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SUPPLEMENTAL MEMORANDUM ON THE ROLE AND FUNCTION OF THE  
MILITARY GOVERNMENT OF HAWAI‘I

This memorandum is a supplement to the memorandum on the role and function of the Military Government of Hawai‘i dated 7 April 2023.<sup>1</sup>

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.”<sup>2</sup> Accordingly, “[t]he 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 as required by the governor.”<sup>3</sup> In other words, the Adjutant General, who is Army Major General Kenneth Hara, operates under two regimes of law, that of the State of Hawai‘i and that of the United States Army.

The State of Hawai‘i Constitution is an American municipal law that was approved by the Territorial Legislature of Hawai‘i on 20 May 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 30 April 1900.<sup>4</sup> The constitution was adopted by a vote of American citizens in the election throughout the Hawaiian Islands held on 7 November 1950. The State of Hawai‘i Constitution came into effect by “An Act To provide

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<sup>1</sup> David Keanu Sai, *Memorandum on the Role and Function of the Military Government of Hawai‘i* (7 April 2023) (online at [https://hawaiiankingdom.org/pdf/HK\\_Supp\\_Memo\\_Military\\_Gov.pdf](https://hawaiiankingdom.org/pdf/HK_Supp_Memo_Military_Gov.pdf)).

<sup>2</sup> Hawai‘i Revised Statutes, §121-7.

<sup>3</sup> *Id.*, §121-9.

<sup>4</sup> 31 Stat. 141 (1900).

for the admission of the State of Hawaii into the Union” passed by the Congress on 18 March 1959.<sup>5</sup>

In *United States v. Curtiss Wright Corp.*, the U.S. Supreme Court stated, “[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.”<sup>6</sup> 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.”<sup>7</sup> Therefore, the State of Hawai‘i cannot claim to be a *de jure* government because its only claim to authority derives from Congressional legislation that has no extraterritorial effect.

Article 43 of the 1907 Hague Regulations provides that “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>8</sup> Article 64 of the 1949 Fourth Geneva Convention also states, “[t]he penal laws of the occupied territory shall remain in force.”<sup>9</sup> Under Article 43 sovereignty is not transferred to the occupying State.<sup>10</sup> Section 358, United States Army Field Manual 27-10, declares, “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.”

“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

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<sup>5</sup> 73 Stat. 4 (1959).

<sup>6</sup> *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>7</sup> *The Apollon*, 22 U.S. 362, 370 (1824).

<sup>8</sup> 36 Stat. 2277, 2306 (1907).

<sup>9</sup> 6.3 U.S.T. 3516, 3558 (1955).

<sup>10</sup> See Eyal Benvenisti, *The International Law of Occupation* 8 (1993); Gerhard von Glahn, *The Occupation of Enemy of Territory—A Commentary on the Law and Practice of Belligerent Occupation* 95 (1957); Michael Bothe, “Occupation, Belligerent,” in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 3, 765 (1997).

constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders.”<sup>11</sup>

In *Hawaiian Kingdom v. Biden et al.*,<sup>12</sup> the State of Hawai‘i argued that the Hawaiian Kingdom’s “Amended Complaint challenges the legality of Hawaii’s admission to, and continued existence as a state of, the United States. As such, Plaintiff presents a nonjusticiable political question to this Court for determination.”<sup>13</sup> A political question is not an affirmative defense, but a jurisdictional argument where “there is [arguably] a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>14</sup> More importantly, it is a court precedence of American jurisprudence and like Congressional legislation has no extra-territorial effect. For the State of Hawai‘i to have established an affirmative defense, it would have provided rebuttable evidence as to the presumption of continuity of the Hawaiian Kingdom as a State despite its government having been unlawfully overthrown by the United States on 17 January 1893, and not argue jurisdiction under the political question doctrine.

Because the State of Hawai‘i Constitution and its Revised Statutes are situations of facts and not laws, they have no legal effect, as American municipal laws, 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.<sup>15</sup> 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.

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<sup>11</sup> Marco Sassòli, “Article 43 of the Hague Regulations and Peace Operations in the Twenty-first Century,” *International Humanitarian Law Research Initiative* 6 (2004) (online at <https://www.hpcrrresearch.org/sites/default/files/publications/sassoli.pdf>).

<sup>12</sup> *Hawaiian Kingdom v. Biden et al.*, Amended Complaint for Declaratory and Injunctive Relief (11 August 2021) (online at [https://hawaiiankingdom.org/pdf/Amended\\_Complaint\\_and\\_Exhibits\\_1\\_&\\_2%20\(Filed\\_2021-08-11\).pdf](https://hawaiiankingdom.org/pdf/Amended_Complaint_and_Exhibits_1_&_2%20(Filed_2021-08-11).pdf)).

<sup>13</sup> *Hawaiian Kingdom v. Biden et al.*, State of Hawai‘i Memorandum in Support of Motion 8 (12 August 2022) (online at [https://hawaiiankingdom.org/pdf/ECF\\_241-1\]\\_Memo\\_in\\_Support\\_SOH%20Motion\\_\(Filed\\_2022-08-12\).pdf](https://hawaiiankingdom.org/pdf/ECF_241-1]_Memo_in_Support_SOH%20Motion_(Filed_2022-08-12).pdf)).

<sup>14</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>15</sup> Council of Regency, *Proclamation of Provisional Laws* (10 Oct. 2014), (online at [https://hawaiiankingdom.org/pdf/Proc\\_Provisional\\_Laws.pdf](https://hawaiiankingdom.org/pdf/Proc_Provisional_Laws.pdf)); see also David Keanu Sai, *Memorandum on the Formula to Determine Provisional Laws* (22 March 2023) (online at [https://hawaiiankingdom.org/pdf/HK\\_Memo\\_Provisional\\_Laws\\_Formula.pdf](https://hawaiiankingdom.org/pdf/HK_Memo_Provisional_Laws_Formula.pdf)).

Since the Council of Regency recognized, by proclamation on 3 June 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,”<sup>16</sup> 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*.<sup>17</sup>

While international humanitarian law has effectively stripped the authority of senior leadership of the State of Hawai‘i, it did not strip the Adjutant General’s “military duties consistent with the regulations and customs of the armed forces of the United States.”<sup>18</sup> International humanitarian law acknowledges the military duties of Major General Hara who is the most senior Army general officer within the territory of the Hawaiian Kingdom as an occupied State. Although General Charles A. Flynn is the Commanding General of the United States Army Pacific (USARPAC), whose troops comprise the largest Army unit in the Hawaiian Islands, USARPAC is not in effective control of the majority of Hawaiian territory like the State of Hawai‘i and, therefore, there is no duty to establish a Military Government pursuant to Article 42 of the 1907 Hague Regulations.<sup>19</sup> According to U.S. Army Field Manual 27-5:

3. COMMAND RESPONSIBILITY. The theater commander bears full responsibility for [Military Government]; therefore, he is usually designated as military governor or civil affairs administrator, but is authorized to delegate his 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.

4. REASON FOR ESTABLISHMENT. a. Reasons for the establishment of [Military Government is] either military necessity as a right, or as an obligation under international law. b. Since the military occupation of enemy territory

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<sup>16</sup> Council of Regency, *Proclamation Recognizing the State of Hawai‘i and its Counties* (3 June 2019) (online at [https://www.hawaiiankingdom.org/pdf/Proc\\_Recognizing\\_State\\_of\\_HI.pdf](https://www.hawaiiankingdom.org/pdf/Proc_Recognizing_State_of_HI.pdf)).

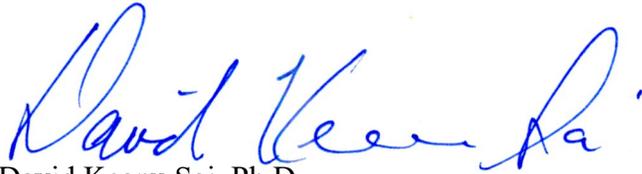
<sup>17</sup> Website of the Royal Commission of Inquiry at <https://hawaiiankingdom.org/royal-commission.shtml>.

<sup>18</sup> Hawai‘i Revised Statutes, §121-9.

<sup>19</sup> Article 42 of the 1907 Hague Regulations 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.”

suspends the operation of the government of the occupied territory, the obligation arises under international law for the occupying force to exercise the functions of civil government looking toward the restoration and maintenance of public order. These functions are exercised by [Military Government]. An armed force in territory other than that of an enemy similarly has the duty of establishing [Military Government] when the government of such territory is absent or unable to function properly.<sup>20</sup>

The transformation of the State of Hawai‘i into a Military Government would be the first step toward correcting the course of the United States’ non-compliance with international humanitarian law for 130 years. Major General Hara would make the proclamation of the establishment of the Military Government, as the Military Governor, in similar fashion to the establishment of the Office of Military Government for Germany on 1 October 1945 that was responsible for administering the U.S. zone of occupation and the U.S. sector of Berlin.



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<sup>20</sup> Department of the Army, *Field Manual 27-5, Civil Affairs Military Government 4* (1947).