

**PERPETUAL WAR IN PARADISE:
ILLEGAL OCCUPATION, HUMANITARIAN LAW,
AND LIBERATION OF THE HAWAIIAN KINGDOM**

by Andrew B. Reid¹

**Book Review: The Royal Commission of Inquiry, *Investigating
War Crimes and Human Rights Violations Committed
in the Hawaiian Kingdom*
(Hawaiian Kingdom, 2020) (Edited by Dr. David Keanu Sai)**

He who is engaged in war derives all of his right from the justice of the cause. The unjust adversary who attacks or threatens him, -- who withholds what belongs to him, -- in a word, who does him an injury Whoever therefore takes up arms without just cause, can absolutely have no right whatsoever: every act of hostility that he commits is an act of injustice.

He is chargeable with all the evils, all the horrors of the war, ... he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example. ...

He who does injury is bound to repair the damage, or to make adequate satisfaction if the evil be irreparable ...

The restitution of conquests, of prisoners, and of all property that still exists in a recoverable state, admits no doubt when the injustice of the war is acknowledged.

If the people do not voluntarily submit, the state of war still subsists.

Emer D. Vattel (1758)²

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² LAW OF NATIONS (1758) (B. Kapossy and R. Whatmore, ed. 2008 (Liberty Fund, Indianapolis)), Book III, Chapter XI, page 586 (“Of the Sovereign who wages an unjust

In the late 19th Century, the islands of Hawai‘i³ (called the Sandwich Islands by explorer James Cook) were the territory of an internationally recognized nation-state, the Hawaiian Kingdom, governed by its Constitution of 1864. It was the first non-European indigenous state whose independence was recognized by the major powers, including by the United States formally in 1849. It exchanged consulates with other nations and between 1848 and 1887 entered into numerous treaties with the nations of Europe, Japan, Russia, and the United States,⁴ its chief trading partner.⁵

On January 16, 1893, the United States landed marines from the USS Boston onto the territory of the Hawaiian Kingdom and participated with some 1,500 armed non-Hawaiian mercenaries in the illegal overthrow of the Kingdom’s monarch, Queen Lili‘uokalani, in the installation of a “Provisional Government of Hawaii,” and in the U.S. occupation of the islands as a “protectorate.”

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by such force,

War”) and Chapter XIII, page 199 (“Of Acquisitions of War, and particularly of Conquests”).

3 The term “Hawai‘i” refers to the islands while the term “Hawaii” refers to the State of Hawaii of the islands. US National Park Service, *Pacific Island Network: Geographic Names, Appendix F*, 3, <https://irma.nps.gov/DataStore/DownloadFile/575333#:~:text=The%20name%20of%20the%20state,same%20name%20is%20Hawai'i>.

4 The United States and the Hawaiian Kingdom entered into multiple treaties and agreements to govern commerce and navigation between the two nations, including those from 1826, 1842, 1849, 1875, and 1887. See Office of the Historian, *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations by Country, Since 1776: Hawaii*, <https://history.state.gov/countries/hawaii#:~:text=On%20December%20%20%202020%2C%201849%2C%20the,Secretary%20of%20State%20John%20M.>; (last accessed Nov. 12, 2021); see also,

Pub. L. 103-150, 107 Stat 1510, S.J. Res. 19 (1993). The 1849 Treaty of Washington, D.C. is found in the Appendix of the Royal Commission of Inquiry’s book reviewed here, DAVID KEANU SAI, ED., *INVESTIGATING WAR CRIMES AND HUMAN RIGHTS VIOLATIONS COMMITTED IN THE HAWAIIAN KINGDOM* (Hawaiian Kingdom, 2020), 350 (hereinafter “*INVESTIGATING WAR CRIMES*”). Article I of the Treaty provided: “There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, His heirs and His successors.” Article X provided for the exchange of “consuls, vice-consuls, and commercial agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nations....”

5 See generally, RALPH S. KIKOKIHONA, *THE HAWAIIAN KINGDOM*, Vol. 2, 1854-1874, TWENTY CRITICAL YEARS (1953); *INVESTIGATING WAR CRIMES*, *supra* note 4, at Appendix, 236-310.

yield my authority until such time as the Government of the United States shall, upon 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.

Queen Lili‘uokalani (1893)⁶

U.S. President Grover Cleveland appointed a Special Commissioner to investigate. Upon receiving the Special Commissioner’s report, Secretary of State Walter Gresham notified President Cleveland that:

The Government of Hawaii surrendered its authority under threat of war, until such time as the Government of the United States ...should reinstate the constitutional sovereign

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.⁷

President Cleveland in response recalled the U.S. Minister to the Kingdom, ordered the resignation of the U.S. military commander of the forces, and sent a lengthy Message to Congress reiterating that “Hawaii was taken possession of by the United States ...wholly without justification”⁸ through an “armed invasion by the United States”⁹ in “an act of war,”¹⁰ that Queen Liliuokalani abdicated her authority under duress and protest, and that “[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown.”¹¹ President Cleveland concluded, “if a feeble but friendly state is in danger of being robbed of its independence and sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor

6 Queen Lili‘uokalani, *Statement to James H. Blount*, BLOUNT REPORT (1893), <http://libweb.hawaii.edu/digicoll/annexation/protest/liliu1.php> (last visited Nov. 12, 2021).

7 United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95*, 462-63 (1895).

8 Grover Cleveland, *December 18, 1893 Message Regarding Hawaiian Annexation*, MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/december-18-1893-message-regarding-hawaiian-annexation> (last visited Nov. 12, 2021).

9 *Id.*

10 *Id.*

11 *Id.*

and its sense of justice by an earnest effort to make all possible reparation. These principles apply to the present case with irresistible force when the special conditions of the Queen's surrender of her sovereignty are recalled."¹²

A few weeks later, President Cleveland delivered his 1893 State of the Union Address to Congress acknowledging:

*beyond all question that the constitutional Government of Hawaii had been subverted with the active aid of our representative to that Government and through the intimidation caused by the presence of an armed naval force of the United States, which was landed for that purpose at the instance of our minister. Upon the facts developed it seemed to me the only honorable course for our Government to pursue was to undo the wrong that had been done by those representing us and to restore as far as practicable the status existing at the time of our forcible intervention.*¹³

That same day, an Executive agreement was reached with Queen Lili'uokalani for the end of the occupation and her restoration to the throne. President Cleveland so notified Congress, but Congress by resolution was able to prevent the fulfillment of the agreement. It held up the agreement between sovereigns until 1897 when President Cleveland was replaced by William McKinley. The following year arguably as a defense against Japanese Pacific expansionism, Congress passed, and President McKinley, signed a joint resolution, the Newlands Resolution, annexing Hawai'i into the United States as a territory. The resolution unilaterally abrogated all treaties the United States had signed with the Hawaiian Kingdom.¹⁴ Hawaii was then admitted into the United States in 1959 as the 50th state without any input from Native Hawaiians.¹⁵

¹² *Id.*

¹³ President Grover Cleveland, *President of the United States, State of the Union (1893)*, <http://www.let.rug.nl/usa/presidents/grover-cleveland/state-of-the-union-1893.php> (last visited Nov. 12, 2021).

¹⁴ 2nd Sess., 55th Cong., July 7, 1898; 30 Stat. at L. 750.

¹⁵ A detailed discussion by Dr. Sai of the background and context of the US invasion and annexation of the Hawaiian Islands is contained in Chapter 1 of *INVESTIGATING WAR CRIMES*, *supra* note 4, at 57-94, 104; *see also*, David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice in Hawai'i Today*, 10 J. L. & SOC. CHALLENGES 68 (Fall 2008) (noting that the executive agreement may qualify as a treaty); RUTH I. HAZLITT, *AMERICAN IMPERIALISM AND THE ANNEXATION OF HAWAII*, (1933), *available at* <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=2532&context=etd> (last

On November 23, 1993 – the 100th Anniversary of the “illegal overthrow” of the Hawaiian Kingdom – Congress passed, and President Bill Clinton signed, the Apology Resolution.¹⁶ By the Resolution, the United States formally apologized to Native Hawaiians for the overthrow of the Kingdom of Hawaii. It acknowledged the independence of the Kingdom of Hawaii as an independent state with full diplomatic recognition at the time of the overthrow. The Resolution confessed that the United States had engaged in a wrongful “conspiracy to overthrow the Government of Hawaii” and “invade the sovereign Hawaiian nation in an ‘act of war’ on January 16, 1893,” wrongfully imprisoning and forcing Queen Lili‘uokalani to abdicate her throne.¹⁷

Relying on the Apology Resolution, Native Hawaiians and the Office of Hawaiian Affairs brought an action to halt the alienation of lands from a public land trust established for Native Hawaiians.¹⁸ Upon reaching the Supreme Court of Hawai‘i, the Court vacated an adverse ruling by a lower court and ruled that the Apology Resolution could support a claim for the return of ceded lands to native Hawaiians.¹⁹ The ruling clouded the titles to much of the private land of Hawai‘i. The State of Hawai‘i appealed to the U.S. Supreme Court which, in *Hawaii v. Office of Hawaiian Affairs*, reversed the Hawaiian Supreme Court’s decision and held that the Resolution had no binding legal effect upon the United States or the State of Hawaii – nor conveyed any rights upon native Hawaiian claims.²⁰

The citizens of the Hawaiian Kingdom have not gone quietly into the night. After the U.S. invasion in 1893, the Provisional Government was pressured by Japan, the United Kingdom, and President Cleveland to return Queen Lili‘uokalani to power.²¹ In 1895, while the Queen was still under house arrest, her loyalists attempted an unsuccessful counter-rebellion. She and some of her jailed supporters were tried by a military tribunal of the Provisional Government and convicted of treason. She was sentenced to life imprisonment and her supporters, including two Hawaiian princes, were sentenced to death. The Queen, under this extreme pressure, agreed to abdicate

visited Nov. 12, 2021).

16 Pub. L. 103-105, 107 Stat 1510, S.J. Res. 19.

17 *Id.*

18 *Hawaii v. Office of Hawaiian Affairs*, 117 Haw. 174, 177 P.3d 884 (2008).

19 *Id.*

20 *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

21 Report Committee Foreign Relations, United States Senate, Accompanying Testimony, Executive Documents transmitted Congress January 1, 1893, March 10, 1891, at 2144 (known as “Black Week”).

her throne, in part, to save the lives of her supporters.²²

The resistance of the Hawaiian people to the illegal invasion, occupation, and annexation of their territory by the United States has never ceased. Shortly after the *coup de main*, Ka Hui Hawaii Aloha Aina (The Hawaiian Patriotic League) was formed by Native Hawaiian political leaders, including Joseph Nawahi, to promote Hawaiian patriotism and independence and oppose the overthrow and annexation of Hawaii to the United States.²³ In 1897, Native Hawaiians organized a massive petition drive to protest the annexation plans. Ninety-five percent of the Native population signed the petition which caused the annexation treaty to fail in the U.S. Senate.²⁴ A grassroots political and cultural campaign to establish an autonomous or independent nation or kingdom for Hawaiians continues to this day.²⁵ Two early advocates of Hawaiian sovereignty are the Ohana Council and the Nation of Hawai‘i, led by Dennis Pu‘uhonua “Bumpy” Kanahale. He and others in 1987 occupied the Makapu‘u Lighthouse “reclaiming” the land as theirs.²⁶ In 1993, he and some 300 members of the Nation of Hawai‘i occupied and extended their claim to Kaupo Beach.²⁷ They established a village called Pu‘uhonua o Waimanalo (“Refuge of Waimanalo”) as a Native Hawaiian community in 1994 through an agreement with the State of Hawai‘i.²⁸ The following year the Nation of Hawai‘i gave sanctuary to Nathan Brown, a Native Hawaiian

22 LILIUOKALANI, HAWAII’S STORY BY HAWAII’S QUEEN LILIUOKALANI, (1898).

23 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 81-84.

24 NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004).

25 AMANDA PACHECO, PAST, PRESENT, AND POLITICS: A LOOK AT THE NATIVE HAWAIIAN SOVEREIGNTY MOVEMENT (2005), available at, <https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/2262/Amanda%20Pacheco.pdf?sequence=1&isAllowed=y> (last visited Nov. 12, 2021).

26 Hawaii, *On this Day in 1987: Hawaiians Occupy Empty Makapu‘u Houses*, <https://www.nationofhawaii.org/news/on-this-day-in-1987-hawaiians-occupy-empty-makapuu-houses/> (last visited Nov. 12, 2021) (“This is not a protest. We have filed a deed claiming the land and are just returning home”). International law scholar Francis Boyle of the University of Illinois College of Law provided expert testimony in defense of the actions of Bumpy Kanahale. Francis Anthony Boyle, *Restoration of Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (Summer, 1995); FRANCIS A. BOYLE, RESTORING THE KINGDOM OF HAWAII: THE KANAKA MAOLI ROUTE TO INDEPENDENCE (2014); HAUNAI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1999) (regarding Ka Lahui Hawaii).

27 Thomas Alex Tizon, *Fight for sovereignty gains ground in Hawai‘i*, SEATTLE TIMES (July 30, 2005), <https://www.seattletimes.com/nation-world/fight-for-sovereignty-gains-ground-in-hawaii/>.

28 *Hawaiian Cultural Village and Traditional Lo‘I Kalo Agricultural Restoration Project*, Nation of Hawai‘i, <https://www.hawaii-nation.org/puuhonua.html> (last visited Nov. 12, 2021).

activist who had refused to pay federal taxes in protest against the U.S. presence in Hawai‘i.²⁹ Ka Lāhui and Ka Pākaukau were also formed in the late 1980s as grassroots organizations advocating for Hawaiian sovereignty and independence from the United States. In 1993, Ka Lāhui led 10,000 people on a march to the Queen’s palace on the 100th anniversary of her overthrow. That same year, Ka Pākaukau convened the Ka Ho‘okolokolonui Kānaka Maoli (the “People’s International Tribunal Hawai‘i”) to put the U.S. Government on trial for the theft of Hawaii’s sovereignty and for additional related violations of international law.³⁰ Others advocating for Hawaiian independence include Nou Ke Akua Ke Aupuni O Hawai‘i (The Kingdom of Hawai‘i), attorney Poka Laenui (Hayden Burgess) of the Institute for the Advancement of Hawaiian affairs, and the “Hawaiian Kingdom Government” led by Mahealani Kahau.³¹ Liberation and the restoration of governance by a nation and peoples after over 100 years of continuing illegal occupation wrongful annexation by a superior power is an understandably messy process. However, this does not diminish the legitimacy of these many separate efforts and factions within the Hawaiian liberation and nationalist movements. Rather, it not only exposes the harms to the peoples and their nation caused by the illegal occupation but evidences the continuing vitality of the struggle and the resilience, will, and strength of the Hawaiian people.

Standing out among these many efforts to defeat the prolonged U.S. occupation of the Hawaiian Islands and restore Hawaiian governance are those of Dr. Keanu Sai and the Hawaiian Kingdom. Sai served in the U.S. Military as an artilleryman during the Gulf War when Iraq illegally invaded and occupied Kuwait, installed a puppet government, and then attempted to annex Kuwait into Iraq in violation of the Hague and Geneva Conventions. He noticed a familiar pattern: “The parallels were unbelievable, and I quickly saw Hawai‘i’s situation.”³²

29 Leila Fujimori, *Fugitive tax protestor is nabbed*, STAR BULLETIN (March 8, 2003), <http://archives.starbulletin.com/2003/03/08/news/story4.html>.

30 *The Eyes of the Land’ Nā Maka o ka Āina*, Hawaiian Voice, <https://www.hawaiianvoice.com/products-page/history-and-sovereignty/the-tribunal/> (last visited Nov. 12, 2021).

31 NOELANI GOODYEAR-KA’OPUA, *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* (2014); MARIA ELLIOT, *WE THE PEOPLE OF KE AUPUNI O HAWAII*, available at <http://www.hawaiiakingdom.net/> (last visited Nov. 12, 2021). Leon Sui, The Minister of Foreign Affairs for the Kingdom of Hawai‘i published the booklet: *The Basis for the Restoration of the Hawaiian Kingdom* (2015).

32 Axel Beers, *Hawai‘i: The Fake State – Dr. David Keanu Sai Talks to the Maui County Council About the Ongoing American Occupation of the Hawaiian Kingdom*, MAUI TIME (May 24, 2019), <https://mauitime.com/news/politics/hawaii-the-fake-state-dr-david-keanu-sai-talks-to-the-maui-county-council-about-the-ongoing-american-occupation-of->

After completing his service and returning to Hawai‘i, Sai dived into intensive research of the history and law relating to the U.S. armed invasion, occupation, forced royal abdication, and annexation of the Hawaiian Islands.³³ He found that, as a matter of international law, Hawaii was a nation under prolonged occupation pursuant to an unjust war and not part of the United States, and that, despite the occupation and forced royal abdication, the Hawaiian Kingdom and its laws continued to and still exist. “Overthrowing the government does not equate to an overthrow of the Hawaiian Kingdom as an independent state.”³⁴

Sai entered the graduate programs at the University of Hawai‘i, Manoa, and obtained M.A. and Ph.D. degrees in Political Science focusing his studies on the prolonged illegal occupation of the Hawaiian Kingdom by the United States. In 2008, he submitted his doctoral dissertation, “The American Occupation of the Hawaiian Kingdom: Beginning the Transition From Occupied to Restored State.”³⁵ He is now on the faculty of the University of Hawai‘i where he teaches classes on the Hawaiian Kingdom.

Dr. Sai recognized that, as an existing independent state, the Hawaiian Kingdom remains governed by its own Constitution and laws that were in existence at the time of the U.S. invasion and occupation despite the Hawaiian government’s demise in 1895. In 1995, 100 years after the Queen’s forced abdication, Dr. Sai, with others, formed an entity under the Hawaiian Kingdom’s 1880 Co-Partnership Act to challenge the validity of real property titles issued by the occupying United States. They used this as an act necessitating the “reestablishment” of the Hawaiian Kingdom government under the 1864 Hawaiian Constitution, particularly Article 33 which provides for the establishment of a “regency” during the absence of the monarch.³⁶ They

[the-hawaiian-kingdom/](#); *INVESTIGATING WAR CRIMES*, *supra* note 4, at 14.

33 Beers, *supra* note 32.

34 *Id.*

35 David Keanu Sai, *The American Occupation of the Hawaiian Kingdom: Transition from Occupied to Restored State* (December 2008) (unpublished Ph.D. dissertation, University of Hawai‘i), available at [https://www.hawaiiankingdom.org/pdf/Dissertation\(Sai\).pdf](https://www.hawaiiankingdom.org/pdf/Dissertation(Sai).pdf) (last visited Nov. 12, 2021).

36 There might be an issue over the reliance of Dr. Sai and the Hawaiian Kingdom Council of Regency on the 1864 Constitution in that the Kingdom adopted another Constitution in 1887 under the reign of King [Kalākaua](#) in an effort to avoid, or prepare for, threats from the outside. The 1887 document was drafted not by the Hawaiian Kingdom but by anti-monarchists to strip the Hawaiian monarchy of much of its authority, initiating a transfer of power to American, European and native Hawaiian elites and investors. It became known as the Bayonet Constitution for the use of the armed militia of those elites

formed the Hawaiian Kingdom Trust Company to serve as a provisional surrogate for the absentee Hawaiian government, proclaimed in 1996, and appointed acting officers as a Council of Regency under the Constitution until a meeting of the Legislative Assembly and the re-establishment of the Hawaiian Kingdom's government could occur. Dr. Sai assumed the positions of acting Minister of the Interior, Minister of Foreign Affairs *ad interim*, and chairman of the Hawaiian Kingdom Council of Regency.³⁷

The Council of Regency took on the tasks of (1) verification of the Hawaiian Kingdom as an independent state and subject of international law; (2) exposure of Hawaiian Islands statehood within the framework of international law and the laws of occupation; and (3) restoration of the Hawaiian Kingdom as an independent state and a subject of international law.³⁸

In August 1999, a complaint was filed with the Permanent Court of Arbitration, The Hague, against the Hawaiian Kingdom in order to obtain a ruling recognizing the Hawaiian Kingdom as an independent state obligated to defend its subjects from the law of the occupying power, the United States. Following arguments by Dr. Sai as Agent for the Hawaiian Kingdom's Council of Regency, the Permanent Court of Arbitration accepted the complaint as a dispute between a State and a private party thereby treating the Hawaiian Kingdom as an independent state subject to international law, and the Council of Regency as the interim government of the Hawaiian Kingdom.³⁹ However, the action was dismissed by the Court ruling that the United States was an indispensable party to the claims.⁴⁰

In July 2001, the Hawaiian Kingdom by Agent Sai acting pursuant to

to intimidate and force King [Kalākaua](#) to sign it or be deposed. *INVESTIGATING WAR CRIMES*, *supra* note 4, at 79-81. In fact, it appears that it was the expressions of Queen Lili'uokalani of her intent to repeal the 1887 Constitution that triggered the mercenary and U.S. invasion and takeover of the Kingdom in 1893. *See* KIKOKIHONA, *supra* note 5; LILIUOKALANI, *supra* note 22; David W. Forbes, HAWAIIAN NATIONAL BIBLIOGRAPHY, 1780-1900 (2003), 232-233; ANNE FEDER LEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE (1993), 4-5. The circumstances surrounding the adoption of the 1887 Constitution may justify assertions of its invalidity and the reliance upon the 1864 Constitution.

37 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 18-22, 55; *see also* Hawaiian Kingdom, <https://www.hawaiiankingdom.org/govt-reestablished.shtml> (last visited Nov. 12, 2021).

38 Beers, *supra* note 32.

39 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 24; Lance Paul Larsen v. Hawaiian Kingdom, <https://www.alohaquest.com/arbitration/log.htm> (last visited Nov. 12, 2021).

40 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 25-27; *see also* Bernard H. Oxman (ed.), *Lance Paul Larsen v. The Hawaiian Kingdom*, 95 AM. J. INT'L L. 927 (2001).

Article 35(2) of the U.N. Charter filed a complaint with the United Nations Security Council against the United States asserting violations of the Laws of War, the 1859 Hawaiian-U.S. Treaty, Article 43 of the 1907 Hague Conventions IV and V (on the law of occupation), and Article 19, section 3(a) of the Draft Articles of State Responsibility.⁴¹ The complaint requested an Article 36(1) investigation into the Hawaiian Kingdom question and recommendation of appropriate procedures or methods of adjustment.⁴² In August 2012, Agent Sai for the Hawaiian Kingdom and acting under Article 35(2) of the U.N. Charter as a non-Member State filed a Protest and Demand with the United Nations General Assembly challenging the “prolonged and illegal” occupation of the Hawaiian Islands by the United States.⁴³ The U.N. Protest and Demand asserts further claims against those States who had signed treaties with the Hawaiian Kingdom and against all 173 member States of the United Nations to compel them to act in conformity with the U.N. Charter and their international obligations, including the duty of all States to bring an end to the United States’ serious breaches of humanitarian and human rights law and *jus cogens* norms.⁴⁴

Over the past 25 plus years, the Hawaiian Kingdom and Dr. Sai have been building support for their effort to end the U.S. occupation of the Ha-

41 *Hawaiian Kingdom v. United States of America*, United Nations Security Council (2001), available at

https://www.hawaiiankingdom.org/pdf/Hawaiian_UN_Complaint.pdf (last visited Nov. 12, 2021); United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI, art. 35(2); International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, art. 43;

International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art. 19, sec. 3.

42 *Id.*

43 *Protest and Demand by The Hawaiian Kingdom for Serious Breaches of Obligations under Preemptory Norms of General International Law Committed by The United States of America, etc.*, UN General Assembly, available at https://www.hawaiiankingdom.org/pdf/UN_Protest.pdf (last visited Nov. 12, 2021).

44 *Id.*; see also *INVESTIGATING WAR CRIMES*, *supra* note 4, at 15-17 (discussing war crimes as *jus cogens* norms); Valentina Azarova, *Israel’s Unlawfully Prolonged Occupation: Consequences Under an Integrated Legal Framework*, European Council on Foreign Relations, 11-13 (June 2017), available at https://www.ecfr.eu/page/-/ISRAELS_UN-LAWFULLY_PROLONGED_OCCUPATION_ECFR216.pdf (last visited Nov. 12, 2021); Valentina Azarova, *From Discretion to Necessity: Third State Responsibility for Israel’s Control of Stay and Entry into Palestinian Territory*, 6 J. OF HUM. RTS. PRAC. 327-55 (No. 2, 2014).

waiian Islands.⁴⁵ Significantly, Dr. Alfred-Maurice de Zayas, a former senior lawyer and then an independent expert with the Office of the United Nations High Commissioner for Human Rights and the Chief of Petitions and former Secretary of the United Nations Human Rights Committee, opined in a 2018 communication to the State of Hawai‘i Judiciary 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).⁴⁶

Many others within the international community have informally and formally acknowledged the prolonged occupation and annexation of the Hawaiian Islands by the United States as in violation of international law.⁴⁷

The Hawaiian Kingdom and its officers and supporters have also sought to force the issue in the courts of the State of Hawai‘i, its counties, and U.S. federal court. In *State of Larsen v. Hawaii*,⁴⁸ and *State of Hawaii v. Armitage*,⁴⁹ for example, criminal defendants challenged the jurisdiction of the State of Hawai‘i over them by contending, under international law, that the Hawaiian Kingdom still existed as an independent sovereign. While dismissing those challenges, the state courts did acknowledge that were the defendants able to provide a sufficient factual basis for the existence of the Hawaiian Kingdom they “may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him or her.”⁵⁰ In 2018, the Hawaiian Kingdom Council of Regency filed in the U.S. District Court for the District of Colum-

45 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 28-29, 32-34.

46 *Id.*, at 33.

47 *Id.*, at 28-29, 32-35; S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. (1994); Boyle, 7 ST. THOMAS L. REV. 723, *supra* note 26; BOYLE, RESTORING THE KINGDOM OF HAWAII, *supra* note 26; *see also* *INVESTIGATING WAR CRIMES*, *supra* note 4, at 33 (Zayas letter to UN).

48 77 Haw. 219, 220, 883 P.2d 641, 642 (1994).

49 132 Haw. 36, 57, 319 P.3d 1044 (2014).

50 *Id.*

bia a mandamus action against President Donald Trump seeking to enjoin the President from acting in derogation of the Hague Convention IV, the Geneva Convention IV, international humanitarian laws, and customary international law.⁵¹ The federal court refused to hear the claims ruling that the international law did not create a right of action and that the matter was subject to the “political question doctrine.”⁵² Undeterred, the Hawaiian Kingdom, on May 20, 2021, filed a complaint with the U.S. District Court for the District of Hawai’i asserting claims against President Biden, Biden Administration officials, the Governor of Hawai’i, Hawai’i state and county officials, and various diplomatic representatives of numerous countries.⁵³ The complaint challenges the U.S. military occupation of Hawai’i and seeking formal legal recognition of the continued existence and sovereign authority of the Hawaiian Kingdom under international humanitarian and treaty law and the Supremacy Clause of the U.S. Constitution and the enforcement of the Hawaiian Constitution of 1864 and the laws of the Hawaiian Kingdom.⁵⁴ That matter is pending before the federal District Court.

This immense 25-year effort of Dr. Sai and the Council of Regency to end the illegal U.S. occupation of the Hawaiian Islands, and the law supporting it, is compiled in the Hawaiian Kingdom Royal Commission of Inquiry’s book, *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom (“Investigating War Crimes”)* published this year and edited by Dr. Sai. The book is supplemented with an Appendix containing relevant law of the Hawaiian Kingdom, including its 1864 Constitution, many of the various treaties between the Hawaiian Kingdom and other nations of the world, including the 1849 Treaty with the United States, various constituting documents and declarations of the interim Hawaiian Kingdom, and the key relevant conventions of international law, the Hague Convention IV of 1907 (on the laws and customs of war) and the Geneva Convention IV of 1949 (on the protection of civilians in time of war).

Investigating War Crimes makes both a compelling and exhaustive factual and legal argument for the liberation of the Hawaiian Kingdom from prolonged illegal U.S. occupation. In contrast to many other liberation struggles, the existence of the occupied State as a recognized nation-state at the

51 *Sai v. Trump*, 325 F.Supp.3d 68 (D.D.C. 2018); *INVESTIGATING WAR CRIMES*, *supra* note 4, at 40-42.

52 *Id.*

53 *Hawaiian Kingdom v. Joseph Robinette Biden, Jr.*, United States District Court for the District of Hawai’i (Case No. 21-cv-00243).

54 *Id.*

time of occupation is factually and legally beyond question – as admitted to by the United States in its Apology Resolution and the many treaties and agreements it entered into with the Hawaiian Kingdom.⁵⁵ Likewise, the illegality of the invasion, occupation, and annexation of the Hawaiian Islands, and the overthrow of the Hawaiian Kingdom’s monarchy, by the United States is factually and legally beyond question – as admitted to by the U.S. Apology Resolution.⁵⁶ There can be no question that the invasion, occupation, and annexation of the Hawaiian Islands was an unjust and illegal act of war by the United States against the Hawaiian Kingdom. Again, that fact and conclusion of law is openly and candidly admitted by the United States both contemporaneously in 1893 and 100 years later in the U.S. Apology Resolution.⁵⁷

Perhaps daunted by the immensity of the national liberation struggle but more likely as an effort to preserve the survival of Native Hawaiians and their culture, or to preserve the State of Hawai‘i, some Hawaiians have considered taking advantage of the domestic and international laws that provide some protection to Native nations and peoples also occupied by the United States. Beginning in 2000, Hawaiian Senator Daniel Akaka annually submitted to Congress various bills to establish U.S. federal recognitions of Native Hawaiians similar to “Indian tribes.” The bills have been opposed for many reasons, including by those who see the bills as race-based and unconstitutional⁵⁸ and by Native Hawaiian sovereignty activists who believe it blocks their attempts to establish Hawaiian independence from the United States.⁵⁹ In 2015, the U.S. Department of the Interior announced the creation of a Native Hawaiian Roll Commission and a procedure to recognize a Native Hawaiian government and the adoption of a Native Hawaiian constitution. The effort was dropped after the collection of Native Hawaiian names for the Roll was halted by an interim order by U.S. Supreme Court Justice Anthony

55 Contrast this, for example, with the historical context of the struggle of the Palestinian people for liberation from occupation by Israel where the Palestine Declaration of Independence was not issued until 1988 and the State of Palestine still lacks recognition from many other states and full state status within the United Nations.

56 Compare this, for example, with the US invasion and occupation of Japan and the replacement of its government following the Second World War in response to Japan’s attack upon the United States.

57 This can be contrasted with occupation by settler colonialism which, if not pursuant to war, would not necessarily be subject to the laws of war, humanitarian law, but rather to the principles of human rights law. Both international legal regimes consider the concepts of wrongful occupation and the collective right of peoples to self-determination, but within different legal contexts.

58 See *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

59 *Akaka Bill*, <https://www.congress.gov/bill/111th-congress/house-bill/2314> (last visited Nov. 12, 2021).

Kennedy.”⁶⁰ Justice Kennedy had previously held in *Rice v. Cayetano* regarding Native Hawaiian ancestry voting privileges that “ancestry can be a proxy for race.”⁶¹

Many of those involved in the Hawaiian liberation movement also recognize that Native peoples subject to domestic federal (colonial) Indian law and to the international law of indigenous peoples suffer from additional barriers to their liberation from U.S. occupation.⁶² Federal Indian law still follows the Nineteenth Century colonial and racial *sua generis* doctrines of discovery, U.S. trust authority, and U.S. plenary power and colonial rule over Native nations and peoples which were established by the Marshall Trilogy.⁶³ Under these fundamental colonial doctrines, current today, Native nations as a matter of law are considered “domestic, dependent, nations” possessed under the colonial doctrine of discovery of only a right to occupy, not own, their lands and territory, and are considered to be a “savage,” “uncivilized,” peoples incapable of handling their own affairs and therefore in need a guardian (the United States) with plenary authority over them, including the right to abrogate treaties at will and with impunity.⁶⁴

In contrast, the Hawaiian Kingdom possesses major historic and legal advantages over Native nations in that the Hawaiian Islands separated from the mainland by an ocean have never been subjected to the colonial claim of a “right of discovery” by the United States or its predecessor colonial powers that was imposed on Native territories to justify settler colonialism. Therefore, the Hawaiian Kingdom remained an independent sovereign fully possessed of its territory and lands at the time of the U.S. invasion. The claims of the peoples of the Hawaiian Islands for liberation from U.S. occupation as incident to war are not complicated by arguments of occupation under the doctrine of discovery and settler colonialism. The former is generally governed by humanitarian law while the latter is largely governed by the collective right of peoples to self-determination under international human rights law.⁶⁵ It postures the discussion of the Hawaiian liberation as a “political question,” a dispute between nations, rather than a liberation from collective

60 *Rice*, 528 U.S. at 514; *Makekau v. Hawaii*, 2017 WL 2450159 (D.Haw. 2017).

61 *Rice*, 528 U.S. at 514.

62 *See Sai*, *supra* note 15.

63 *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nations v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

64 *Id.*; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

65 *See* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); U.N. Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007); *INVESTIGATING WAR CRIMES*, *supra* note 4, at 212-214.

racial and ethnic oppression by a colonial power.⁶⁶ Unlike indigenous nations and peoples, perhaps due to the Hawaiian Islands' escape from being subjected to a colonial doctrine of discovery, the Hawaiian people were not held, factually or as a matter of law, to be savages or heathens incapable of owning property or organizing as a nation-state and a member of the community of nations.⁶⁷

Similarly, colonial rule and racial and ethnic discrimination have permeated and still infest the law of nations, international law, and even human rights law. In *Cayuga Indians (Great Britain) v. United States* (1926),⁶⁸ a UN arbitral tribunal opined that an “[Indian] tribe is not a legal unit under international law. ...So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.” As late as 1989, the International Law Organization’s seminal Indigenous and Tribal Peoples Convention provided: “The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”⁶⁹

U.N. General Assembly Resolution 1514 (1960), “Declaration on the granting of independence to colonial countries and peoples,” after condemning and directing all States to immediately eliminate “all forms and manifestations” of colonialism, sanctified the “territorial integrity” of countries to excuse its application to indigenous peoples and nations found within the territories of colonial powers⁷⁰ – ignoring the fact that by definition it was the colonizing power that invaded and breached the territorial integrity of the pre-existing indigenous nations. This colonizing concept has been referred to as the “blue water rule” or the “salt water thesis” which asserts that to be eligible for decolonization, the presence of “blue water” between the colony and the colonizing country or a discrete set of boundaries would be needed.⁷¹ It emerged after Belgium attempted to move the United States to decolonize Native nations and peoples. This same colonial escape provision was inserted

66 See, e.g., *Early Warning and Urgent Action Procedure*, U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Decision I (68)*; U.N. Doc. CERD/C/USA/DEC/1 (April 11, 2006); *Mabo v. Queensland (No. 1)*, 166 C.L.R. 186 (H.C.A. 1988).

67 This “race” versus “political status” distinction was the logic used by the United States Supreme Court per Chief Justice Roger Taney in its notorious *Dred Scott* decision. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856).

68 6 R.I.A.A. 173.

69 C169, 27 June 1989, Art. 1, Sec. 3.

70 A/res 1514 (XV) of 14 December 1960, par. 6.

71 U.N.G.A. Resolution 637 (VII) of 16 December 1952.

into the recent United Nations Declaration on the Rights of Indigenous Peoples (2007) despite other provisions that declared that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity,” and that “Indigenous peoples have the right to self-determination [which] by virtue of that they freely determine their political status...”⁷² Given the location of the Hawaiian Islands, it would appear that this colonial blue or salt water rule could not be applied to the Hawaiian Kingdom in contrast to the situation of the Native nations and peoples found within the arbitrary colonial boundaries of the United States.

Thus, even under international human rights law and despite the rights of self-determination⁷³ and freedom from racial or ethnic discrimination⁷⁴ having the status of customary international law or *jus cogens* norms, indigenous peoples have remained saddled with a colonial past and a less-than-equal or less-full right to self-determination or freedom from discrimination. It is not surprising then that Hawaiians engaged in the struggle for the liberation of their island kingdom from U.S. occupation have sought to distinguish their situation from that of the colonial occupation of indigenous nations and peoples.⁷⁵ With the U.S. admissions of unjust war and illegal occupation and annexation in its formal Apology Resolution, the peoples of Hawai‘i already stand on third base with home plate in sight. There is no statute of limitations on gross violations of humanitarian or human rights law. The primary question, then, is whether the prolonged, 125-year occupation and annexation can negate the legitimate claims of the Hawaiian peoples for liberation and independence from the United States. It is an issue of State continuity.

The Hawaiian Kingdom Royal Commission of Inquiry’s book, *Investigating War Crimes*, attacks this question head on. Initially, in Chapter 1, Dr. Sai establishes the continuing existence, vitality, and applicability of the domestic law of the Hawaiian peoples expressed primarily in the 1864 Hawaiian Constitution.⁷⁶ Next, in Chapter 2, he elaborates upon the legal

72 A/RES/61/295, art. 2, art. 3, and art. 46.

73 See, e.g., Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, International Court of Justice (Advisory Opinion), 25 February 2019, at 294-334 (Separate Opinion of J. Robinson).

74 See RESTATEMENT OF THE LAW, FOURTH: FOREIGN RELATIONS LAW OF THE UNITED STATES, §702; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1971)* I.C.J. REP. 16, at 57.

75 Sai, *supra* note 15; *INVESTIGATING WAR CRIMES*, *supra* note 4, at 212-214.

76 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 57-94; see also Matthew Craven,

consequences of the U.S. “belligerent” occupation of the Hawaiian Islands pursuant to an unjust and illegal war. Under the laws of war, these include U.S. obligations under *jus in bello* which governs the way in which warfare is conducted including the occupation of another nation pursuant to an armed conflict or war (the law of belligerent or military occupation). International humanitarian law (“IHL”), found principally in the 1907 Hague Conventions IV and V, and the 1949 Geneva Convention V, is synonymous with *jus in bello* and seeks to minimize suffering in armed conflicts, notably protecting and assisting all victims of armed conflict to the greatest extent possible. It applies irrespective of the reasons for the conflict, of whether not the war as a just one (*jus ad bellum*).⁷⁷ Significant to this discussion, Dr. Sai notes the duty under IHL of third state neutrality, which obligates states not parties to the conflict to prevent with the means at their disposal continuing violations by a belligerent state such as through the recognition of a puppet regime, like the 1893 Provisional Government and the so-called Republic of Hawai‘i, unlawfully created by an act of war.

Dr. Sai then turns to and establishes the obligation of the occupying state, the United States, under IHL to administer the law of the occupied state, the Hawaiian Kingdom. Related to the occupation, he also covers numerous impacts, some amounting to war crimes or human rights violations against the Hawaiian people, that are incident to the U.S. occupation and further violations of IHL. While formally admitting and apologizing to the Hawaiian people for its unjust war and illegal occupation and annexation of the Islands, it is clear that the United States holds the position that its violations of the laws of war and its possession of and sovereignty over the Islands have been cured and settled by the passage of time and that it is too late to turn back the clock. It is one thing to demonstrate the IHL obligations of the United States following its occupation of the Hawaiian Islands but another to establish that such obligations have continued to today, some 125 years later.

The issue of the State continuity of the Hawaiian Kingdom from 1983 to 2020 as a matter of law is addressed by Dr. Matthew Craven in Chapter 3 of *Investigating War Crimes*.⁷⁸ Dr. Craven is a professor of international law former Dean of the Faculty of Law and Social Sciences at the SOAS University of London. He is the Director of the Centre for the Study of Colonialism,

Continuity of the Hawaiian Kingdom (July 12, 2002), available at https://hawaiiankingdom.org/pdf/Continuity_Hawn_Kingdom.pdf (last visited Nov. 12, 2021).

⁷⁷ *INVESTIGATING WAR CRIMES*, *supra* note 4, at 97-121; *see also* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 61 *EUROPEAN J. OF INT’L L.* 695 (no. 4, 2005).

⁷⁸ *Id.* at 125-49.

Empire and International Law. On the issue of State continuity, Dr. Craven notes that the determination of this question as to Hawai'i implicates as a matter of international law U.S. sovereignty over the Hawaiian Islands and the Hawaiian population, the existence in the Hawaiian people of the right to self-determination in a manner prescribed by international law, the current validity and effectiveness of the treaties made between the United States and the Hawaiian Kingdom, and the ownership of State property. As summarized by Dr. Craven:

If the State concerned retains its identity it can be considered to 'continue' and vice versa. Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another 'successor' state (to the extent provided by the rules of succession).⁷⁹

He notes that under the law of State continuity, there is a presumption of continuity that places the burden upon the United States to make a valid demonstration of legal title, or sovereignty. "The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands."⁸⁰ That will depend upon the establishment of two legal facts: that the Hawaiian Kingdom existed as a recognized entity for the purposes of international law prior to the US invasion, and that intervening events have not been such as to deprive it of that status.⁸¹

On the first essential legal fact, after examining the pre-invasion history of the Hawaiian Kingdom, Dr. Craven was able to conclude that "[t] here is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893"⁸² On the second and obviously more difficult legal fact, Dr. Craven examined the legitimacy of the intervening event, the U.S. invasion, occupation, and annexation of the Islands. The determination of this legal fact turns upon the grounds the United States would likely assert to justify its possession of and sovereignty over the Islands: the original acquisition of the Islands in 1898 by cession from the Provisional Government or annexation;

79 *Id.* at 126.

80 *Id.* at 128-29.

81 *Id.* at 129.

82 *Id.* at 131.

the confirmation of the exercise of U.S. sovereignty over the Islands by plebiscite in 1959; and, the continuous and effective display of U.S. sovereignty since 1898 to the present day (acquisitive prescription in the form of adverse possession).⁸³

After examining the history of the U.S. acquisition of the Islands, on the cession of the Islands to the United States by the Provisional Government Dr. Craven could find no support for an argument by the United States that the cession was legitimate as the Provisional Government, being an illegal body engaged in an unlawful scheme with the United States, lacked the required competence to cede the Islands to the United States.⁸⁴ He reasoned that, due to the intervening possession of the Islands by the Provisional Government, the facts did not support an argument of forcible annexation by the United States as it was not at war with the Provisional Government. Further, the United States was prohibited by the Treaty of 1849 from unilaterally annexing the Islands, but could do so only by a treaty of cession with the Hawaiian Kingdom.⁸⁵ Dr. Craven next applied international law concepts of belligerent occupation and peaceful occupation (occupation *pacifica*) to the facts of the U.S. occupation and noted that under the law of the time, now expressed in Article 47 of the 1949 Geneva Convention, the United States as a belligerent occupying power could not have acquired sovereignty over the Hawaiian Islands in 1898.⁸⁶

In 1945, pursuant to Article 73 of the U.N. Charter, Hawai‘i was listed as a Non-Self-Governing Territory administered by the United States. Dr. Craven related that the U.N. Charter made the principle of self-determination applicable to all such territories, including Hawai‘i.⁸⁷ He then examined the 1959 Plebiscite (on the admission of Hawai‘i into the Union as a state) to determine whether or not it was an effective exercise of self-determination by the Hawaiian people. Dr. Craven noted that the Plebiscite failed to distinguish between citizens of the Hawaiian Kingdom in 1898 and those colonial residents that arrived on the Islands after annexation and that the Plebiscite failed to provide a proper choice between integration or independence, both of which made the Plebiscite fatally defective as a proper expression of self-

83 *Id.* at 135.

84 *Id.* at 138-39.

85 *Id.* at 140.

86 *Id.* at 141-42.

87 *Id.* at 143-44. There has been a proposal that Hawai‘i be re-inscribed on the UN’s list of non-self-governing territories as a solution to the existing dispute. Ramon Lopez-Reyes, *The Re-Inscription of Hawaii on the United Nations’ List of Non-Self-Governing Territories*, 28 PEACE RESEARCH 71-96 (no. 3, August 1996).

determination.⁸⁸

Finally, on the issue of whether the United States could acquire the Hawaiian Islands by “effective occupation” or adverse prescription, assuming that was a recognized method under international law of acquiring territory and sovereignty, Dr. Craven raised the defense that protesting in any way that might be reasonably required under the circumstances should effectively defeat a claim of prescription. He cited the Queen’s “vociferous” protestations at the time and on subsequent occasions. He further highlighted a general rule of law, acquiescence on the part of the occupied State is the “essence” of the prescriptive process. Because the monarchy was overthrown, such acquiescence thereafter was an impossibility as no government existed. The United States by the Apology Resolution itself formally acknowledged that the Hawaiian people never directly relinquished their claims to inherent sovereignty over the Islands as a peoples.⁸⁹

Having established State continuity as a matter of fact and international law, *Investigating War Crimes* makes a compelling claim for the present existence of the State, the Hawaiian Kingdom, the survival of its laws, and the currently and continuing illegal occupation of the Hawaiian Islands by the United States.

Occupations pursuant to unjust wars generate not only violations of international humanitarian law but usually by the nature of such wars specific war crimes as well. Dr. Sai lists many crimes and the elements to prove each as they relate to the prolonged illegal occupation of the Hawaiian Islands by the United States.⁹⁰ In Chapter 4 of *Investigating War Crimes*, Dr. William Schabas examines war crimes and the international law that governs them, primarily Hague Convention II (1899), Hague Convention IV (1907), and Geneva Convention IV (1949). Dr. Schabas is a professor of international and human rights law at Middlesex University in London, at Leiden University,

88 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 142-46.

89 *Id.* at 146-48. Under IHL, military occupation was to be temporary and justified by military necessity. A prolonged occupation without a showing of military necessity is, by definition, a violation of IHL. *See* Yutaka Arai-Takahashi, *Unearthing the Problemized Terrain of Prolonged Occupation*, 52 *ISR. L. REV.* 1, 52 (no. 2, 2019); Azarova, 3, 5, *supra* note 44.; Valentina Azarova, *Towards a Counter-Hegemonic Law of Occupation: The Regulation of Predatory Interstate Acts in Contemporary International Law*, 20 *YEARBOOK ON INT’L HUMANITARIAN L.* 113-160 (2017); Michael Bothe, *Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory*, Norwegian Refugee Council (June, 2017), <https://www.nrc.no/resources/legal-opinions/expert-opinion-relating-to-the-conduct-of-prolonged-occupation-in-the-occupied-palestinian-territory/>.

90 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 49-51.

and the National University of Ireland (emeritus). He is the honorary chairman of the Irish Centre for Human Rights, the recipient of many other honors, and the author of more than twenty books dealing in whole or part with international human rights law.

Dr. Schabas restricted his discussion to the nature of war crimes and to crimes that currently exist (i.e., continuing or more recent crimes) opining that war crimes that may have been committed by individuals at the time the U.S. occupation of the Hawaiian Islands began cannot today be prosecuted. The crimes considered by Dr. Schabas include usurpation of sovereignty, compulsory enlistment of soldiers among the inhabitants of the occupied territories (the crime of denationalization), pillage, confiscation and destruction of property, exaction of illegitimate or exorbitant contributions (such as through the occupying powers collection of taxes, dues, tolls, etc.), deprivation of fair and regular trial, unlawful deportation or transfer of civilians from the occupied territory, and unlawful transfer of populations to the occupied territory.⁹¹ He does not analyze or relate any specific acts or persons arising out of the U.S. invasion and occupation of the Hawaiian Islands, apparently leaving that to the Royal Commission of Inquiry and a future international criminal tribunal.⁹² However, the discussion is valuable in understanding how war crimes arise out of occupation and may survive or subsequently occur despite prolonged occupation and even annexation.

In the final chapter of *Investigating War Crimes*, Chapter 5, Dr. Federico Lenzerini examines in great detail international human rights law and self-determination as it may relate to the U.S. invasion and occupation of the Hawaiian Islands and its overthrow of the monarchy.⁹³ Dr. Lenzerini is a professor of public international law, European Union law and international

91 *Id.* at 155-67.

92 “The purpose of the Royal Commission shall be to investigate the consequences of the United States’ belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context.” *INVESTIGATING WAR CRIMES*, *supra* note 4, at 8. These investigations are to be done by reports of the RCI. At this particular stage, the RCI has completed three “preliminary reports” regarding “international law, humanitarian law and human rights.” The first preliminary report addresses how the RCI will conclude whether the elements of war crimes have been met by a war criminal and the charge of *dolus directus* in the first degree or second degree, and *dolus directus eventualis*. The second preliminary report addresses the authority of the Council of Regency and its formation of the Royal Commission of Inquiry. And the third preliminary report addresses the legal status of land titles throughout the islands. Reports of particular war crimes committed will follow along with its recommendations for indictments. See Hawaii, <https://hawaiiankingdom.org/royal-commission.shtml> (last visited Nov. 12, 2021).

93 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 173-216.

human rights law at the University of Siena (Italy) and of intercultural human rights at the St. Thomas University School of Law (USA). He is a UNESCO consultant and has been the Rapporteur of the International Law Association on the rights of indigenous peoples. He is the author of several books on human rights, culture, and reparations.

Although the primary focus of the Royal Commission of Inquiry is the use of the law of war, international humanitarian law, to compel the end of U.S. occupation and the restoration of the Hawaiian Kingdom and sovereignty over the islands of Hawai‘i, the facts surrounding the invasion and prolonged and continuing occupation of the Hawaiian Islands along with the overthrow of the monarchy do implicate a great number of human rights violations some of which are detailed by Dr. Lenzerini in Chapter 5. Dr. Lenzerini first provides a general discussion of the development and scope of human rights law manifested in the U.N. Charter, the *Universal Declaration on Human Rights* (1948), and other human rights treaties including the *International Convention on Civil and Political Rights* (1966), and the *International Covenant on Economic, Social, and Cultural Rights* (1966), the *American Declaration on the Rights and Duties of Man* (1948), and the *American Convention on Human Rights*.⁹⁴ He notes that fundamental human rights may rise to the level of a *jus cogens* norm, a preemptory norm from which no State may deviate or to an *ergo omnes* obligation that requires State action.⁹⁵ Dr. Lenzerini further elaborates on the applicability of human rights protections and obligations during armed conflict and belligerent occupation.⁹⁶

Obviously under a belligerent occupation, whether viewed in the context of humanitarian law principles or those within a human rights framework, the primary fundamental right violated is the collective right of peoples to self-determination, their right to freely determine their own destiny as a peoples, particularly in political terms. Dr. Lenzerini expounds on the history and source of this right as well as its nature and scope before applying it to the situation at hand.⁹⁷ He emphasizes that the “kind” of self-determination that has been developed to apply to indigenous peoples under colonialism

94 *Id.* at 174-180, 182-209.

95 *Id.* at 180; *see also* Yael Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201 (2008);

96 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 199-206; Waseem Almad Qureshi, *Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict*, 6 J. OF L. & INT’L AFFAIRS 205 (No. 1, 2018).

97 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 209-212; *see also* Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?* 18 EUROPEAN J. OF INT’L LAW 1 (no. 1, 2007).

is different from that which should apply in this situation regarding the self-determination of the Hawaiian peoples who have been occupied outside the colonial context.⁹⁸

On the existence and applicability of the right to self-determination of peoples at the time of the U.S. occupation in 1893, prior to the development of modern human rights law, Dr. Lenzerini reviewed the domestic and international law and practices of the Hawaiian Kingdom and found that “the Hawaiian people was exercising its right to self-determination before this right was recognized in international law” and concluded that “the idea of self-determination was well-entrenched in the understanding of international and international relations by the Hawaiian Kingdom well before it was accepted as a rule of international law” entitling the Hawaiian people the right to exercise it now.⁹⁹ He further remarked that the right to self-determination is a “right of continuing character” and that to the extent that the Hawaiian Kingdom may be considered as being subjected to a foreign occupation, “the Hawaiian people retains its rights to self-determination, as established by customary international law ...”¹⁰⁰

The struggle for liberation from occupation and oppression by a superior power of course does not come without great sacrifice by those who engage in it. The liberators or patriots are often branded and treated as criminals, revolutionaries, secessionists, traitors, or, when employing arms or violence, enemy combatants or terrorists.¹⁰¹ The same can be said for the Hawaiian nationalists resisting the prolonged occupation of the Hawaiian Islands by the United States. As previously mentioned, in 1895, while the Queen was still under house arrest, her loyalists attempted an unsuccessful counter-rebellion from which she and some of her jailed supporters were tried by a military

98 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 214.

99 *Id.* at 214-15.

100 *Id.* at 215; *see also* Salvatore Fabio Nicolosi, *The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty*, POLISH YEARBOOK OF INT’L L. 165 (2011) (distinguishing between *de jure* and *de facto* sovereignty during military occupation with a focus on the right of self-determination); ANAYA, *supra* note 47.

101 *See, e.g.*, Effects and effectiveness of law enforcement intelligence measures to counter homegrown terrorism: A case study on the *Fuerzas Armadas de Liberacion Nacional* (FALN), Final Report to the Science and Technology Directorate, U.S. Department of Homeland Security (2012), *available at* https://www.dhs.gov/sites/default/files/publications/OPSR_TP_START_Countermeasures-Case-Study-of-LE-Countermeasures-Against-FALN-Report_1208-508.pdf; MICHAEL D. CLODFELTER, *THE DAKOTA WAR: THE UNITED STATES ARMY VERSUS THE SIOUX, 1862-1865* (2006); Olivia B. Wazman, *The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here’s Why*, TIME MAGAZINE (July 18, 2018).

tribunal of the Provisional Government, convicted of treason, and sentenced to life imprisonment and death. In 1996, Bumpy Kanahale was convicted of interfering with U.S. marshals seeking to apprehend Native Hawaiian sovereignty activist Nathan Brown within their Native community and was sentenced to four months in prison.¹⁰² Brown was also convicted for his refusal to pay taxes to the occupying power, the United States, and sentenced to over 7 years of imprisonment.¹⁰³ Lance Larson was jailed for 30 days, 7 days in solitary confinement, after challenging the legitimacy of the State of Hawaii and its jurisdiction over him.¹⁰⁴ Dr. Sai has also been targeted and attacked for his assertions of Hawaiian Kingdom sovereignty.¹⁰⁵

Investigating War Crimes lays out a persuasive argument for the liberation of the Hawaiian Islands from U.S. occupation despite its annexation and the passage of time. One of the fathers of international law, Emer D. Vattel, remarked: “If the people do not voluntarily submit, the state of war still subsists.” This book and the efforts of the Hawaiian Kingdom Council of Regency and its Royal Commission of Inquiry are part of that continuing resistance of the Hawaiian peoples to illegal occupation of their Islands by the United States. The war in Afghanistan may not be the longest war in U.S. history as it may be eclipsed by the Hundred Years War Against the Hawaiian Kingdom. The Royal Commission of Inquiry in its book convincingly demonstrates the continuity of the Hawaiian Kingdom as a nation-state under international law. It is a worthwhile read for anyone interested in Hawai‘i, in the law of occupation and the rights of those under prolonged occupation, or in the liberation of nations and peoples and restorative justice. It is also a large step along the long road of the Hawaiian Kingdom and its people to free themselves from under the rule of the United States and to restore their independence and full sovereignty as a peoples and nation-state within the international community.

102 Linda Hosek, ‘Bumpy’ Kanahale gets Minimum Term, HONOLULU STAR TRIBUNE (Feb. 3, 1998), http://hawaii-nation.org/political_prisoner.html.

103 *Activist gets Extra Prison Time*, STARBULLETIN (March 20, 2004) <http://archives.starbulletin.com/2004/03/20/news/story9.html>.

104 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 4; *Lance Paul Larsen v. Hawaiian Kingdom*, <https://www.alohaquest.com/arbitration/log.htm>; *State v. Larsen*, 77 Haw. 219, 220, 883 P.2d 641, 642 (1994).

105 See Andrew Walden, *Sovereignty Mortgage Scammer Keanu Sai at it again from Legislators, Maui Council, University* (July 17, 2011), <http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/4684/Sovereignty-Mortgage-Scammer-Keanu-Sai-at-it-again-with-help-from-Legislators-Maui-Council-University.aspx>.