaty of peace between the Hawaiian Kingdom and the United States, and, therefore, sovereignty remains vested in the Hawaiian Kingdom even as an Occupied State.

Since 1893, the United States has been exercising its authority over Hawaiian territory without any ‘permissive rule derived from international custom or from a convention (treaty).’ The actions taken by the provisional government and the Republic of Hawai‘i are unlawful because they were puppet governments established by the United States. President Cleveland sealed this fact when he informed the Congress on December 18, 1893, that the “provisional government owes its existence to an armed invasion by the United States.”²⁹ This status did not change when the insurgents changed their name to the Republic of Hawai‘i on July 4, 1894. According to Professor Marek:

From the status of the puppet governments as organs of the occupying power the conclusion has been drawn that their acts should be subject to the limitation of the Hague Regulations. The suggestion, supported by writers as well as by decisions of municipal courts, seems at first both logical and convincing. For it is true that puppet governments are organs of the occupying power, and it is equally true that the occupying power is subject to the limitations of the Hague Regulations. But the direct actions of the occupant himself are included in the inherent legality of belligerent occupation, whilst the very creation of a puppet government or State is itself an illegal act, creating an illegal situation. Were the occupant to remain within the strict limits laid down by international law, he would never have recourse to the formation of puppet governments or States. It is therefore not to be assumed that puppet governments will conform to the Hague Regulations; this the occupant can do himself; for this he does not need a puppet. The very aim of the

²⁶ 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* (Honolulu: Ministry of the Interior, 2020), 128, accessed October 17, 2024, <https://hawaiiankingdom.org/royal-commission.shtml>.

²⁷ 9 Stat. 922 (1848).

²⁸ 30 Stat. 1754 (1898).

²⁹ Executive Documents, 454.

latter, as has already been seen, is to enable the occupant to act in *fraudem legis*, to commit violations of the international regime of occupation in a disguised and indirect form, in other words, to disregard the firmly established principle of the identity and continuity of the occupied State. Herein lies the original illegality of puppet creations.³⁰

From January 17, 1893, to July 7, 1898, the United States has been unlawfully exercising its power, indirectly, over the territory of the Hawaiian State, through its puppet governments. From the purported annexation of the Hawaiian Islands by a congressional joint resolution on July 7, 1898, to the present, the United States has been directly exercising unlawful authority over the territory of the Hawaiian State. How does international law and the law of occupation see this unlawful exercise of authority? If the United States, to include the State of Hawai‘i, has no lawful authority to exercise its power in Hawaiian territory, then everything that derives from its unlawful authority is invalid in the eyes of international law. This comes from the rule of international law *ex injuria jus non oritur*, which is Latin for “law (or right) does not arise from injustice.” This international rule’s “coming of age” is traced to the latter part of the nineteenth century,³¹ and was acknowledged by President Cleveland in his message to the Congress on December 18, 1893, where he stated:

As I apprehend the situation, we are brought face to face with the following conditions:

The lawful Government of Hawaii was overthrown without a drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.

But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen’s Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have

³⁰ Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie Droz, 1968), 115.

³¹ Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Irvington-on-Hudson New York: Transnational Publishers, Inc., 1993), 43-45.

proclaimed the provisional government from the steps of the Government building.

And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.

Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.³²

From this international rule—*ex injuria jus non oritur*, when applied to an Occupied State, springs forth another rule of international law called *postliminium*, where all unlawful acts that an Occupying State may have been done in an occupied territory, are invalid and cannot be enforced when the occupation comes to an end. According to Professor Oppenheim, if “the occupant has performed acts which are not legitimate acts [allowable under the law of occupation], postliminium makes their invalidity apparent.”³³ Professor Marek explains:

Thus, the territory of the occupied State remains exactly the same and no territorial changes, undertaken by the occupant, can have any validity. In other words, frontiers remain exactly as they were before the occupation. The same applies to the personal sphere of validity of the occupied State; in other words, occupation does not affect the nationality of the population, who continues to owe allegiance to the occupied State. There can hardly be a more serious breach of international law than forcing the occupant's nationality on citizens of the occupied State.³⁴

This rule of international law renders everything stemming from American laws and administrative measures null and void, *e.g.* land titles, business registrations, court decisions, incarcerations, and taxation. Regarding land titles, there were no lawful notaries after January 17, 1893, to notarize

³² Executive Documents, 455-456.

³³ L. Oppenheim, *International Law—A Treatise*, vol. II, War and Neutrality, 2nd ed. (London: Paternoster Row, 1912), §283.

³⁴ Marek, 83.

transfers of title throughout the Hawaiian Islands. This renders all titles that were acquired after January 17, 1893, void, and not voidable.³⁵

VII. THE LAW OF ARMED CONFLICT PROHIBITS ANNEXATION OF THE OCCUPIED STATE

The United States purportedly annexed the Hawaiian Islands in 1898 by unilaterally enacting a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.³⁶ As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to Professor Roberts, even where a “whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right of annexation.”³⁷ Therefore, because the Hawaiian Kingdom retained the sovereignty of the State despite being occupied, only the Hawaiian Kingdom could cede its sovereignty and territory to the United States by way of a treaty of peace. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.³⁸ International law does not permit annexation of territory of another state.³⁹

Furthermore, in 1988, the U.S. Department of Justice’s Office of Legal Counsel (“OLC”) published a legal opinion that addressed, *inter alia*, the annexation of Hawai‘i. The OLC’s memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.⁴⁰ The OLC concluded that only the President,

³⁵ See David Keanu Sai, “Setting the Record Straight on Hawaiian Indigeneity,” *Hawaiian Journal of Law and Politics* 3 (2021): 14-16.

³⁶ 30 Stat. 750 (1898).

³⁷ Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights,” *American Journal of International Law* 100(3) (2006): 580, 583.

³⁸ 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.

³⁹ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), Section 525, 242.

⁴⁰ Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” *Opinions of the Office of Legal Counsel* 12 (1988): 238.

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.”⁴¹ As Justice Marshall stated, the “President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,”⁴² 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.”⁴³ 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.”⁴⁴

That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC investigated whether it could be accomplished by the President’s proclamation. In other words, the Congress could not extend the territorial sea an additional 9 miles by statute because its authority was limited up to the 3-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the “laws of no nation can justly extend beyond its own territories.”⁴⁵

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the “constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. ... Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it.”⁴⁶ Professor Willoughby also stated that the “incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is...essentially a matter falling

⁴¹ *Id.*, 242.

⁴² *Id.*.

⁴³ *Id.*

⁴⁴ *Id.*, 262.

⁴⁵ *The Apollon*, 22 U.S. 362, 370 (1824).

⁴⁶ Kmiec, 252.

within the domain of international relations, and, therefore, beyond the reach of legislative acts.”⁴⁷ According to Professor Lenzerini:

[I]ntertemporal-law-based perspective confirms the illegality—under international law—of the annexation of the Hawaiian Islands by the US. In fact, as regards in particular the topic of military occupation, the affirmation of the *ex injuria jus non oritur* rule predated the Stimson doctrine, because it was already consolidated as a principle of general international law since the XVIII Century. In fact, “[i]n the course of the nineteenth century, the concept of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied territory, the fate of which could be determined only by a peace treaty”; in other words, “the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory.”⁴⁸

Therefore, despite the prolonged nature of the American occupation, the Hawaiian Kingdom legal status under international law remained undisturbed. Under customary international law, the Hawaiian Kingdom continues to exist as a State despite its government being unlawfully overthrown by the United States on January 17, 1893.

VIII. RESTORATION OF THE HAWAIIAN GOVERNMENT AND THE RECOGNITION OF THE CONTINUITY OF THE HAWAIIAN STATE BY THE PERMANENT COURT OF ARBITRATION

According to Professor Rim, the State continues “to exist even in the factual absence of government so long as the people entitled to reconstruct the government remain.”⁴⁹ In 1997, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in similar fashion to governments established in exile during the Second World War.⁵⁰ By virtue of this

⁴⁷ Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1 (New York: Baker, Vooris and Company, 1910), 345.

⁴⁸ Federico Lenzerini, “Military Occupation, Sovereignty, and the *ex injuria jus non oritur* Principle. Complying with the Supreme Imperative of Suppressing ‘Acts of Aggression or other Breaches of the Peace’ à la carte?,” *International Review of Contemporary Law* 6(2) (June 2024): 64.

⁴⁹ Yejoon Rim, “State Continuity in the Absence of Government: The Underlying Rationale in International Law,” *European Journal of International Law* 20(20) (2021): 4.

⁵⁰ David Keanu Sai, “The Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 18-23; see also Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” *Hawaiian Journal of Law and Politics* 3 (2021): 317-333.

process the Hawaiian government is comprised of officers *de facto*. According to U.S. constitutional scholar Thomas Cooley:

A provisional government is supposed to be a government *de facto* for the time being; a government that in some emergency is set up to preserve order; to continue the relations of the people it acts for with foreign nations until there shall be time and opportunity for the creation of a permanent government. It is not in general supposed to have authority beyond that of a mere temporary nature resulting from some great necessity, and its authority is limited to the necessity.⁵¹

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

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili‘uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States’ recognition of the Hawaiian Kingdom as an independent State on July 6, 1844,⁵² was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili‘uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.⁵³ Successors to King Kamehameha III were not established through “extra-legal changes,” but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, where “a new administration succeeds to power in accordance with a state’s constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed.”⁵⁴

⁵¹ Thomas M. Cooley, “Grave Obstacles to Hawaiian Annexation,” *The Forum* (1893): 390.

⁵² U.S. Secretary of State Calhoun to Hawaiian Commissioners (July 6, 1844), accessed October 17, 2024, https://hawaiiakingdom.org/pdf/US_Recognition.pdf.

⁵³ M.J. Peterson, *Recognition of Governments: Legal Doctrines and State Practice, 1815-1995* (New York: St. Martin’s Press, 1997), 26.

⁵⁴ *Restatement of the Law Third, The Foreign Relations Law of the United States* (Philadelphia, Pennsylvania: American Law Institute, 1987), §203, comment c.

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

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of customary international law that apply to established States must be considered, and not the rules of that would apply to new States such as the case with Palestine. The issue before the PCA was not the recognition of Hawaiian Statehood, but rather recognition of the “continuity” of Hawaiian Statehood since the nineteenth century. Professor Lenzerini concluded that “according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, ‘the legal existence of...States [is] preserved from extinction,’ since ‘illegal occupation cannot of itself terminate statehood.’”⁵⁵

After the PCA verified the continued existence of the Hawaiian State, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a “State” and a “Private entity” in its case repository.⁵⁶ Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai‘i.

Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency (“Hawaiian Kingdom”) on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).⁵⁷

⁵⁵ Lenzerini, *Legal Opinion*, 322.

⁵⁶ Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, accessed October 17, 2024, <https://pca-cpa.org/en/cases/35/>.

⁵⁷ *Id.*

It should also be noted that the United States, by its embassy in The Hague, entered into an agreement with the Council of Regency to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal.⁵⁸ This agreement also constitutes explicit recognition by the United States of the continued existence of the Hawaiian Kingdom and the Council of Regency as its government.

IX. AS AN AMERICAN PUPPET REGIME,
THE ROLE OF THE ADJUTANT GENERAL

The military force of the provisional government was not an organized unit or militia but rather armed insurgents under the command of John Harris Soper. Soper attended a meeting of the leadership of the insurgents, calling themselves the Committee of Safety, in the evening of January 16, 1893, where he was asked to command the armed wing of the insurgency. Although Soper served as Marshal of the Hawaiian Kingdom under King Kalākaua, he admitted in an interview with U.S. Special Commissioner James Blount on June 17, 1893, who was investigating the overthrow of the Hawaiian Kingdom government by direction of U.S. President Grover Cleveland, that he “was not a trained military man, and was rather adverse to accepting the position [he] was not especially trained for, under the circumstances, and that [he] would give them an answer on the following day; that is, in the morning.”⁵⁹ Soper told Special Commissioner Blount he accepted the offer after learning that “Judge Sanford Dole [agreed] to accept the position as the head of the [provisional] Government.”⁶⁰ The insurgency renamed the Hawaiian Kingdom’s Royal Guard to the National Guard by *An Act to Authorize the Formation of a National Guard* on January 27, 1893.⁶¹ Soper was thereafter commissioned by the insurgents as Colonel to command the National Guard and was called the Adjutant General.

Under international law, the provisional government was an armed force of the United States in effective control of Hawaiian territory since April 1, 1893, after the departure of U.S. troops. As an armed proxy of the United States, they were obliged to provisionally administer the laws of the Hawaiian Kingdom until a peace treaty was negotiated and agreed upon between the United States and the Hawaiian Kingdom. As a matter of fact, and law, it would have been Soper’s duty to head the military government as its military governor after President Cleveland completed

⁵⁸ Sai, *The Royal Commission of Inquiry*, 25-26.

⁵⁹ Executive Documents, 972.

⁶⁰ *Id.*

⁶¹ *An Act to Authorize the Formation of a National Guard*, Laws of the Provisional Government of the Hawaiian Islands (1893), 8.

his investigation of the overthrow of the Hawaiian Kingdom government and notified the Congress on December 18, 1893. A military government was not established under international law but rather the insurgency maintained the facade that they were a *de jure* government.

The insurgency changed its name to the Republic of Hawai‘i on July 4, 1894. Under *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard* of August 13, 1895, the National Guard was reorganized and commanded by the Adjutant General that headed a regiment of battalions with companies who were comprised of American citizens.⁶²

Under *An Act To provide a government for the Territory of Hawaii* enacted by the U.S. Congress on April 30, 1900,⁶³ the Act of 1895 continued in force. According to section 6 of the Act of 1900, “the laws not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.” Soper continued to command the National Guard as Adjutant General until April 2, 1907, when he retired. The Hawai‘i National Guard continued in force under *An Act To provide for the admission of the State of Hawaii into the Union* enacted by the U.S. Congress on March 18, 1959.⁶⁴ The State of Hawai‘i governmental infrastructure is the civilian government of the Hawaiian Kingdom.

Article V of the State of Hawai‘i Constitution provides that the Governor is the Chief Executive of the State of Hawai‘i. He is also the Commander-in-Chief of the Army and Air National Guard and appoints the Adjutant General who “shall be the executive head of the department of defense and commanding general of the militia of the State.”⁶⁵ Accordingly, the “adjutant general shall perform such duties as are prescribed by law and such other military duties consistent with the regulations and customs of the armed forces of the United States [...]”⁶⁶ In other words, the Adjutant General operates under two regimes of law, that of the State of Hawai‘i and that of the United States Department of Defense.

⁶² *An Act to Establish and Regulate the National Guard of Hawaii and Sharpshooters, and to Repeal Act No. 46 of the Laws of the Provisional Government of the Hawaiian Islands Relating to the National Guard*, Laws of the Republic of Hawaii (1895), 29.

⁶³ *An Act To provide a government for the Territory of Hawaii*, 31 Stat. 141 (1900).

⁶⁴ *An Act To provide for the admission of the State of Hawaii into the Union*, 73 Stat. 4 (1959).

⁶⁵ Hawai‘i Revised Statutes, §121-7.

⁶⁶ *Id.*, §121-9.

The State of Hawai‘i Constitution is an American municipal law that was approved by the Territorial Legislature of Hawai‘i on May 20, 1949 under *An Act to provide for a constitutional convention, the adoption of a State constitution, and appropriating money therefor*. The Congress established the Territory of Hawai‘i under *An Act To provide a government for the Territory of Hawaii*, on April 30, 1900.⁶⁷ The constitution was adopted by a vote of American citizens, that included those Hawaiian subjects that were led to believe they were American citizens as a result of the war crime of denationalization, in the election throughout the Hawaiian Islands held on November 7, 1950. The State of Hawai‘i Constitution came into effect by *An Act To provide for the admission of the State of Hawaii into the Union* passed by the Congress on March 18, 1959.⁶⁸

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, “Neither 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.”⁶⁹ The Court also concluded that the “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.”⁷⁰ Therefore, the State of Hawai‘i cannot claim to be a *de jure*—lawful government because its only claim to authority derives from American legislation that has no extraterritorial effect. And under international law, the United States “may not exercise its power in any form in the territory of another State.”⁷¹ To do so, according to Professor Schabas, is the war crime of usurpation of sovereignty during occupation.⁷²

“The occupant,” according to Professor Sassòli, “may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation.” Professor Sassòli further explains that the “expression ‘laws in force in the country’ in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in

⁶⁷ 31 Stat. 141 (1900).

⁶⁸ 73 Stat. 4 (1959).

⁶⁹ *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

⁷⁰ *The Apollon*, 22 U.S. 362, 370 (1824).

⁷¹ *Lotus case*, 18.

⁷² William Schabas, “Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” *Hawaiian Journal of Law and Politics* 3 (2021): 340, accessed October 17, 2024, [https://hawaiiankingdom.org/pdf/3HawJLPol334_\(Schabas\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol334_(Schabas).pdf).

territories of common law tradition), as well as administrative regulations and executive orders.”⁷³

All authority of the State of Hawai‘i is by virtue of American laws, which constitutes war crimes. Consequently, because of the continuity of the Hawaiian Kingdom as a State and it being vested with the sovereignty over the Hawaiian Islands, the authority claimed by the State of Hawai‘i is invalid because it never legally existed in the first place. What remains valid, however, is the authority of the State of Hawai‘i Department of Defense, which is its Army and Air National Guard. The authority of both branches of the military continues as members of the United States Armed Forces that are situated in occupied territory. Army doctrine does not allow for civilians to establish a military government. The establishment of a military government is the function of the U.S. Army.

As the occupant in effective control of most of the territory of the Hawaiian Kingdom at 10,931 square miles, while the U.S. Indo-Pacific Combatant Command is in effective control of less than 500 square miles, the Army National Guard is vested with the authority to transform the State of Hawai‘i into a Military Government of Hawai‘i forthwith. Enforcement of the laws of an occupied State requires the occupant to be in effective control of territory so that the laws can be enforced. The current Adjutant General is an Army general officer and not an Air Force general officer.

X. PREPARING FOR THE TRANSFORMATION OF THE STATE OF HAWAI‘I INTO A MILITARY GOVERNMENT OF HAWAI‘I

According to Professor Paulsen, the constitution of necessity “properly operates as a meta-rule of construction governing how specific provisions of the document are to be understood. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results.”⁷⁴ U.S. President Abraham Lincoln was the first to invoke the principle of constitutional necessity, or in his words “indispensable necessity.” President Lincoln determined his duty to preserve, “by every indispensable means, that government—that nation—of which the constitution was the organic law.”⁷⁵ In his letter to U.S. Senator Hodges, President Lincoln explained the theory of constitutional necessity.

⁷³ Marco Sassòli, “Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century,” *International Humanitarian Law Research Initiative* (2004), 6, accessed October 17, 2024, <https://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf>.

⁷⁴ Michael Stokes Paulsen, “The Constitution of Necessity,” *Notre Dame L. Rev.* 79(4) (2004): 1268.

⁷⁵ Letter from Abraham Lincoln, U.S. President, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *Abraham Lincoln: Speeches and Writings 1859-65*, Don E. Fehrenbacher (ed.) (New York, Library of America, 1989), 585-86.

By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.⁷⁶

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

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

In that year's legislative session, the House of Representatives could not agree with the House of Nobles on an appropriation bill to cover the national budget. King Kamehameha IV explained that "the House of Representatives framed an Appropriation Bill exceeding Our Revenues, as estimated by our Minister of Finance, to the extent of about \$200,000, which Bill we could not sanction."⁷⁷ After the House of Nobles "repeated efforts at conciliation with the House of Representatives, without success, and finally, the House of Representatives refused to confer with the House of Nobles respecting the said Appropriation Bill in its last stages, and We deemed it Our duty to exercise Our constitutional prerogative of dissolving the Legislature, and therefore there are no Representatives of the people

⁷⁶ *Id.*

⁷⁷ Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* (Honolulu, Hawaiian Gazette, 1918), 62.

in the Kingdom.”⁷⁸ A new election for Representatives occurred and the Legislative Assembly was reconvened in special session and a budget passed.

Under Article 24 of the 1864 Constitution, the Executive Monarch took the following oath: “I solemnly swear in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.” The Ministers, however, took another form of oath: “I solemnly swear in the presence of Almighty God, that I will faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties of [Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General].”

Lincoln viewed the source of constitutional necessity as arising from the oath taken by the executive chief, whereby the duty for making “constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—[is] in the President of the United States, whose special sworn duty the Constitution makes it to ‘preserve, protect and defend the Constitution of the United States.’”⁷⁹ The operative word for the Executive Monarch’s oath of office is “to maintain the Constitution of the Kingdom whole and inviolate.” Inviolable meaning free or safe from injury or violation. The Hawaiian constitution is the organic law for the country.

XI. EXERCISING THE CONSTITUTIONAL PREROGATIVE WITHOUT A MONARCH

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

The Cabinet Ministers that comprise the Council of Regency have taken their individual oaths to “faithfully support the Constitution and laws of the Hawaiian Kingdom, and faithfully and impartially discharge the duties” of their offices, but there is no prerogative in their oaths to “maintain the Constitution of the Kingdom whole and inviolate.” Therefore, this prerogative must be construed to be inherent in Article 33 when the Cabinet Council serves as the Council of Regency, “who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.” The Monarch’s

⁷⁸ *Id.*

⁷⁹ Paulsen, 1258.

constitutional prerogative is in its “Powers” that the Council of Regency temporarily exercises in the absence of the Monarch. Therefore, the Council of Regency has the power “to maintain the Constitution of the Kingdom whole and inviolate,” and, therefore, provisionally legislate, through proclamations, for the protection of Hawaiian subjects during the American military occupation.

XII. LEGAL STATUS OF AMERICAN MUNICIPAL LAWS IN THE HAWAIIAN KINGDOM

Under public international law, American municipal laws being imposed in the Hawaiian Kingdom are not laws but rather situations of facts. Within the Hawaiian constitutional order, this distinction between situations of facts and Hawaiian law is fundamental so as not to rupture the Hawaiian legal system in this extraordinary and extralegal situation of a prolonged military occupation.

As Professor Dicey once stated, “English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country.”⁸⁰ Any right acquired under American municipal laws that have been unlawfully imposed within the territory of the Hawaiian Kingdom, being a situation of fact and not law, must be recognized by Hawaiian law. Without it being acquired under Hawaiian law, there is no right to be recognized. Before any right can be claimed, American municipal laws must first be transformed from situations of facts into provisional laws of the Hawaiian Kingdom.

Because the State of Hawai‘i Constitution and its Revised Statutes are situations of facts and not laws, they have no legal effect within Hawaiian territory. Furthermore, the State of Hawai‘i Constitution is precluded from being recognized as a provisional law of the Hawaiian Kingdom, pursuant to the 2014 Proclamation by the Council of Regency recognizing certain American municipal laws as the provisional laws of the Kingdom, because the 1864 Hawaiian Constitution, as amended, remains the organic law of the country and the State of Hawai‘i Constitution is republican in form.⁸¹ As such, all officials that have taken the oath of office under the State of Hawai‘i Constitution, to include the Governor and his staff, cannot claim lawful authority without committing the war crime of *usurpation of sovereignty during military occupation* with the exception of the Adjutant General who also operates under U.S. Army doctrine and regulations.

⁸⁰ A.V. Dicey, *The Conflict of Laws*, 6th ed., (London: Stevens and Sons, Ltd., 1949), 12.

⁸¹ Council of Regency, *Proclamation of Provisional Laws* (10 Oct. 2014), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf; see also David Keanu Sai, *Memorandum on the Formula to Determine Provisional Laws* (22 March 2023), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Memo_Provisional_Laws_Formula.pdf.

Since the Council of Regency recognized, by proclamation on June 3, 2019, “the State of Hawai‘i and its Counties, for international law purposes, as the administration of the Occupying Power whose duties and obligations are enumerated in the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international humanitarian law,”⁸² the State of Hawai‘i and its Counties, however, did not take the necessary steps to comply with international humanitarian law by transforming itself into a military government. This omission consequently led to war criminal reports, subject to prosecution, by the Royal Commission of Inquiry finding the senior leadership of the United States, State of Hawai‘i, and County governments guilty of committing the war crimes of *usurpation of sovereignty during military occupation, deprivation of a fair and regular trial and pillage*.⁸³

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

1. The first consideration begins with Hawaiian constitutional alignment. Does the American municipal law violate any provisions of the 1864 Constitution, as amended?
2. Does it run contrary to a monarchical form of government? In other words, does it promote a republican form of government.
3. If the American municipal law has no comparison to Hawaiian Kingdom law, would it run contrary to the Hawaiian Kingdom’s police power?
4. If the American municipal law is comparable to Hawaiian Kingdom law, does it run contrary to the Hawaiian statute?
5. Does the American municipal law infringe vested rights secured under Hawaiian law?
6. And finally, does it infringe the obligations of the Hawaiian Kingdom under customary international law or by virtue of it being a Contracting State to its treaties? The last question would also be applied to Hawaiian Kingdom laws enumerated in the Civil Code, together with the session laws of 1884 and 1886, and the Penal Code.

⁸² Council of Regency, *Proclamation Recognizing the State of Hawai‘i and its Counties* (June 3, 2019), accessed October 17, 2024, https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf.

⁸³ Website of the Royal Commission of Inquiry, accessed October 17, 2024, <https://hawaiiankingdom.org/royal-commission.shtml>.

XIII. CUSTOMARY INTERNATIONAL LAW CONCLUDES THE HAWAIIAN KINGDOM CONTINUES TO EXIST

The continuity of Hawaiian Statehood is a matter of customary international law, and is evidenced by two legal opinions, one by Professor Craven⁸⁴ and the other by Professor Lenzerini.⁸⁵ Furthermore, war crimes that are being committed, by the imposition of American municipal laws over the territory of the Hawaiian Kingdom, is also a matter of customary international law as evidenced by the legal opinion of Professor Schabas.⁸⁶ These writings are considered from “the most highly qualified publicists,” and as such, a source of customary international law. Thus, under customary international law, the Hawaiian Kingdom continues to exist and that war crimes are being committed throughout its territory.

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

According to Professor Shaw, “Because of the lack of supreme authorities and institutions in the international legal order, the responsibility is all the greater upon publicists of the various nations to inject an element of coherence and order into the subject as well as to question the direction and purposes of the rules.”⁸⁷ Therefore, “academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules.”⁸⁸ As the U.S. Supreme Court explained in the *Paquette Habana* case:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,

⁸⁴ Matthew Craven, “Continuity of the Hawaiian Kingdom,” *Hawaiian Journal of Law and Politics* 1 (2004): 508, accessed October 17, 2024, [https://hawaiiankingdom.org/pdf/1HawJLPol508_\(Craven\).pdf](https://hawaiiankingdom.org/pdf/1HawJLPol508_(Craven).pdf).

⁸⁵ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” *Hawaiian Journal of Law and Politics* 3 (2021): 317, accessed October 17, 2024, [https://hawaiiankingdom.org/pdf/3HawJLPol317_\(Lenzerini\).pdf](https://hawaiiankingdom.org/pdf/3HawJLPol317_(Lenzerini).pdf).

⁸⁶ William Schabas, “Legal Opinion on War Crimes Related to the United States Occupation of the Hawaiian Kingdom since 17 January 1893,” *Hawaiian Journal of Law and Politics* 3 (2021): 334.

⁸⁷ Malcolm N. Shaw QC, *International Law*, 6th ed., (New York: Cambridge University Press, 2008), 113.

⁸⁸ *Id.*, 71.

as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is (emphasis added).*⁸⁹

As a source of international law, the legal opinions establish a legal foundation, under customary international law, that the Hawaiian Kingdom continues to exist as a State, and that the State of Hawai‘i Adjutant General is obligated to transform the State of Hawai‘i into a military government despite 131 of non-compliance with the law of occupation and U.S. Army regulations.

XIV. CONCLUSION

The legal foundation is set for the State of Hawai‘i to be transformed into the Military Government of Hawai‘i. The path to compliance with international law began with the Permanent Court of Arbitration in 1999 recognizing, under customary international law, the continued existence of Hawaiian Kingdom Statehood and the Council of Regency as its provisional government. The Regency’s three-phase strategic plan set in motion the path to compliance.⁹⁰

The Hawaiian Council of Regency is a government restored in accordance with the constitutional laws of the Hawaiian Kingdom as they existed prior to the unlawful overthrow of the previous administration of Queen Lili‘uokalani. It was not established through “extra-legal changes,” and, therefore, did not require diplomatic recognition to give itself validity as a government. It was a successor in office to Queen Lili‘uokalani as the Executive Monarch.

According to Professor Lenzerini, in his legal opinion, based on the doctrine of necessity, “the Council of Regency possesses the constitutional authority to temporarily exercise the Royal powers of the Hawaiian Kingdom.”⁹¹ He also concluded that the Regency “has the authority to represent the Hawaiian Kingdom as a State, which has been under a

⁸⁹ *The Paquete Habana*, 175 U.S., 677, 700 (1900).

⁹⁰ Council of Regency, *Strategic Plan* (September 26, 1999), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf.

⁹¹ Lenzerini, *Legal Opinion*, 324.

belligerent occupation by the United States of America since 17 January 1893, both at the domestic and international level.”⁹²

After all four offices of the Cabinet Council were filled on September 26, 1999, a strategic plan was adopted based on its policy: first, exposure of the prolonged occupation; second, ensure that the United States complies with international humanitarian law; and, third, prepare for an effective transition to a completely functioning government when the occupation comes to end. The Council of Regency’s strategic plan has three phases to carry out its policy.

Phase I: Verification of the Hawaiian Kingdom as an independent State and 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 Law, which is when the occupation comes to an end.

This grand strategy of the Council of Regency is long term, not short term, and can be compared to China’s grand strategy, which is also long term. According to Professors Leverett and Bingbing:

What is grand strategy, and what does it mean for China? In broad terms, grand strategy is the culturally shaped intellectual architecture that structures a nation’s foreign policy over time. It is, in Barry Posen’s aphoristic rendering, “a state’s theory of how it can best ‘cause’ security for itself.” Put more functionally, grand strategy is a given political order’s template for marshalling all elements of national power to achieve its self-defined long-term goals. Diplomacy—a state’s capacity to increase the number of states ready to cooperate with it and to decrease its actual and potential adversaries—is as essential to grand strategy as raw military might. So too is economic power. For any state, the most basic goal of grand strategy is to protect that state’s territorial and political integrity. Beyond this, the grand strategies of important states typically aim to improve their relative positions by enhancing their ability to shape strategic outcomes, maximize their influence, and bolster their long-term economic prospect.⁹³

Phase I was completed when the PCA acknowledged the continued existence of the Hawaiian Kingdom as a State for the purposes of its

⁹² *Id.*, 325.

⁹³ Flynt Leverett and Wu Bingbing, “The New Silk Road and China’s Evolving Grand Strategy,” *The China Journal* 77 (2017): 112.

institutional jurisdiction prior to forming the arbitration tribunal on June 9, 2000. The notice of arbitration was filed with the PCA by Larsen on November 8, 1999. The Hawaiian Kingdom's invitation to the United States, on March 3, 2000, to join in the arbitration proceedings occurred "after" the PCA already acknowledged the continued existence of Hawaiian Kingdom Statehood and the Council of Regency as its government.⁹⁴

The State of Hawai'i Adjutant General will be guided in the establishment of a military government by the Royal Commission of Inquiry's memorandum on bringing the American occupation of Hawai'i to an end by establishing an American military government (June 22, 2024),⁹⁵ and by the Council of Regency's Operational Plan for transitioning the State of Hawai'i into a Military Government (August 14, 2023).⁹⁶

⁹⁴ David Keanu Sai, "The Royal Commission of Inquiry," in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu: Ministry of the Interior, 2020), 25.

⁹⁵ Royal Commission of Inquiry, *Memorandum on bringing the American occupation of Hawai'i to an end by establishing an American Military Government* (June 22, 2024), accessed October 17, 2024, [https://hawaiiankingdom.org/pdf/RCI_Memo_re_Military_Government_\(6.22.24\).pdf](https://hawaiiankingdom.org/pdf/RCI_Memo_re_Military_Government_(6.22.24).pdf).

⁹⁶ Council of Regency, *Operational Plan for Transitioning the State of Hawai'i into a Military Government* (August 14, 2023), accessed October 17, 2024, https://hawaiiankingdom.org/pdf/HK_Operational_Plan_of_Transition.pdf.

Enclosure “2”



77ème anniversaire de la Charte des Nations Unies 77 Years of the United Nations Charter

Graphics by Marylia Cabane, Chitro Shihabuddin, the Movement for Palestine





Daniel Lagot

Daniel Lagot après ses études à l'École Polytechnique, a fait une carrière scientifique au cours de laquelle il a présidé plusieurs grandes conférences scientifiques internationales. Depuis les années 2000, il s'est orienté vers les questions de la guerre et la paix et a publié ou dirigé la publication d'une douzaine de livres dans ce domaine.

Non-agression et intangibilité des frontières : quel rôle pour l'ONU ? Les cas du Kosovo, de la guerre en Ukraine et de Taiwan

Après une discussion sur les trois principes énumérés par l'auteur (Non agression et intangibilité des frontières, le droit à l'autodétermination et la responsabilité de protéger) et sur ce que pourrait ou devrait être le rôle de l'ONU, sont évoquées la manière dont les guerres se terminent et les solutions éventuelles pour le Kosovo, Taïwan et pour la paix en Ukraine, le jour où les parties seraient prêtes à négocier, dont la solution proposée par le présent auteur.

Dr. David Keanu Sai

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The Responsibility of the Hawaiian Kingdom to Protect its Population from War Crimes and Crimes Against Humanity

This article address the first pillar of the principle of Responsibility to Protect: "every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing" and the legal struggle for its application in the the Hawaiian Kingdom.

Jean-Pierre PAGE

Ancien responsable du Département international de la CGT.

Derniers ouvrages parus :

- "La Chine sans oeillères", 2021, Editions Delga . Ouvrage collectif, co-dirigé avec Maxime Vivas.
- "Les divagations des antichinois en France, 2022, Editions Delga. Avec Aymeric Monville et Maxime Vivas.
- "La Russie sans oeillères", 2022, Editions Delga. Ouvrage collectif, co-dirigé avec Aymeric Monville et Maxime Vivas.

Les pays occidentaux aggravent leur déclin en suivant aveuglément Washington - La Charte des Nations Unies comme but et moyen de la coopération internationale

C'est une contribution de l'auteur lors d'un forum international qui a réuni des délégations venant de 100 pays à Pékin Les 14 et 15 juin 2023 sur le thème "International cooperation and global human rights governance"



All States have a Responsibility to Protect their Population from War Crimes — Usurpation of Sovereignty During Military Occupation of the Hawaiian Islands

David Keanu Sai

At the United Nations World Summit in 2005, the *Responsibility to Protect* was unanimously adopted.¹ The principle of the *Responsibility to Protect* has three pillars: (1) every State has the Responsibility to Protect its populations from four mass atrocity crimes—genocide, war crimes, crimes against humanity and ethnic cleansing; (2) the wider international community has the responsibility to encourage and assist individual States in meeting that responsibility; and (3) if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter. In 2009, the General Assembly reaffirmed the three pillars of a State's responsibility to protect their populations from war crimes and crimes against humanity.² And in 2021, the General Assembly passed a resolution on “The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity.”³ The third pillar, which may call into action State intervention, can become controversial.⁴

Rule 158 of the International Committee of the Red Cross Study on Customary International Humanitarian Law specifies that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute

the suspects.”⁵ This “rule that States must investigate war crimes and prosecute the suspects is set forth in numerous military manuals, with respect to grave breaches, but also more broadly with respect to war crimes in general.”⁶

Determined to hold to account individuals who have committed war crimes and human rights violations throughout the Hawaiian Islands, being the territory of the Hawaiian Kingdom, the Council of Regency, by proclamation on 17 April 2019,⁷ established a Royal Commission of Inquiry (“RCI”) in similar fashion to the United States proposal of establishing a Commission of Inquiry after the First World War “to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.” The author serves as Head of the RCI and Professor Federico Lenzerini from the University of Siena, Italy, as its Deputy Head. This article will address the first pillar of the principle of *Responsibility to Protect*.

On 22 March 2022, the International Association of Democratic Lawyers and the American Association of Jurists notified the United Nations Human Rights Council at its 49th session that war crimes and human rights violations are taking place in the Hawaiian Islands through the unlawful imposition of American laws over Hawaiian territory since 1898.⁸ This imposition of American laws

1 2005 World Summit Outcome A/60/L.1

2 G.A. Resolution 63/308 The responsibility to protect, A/63/308.

3 G.A. Resolution 75/277 The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/75/277.

4 Marjorie Cohn, “The Responsibility to Protect – the Cases of Libya and Ivory Coast,” *Truthout* (16 May 2011) (online at <https://truthout.org/articles/the-responsibility-to-protect-the-cases-of-libya-and-ivory-coast/>).

5 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I: Rules, 607 (2009).

6 *Id.*, 608.

7 Proclamation: Establishment of the Royal Commission of Inquiry (17 April 2019) (online at https://hawaiiankingdom.org/pdf/Proc_Royal_Commission_of_Inquiry.pdf).

8 IADL, Video: Dr. Keanu Sai's oral statement to the UN Human Rights Council on the U.S. occupation of the Hawaiian Kingdom (online at <https://>



constitutes the war crime of *usurpation of sovereignty during military occupation* under particular customary international law, which has denied Hawaiian subjects their right to self-determination for over a century. The thought that Hawai'i, which is called the Hawaiian Kingdom, has been under a prolonged occupation by the United States for over a century would come as a shock to many who don't know Hawaiian history.

On 28 November 1843, both Great Britain and France jointly recognized the Hawaiian Kingdom as an independent State making it the first country in Oceania to join the international community of States. As a progressive constitutional monarchy, the Hawaiian Kingdom had compulsory education, universal health care, land reform and a representative democracy.⁹ The Hawaiian Kingdom treaty partners include Austria and Hungary, Belgium, Bremen, Denmark, France, Germany, Hamburg, Italy, Japan, Luxembourg, Netherlands, Portugal, Russia, Spain, Switzerland, Sweden and Norway, the United Kingdom and the United States.¹⁰ By 1893, the Hawaiian Kingdom maintained over 90 Legations and Consulates throughout the world.

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

According to Professor Oppenheim, once recognition of

a State is granted, it “is incapable of withdrawal”¹¹ by the recognizing State, and that “recognition estops the State which has recognized the title from contesting its validity at any future time.”¹² And the “duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be ‘derecognized.’”¹³

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof and what is to be proven. According to Judge Crawford, there “is a presumption that the State continues to exist, with its rights and obligations [...] despite a period in which there is no, or no effective, government,”¹⁴ and belligerent occupation “does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.”¹⁵ Addressing the presumption of the German State's continued existence despite the military overthrow of the Nazi government during the Second World War, Professor Brownlie explains:

Thus, after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.¹⁶

“If one were to speak about a presumption of continuity,” explains Professor Craven, “one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.”¹⁷ Evidence of

iadllaw.org/2022/03/video-dr-keanu-sais-oral-statement-to-the-un-human-rights-council-on-the-u-s-occupation-of-the-hawaiian-kingdom/).

9 David Keanu Sai, “Hawaiian Constitutional Governance,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 58-94 (2020) (online at [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

10 “Treaties with Foreign States,” in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 237-310 (2020).

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

12 Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” 51(2) *American Journal of International Law* 308, 316 (1957).

13 Restatement (Third) of the Foreign Relations Law of the United States, §202, comment g.

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

15 *Id.*

16 Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

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



“a valid demonstration of legal title, or sovereignty, on the part of the United States” would be an international treaty, particularly a peace treaty, whereby the Hawaiian Kingdom would have ceded its territory and sovereignty to the United States. Examples of foreign States ceding sovereign territory to the United States by a peace treaty include the 1848 *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*¹⁸ and the 1898 *Treaty of Peace between the United States of America and the Kingdom of Spain*.¹⁹

The United States purportedly annexed the Hawaiian Islands in 1898 by a municipal law called the *joint resolution to provide for annexing the Hawaiian Islands to the United States*.²⁰ As a municipal law of the United States, it is without extraterritorial effect. It is not an international treaty. Annex “is to tie or bind[,] [t]o attach.”²¹ Under international law, to annex territory of another State is a unilateral act, as opposed to cession, which is a bilateral act between States. Under international law, annexation of an occupied State is unlawful. According to *The Handbook of Humanitarian Law in Armed Conflicts*:

The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.²² International law does not permit annexation of territory of another state.²³

Furthermore, in 1988, the United States Department of Justice’s Office of Legal Counsel (“OLC”) published a legal opinion that addressed, *inter alia*, the annexation of Hawai‘i. The OLC’s memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three-mile limit to twelve.²⁴ The OLC concluded that only the President

and not the Congress possesses “the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”²⁵ As Justice Marshall stated, the “President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,”²⁶ and not the Congress.

The OLC further opined, “we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”²⁷ Therefore, the OLC concluded it is “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”²⁸ That territorial sea was to be extended from three to twelve miles under the United Nations Law of the Sea Convention and since the United States is not a Contracting State, the OLC looked into it being accomplished by the President’s proclamation. In other words, the Congress could not extend the territorial sea an additional nine miles by statute because its authority was limited up to the three-mile limit. This is not rebuttable evidence as to the presumption of the continuity of the Hawaiian State. Furthermore, the United States Supreme Court, in *The Apollon*, concluded that the “laws of no nation can justly extend beyond its own territories.”²⁹

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby who stated the “constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. ... Only by means of treaties, it was asserted, can the relations between States be gov-

18 9 Stat. 922 (1848).

19 30 Stat. 1754 (1898).

20 30 Stat. 750 (1898).

21 *Black’s Law Dictionary* 88 (6th ed. 1990).

22 There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

23 Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995).

24 Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea,” 12 *Opinions of the Office of Legal Counsel* 238 (1988).

25 *Id.*, 242.

26 *Id.*, 242.

27 *Id.*

28 *Id.*, 262.

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



erned, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it.”³⁰ Professor Willoughby also stated that the “incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is [...] essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts.”³¹

In 1906, the United States implemented a policy of denationalization through Americanization in the schools throughout the Hawaiian Islands and within three generations the national consciousness of the Hawaiian Kingdom was obliterated.³² Notwithstanding the devastating effects that erased the Hawaiian Kingdom in the minds of its nationals and nationals of countries of the world, the Hawaiian government was restored *in situ* by a Council of Regency under Hawaiian constitutional law and the doctrine of necessity in 1997.³³ Under Hawaiian law, the Council of Regency serves in the absence of the Executive Monarch. The last Executive Monarch was Queen Lili‘uokalani who died on 11 November 1917.

On 8 November 1999, arbitral proceedings were instituted at the Permanent Court of Arbitration (“PCA”) in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01, where Larsen, a Hawaiian subject, claimed that the government of the Hawaiian Kingdom, by its Council of Regency, should be liable for allowing the unlawful imposition of American laws that denied him a fair trial and led to his incarceration.³⁴ Prior to the establishment of an *ad hoc* tribunal, the PCA acknowledged the Hawaiian Kingdom as a non-Contracting State under Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes that brought the dispute under the auspices of the PCA.

In determining the continued existence of the Hawaiian Kingdom as a non-Contracting State, the relevant rules of international law that apply to established States must

be considered, and not those rules of international law that would apply to new States such as the case with Palestine. Professor Lenzerini concluded that “according to a plain and correct interpretation of the relevant rules, the Hawaiian Kingdom cannot be considered, by virtue of the prolonged US occupation, as extinguished as an independent State and subject of international law. In fact, in the event of illegal annexation, ‘the legal existence of [...] States [is] preserved from extinction,’ since ‘illegal occupation cannot of itself terminate statehood.’”³⁵

Because the State is a juristic person, it requires a government to speak on its behalf, without which the State is silent, and, therefore, there could be no arbitral tribunal to be established by the PCA. On the contrary, the PCA did form a tribunal after confirming the existence of the Hawaiian State and its government, the Council of Regency, pursuant to Article 47. In international intercourse, which includes arbitration at the PCA, the Permanent Court of International Justice, in *German Settlers in Poland*, explained that “States can act only by and through their agents and representatives.”³⁶ As Professor Talmon states, the “government, consequently, possesses the *jus repraesentationis omnimoda*, i.e. plenary and exclusive competence in international law to represent its State in the international sphere. [Professor Talmon submits] that this is the case irrespective of whether the government is *in situ* or in exile.”³⁷

After the PCA verified the continued existence of the Hawaiian State, as a juristic person, it also simultaneously ascertained that the Hawaiian State was represented by its government—the Council of Regency. The PCA identified the international dispute in *Larsen* as between a “State” and a “Private entity” in its case repository.³⁸ Furthermore, the PCA described the dispute between the Council of Regency and Larsen as between a government and a resident of Hawai‘i.

30 Kmiec, 252.

31 Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

32 David Keanu Sai, “United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 114 (2020).

33 David Keanu Sai, “The Royal Commission of Inquiry,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 18-23 (2020); see also Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law and Politics* 317-333 (2021).

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

35 Lenzerini, 322.

36 *German Settlers in Poland*, 1923, PCIJ, Series B, No. 6, 22.

37 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* 115 (1998).

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



Lance Paul Larsen, a resident of Hawaii, brought a claim against the Hawaiian Kingdom by its Council of Regency (“Hawaiian Kingdom”) on the grounds that the Government of the Hawaiian Kingdom is in continual violation of: (a) its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, as well as the principles of international law laid down in the Vienna Convention on the Law of Treaties, 1969 and (b) the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant’s person within the territorial jurisdiction of the Hawaiian Kingdom (emphasis added).³⁹

Furthermore, the United States, by its embassy in The Hague, entered into an agreement with the Hawaiian Kingdom to have access to the pleadings of the arbitration. This agreement was brokered by Deputy Secretary General Phyllis Hamilton of the Permanent Court of Arbitration prior to the formation of the arbitral tribunal on 9 June 2000.⁴⁰

There was no legal requirement for the Council of Regency, being the successor in office to Queen Lili‘uokalani under Hawaiian constitutional law, to get recognition from the United States as the government of the Hawaiian Kingdom. The United States’ recognition of the Hawaiian Kingdom as an independent State on 6 July 1844,⁴¹ was also the recognition of its government—a constitutional monarchy. Successors in office to King Kamehameha III, who at the time of international recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. These successors included King Kamehameha IV in 1854, King Kamehameha V in 1863, King Lunalilo in 1873, King Kalākaua in 1874, Queen Lili‘uokalani in 1891, and the Council of Regency in 1997. The legal doctrines of recognition of new governments only arise “with extra-legal changes in government” of an existing State.⁴² Successors to King Kamehameha III were not established through “extra-legal changes,” but rather under the constitution and laws of the Hawaiian Kingdom. According to United States foreign relations law, “Where a new administration succeeds to power in accordance with a state’s constitutional processes, no issue of recognition or acceptance arises; continued recognition is assumed.”⁴³

39 *Id.*

40 Sai, *The Royal Commission of Inquiry*, 25-26.

41 U.S. Secretary of State Calhoun to Hawaiian Commissioners (6 July 1844) (online at: https://hawaiiankingdom.org/pdf/US_Recognition.pdf).

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

43 *Restatement (Third)*, §203, comment c.

44 Black’s Law 1545.

Usurpation of sovereignty during military occupation was listed as a war crime in 1919 by the Commission on Responsibilities of the Paris Peace Conference that was established by the Allied and Associated Powers at war with Germany and its allies. The Commission was especially concerned with acts perpetrated in occupied territories against non-combatants and civilians. *Usurpation of sovereignty during military occupation* is the imposition of the laws and administrative policies of the Occupying State over the territory of the Occupied State. Usurpation “is the “unlawful encroachment or assumption of the use of property, power or authority which belongs to another.”⁴⁴

While the Commission did not provide the source of this crime in treaty law, it appears to be Article 43 of the 1907 Hague Regulations, which states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Article 43 is the codification of customary international law that existed on 17 January 1893, when the United States unlawfully overthrew the government of the Hawaiian Kingdom.

The Commission charged that in Poland the German and Austrian forces had “prevented the populations from organising themselves to maintain order and public security” and that they had “[a]ided the Bolshevik hordes that invaded the territories.” It said that in Romania the German authorities had instituted German civil courts to try disputes between subjects of the Central Powers or between a subject of these powers and a Romanian, a neutral, or subjects of Germany’s enemies. In Serbia, the Bulgarian authorities had “[p]roclaimed that the Serbian State no longer existed, and that Serbian territory had become Bulgarian.” It listed several other war crimes committed by Bulgaria in occupied Serbia: “Serbian law, courts and administration ousted;” “Taxes collected under Bulgarian fiscal regime;” “Serbian currency suppressed;” “Public property removed or destroyed, including books, archives and MSS (e.g., from the National Library, the University Library, Serbian Legation at Sofia, French Consulate



at Uskub);” “Prohibited sending Serbian Red Cross to occupied Serbia.” It also charged that in Serbia the German and Austrian authorities had committed several war crimes: “The Austrians suspended many Serbian laws and substituted their own, especially in penal matters, in procedure, judicial organisation, etc.,” “Museums belonging to the State (e.g., Belgrade, Detchani) were emptied and the contents taken to Vienna.”⁴⁵

The crime of *usurpation of sovereignty during military occupation* was referred to by Judge Blair of the American Military Commission in a separate opinion in the *Justice Case*, holding that this “rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant.”⁴⁶ Australia, Netherlands and China enacted laws making *usurpation of sovereignty during military occupation* a war crime. In the case of Australia, the Parliament enacted the Australian War Crimes Act in 1945 that included the war crime of *usurpation of sovereignty during military occupation*.

The war crime of *usurpation of sovereignty during military occupation* has not been included in more recent codifications of war crimes, casting some doubt on its status as a crime under customary international law. According to Professor Schabas, “there do not appear to have been any prosecutions for that crime by international criminal tribunals.”⁴⁷ However, the war crime of *usurpation of sovereignty during military occupation* is a war crime under “particular” customary international law. According to the International Law Commission, “A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.”⁴⁸ In the 1919 report of the Commission, the United States, as a member of the commission, did not contest the listing of the war crime of *usurpation of sovereignty during military occupation*, but rather only disagreed, *inter alia*, with the Commission’s position on the means of prosecuting Heads of State for the listed war crimes by conduct or omission.

The RCI views *usurpation of sovereignty during military occupa-*

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

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

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

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

45 *Violation of the Laws and Customs of War, Reports of Majority and Dissenting Reports*, Annex, TNA FO 608/245/4 (1919).

46 *United States v. Alstötter et al.*, Opinion of Mallory B. Blair, Judge of Military Tribunal III, III TWC 1178, 1181 (1951).

47 William Schabas, “War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom,” in David Keanu Sai’s (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 156 (2020).

48 Conclusion 16—Particular customary international law, International Law Commission’s Draft conclusions on identification of customary international law, with commentaries (2018) (A/73/10).



laws of occupation.

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

The Counties have recently added 3% surcharges to the State of Hawai'i's 10.25% transient accommodations tax. Added with the State of Hawai'i's general excise tax of 4% in addition to the 0.5% County general excise tax surcharges, tourists will be paying a total of 17.75% to the occupying power. In addition, those civilians of foreign countries doing business in the Hawaiian Islands are also subjected to paying American duties on goods that are imported to the United States destined to Hawai'i. These duty rates are collected by the United States according to the United States Tariff Act of 1930, as amended, and the Trade Agreements Act of 1979.

The Council of Regency's strategic plan entails three phases. Phase I—verification of the Hawaiian Kingdom as an independent State and a subject of international law. Phase II—exposure of Hawaiian Statehood within the framework of international law and the laws of occupation as it affects the realm of politics and economics at both the international and domestic levels.⁴⁹ Phase III—restoration of the Hawaiian Kingdom as an independent State and a subject of international. Phase III is when the American occupation comes to an end. After the PCA verified the continued existence of Hawaiian Statehood prior to forming the arbitral tribunal in *Larsen v. Hawaiian*

Kingdom,⁵⁰ Phase II was initiated, which would contribute to ascertaining the *mens rea* and satisfying the element of awareness of factual circumstances that established the existence of the military occupation.

Implementation of phase II was initiated at the University of Hawai'i at Mānoa when the author of this article entered the political science graduate program, where he received a master's degree specializing in international relations and public law in 2004 and a Ph.D. degree in 2008 on the subject of the continuity of Hawaiian Statehood while under an American prolonged belligerent occupation since 17 January 1893. This prompted other master's theses, doctoral dissertations, peer review articles and publications about the American occupation. The exposure through academic research also motivated historian Tom Coffman to change the title of his 1998 book from *Nation Within: The Story of America's Annexation of the Nation of Hawai'i*,⁵¹ to *Nation Within—The History of the American Occupation of Hawai'i*.⁵² Coffman explained the change in his note on the second edition:

I am compelled to add that the continued relevance of this book reflects a far-reaching political, moral and intellectual failure of the United States to recognize and deal with the takeover of Hawai'i. In the book's subtitle, the word Annexation has been replaced by the word Occupation, referring to America's occupation of Hawai'i. Where annexation connotes legality by mutual agreement, the act was not mutual and therefore not legal. Since by definition of international law there was no annexation, we are left then with the word occupation.

In making this change, I have embraced the logical conclusion of my research into the events of 1893 to 1898 in Honolulu and Washington, D.C. I am prompted to take this step by a growing body of historical work by a new generation of Native Hawaiian scholars. Dr. Keanu Sai writes, "The challenge for ... the fields of political science, history, and law is to distinguish between the rule of law and the politics of power." In the history of the Hawai'i, the might of the United States does not make it right.⁵³

49 Strategic Plan of the Council of Regency (online at https://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf).

50 David Keanu Sai, "Backstory—Larsen v. Hawaiian Kingdom at the Permanent Court of Arbitration (1999-2001)," 4 *Haw. J.L. Pol.* 133-161 (2022).

51 Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (1998).

52 Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (2nd ed. 2009). Duke University Press published the second edition in 2016.

53 *Id.*, xvi.



As a result of the exposure, United Nations Independent Expert, Dr. Alfred deZayas sent a communication from Geneva to Judge Gary W.B. Chang, Judge Jeannette H. Castagnetti, and members of the judiciary of the State of Hawai'i dated 25 February 2018.⁵⁴ Dr. deZayas stated:

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

The exposure also prompted the U.S. National Lawyers Guild (“NLG”) to adopt a resolution in 2019 calling upon the United States of America to begin to comply immediately with international humanitarian law in its long and illegal occupation of the Hawaiian Islands.⁵⁵ Among its positions statement, the “NLG supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of the Occupying State.”⁵⁶

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

As an organization committed to the mission that human rights and the rights of ecosystems are more sacred than property interests, the NLG is deeply concerned that international humanitarian law continues to be flagrantly violated with apparent impunity by the State of Hawai'i and

its County governments. This has led to the commission of war crimes and human rights violations of a colossal scale throughout the Hawaiian Islands. International criminal law recognizes that the civilian inhabitants of the Hawaiian Islands are “protected persons” who are afforded protection under international humanitarian law and their rights are vested in international treaties. There are no statutes of limitation for war crimes, as you must be aware.

We urge you, Governor Ige, to proclaim the transformation of the State of Hawai'i and its Counties into an occupying government pursuant to the Council of Regency's proclamation of June 3, 2019, in order to administer the laws of the Hawaiian Kingdom. This would include carrying into effect the Council of Regency's proclamation of October 10, 2014 that bring the laws of the Hawaiian Kingdom in the nineteenth century up to date. We further urge you and other officials of the State of Hawai'i and its Counties to familiarize yourselves with the contents of the recent eBook published by the RCI and its reports that comprehensively explains the current situation of the Hawaiian Islands and the impact that international humanitarian law and human rights law have on the State of Hawai'i and its inhabitants.

On 7 February 2021, the International Association of Democratic Lawyers (“IADL”), a non-governmental organization (NGO) of human rights lawyers that has special consultative status with the United Nations Economic and Social Council (“ECOSOC”) and accredited to participate in the Human Rights Council's sessions as Observers, passed a resolution calling upon the United States to immediately comply with international humanitarian law in its prolonged occupation of the Hawaiian Islands—the Hawaiian Kingdom.⁵⁷ In its resolution, the IADL also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai'i and its Counties comply with international humanitarian law as the administration of

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

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

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

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



the Occupying State.”

Together with the IADL, the American Association of Jurists—Asociación Americana de Juristas (“AAJ”), who is also an NGO with consultative status with the United Nations ECOSOC and accredited as an observer in the Human Rights Council’s sessions, sent a joint letter dated 3 March 2022 to member States of the United Nations on the status of the Hawaiian Kingdom and its prolonged occupation by the United States.⁵⁸ In its joint letter, the IADL and the AAJ also “supports the Hawaiian Council of Regency, who represented the Hawaiian Kingdom at the Permanent Court of Arbitration, in its efforts to seek resolution in accordance with international law as well as its strategy to have the State of Hawai‘i and its Counties comply with international humanitarian law as the administration of the Occupying State.”

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

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

The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty,

under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

None of the 47 member States of the HRC, which includes the United States, protested, or objected to the oral statement of war crimes being committed in the Hawaiian Kingdom by the United States. Under international law, acquiescence “concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for.”⁵⁹ Silence conveys consent. Since they “did not do so [they] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*”⁶⁰

In mid-November of 2022, the RCI published thirteen war criminal reports finding that the senior leadership of the United States and the State of Hawai‘i, which includes President Joseph Biden Jr., Governor David Ige, Hawai‘i Mayor Mitchell Roth, Maui Mayor Michael Victorino and Kaua‘i Mayor Derek Kawakami, are guilty of the war crime of *usurpation of sovereignty during military occupation*, and all of the named perpetrators have met the requisite element of *mens rea*.⁶¹ In these reports, the RCI has concluded that these perpetrators have met the requisite elements of the war crime and are guilty *dolus directus* of the first degree. “It is generally assumed that an offender acts with *dolus directus* of the first degree if he desires to bring about the result. In this type of intent, the actor’s ‘will’ is directed finally towards the accomplishment of that result.”⁶²

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

1. The perpetrators imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for mili-

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

59 Nuno Sérgio Marques Antunes, “Acquiescence”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* para. 2 (2006).

60 See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.

61 Website of the Royal Commission of Inquiry at <https://hawaiiankingdom.org/royal-commission.shtml>.

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



tary purposes of the occupation.

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

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

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
3. There is only a requirement for the awareness of the factual circumstance that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with.”⁶³

The evidence of the *actus reus* and *mens rea* or guilty mind were drawn from the perpetrators’ own pleadings and the rulings by the court in a U.S. federal district court case in Honolulu, *Hawaiian Kingdom v. Biden et al.*, civil no. 1:21:cv-00243-LEK-RT. The perpetrators were being sued not in their individual or private capacities but rather in their official capacities as State actors because the war crime of *usurpation of sovereignty during military occupation* involves “State action or policy or the action or policies of an occupying State’s proxies” and not the private actions of individuals. The perpetrators are subject to prosecution and there is no statute of limitation for war crimes.⁶⁴

The 123 countries who are State Parties to the Rome Statute of the International Criminal Court have primary responsibility to prosecute war criminals under universal jurisdiction, but the perpetrator would have to enter the territory of the State Party to be apprehended and prosecuted. Under the principle of complementary jurisdiction under the Rome Statute, State Parties have the first

responsibility to prosecute individuals for international crimes to include the war crime of *usurpation of sovereignty during military occupation* without regard to the place the war crime was committed or the nationality of the perpetrator. The ICC is a court of last resort. Except for the United States, China, Cuba, Haiti, Nicaragua, and Thailand, the Allied Powers and Associated Powers of the First World War are State Parties to the Rome Statute.

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

The commission of the war crime of *usurpation of sovereignty during military occupation* can cease when the United States, the State of Hawai‘i and the Counties begin to comply with Article 43 of the 1907 Hague Regulations and administer the laws of the Occupied State—the Hawaiian Kingdom. At present, this is not the case, and the Hawaiian Kingdom has now entered 130 years of occupation being the longest occupation in the history of international relations.

⁶³ Schabas, 167.

⁶⁴ United Nations General Assembly Res. 3 (I); United Nations General Assembly Res. 170 (II); United Nations General Assembly Res. 2583 (XXIV); United Nations General Assembly Res. 2712 (XXV); United Nations General Assembly Res. 2840 (XXVI); United Nations General Assembly Res. 3020 (XXVII); United Nations General Assembly Res. 3074 (XXVIII).

Enclosure “3”

Curriculum Vitae

DAVID KEANU SAI



EXPERTISE:

International relations, state sovereignty, international laws of occupation, United States constitutional law, Hawaiian constitutional law, and Hawaiian land titles.

ACADEMIC QUALIFICATIONS:

- Dec. 2008: Ph.D. in Political Science specializing in international law, state sovereignty, international laws of occupation, United States constitutional law, and Hawaiian constitutional law, University of Hawai‘i, Manoa, H.I.
- Doctoral dissertation titled, “American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State.”
- May 2004: M.A. in Political Science specializing in International Relations, University of Hawai‘i, Manoa, H.I.
- May 1987: B.A. in Sociology, University of Hawai‘i, Manoa, H.I.
- May 1984: A.A. in Pre-Business, New Mexico Military Institute, Roswell, N.M., U.S.
- May 1982: Diploma, Kamehameha Schools, Honolulu, H.I.

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ACADEMIC POSITIONS:

Aug. 2017 – present: Affiliate Faculty, University of Hawai‘i College of Education, graduate program

Aug. 2010 – present: Senior Lecturer, Hawaiian Studies and Political Science, University of Hawai‘i Windward Community College

Aug. 2009 – 2010: Lecturer, Political Science, University of Hawai‘i Kapi‘olani Community College

Doctoral Committee Membership:

- Willy Daniel Kauai, Ph.D., political science, University of Hawai‘i at Manoa (2011-2014)
- Brandi Jean Nalani Balutski, Ph.D. student, education, University of Hawai‘i at Manoa (2019-2024)

Referee, *Law and History Review*, Cambridge University Press

Referee, *Hawaiian Journal of Law and Politics*, University of Hawai‘i

GOVERNMENT POSITIONS:

March 1, 1996: Appointed Regent *pro tempore* by the Hawaiian Kingdom Trust Company that served in place of the absentee government—the Hawaiian Kingdom government.

Sep. 26, 1999: Resumed the office of *acting* Minister of the Interior, and Chairman of the Council of Regency, after the vacancies for the office of the Minister of Foreign Affairs and Minister of Finance were filled on September 7, 1999, and the office of the Attorney General was filled on September 9, 1999.

1999-2001: Served as lead Agent for the Hawaiian Kingdom in *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, PCA Case no. 1999-01.

April 17, 2019: Appointed Head of the Royal Commission of Inquiry by the Council of Regency

Nov. 11, 2019: Appointed *acting* Minister of Foreign Relations *ad interim* after the death of H.E. Peter Umialiloa Sai on October 17, 2018.

PANELS AND PRESENTATIONS:

- *Myth Busting—Hawai‘i is not the 50th State, but rather an Occupied State*, NCORE—National Conference on Race & Ethnicity in Higher Education, Hawai‘i Convention Center, Honolulu, May 29, 2024.
- *Bringing Compliance with International Law: The American Occupation of the Hawaiian Kingdom*, 2023 Class of the National Defense University, East-West Center, University of Hawai‘i at Mānoa, May 2, 2023.
- *The Royal Commission of Inquiry—Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* with Dr. David Keanu Sai, Professor William Schabas, and Professor Federico Lenzerini, the Hawaiian Society of Law and Politics Symposium at the University of Hawai‘i at Mānoa, February 11, 2023.
- *Bringing Compliance with International Law: The American Occupation of the Hawaiian Kingdom*, Central Connecticut State University, April 25, 2023.
- *Bringing Compliance with International Law: The American Occupation of the Hawaiian Kingdom*, St. University of Saint Joseph, Connecticut, April 25, 2023.
- *Paradise Lost: A Conversation about Hawai‘i and the United States* with Dr. Keanu Sai and Professor Williamson Chang, webinar, American Constitution Society, Stetson University’s College of Law, March 2, 2022.
- *Hawaiian Kingdom, United States and International Law*, webinar, Centre for International Legal Studies, Jindal Global Law School, and Addis Ababa University IHL Clinic, April 8, 2021 (online at <https://hawaiiankingdom.org/blog/dr-keanu-sai-to-present-on-the-hawaiian-kingdom-united-states-and-international-law-on-april-8/>).
- *War Crimes and the U.S. Occupation of Hawai‘i* with Dr. Keanu Sai and Professor Federico Lenzerini, webinar, International Association of Democratic Lawyers and the National Lawyers Guild, on January 9, 2021 (online at <https://iadllaw.org/2021/01/video-webinar-on-war-crimes-and-the-u-s-occupation-of-hawaii-with-dr-keanu-sai-and-professor-federico-lenzerini/>).
- *The Law of Occupation—Hawai‘i, Iraq, Afghanistan and Palestine*, National Lawyers Guild International Committee online Continuing Law Education. Webinar panelists along with Professor Federico Lezerini, University of Siena, Italy, Professor Marjorie Cohn, Thomas Jefferson Law School, and Dr. Valentina Azarova, Global Legal Action Network, September 21, 2020.
- *The United States Prolonged Occupation of Hawai‘i: War Crimes and Human Rights Violations*, presentation at Middlesex University School of Law, London, U.K., October 15, 2019.

- *Status of the Hawaiian Kingdom under International Law*, (3) workshops for the Maui County Council’s Planning and Sustainable Land Use Committee, May 15, 2019, June 5, 2019, and August 21, 2019.
- *Permanent Court of Arbitration: International Commission of Inquiry—Larsen v. Hawaiian Kingdom*, presentation with Professor Federico Lenzerini, Kamehameha Schools at Kapalama, Honolulu, January 30, 2017.
- *Hawai‘i Reloaded, The Matrix Alive*, Smithsonian Asian Pacific American Center—A Culture Lab on Imagined Futures, New York City, November 12-13, 2016.
- *The American Occupation of the Hawaiian Kingdom: Genocide Through Denationalization*, presentation at University of Torino, Department of Anthropology, Italy, October 21, 2016.
- *The American Occupation of the Hawaiian Kingdom: Genocide Through Denationalization*, presentation at University of Siena Law School, Italy, October 18, 2016.
- *The American Occupation of the Hawaiian Kingdom: Genocide Through Denationalization*, presenter at a conference, “eVenti Nativi 2016,” Ravenna, Italy, October 14, 2016.
- *Hawai‘i—Let the Truth be Told: Genocide Through Denationalization*, presentation at New York University, New York City, June 11, 2016.
- *Hawai‘i—Let the Truth be Told: Genocide Through Denationalization*, presentations at Smithsonian National Museum of the American Indian, Washington, D.C., June 6, 2016.
- *Sovereignty and Imperialism: Non-European Powers in the Age of Empire*, invited presenter at an academic conference, University of Cambridge, UK, September 10-12, 2015.
- *The Aftermath of the U.S. Department of Interior Proposals Regarding Federal Recognition: Clarification*, American Constitution Society’s William S. Richardson School of Law Student Chapter and ‘Ahahui o Hawai‘i, University of Hawai‘i at Manoa, Presenter-Panelist with Professor Williamson Chang and Dr. Willy Kauai, September 2, 2014.
- *Alternative Visions of Sovereignty*, American Constitution Society’s William S. Richardson School of Law Student Chapter, University of Hawai‘i at Manoa, Presenter-Panelist with Professor Williamson Chang and former Governor John Waihe‘e, III, April 17, 2014.

- *The Hawai‘i-Connecticut Missionary Connection: Rumors and Realities*, Hartford Seminary, Panellist-Discussant with Aolani Kaili Hou, Dr. Stephen Blackburn, and Dr. Clifford Putney, April 10, 2014.
- *Hawai‘i: An American State or a State under American Occupation*, Central Connecticut State University, April 10, 2014.
- *Hawai‘i: An American State or a State under American Occupation*, University of Massachusetts Boston, April 8, 2014.
- *Hawai‘i: An American State or a State under American Occupation*, Harvard University, April 8, 2014.
- *Hawai‘i: An American State or a State under American Occupation*, New York University, April 7, 2014.
- *Hawai‘i: An American State or a State under American Occupation*, Swiss Diplomats—Zurich Network and Foraus, University of Zurich, Switzerland, November 11, 2013.
- *Puana Ka `Ike Lecture Series (Imparting Knowledge)*, Kamehameha Investment Corporation, Keahou Hotel, Kona, Hawai‘i. A presentation entitled “1893 Executive Agreements and their Impact Today,” March 15, 2013.
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- “Ua Mau Ke Ea: Sovereignty Endured.” Joint presentation with Pu`a Foundation of an educational package and curriculum I authored for teaching Hawaiian history, *Native Hawaiian Education Association Conference*, Windward Community College, March 19, 2010.
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- “The Legal and Political History of Hawai‘i.” Presentation to the *Hui Aloha `Aina Tuahine*, Center for Hawaiian Studies, University of Hawai‘i at Manoa, October 30, 2009.

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- “American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State.” Briefing for Colonel James Herring, Army Staff Judge Advocate, 8th Theater Sustainment Command, and his staff officers, Wheeler AAF Courthouse, U.S. Army Pacific, Wahiawa, Hawai‘i, February 25, 2009.
- *Ka Nalu: Towards a Hawaiian National Consciousness*, Symposium of the Hawaiian Society of Law and Politics, University of Hawai‘i at Manoa, Imin Conference Bldg (East West Center). Presented a portion of my doctoral dissertation entitled “The Myth of Ceded Lands: A Legal Analysis,” February 28, 2009.
- *Manifold Destiny: Disparate and Converging Forms of Political Analysis on Hawai‘i Past and Present*, International Studies Association Annual Conference, San Francisco, California, March 26, 2008. Presented a paper entitled “A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian Nationality and Hawaiian Indigeneity and its Use and Practice in Hawai‘i today,” March 26, 2008.
- *Mana Kupuna Lecture Series*, University of Waikato, New Zealand. A presentation entitled “Legal and Political History of the Hawaiian Kingdom,” March 5, 2008.
- *Indigenous Politics Colloquium* speaker series, Department of Political Science, University of Hawai‘i at Manoa. Presented an analysis and comparison between Hawaiian State sovereignty and Hawaiian indigeneity and its use and practice in Hawai‘i today,” January 30, 2007.
- Conference at Northeastern Illinois University entitled *Dialogue Under Occupation: The Discourse of Enactment, Transaction, Reaction and Resolution*. Presented a paper on a panel entitled “Prolonged Occupation of the Hawaiian Kingdom,” Chicago, Illinois, November 10, 2006.
- The 14th Biennial Asian/Pacific American Midwest Student Conference, “Refocusing Our Lens: Confronting Contemporary Issues of Globalization and Transnationalism.”

Presented article “American Occupation of the Hawaiian State: A Century Unchecked” on Militarization Panel, Oberlin College, Ohio, February 18, 2006.

- 2005 American Studies Association Annual Conference. Panelist on a roundtable discussion entitled, “The Case for Hawai‘i’s Independence from the United States - A Scholarly and Activist Roundtable Discussion,” with Keala Kelly and Professor Kehaulani Kauanui. Renaissance Hotel, Washington, D.C., November 4, 2005.
- Kamehameha Schools 2005 Research Conference on Hawaiian Well-being, sponsored by the Kamehameha Schools *Policy Analysis & Systems Evaluation* (PACE). Presented article “Employing Appropriate Theory when Researching Hawaiian Kingdom Governance” with two other presenters, Malcolm Naea Chun and Dr. Noelani Goodyear-Kaopua. Radisson Prince Kuhio Hotel, Waikiki, October 22, 2005.
- 1st Annual Symposium of the *Hawaiian Society of Law & Politics* showcasing the first edition of the *Hawaiian Journal of Law & Politics* (summer 2004). Presented article “American Occupation of the Hawaiian State: A Century Gone Unchecked,” with response panellists Professor John Wilson, Political Science, and Kanale Sadowski, 3rd year law student, Richardson School of Law. Imin International Conference Center, University of Hawai‘i at Manoa, April 16, 2005.
- “A Symposium on Practical Pluralism.” Sponsored by the *Office of the Dean*, William S. Richardson School of Law. Panelist with Professor Williamson Chang and Dr. Kekuni Blaisdell, University of Hawai‘i at Manoa, Honolulu, April 16-17, 2004.
- “Mohala A‘e: Blooming Forth,” *Native Hawaiian Education Association’s 5th Annual Conference*. Presented a workshop entitled “Hawaiian Epistemology.” Windward Community College, Kane‘ohe, March 23, 2004.
- “First Annual ‘Ahahui o Hawai‘i Kukakuka: Perspectives on Federal Recognition.” Guest Speaker at a symposium concerning the Akaka Bill. Sponsored by the *‘Ahahui o Hawai‘i* (organization of native Hawaiian law students), University of Hawai‘i at Manoa Richardson School of Law, Honolulu, March 12, 2004.
- “The Status of the Kingdom of Hawai‘i.” A debate with Professor Didrick Castberg, University of Hawai‘i at Hilo (Political Science), and moderator Professor Todd Belt University of Hawai‘i at Hilo (Political Science). Sponsored by the *Political Science Club*, University of Hawai‘i at Hilo, Campus Center, March 11, 2004.
- “The Political History of the Hawaiian Kingdom: Past and Present.” A presentation to the *Hawai‘i Island Association of Hawaiian Organizations*, Queen Lili‘uokalani Children’s Center, Hilo, February 13, 2004.
- “Globalization and the Asia-Pacific Region.” Panel with Dr. Noenoe Silva (Political Science). *East-West Center Spring 2004 Core Course*, Honolulu, February 4, 2004.

- Televised symposium entitled, “Ceded Lands.” Other panelists included Professor Jon Van Dyke (Richardson School of Law) and Professor Lilikala Kame‘eleihiwa (Center for Hawaiian Studies). Sponsored by the *Office of Hawaiian Affairs*, Wai‘anae, August 2003.
- “Hawai‘i’s Road to International Recovery, II.” Sponsored by *Kipuka*, University of Hawai‘i at Hilo, September 25, 2003.
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- “The Hawaiian Kingdom in Arbitration Proceedings at the Permanent Court of Arbitration, The Hague, Netherlands.” A presentation at the 6th World Indigenous Peoples Conference on Education, Stoney Park, Morley, Alberta, Canada, August 6, 2002.
- “The Hawaiian Kingdom and the United States of America: A State to State Relationship.” *Reclaiming the Legacy*, U.S. National Archives and Records Administration, University of San Francisco, May 4, 2002
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- “Lance Larsen vs. the Hawaiian Kingdom,” presentation to the *Native Hawaiian Bar Association*, quarterly meeting, Kana‘ina Building, Honolulu, 2001.
- “Hawaiian Political History,” *Hawai‘i Community College*, Hilo, March 5, 2001.
- “The History of the Hawaiian Kingdom,” A guest speaker at the *Aloha March* rally in Washington, D.C., August 12, 1998.
- Symposium entitled, “Human Rights and the Hawaiian Kingdom on the occasion of the 50th anniversary of the Universal Declaration of Human Rights.” Other panelist included Francis Boyle (Professor of International Law, University of Illinois), Mililani Trask (Trustee, Office of Hawaiian Affairs), Richard Grass (Lakota Sioux Nation), and Ron Barnes (Tununak Traditional Elders Council, Alaska). University of Hawai‘i at Hilo, April 16, 1998.
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- "What does TWA Flight 800 and the Hawaiian Kingdom have in Common"
- "American Migration to the Hawaiian Kingdom and the Push for State into the American Union"
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- “Attempted Overthrow of 1893”
- “The Annexation that Never Was”
- “Internal Laws of the United States”
- “Supreme Courts and International Courts”
- “U.S. Senate debate: Apology resolution, Oct. 1993”

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2. *Onewest Bank v. Tamanaha*, case no. 3RC10-1-1306
3. *State of Hawai‘i v. English*, case no. CR 14-1-0819
4. *State of Hawai‘i v. Dudoit*, case no. CR 14-1-0820
5. *State of Hawai‘i v. Kinimaka*, case no. 5DCW-16-0000233
6. *State of Hawai‘i v. Larsen*, case no. 3DTA08-03139
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9. *State of Hawai‘i v. Asam*, case no. 1DCW-17-0000364
10. *State of Hawai‘i v. Asam*, case no. 1DCW-18-0000395

MILITARY:

Aug. 1994: Honourably Discharged
Dec. 1990: Diploma, *U.S. Army Field Artillery Officer Advanced Course*, Fort Sill, OK
May 1990: Promoted to Captain (O-3)
Apr. 1990: Diploma, *U.S. Air Force Air Ground Operations School*, Hurlbert Field, FL
May 1987: Promoted to 1st Lieutenant (O-2)
Sep. 1987: Diploma, *U.S. Army Field Artillery Officer Basic Course*, Fort Sill, OK
Sep. 1984: Assigned to *1st Battalion, 487th Field Artillery*, Hawai‘i Army National Guard, Honolulu, H.I.
May 1984: Army Reserve Commission, 2nd Lieutenant (O-1), Early Commissioning Program (ECP) from the New Mexico Military Institute, Roswell, NM

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Enclosure “4”

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

edited by Dr. David Keannu Sai, Head of the Hawaiian Royal Commission of Inquiry, 2020, 380pp.

DOI: [10.58183/pjps.02112022](https://doi.org/10.58183/pjps.02112022)

The subject of review here is the multi-author publication *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, edited by Dr. David Keannu Sai, Head of the Hawaiian Royal Commission of Inquiry, published in 2020. The book is divided into three parts, i.e. Part 1 *Investigating war crimes and human rights violations committed in the Hawaiian Kingdom*; Part 2 *The prolonged occupation of the Hawaiian Kingdom*; and Part 3 *Hawaiian law, treaties with foreign states and international humanitarian law*. This final part represents a collection of source documents in such fields as Hawaiian law, but also international-law treaties with foreign states (in fact 18 including the USA) – dating back to the 19th century. A selection of treaties from the sphere of international humanitarian law has also been made and included.

The essence of the publication nevertheless resides in its two first parts, in which the authors offer an in-depth treatment of the complicated long-time relationship between Hawaii and the United States. Nevertheless, the thesis pursued here overall is the straightforward one that Hawaii has been

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occupied illegally and incorporated into the United States unlawfully, with that occupation continuing to the present day and needing to be understood in such terms. The authors also pursue the difficult thread of the story relating to war crimes.

The above main assumption of the book is emphasised from the very beginning of Part I, which is preceded by the text of the Proclamation Establishing the Royal Commission of Inquiry, recalling that that Commission was established to “ensure a full and thorough investigation into the violations of international humanitarian law and human rights within the territorial jurisdiction of the Hawaiian Kingdom.”¹

In fact, the main aim of the above institution as called into being has been to pursue any and all offences and violations in the spheres of humanitarian law, human rights and war crimes committed by the Americans in the course of their occupation of Hawaii – which is given to have begun on 17 January 1893.

Presented next is the genesis and history of the Commission’s activity described by its aforementioned Head – Dr. David Keanu Sai. He presents the Commission’s activity in detail, by reference to concrete examples; with this part going on to recreate the entire history of the Hawaiian-US relations, beginning with the first attempt at territorial annexation. This thread of the story is supplemented with examples and source texts relating to the recognition of the Hawaiian Kingdom by certain countries (e.g. the UK and France, and taken as evidence of international regard for the integrity of statehood). Particularly noteworthy here is the author’s exceptionally scrupulous analysis of the history of Hawaii and its state sovereignty. No obvious flaws are to be found in the analysis presented.

It is then in the same tone that the author proceeds with an analysis relating to international law, so as to point to the aspects of Hawaii’s illegal occupation by the United States – including an unprecedentedly detailed analysis of the contents of documents, resolutions, mutual agreements and official political speeches, but also reference to other scientific research projects. This very interesting strand of the story is followed by Matthew Craven in Chapter 3 on the *Continuity of the Hawaiian Kingdom as a State under International Law*. Notwithstanding the standpoint on the legality of the occupation or annexation of Hawaii by the United States, the matter of the right to self-determination keeps springing up now and again.

1. *Proclamation Establishing the Royal Commission of Inquiry*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 8.

Considerable attention is also paid to the multi-dimensional nature of the plebiscite organised in 1959 (with regard to Hawaii's incorporation as a state into the United States of America), with the relative lack of transparency of organisation pointed out, along with various breaches and transgressions that may have taken place.

In turn, in Chapter 4 – on *War Crimes Related to the United States' Belligerent Occupation of the Hawaiian Kingdom* – William Schabas makes attempts to verify the assertion, explaining the term war crimes and referring to the wording of the relevant definition that international law is seen to have generated. The main problem emerging from this concerns lack of up-to-date international provisions as regards the above definition. The reader's attention is also drawn to the incomplete nature of the catalogue of actions or crimes that could have constituted war crimes (in line with the observations of Lemkin).²

While offering narration and background, this Chapter's author actually eschews Hawaiian-US examples. Instead, he brings the discussion around to cases beyond Hawaii, and in so doing also invokes examples from case-law (e.g. of Criminal Courts and Tribunals). While this is a very interesting choice of approach, it would still have been interesting for the valuable introduction to the subject matter to be supplemented by concrete examples relating to Hawaii, and to the events occurring there during the period under study.

Chapter 5 – on *International Human Rights Law and Self-Determination of Peoples Related to the United States' Occupation of the Hawaiian Kingdom* – allows its author Federico Lenzerini to contribute hugely to the analysis of the subject matter, given his consideration of the human rights protection system and its development with a focus on the right to self-determination. The author separates those dimensions of the law in question that do not relate to the Hawaiian Kingdom³, as well as those that may have application to the Hawaiian society.⁴ Indeed, the process ends with *Applicability of the Right to Self-Determination During the American Occupation* – a chapter written with exceptional thoroughness, objectivity and synthesis. The author first tells the story on how the human rights protection system came to be formulated (by the 1948 Universal Declaration of Human Rights and the Covenants of 1996, but also by reference to other Conventions). Rightly signalled is the institutional dimension to the protection of human rights, notably the Human Rights Committee founded to protect the rights outlined in the Covenant on Civil and Political Rights. It is of course recalled that the US is not a party to the relevant Protocols, which is preventing US citizens from assert-

2. W. Schabas, *War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 156.

3. F. Lenzerini, *International Human Rights Law and Self-Determination of Peoples Related to the United States' Occupation of the Hawaiian Kingdom*, in: *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. D.K. Sai, Royal Commission of Inquiry 2020, p. 212.

4. *Ibidem*, p. 214.

ing the rights singled out in the 1966 Covenants.⁵ Again rightly, attention is also paid to the regional human rights mechanism provided for by the 1969 American Convention on Human Rights, which also lacks the United States as a party.

The focus here is naturally on the right to self-determination, which the author correctly terms the only officially recognised right of a collective nature (if one excludes the rights of tribal peoples). The further part of the chapter looks at the obligations of states when it comes to safeguarding their citizens' fundamental human rights. The philosophical context underpinning the right to self-determination is considered next (with attention rightly paid first to liberty related aspects and the philosophical standpoints of Locke and Rousseau⁶, along with the story of the formulation of this right's ideological basis and reference to what is at times a lack of clarity regarding its shape and scope (not least in Hawaii's case).⁷ What is therefore welcome is the wide-ranging commentary offered on the dimensions to the above rights that do relate to Hawaiian society as well as those that do not.

In summing up the substantive and conceptual content, it is worth pointing to the somewhat interdisciplinary nature of the research encompassed. Somewhat simplifying things, this book can first be seen as an in-depth analysis of matters historical (with much space devoted to the roots of the relations between Hawaii and the United States, to the issue of this region's occupation and the genesis of Hawaii's incorporation into the USA). These aspects have all been discussed with exceptional thoroughness and striking scrupulousness, in line with quotations from many official documents and source texts. This is all pursued deliberately, given the authors' presumed intention to illustrate the genesis of the whole context underpinning the Hawaiian-US relations, as well as the further context through which Hawaii's loss of state sovereignty came about. This strand to the story gains excellent illustration thanks to Dr. Keannu Sai.

The second part is obviously international law related and it also has much space devoted to it by the authors. The publication's core theses gain support in the analysis of many and varied international documents; be these either mutual agreements between Hawaii and the United States or international Conventions, bilateral agreements of other profiles, resolutions, instruments developed under the aegis of the UN or those of a regional nature (though not only concerned with the Americas, as much space is devoted to European solutions, and European law on the protection of human rights in particular). There is also much reference to international case-law and juris-

5. *Ibidem*, p. 177.

6. *Ibidem*, p. 209.

7. *Ibidem*, p. 214.

prudence in a broader sense, the aim being to indicate the precedents already arrived at, and to set these against the international situation in which Hawaii finds itself.

However, notwithstanding this publication's title, the authors here do not seek to "force-feed" readers with their theses regarding Hawaii's legal status. Rather, by reaching out to a wide range of sources in international law as well as from history, they provide sufficient space for independent reflection and drawing of conclusions. In this regard, it would be interesting if few remarks were devoted to present-day relations between Hawaii and the rest of the USA, with a view to achieving a more-profound illustration of the state of this relationship. However, it might seem from the book's overall context that this was done deliberately so that the foundations of this unique dispute gain proper presentation. All is then augmented further by Part 3 – the collection of agreements and documents considered to sustain the main assumptions of the publication under review. Were I to force myself to point out any failure of the book to meet expectations, I would choose the cultural dimension. There is no way of avoiding an impression – only enhanced by cover-to-cover reading – that this publication is deeply rooted in the Hawaiians' sense of cultural and historical identity. So it would have been interesting to see the cultural dimension addressed, including through a more in-depth analysis of social awareness. At the very least, I have in mind here Article 27 UDHR, traditionally regarded as the source of the right to culture and the right to participate in cultural life. To be added to that might be Article 15 of the International Covenant on Economic, Social and Cultural Rights, as well as Article 27 of the International Covenant on Civil and Political Rights. While (as Boutros Boutros-Ghali noted in 1970) the right in question initially meant access to high culture, there has since been a long process of change that has seen an anthropological dimension conferred upon both culture and the right thereto. A component under that right is the right to a cultural identity⁸ – which would seem to be the key space in the Hawaiian context. The UN and UNESCO have in fact been paying a great deal of attention to this matter, with the key relevant documents being the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* that in general links these issues with the human rights dimension as well as the *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It* (1976).

So a deeply-rooted cultural-identity dimension would have offered an interesting complement to the publication's research material, all the more so as it would presumably reveal the attempts to annihilate that culture (thus striking not merely at statehood, but at national integrity of identity). An interesting approach would then have been to show in details whether and to what extent

8. See: Y.M. Donders, *Towards a Right to Cultural Identity?*, Intersentia 2002.

this is resisted by the USA (e.g. in regard to the upholding of symbols of material and non-material cultural heritage).

However, given the assumption the book is based on – i.e. the focus on state sovereignty (not the right of cultural minorities, but the right of a nation to self-determination), the above “omission” actually takes nothing away from the value of the research presented. However, the aspect of national identity – of which cultural and historical identity is a key component – may represent an impulse for further, more in-depth research.

I regard this publication as an exceptionally valuable one that systematises matters of the legal status of the Hawaiian Kingdom, taking up the key issues surrounding the often ignored topic of a difficult historical context occurring between Hawaii and the United States. The issue at stake here has been regenerated synthetically, on multiple levels, with a penetrating analysis of the regulations and norms in international law applying to Hawaii – starting from potential occupied-territory status, and moving through to multi-dimensional issues relating to both war crimes and human rights. This is one of the few books – if not the only one – to describe its subject matter so comprehensively and completely. I therefore see this work as being of exceptional value and considerable scientific importance. It may serve not only as an academic source, but also a professional source of knowledge for both practicing lawyers and historians dealing with the matter on hand. The ambition of those who sought to take up this difficult topic can only be commended.

Donders Y.M., *Towards a Right to Cultural Identity?*, Intersentia 2002.

Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom, ed. D.K. Sai, Royal Commission of Inquiry 2020.

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