



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

Head, Royal Commission of Inquiry
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: <http://hawaiiankingdom.org/royal-commission>

November 11, 2024

Lieutenant Colonel Michael I. Rosner
Executive Officer, 29th Infantry Brigade
Email: michael.i.rosner.mil@army.mil

Via electronic mail

Re: U.S. Army Doctrine of Command Responsibility for War Crimes

Lieutenant Colonel Rosner:

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."¹ In the occupied territory, 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.

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

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].²

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 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 the 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.

² Major William H. Parks, “Command Responsibility for War Crimes,” 62 *Military Law Review* 1, 37-38 (1973).

You, and the commanders before you, were provided information that war crimes have and continue to be committed by the federal government, 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.³

You, and the commanders before you, were also provided legal opinions from scholars of international law in Europe, which are considered sources of customary 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,⁴ on the legitimacy of the Council of Regency by Professor Federico Lenzerini from the University of Siena, Italy,⁵ and on war crimes being committed in the Hawaiian Kingdom by Professor William Schabas from Middlesex University London. In his legal opinion, Professor Schabas directly cites Professor Craven’s legal opinion 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.⁶

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

³ 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).

⁴ Matthew Craven, “Continuity of the Hawaiian Kingdom,” 1 *Hawaiian Journal of Law & Politics* 508 (2004).

⁵ Federico Lenzerini, “Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom,” 3 *Hawaiian Journal of Law & Politics* 317 (2021).

⁶ Schabas, 335-336.

Failure to 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 in order to put a stop to the war crimes being committed upon the civilian population whether they are aware that they are victims or not.

Thus, you have until November 28, 2024, to establish a military government or you will be the subject of a war criminal report for the war crime by omission. Lieutenant Colonel Phelps is your legal advisor, and, as such, should advise you on the veracity of this information that I have provided you and the commanders before you.



David Keanu Sai, Ph.D.

Head, *Royal Commission of Inquiry*

cc: Professor Federico Lenzerini, Deputy Head, Royal Commission of Inquiry
(federico.lenzerini@unisi.it)

Lieutenant Colonel Lloyd Phelps, Staff Judge Advocate
(lloyd.c.phelps4.mil@army.mil)

Major Keoki A. Leong
Executive Officer, 1st Squadron, 299th Cavalry Regiment
(keoki.a.leong.mil@army.mil)

Major Dane V. Antoque
Executive Officer, 1st Battalion, 487th Field Artillery Regiment
(dane.v.antoque.mil@army.mil)

Major Dane R. Calvan
Executive Officer, 227th Brigade Engineer Battalion
(dane.r.calvan.mil@army.mil)

Major Cavan U. Cabatbat
Executive Officer, 29th Brigade Support Battalion
(cavan.u.cabatbat.mil@army.mil)