



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

Chairman of the Council of Regency
P.O. Box 4146
Hilo, HI 96720
Tel: +1 (808) 383-6100
E-mail: interior@hawaiiankingdom.org
Website: <http://hawaiiankingdom.org>

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Major General Kenneth Hara
State of Hawai'i Adjutant General
Department of Defense
3949 Diamond Head Road
Honolulu, HI 96816

Re: Preliminary issue satisfied before establishing a military government for Hawai'i

Dear Major General Hara:

Through our communication channel, I was told that you acknowledged in a meeting on July 27, 2023, the continued existence of the Hawaiian Kingdom as an occupied State under international law, which, to me, satisfies the July 31st suspense date. At our meeting on April 13, 2023, at the Naniloa Hotel, I recommended that you task your Staff Judge Advocate, LTC Lloyd Phelps, to do his due diligence and to investigate into the veracity of the information I provided you regarding the continuity of the Hawaiian State despite its government being overthrown by an act of war committed by U.S. troops on January 17, 1893. He was unable to provide rebuttable evidence as to the presumption on State continuity and your acknowledgment affirms that position.

There is a rule of international law regarding the presumption of continuity of the State, with its rights and obligations, despite the overthrow of its government by an act of war committed by the troops of a foreign State. According to Judge James Crawford of the International Court of Justice, "There is a presumption that the State continues to exist, with its rights and obligations [...] despite a period in which there is [...] no effective, government [...] [and] belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."¹ Judge Crawford also points out that "the presumption—in practice a strong one—is in favour of

¹ James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006).

the continuance, and against the extinction, of an established State.”² On this rule and its application to the Hawaiian Kingdom, Professor Matthew Craven explains, “If one were to speak about a presumption of continuity, 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.”³

This rule of international law has a direct nexus to your obligation to establish a military government in accordance with Article 43 of the 1907 Hague Regulations and guided by Army regulations FM 27-5 and FM 27-10. According to Black’s Law, this is an expressed legal obligation “which the obligor binds himself in express terms to perform his obligation.”⁴ Once you became aware of the Hawaiian Kingdom’s existence as an occupied State, this express obligation under international law was prompted.

The legal effect of Title 32, United States Code, has a significant impact on the Hawai‘i Army and Air National Guard because they are situated outside of U.S. territory. First, as an enactment of Congress, it has no legal effect beyond the territory of the United States. According to international law, the concept of jurisdiction is linked to the territory of a State.⁵ As stated by the Permanent Court of International Justice in 1927, “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 [...] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”⁶ And the U.S. Supreme Court affirmed this rule in 1936, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory.”⁷ Also the Hawaiian Kingdom Supreme Court addressed this in 1858, where it stated, “The laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction.”⁸ Adhering to the limitation of jurisdiction, the decision by the Hawaiian Supreme Court and the Permanent Court of International Justice are binding, but not the U.S. Supreme Court decision, which is merely informative of the same rule.

² *Id.*, n. 2, 417.

³ Matthew Craven, “Legal Opinion on the Continuity of the Hawaiian Kingdom as a State,” in David Keanu Sai (ed.) *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020).

⁴ Black’s Law 1074 (6th ed., 1990).

⁵ Arthur Lenhoff, “International Law and Rules on International Jurisdiction,” 50 *Cornell Law Quarterly* 5 (1964).

⁶ *Lotus*, PCIJ Series A, No. 10, p. 18 (1927).

⁷ *United States v. Curtiss Wright Corp.*, 299 U.S. 304, 318 (1936).

⁸ *In re Francis de Flanchet, a Prisoner in the Fort*, 2 Haw. 96, 108 (1858).

Second, paragraph 353, FM 27-10, acknowledges that “Belligerent occupation in a foreign war, being based upon the possession of enemy territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional. On the other hand, subjugation or conquest implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty of peace. When sovereignty passes, belligerent occupation, as such, of course ceases, although the territory may and usually does, for a period at least, continue to be governed through military agencies.” There is no treaty of peace between the Hawaiian Kingdom and the United States, which is why the military occupation persists today. Because there is no treaty where the Hawaiian Kingdom ceded its sovereignty and territory to the United States, the Permanent Court of Arbitration acknowledged the Hawaiian Kingdom’s continued existence as a State in *Larsen v. Hawaiian Kingdom* in 1999. The Hawaiian Kingdom has sovereignty over the Hawaiian Islands and not the United States.

Since the 1959 Statehood Act (73 Stat. 4) and Title 10 U.S. Code have no effect within the territory of the Hawaiian Kingdom, the State of Hawai‘i Department of Defense’s status under international law, however, is recognized under the 1907 Hague Regulations as a militia of the occupying State—the United States. Article 1 states, “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army.’”

Notwithstanding the territorial limits of United States Code, it does clearly state that the Hawai‘i National Guard forms part of the U.S. Armed Forces, which triggers your international obligation to establish a military government to administer the laws of the occupied State—the Hawaiian Kingdom. Title 32, U.S.C. §104(b) states, “Except as otherwise specifically provided in this title, the organization of the Army National Guard and the composition of its units shall be the same as those prescribed for the Army [...]; and the organization of the Air National Guard and the composition of its units shall be the same as those prescribed for the Air Force [...].” Therefore, the Hawai‘i Army National Guard comes “under the denomination ‘army’” in the 1907 Hague Regulations and not the State of Hawai‘i as a whole. United States practice is for the Army to establish a military government and not the Air Force. You are an Army general officer.

Furthermore, the Indo-Pacific Command is not in your chain of command because you are not Title 10. It would appear to me that because you head both the Army and Air National Guard you would not have to report to both the Secretaries of the Army and Air Force, but rather to the Secretary of Defense since the Hawai‘i militia is comprised of more than one branch of the U.S. Department of Defense. The Secretary of Defense reports to the President. Army regulations on military government, however, provides flexibility and it must adapt to the uniqueness of every situation that presents itself like the Hawaiian situation. According to paragraph 9(b)(4), FM 27-5, “Since the conditions under which [military government] operate will vary widely in a given area as well as between different

areas, flexibility of action must be provided by the preparation of alternate plans in order to meet the rapid changes and alterations which may occur.”

As the last word concerning any acts relating to the administration of the occupied territory is with the occupying power, “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.”⁹ United States practice acknowledges that “The functions of the [occupied] government—whether of a general, provincial, or local character—continue only to the extent they are sanctioned (para. 367(a), FM 27-10).” With specific regard to cooperation with the occupied government, it is also recognized that “The occupant may, while retaining its paramount authority, permit the government of the country to perform some or all of its normal functions (para. 367(b)).”

Since the occupying State does not have the sovereignty of the Hawaiian Kingdom, the Council of Regency, which has the authority to exercise Hawaiian sovereignty, can bring the laws and administrative policies of the Hawaiian Kingdom in 1893 up to date so that the military government can fully exercise its authority under the law of occupation. The purpose of the military government is to protect the population of the occupied State despite 130 years of violating these rights. On behalf of the Council of Regency, I can assure you that the Council of Regency commits itself to working with you to bring compliance with the law of occupation, for both the occupying and occupied States, that will eventually bring the prolonged occupation of the Hawaiian Kingdom to an end.

Na‘u me ka ‘oia‘io,



David Keanu Sai, Ph.D.

Chairman of the Council of Regency

⁹ 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>.