

# The Permanent Court of Arbitration

at the Hague, the Netherlands

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LANCE PAUL LARSEN, CLAIMANT

vs.

THE HAWAIIAN KINGDOM, RESPONDENT

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*COUNTER-MEMORIAL OF THE  
HAWAIIAN KINGDOM GOVERNMENT*

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## COUNTER-MEMORIAL

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DAVID KEANU SAI  
*Acting Minister of Interior  
Agent*

PETER UMIALILOA SAI  
*Acting Minister of Foreign Affairs  
1st Deputy Agent*

GARY VICTOR DUBIN, Esquire  
*Acting Attorney General  
2nd Deputy Agent*

KAU'I P. GOODHUE  
*Acting Minister of Finance  
3rd Deputy Agent*

*Council of Regency  
P.O. Box 2194  
Honolulu, Hawaiian Kingdom  
96805-2194  
(808) 239-5347*

**COUNTER-MEMORIAL**  
**of the Government of the Hawaiian Kingdom**

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- ANNEX 1: United Nations General Assembly Resolution 1514 (XV), *Declaration on the granting of independence to colonial countries and peoples*, December 14, 1960.
- ANNEX 2: United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Saturday, June 11, 1898*, vol. XXXI, pp. 5769-5797.
- ANNEX 3: United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Monday, June 13, 1898*, vol. XXXI, pp. 5827-5851.
- ANNEX 4: United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Wednesday, June 15, 1898*, vol. XXXI, 5967-6021.
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# **COUNTER-MEMORIAL**

## **of the Government of the Hawaiian Kingdom**

### **INTRODUCTION**

#### **A. Preliminary Statement**

1. The case proposed by the Claimant consists of two arguments. First, Claimant contends that due to his adherence to Hawaiian Kingdom law, he was harassed and incarcerated by the United States of America, within the territorial dominion of the Hawaiian Kingdom, of which the Hawaiian Kingdom Government was responsible to arrest the situation, but failed to do so. Second, Claimant contends that he is owed redress by the Hawaiian Kingdom for the harm he suffered from the harassment and incarceration that he endured.

2. Both of Claimant's arguments are based on the allegation that the Hawaiian Kingdom Government did not intervene on behalf of the Claimant. The Hawaiian Kingdom agrees that it was the actions of the United States that violated Claimant's rights, however denies that it failed to intervene. The subsequent conduct and actions of the Parties to this case is to be examined within the framework of an occupied State. This Counter-Memorial will address the legal elements in the Claimant's Memorial.

#### **CHAPTER I. The Claimant's Assertion.**

3. The Government of the Hawaiian Kingdom does not dispute Claimant's recital of historical facts relating to the Hawaiian Kingdom as an independent State in paragraphs 15 to 41 of Claimant's Memorial, but does take exception to the recognition, findings and recommendations of the 1993 People's International Tribunal, listed in paragraph 38 for the purpose of clarification.

#### **A. Under the Laws of Nations, the Hawaiian Kingdom is Occupied and therefore the Application of the United Nations Charter for Indigenous Peoples is Inappropriate.**

4. In 1993, a Hawaiian initiative was held entitled *Ka Ho'okolokolonui Kanaka Maoli*, a People's International Tribunal, *Kanaka Maoli Nation, Plaintiff, vs. United States of America, Defendant*. The Claimant points out in his Memorial that the Tribunal found that:

"Kanaka Maoli Sovereignty has not been extinguished by the illegal actions of the United States...the Kanaka Maoli sovereignty have been subjected to ongoing processes of genocide, both physical and cultural, at the hands of the U.S. government and the government of the State of Hawai'i." <sup>1</sup>

5. In the Summary of General Recognitions, Findings and Recommendations <sup>2</sup> by this People's International Tribunal, the term *Kanaka Maoli* is defined as aboriginal Hawaiian in the Hawaiian

language, and the Tribunal's use of the term *Lahui Kanaka Maoli* is translated to aboriginal Hawaiian race.<sup>3</sup> It is consistently used by the Tribunal to identify a specific ethnic group being indigenous to the Hawaiian Islands, and who, it is alleged, retain the right to self-determination within the meaning of "...Article 73 of the United Nations Charter, and the Declaration on the Granting of Independence to Colonial Countries and Peoples (United Nations General Assembly Resolution 1514, 14 December 1960)." <sup>4</sup>

6. The Recognitions, Findings and Recommendations by the 1993 People's International Tribunal possess no legal framework defining the Hawaiian Kingdom as an independent State since the 1843 Anglo-Franco Proclamation of Hawaiian Independence, together with its legal standing of statehood amongst the other members of the Community of States from 1843. As such, it fails to acknowledge and incorporate in its deliberations and findings the legal standing of the Hawaiian Kingdom as an independent State and the civil and political rights of its nationals within the confines of international law. Instead, it addresses the native population of the Hawaiian Islands as "dependent peoples" who seek the right of self-determination from within the dominion of the United States of America as a colonizing power.

7. Based on paragraphs 4 through 6 above, the 1993 People's International Tribunal was conducted pursuant to the United Nations' definition of self-determination and the process of decolonization. The Tribunal was not conducted according to the laws of nations, specifically, the 1907 Hague Conventions IV and V regarding occupation. The Hawaiian Kingdom is an occupied State as defined under the laws of nations and therefore the application of the United Nations Charter for indigenous peoples by the Tribunal was inappropriate.

**1. United Nations Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, is Inapplicable to the Hawaiian Kingdom because formal International Recognition of Hawaiian Independence was established in 1843.**

8. The United Nations' Declaration on the Granting of Independence to Colonial Countries and Peoples, specifically refers to those peoples who have not attained independence, and have been colonized by an independent State. Section 5 of the Declaration states:

"Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories **which have not yet attained independence**, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." (emphasis added)<sup>5</sup>

9. The Hawaiian people, by and through its monarchical form of government, attained *formal*<sup>6</sup> international recognition of Hawaiian independence in 1843 by the Queen of England and the King of France. In addition, the conduct of the international community to the divers treaties

and conventions, subsequent to the 1843 Anglo-Franco Proclamation, attest to the existence of the Hawaiian Kingdom as an Independent State.<sup>7</sup> As such, the United Nations' Declaration on the Granting of Independence to Colonial Countries and Peoples, is inapplicable.

**2. Rights of Hawaiian nationals cannot be confused with Indigenous rights as defined by International law and any reference by Claimant to the contrary should be excluded.**

10. Since 1843 the aboriginal Hawaiian race (lahui kanaka maoli) held a political status as internationally recognized nationals of the Hawaiian Kingdom, and their rights in the land were secured under Hawaiian Kingdom domestic law and practices. Paragraph 78 of the Respondent's Memorial states:

"As a result of the Great Mahele of 1848, the ancient rights in the land held by the Konohiki (Landlord), and the common people, as native tenants, were incorporated and protected under Kingdom law. Under the laws and the conditions of the Great Mahele, native tenants were capable of acquiring fee-simple titles from the Government or Konohiki (Landlord) whenever they desired. Subsequent laws enacted by the Hawaiian Legislative Assembly further evolved the Hawaiian land tenure system and consequently defined the corporate rights of the State over real property. By 1886, the Hawaiian Kingdom had enacted specific laws on transference and conditions of title, probate proceedings, and heirship rights."

11. The 1993 Recognitions, Findings and Recommendations by the People's International Tribunal, exclusively references indigenous rights to sovereignty of the aboriginal Hawaiian people within the Hawaiian Kingdom, rather than national rights. Rights of Hawaiian nationals cannot be confused with indigenous rights, as defined by International law, and any reference by the Claimant to the contrary should be excluded from this case for the following four reasons.

- a. First, the 1843 Anglo-Franco Proclamation had established international independence for Hawai'i and its people.<sup>8</sup>
- b. Secondly, since the establishment of a constitutional monarchical form of government in 1840, the aboriginal Hawaiian race (lahui kanaka maoli) had attained a political status as Hawaiian subjects or nationals of the Hawaiian Kingdom, with defined civil and political rights under Kingdom law, and possessed the right to change their political status by naturalization or otherwise.<sup>9</sup>
- c. Thirdly, the aboriginal Hawaiian race (lahui kanaka maoli) participated in the Hawaiian Government by serving as statesmen and

civil employees in all three branches of government (i.e. Legislative, Executive and Judicial).<sup>10</sup>

d. Fourthly, the Hawaiian Kingdom was not colonized by the United States of America, but rather occupied since the Spanish-American War of 1898.<sup>11</sup>

**B. The Hawaiian Kingdom Government has fulfilled its Duty and Obligations toward Claimant as created by Two Distinct Relationships: one under Hawaiian Kingdom law, and the other pursuant to Petitions.**

12. Paragraphs 42 to 67 and 68(1) of the Claimant's Memorial clearly state the circumstances of the Claimant. The Respondent Hawaiian Kingdom Government acknowledges the same, but denies the allegation in paragraph 68(2), to wit: "...Mr. Larsen does have redress against the Respondent Government of the Hawaiian Kingdom." The Respondent Hawaiian Kingdom Government also acknowledges paragraphs 69(1), 69(2), 69(3) and 69(4), but denies the allegation in paragraph 69(5), to wit: "The government of the Hawaiian Kingdom, through its acting Regency, has not fulfilled this duty."

13. The Claimant enumerates in paragraphs 58 to 66 of his Memorial two (2) distinct and separate relationships, which import specific duties and obligations between the parties. *Claim* to redress for failure of a *duty* are correlative terms associated with a contractual relationship.

14. Accordingly, based on paragraphs 15 through 35 below, the Hawaiian Kingdom Government has fulfilled its duty and obligations toward Claimant as created by two distinct relationships, one under Hawaiian Kingdom law, and the other pursuant to Petitions.

**1. Relationship under Hawaiian Kingdom law.**

15. First, the Claimant in paragraph 46 of the Memorial identifies the relationship of *law* between himself, as a Hawaiian subject, and the State, by re-stating §6 of the Hawaiian Civil Code. In pertinent part, "The laws are obligatory upon all persons, whether subjects of this Kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom..." At one end, the Claimant, as an individual within the limits of the Kingdom, irrespective of his nationality, is obligated to obey Hawaiian Kingdom law, and at the other end the executive branch of the Hawaiian Kingdom Government, as the instrument of the State, has a duty to enforce the laws of the Hawaiian Kingdom.

16. In time of prolonged occupation, there is the question of enforcement. The Oxford Companion to Law states:

"Does a rule of law cease to be such a rule, or part of the law, if it is in fact not enforced, regularly or invariably, or even if it is unenforceable in fact, or in law, no machinery existing for its

enforcement? The general attitude of developed systems is that so long as it stands unrevoked it is part of the law." <sup>12</sup>

17. The Claimant has a legal duty to obey the laws of the Hawaiian Kingdom, as he owes no allegiance to the occupational force of the United States, and conversely, the *Acting* Council of Regency has the responsibility of ensuring the enforcement of the laws of the Hawaiian Kingdom, even under an illegal occupation. The Hawaiian Kingdom Government, by its *Acting* Regency, has consistently acted upon this responsibility, which is elaborated in paragraphs 237 to 316 of Respondent's Memorial, and acknowledged by the Claimant in paragraphs 111 to 135 of Annex 5 of Claimant's Memorial.

18. The Claimant has made no effort in questioning the actions taken by the *Acting* Regency, as the government, in an effort to terminate the illegal occupation of the Hawaiian Kingdom by the United States of America, and therefore cannot be construed as to be a part of the dispute between the Parties. Rather, the dispute arises out of a special relationship between the Parties.

## **2. Special Relationship by Petitions.**

19. On April 20, 1998, the Claimant "...formally petitioned the acting Office of Regent, for assistance in his (the Claimant's) efforts to assert his Nationality as a Hawaiian subject, and to protest the unlawful imposition of American laws over his person." <sup>13</sup>

20. In response to the Claimant's petition of April 20, 1998, His Excellency David Keanu Sai, *Acting* Regent, did enter the District Court of the Third Circuit, Puna Division, State of Hawai'i, on June 18, 1999 and:

"...testified at trial as an expert witness on Hawaiian Kingdom Law and Treaties on behalf of the Claimant. During His Excellency's testimony, he explained how, pursuant to international law and treaties regarding the Hawaiian Kingdom, Claimant's rights are protected under the laws of the Hawaiian Kingdom. He further explained, that, in accordance with fixed and established principles of customary international law, the laws of the Hawaiian Kingdom, and not the the laws of the United States, possess the *prosecutorial* authority to institute criminal proceedings against the Claimant Lance Paul Larsen within the territorial dominion of the Hawaiian Kingdom." <sup>14</sup>

21. By the Claimant's Petition and the subsequent action of the *Acting* Regent a *constructive-contractual* relationship was established between the Parties. Black's Law Dictionary (1968), defines a *constructive-contract*:

"...when the law prescribes the rights and liabilities of persons who have not in reality entered into a contract at all, but

between whom circumstances make it just that one should have a right, and the other be subject to a liability, similar to the rights and liabilities in cases of express contract." <sup>15</sup>

22. This special relationship between the Claimant and the *Acting* Council of Regency was dependent upon the actions of the Parties and not by any specific agreement or convention. The circumstances of this relationship arose on April 20, 1998, when the Claimant petitioned the Hawaiian Government for support and intervention on his behalf, and the Hawaiian Government, by its *Acting* Regent, responded by entering the court of the occupying government and served as an expert witness for and on behalf of the Claimant on June 18, 1998.

**a. Constitutional Rights of the Claimant.**

23. Pursuant to Article 1 of the 1864 Hawaiian Constitution the Claimant, as a Hawaiian subject, has the inalienable right to:

"...life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." <sup>16</sup>

24. And Article 13 provides that the *Acting* Regency, who serves in the absence of a Monarch, conducts:

"...Government for the common good; and not for the profit, honor, or private interest of any one man, family, or class of men among His subjects." <sup>17</sup>

25. In addition, Article 14 provides that in conducting the Government for the common good:

"...petition the King (Regency) or Legislative Assembly for redress of grievances." <sup>18</sup>

26. The petition of the Claimant of April 20, 1998, established a special relationship between the parties that separated the Claimant from all other persons within the Kingdom. These persons, being Hawaiian subjects and foreign nationals, are protected by law and not by a special relationship, as is the case with the Claimant. While "every member of society has a right to be protected" <sup>19</sup> by the Hawaiian Government, the Claimant had exclusively exercised his constitutional right of petitioning the Government "...for assistance in his (the Claimant's) efforts to assert his Nationality as a Hawaiian subject, and to protest the unlawful imposition of American laws over his *person*." <sup>20</sup> In defining *person*, Pollock explains that:

"*Persons* are the subject of rights and duties; and, as a subject of a right, the person is the object of the correlative duty, and conversely...because rights and duties are ascribed to him. The *person* is the legal subject or substance of which the rights and

duties are attributes." 21

**b. Testimony by His Excellency David Keanu Sai Fails to Arrest violations of Claimant's Constitutional rights.**

27. The testimony given by His Excellency David Keanu Sai, as an expert witness for the Claimant on June 18, 1999, failed to arrest the illegal proceedings against the Claimant by the United States Government. Instead, the presiding Judge, Sandra Schutte, stated:

"...I'm going to deny the motion to dismiss and reset this trial and give you, Ms. Parks (Claimant's Attorney), an opportunity to file your action in Federal Court and remove this case to Federal Court, which at least with your theory may have a more appropriate venue." 22

28. On August 4, 1999, Claimant's attorney, filed a:

"...complaint for injunctive relief in the United States District Court for the District of Hawai'i, against the United States Government and the Hawaiian Kingdom Government. In the federal lawsuit, Mr. Larsen accused both defendants of violating the 1849 Treaty of Commerce, Friendship and Navigation by allowing U.S. domestic law to be imposed over his person within the territorial dominion of the Hawaiian Kingdom." 23

**c. Claimant Files Second Petition for Redress.**

29. On August 31, 1999, Claimant filed a second petition for redress with the *Acting* Regency, again reasserting his constitutional rights. He stated:

"That over the span of my lifetime, and continuing through today, the United States of America, including its political subdivision, the State of Hawai'i and its several Counties have been and continue to impose American municipal laws over my person within the territorial jurisdiction of the Hawaiian Kingdom, infringing upon my Constitutional rights..." 24

30. In the August 31, 1999, petition, the Claimant concluded by stating:

"I now humbly petition David Keanu Sai, Regent, pro tempore of the Hawaiian Kingdom, to intervene or otherwise aid in my attempts to procure justice for myself, and specifically to take appropriate steps to end the unlawful imposition of American municipal laws here in the Hawaiian Kingdom." 25

31. Due to the illegal occupation of the Hawaiian Kingdom and the blatant disregard of international law and Hawaiian Kingdom law by the occupational government of the United States, the *Acting* Regency found itself powerless to effectively intervene and arrest the advancements of the United States against the Claimant. Sadly, on October 4, 1999, Claimant was illegally and wrongfully imprisoned by an American Judge, Sandra Schutte. <sup>26</sup> This being the same judge, wherein His Excellency gave expert testimony of the Hawaiian Kingdom and its treaties.

**d. Hawaiian Kingdom Government waives Sovereign Immunity to address violation of Claimant's rights before an International Tribunal.**

32. Soon thereafter, Ms. Ninia Parks, esquire, attorney for the Claimant, requested an urgent meeting with the *Acting* Regency on account of the Claimant's illegal incarceration. In this meeting she expressed a sincere concern that the United District Attorney would move for a dismissal of the Claimant's Complaint for Injunctive Relief while the Claimant was incarcerated, and that the Federal Judge may grant it. The *Acting* Regency had determined that this situation possessed the opportunity for its intervention, as petitioned by the Claimant in the August 31, 1999 Petition, without jeopardizing the Claimant's constitutional and international rights.

33. In this meeting the Hawaiian Kingdom Government, by its *Acting* Council of Regency, had agreed to waive its sovereign immunity, in this particular case, and enter into an arbitration agreement upon the completion of two conditions. First, Mr. Larsen, by his attorney, dismiss all defendants, including the United States of America, excepting the Hawaiian Kingdom. <sup>27</sup> This action would remedy the concern of the Claimant's attorney and prevent the United States District Attorney from possibly dismissing the case. Second, after the said parties to the complaint have been dismissed, Mr. Larsen, by his Attorney, and the Hawaiian Kingdom, by its *Acting* Attorney General, would enter into an agreement to dismiss the entire case without prejudice, and to submit the dispute between them to final and binding arbitration at the Permanent Court of Arbitration at the Hague, the Netherlands. <sup>28</sup>

34. The Hawaiian Kingdom Government considers the Permanent Court of Arbitration, as its only means, during the illegal occupation of its territory, for providing its citizenry, such as the Claimant, with a tribunal to resolve disputes that would ordinarily be taken to arbitration in a Hawaiian Kingdom court as defined by Chapter XVI -Of Proceedings in Special Cases, Civil Code of the Hawaiian Kingdom. Section 926 provides that:

"The parties to any such controversy may agree in writing, to submit the same to the decision of one or more arbitrators, named in the agreement, or to be appointed in such manner as the parties shall agree upon, stipulating that the award of such arbitrators when rendered, shall be entered up as a judgment of any court of record, or police court, of the Kingdom, mentioned in such agreement." <sup>29</sup>

35. Further, the *Acting* Council of Regency is empowered and authorized to settle disputes

through arbitration by certain deeds of trust, which were transferred by the Trustees of the Hawaiian Kingdom Trust Company, a general partnership, to the Regency, on May 15, 1996. The Arbitral Tribunal may refer to paragraphs 227 to 248 of the Respondent's Memorial which articulates the circumstance and the means of re-establishing the Hawaiian Kingdom Government, albeit in an *acting* capacity, by and through the Hawaiian Kingdom Trust Company, a general partnership. Each of the Deeds of Trust conveyed to the Regency, provided, in part, that:

"...the grantors, in consideration aforesaid and in order to more effectually carry out the intention of this deed doth hereby grant unto the said trustee, its successors and assigns full power to serve in the place of the absentee government, for the benefit of the same; and in the name of the trust to institute and prosecute to final judgment and execution all suits and actions at law, in equity and in admiralty for any breach or violation of Hawaiian law, at the expense of the grantors; and the same to defend if brought against the said grantors by any pretended proprietor or foreign government; **and to refer any matter in dispute to arbitration and the same to settle and compromise**; and to do all acts in the management of the affairs of said parties as if it were the absentee government in the capacity aforementioned." (emphasis added).<sup>30</sup>

## **CHAPTER II. The Legal Status of the Hawaiian Kingdom under International Law is that of an Independent State.**

36. In the political history of the Hawaiian Kingdom, as it relates to international law and statehood, there are three (3) crucial events. *First*, the recognition of Hawaiian independence and statehood; *second*, the January 17, 1893 failed revolutionary attempt to overthrow the *de jure* government of the Hawaiian Kingdom; and, *third*, the failed annexation attempt of 1897-8 of the Hawaiian Islands by the United States of America.

37. As to all three events, the Parties are in agreement, as these historical facts come from the public record. Part One of the Claimant's Memorial gives a general overview of those events, while Part One of the Respondent's Memorial outlines a more rigorous approach in establishing statehood of the Hawaiian Kingdom as it withstood the attacks by a minority of revolutionaries and then by the belligerent acts of the United States of America.

### **A. The Hawaiian Kingdom has been under Pro-longed Occupation by the United States.**

38. As Hawai'i was clearly not *terra nullius* at the time of the illegal occupation by the United States of America in 1898, acquisition of its territory by any other State would have to be either by cession, conquest or prescription. Cession and conquest being clearly removed from the Hawaiian equation as pointed out in paragraphs 172 to 209 of the Respondent's Memorial and

reiterated in paragraphs 22 to 32 of the Claimant's Memorial. The only remaining possibility would be acquisition by prescription. To date there is no record of any international claim confirming prescription to any State, to include the United States of America, over the Hawaiian Islands, which would bar the exercise of Hawaiian statehood. Instead there exists protests of American encroachment of Hawaiian territory by Her Majesty Queen Lili'uokalani, Executive Chief of the Hawaiian Kingdom, and its nationals in 1897, as pointed out in paragraphs 194 to 198 of the Respondents Memorial and paragraphs 29 to 31 of the Claimant's Memorial.

39. Vamvoukos explains the role of protests:

"[i]n terms of result, a great deal will depend on the context in which a 'protest' occurs, including the surrounding circumstances and especially the effect of relevant rules of law...**Again, the protest to be effective as a bar to prescription must go to the heart of the claim.**" <sup>31</sup> (emphasis added)

**1. After the U.S. Senate fails to Ratify the so-called 1897 Treaty of Annexation, a Resolution is introduced in the U.S. House of Representatives to Annex the Hawaiian Islands by Domestic Legislation.**

40. As a result of the vigorous protests by the Hawaiian Kingdom Government and Hawaiian nationals, the United States Senate failed to achieve the required two-thirds vote of its members present <sup>32</sup> to ratify the so-called treaty of annexation with the *self-proclaimed* Republic of Hawai'i. However, despite the failed treaty of annexation, there still existed an appetite of the United States to seize the islands for military purposes. After the so-called treaty was killed, a resolution was introduced in the House of Representatives by Representative Newlands of the State of Nevada, which would provide for annexing the Hawaiian Islands by a domestic statute. <sup>33</sup> The resolution was referred to the U.S. House Committee on Foreign Affairs. <sup>34</sup>

41. The underlying objective for the renewed sense of annexation was military necessity. After the breakout of the Spanish-American War in 1898 and after the treaty was killed in the United States Senate, Naval Captain Mahan and Army General Schofield gave testimony as to the military importance of the Hawaiian Islands before the U.S. House Committee on Foreign Affairs.

42. Captain Mahan stated:

"It is obvious that if we do not hold the islands ourselves we can not expect the neutrals in the war to prevent the other belligerent from occupying them; nor can the inhabitants themselves prevent such occupation. The commercial value is not great enough to provoke neutral interposition. In short, in war we should need a larger Navy to defend the Pacific coast, because we should have not only to defend our own coast, but to prevent, by naval force, an enemy from occupying the islands; whereas, if we

preoccupied them, fortifications could preserve them to us. In my opinion it is not practicable for any trans-Pacific country to invade our Pacific coast without occupying Hawaii as a base." <sup>35</sup>

43. General Schofield stated:

"At this moment the Government is fitting out quite a large fleet of steamers at San Francisco to carry large detachments of troops and military supplies of all kinds to the Philippine Islands. Honolulu is almost in the direct route. That fleet, of course, will want very much to recoal at Honolulu, thus saving that amount of freight and tonnage for essential stores to be carried with it. Otherwise they would have to carry coal enough to carry them all the way from San Francisco to Manila and that would occupy a large amount of the carrying capacity of the fleet, and if they recoal at Honolulu all that will be saved. More than that, a fleet is liable at any time to meet with stress or weather, or perhaps a heavy storm, and there might be an accident to the machinery which will make it necessary to put into the nearest port possible for repairs and additional supplies. By that time it reaches there its coal supply may be well-nigh exhausted; it then has to replenish its coal supply to carry it to whatever port it could reach." <sup>36</sup>

44. After reciting more military rhetoric to the U.S. House of Representatives' Committee on Foreign Affairs as to the justification of seizing the Hawaiian Islands after the treaty had been denied, General Schofield arrogantly concludes that:

"We got a preemption title to those islands through the volunteer action of our American missionaries who went there and civilized and Christianized those people and established a Government that has no parallel in the history of the world, considering its age, and we made a preemption which nobody in the world thinks of disputing, provided we perfect our title. If we do not perfect it in due time, we have lost those islands. Anybody else can come in and undertake to get them.

So it seems to me the time is now ripe when this Government should do that which has been in contemplation from the beginning as a necessary consequence of the first action of our people in going there and settling those islands and establishing a good Government and education and the action of our Government from that time forward on every suitable occasion in claiming the right of American influence over those islands, absolutely excluding any other foreign power from any interference." <sup>37</sup>

45. The annexation resolution spurred heated debates in both the U.S. House of Representatives and then later in the Senate. The opponents of the resolution unsuccessfully argued the unconstitutionality of annexing a foreign territory by domestic Legislation as opposed to a treaty,<sup>38</sup> and could not hold back the tide of military expansionism. Notwithstanding this unilateral action by the United States which stood in violation of Hawaiian treaties and international law, the United States of America occupied the Hawaiian Kingdom at the height of the Spanish-American War of 1898, as outlined in paragraphs 206 and 207 of Respondent's Memorial:

"206. On August 13, 1898, the Klondike steamer entered Honolulu Harbor with American troops of the 1st New York Volunteer Infantry and U.S. Volunteer Engineers on board. They were stationed at the first U.S. military post to be established in the Hawaiian Islands called Camp McKinley which was located below Diamond Head in Waikiki on the Island of O'ahu.

207. This unprovoked incursion by a belligerent State into the territory of a neutral State was a violation of the Laws of War, as well as a breach of the treaties and conventions entered into between the Hawaiian Kingdom and the United States and the obligations thereunder."

## **2. The Illegal Occupation of the Hawaiian Kingdom is Provisional.**

46. Keith explains that the British Courts have long adopted the view that occupation is provisional.

"...in the *Gerasimo* (1857), the Privy Council pointed out that in order to convert a friendly or neutral territory into enemy territory, it was not sufficient that the territory in question should be under hostile occupation and subjected to the control of a hostile Power; some additional proceeding was necessary, *e.g.*, cession or conquest, whereby the territory was incorporated with and made part of the dominions of the invader...Lord Stowell emphasized the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time."<sup>39</sup>

47. In the absence of cession, conquest or a proven claim of prescription that extinguished Hawaiian statehood, the national character of the Hawaiian Kingdom cannot be legally changed. The legal status of the Hawaiian Kingdom is an illegally occupied State by a nation that can claim no international right or title, except through the ignorance of Hawaiian history.

48. Brownlie explains that:

"...illegal occupation cannot of itself terminate statehood.

Elsewhere the general question of balancing effectiveness and the principle *ex injuria non oritur jus* is considered. Here it must suffice to point out that, when elements of certain strong norms (the *jus cogens*) are involved, it is less likely that recognition and acquiescence will offset the original illegality." <sup>40</sup>

49. After careful analysis of the Memorials of both Parties, it is clear that there is no dispute as to the legal status of the Hawaiian Kingdom. This understanding is further evidenced in the Special Agreement of January 25, 2000, which makes specific reference to the 1907 Hague Conventions IV and V which established the jurisdiction of this Arbitral Tribunal. <sup>41</sup>

### **B. International Remedies are available to the Hawaiian Kingdom for International law Violations.**

50. The Hawaiian Kingdom, as an illegally occupied State, is afforded the protection of international law and the remedies available under it. Albeit, the present dispute between the Parties does not include the United States of America, but the circumstances of the dispute between a national and his government are a direct result of the illegal occupation. The basis of the dispute between the Claimant and Respondent rests on who is the responsible party for redress to the Claimant. The Hawaiian Kingdom Government finds itself with no other choice, but to establish an international obligation on the part of the United States of America and the Community of States in order to provide a legal framework to finally resolve the illegal occupation of the Hawaiian Kingdom, which has consequently violated the rights of the Claimant.

#### **1. International Crime Defined.**

51. The International Law Commission, in its draft articles concerning State responsibility, defines an international crime as:

"[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole..." <sup>42</sup>

52. The failure of the United States Government to execute both the civil and penal laws of the Hawaiian Kingdom while illegally occupying the islands, not only affected the property rights of subjects of the Hawaiian Kingdom resident in the Hawaiian Islands, but the property rights of all other residents, foreign nationals or otherwise, residing or doing business in the islands. Since the illegal occupation, and continuing through today, both domestic taxation and the collection of duties upon foreign imports are administered and collected under the auspices of United States law and not in accordance with Hawaiian Kingdom law. Moreover, the transference of property, both real and personal, by subjects of the Hawaiian Kingdom or citizens or subjects of foreign States, are subject to Hawaiian Kingdom law and not the domestic laws of an occupying

government. In addition, commercial treaties concluded between the Hawaiian Kingdom and other independent States, engage that the nationals of these States, while resident within the Hawaiian Kingdom are to be afforded the equal protection of Hawaiian Kingdom law. As these treaties remain intact they are still binding upon the high contracting States and their nationals, which includes the United States of America.

53. Furthermore, the International Law Commission determined that an international crime may result from:

"a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression." <sup>43</sup>

54. Commencing from the date of the illegal occupation of the Hawaiian Kingdom by the United States of America in 1898, military installations were erected throughout the islands in violation of its neutrality. According to the German-Greek Mixed Arbitral Tribunal, *Coenca Brothers vs. Germany*, (1927), this was an illicit act that authorized belligerent States to undertake, even on neutral territory, any operation of war necessary for its defense. <sup>44</sup> The United States military installations on the island of O'ahu, to include its naval facilities at Pearl Harbor, was the sole reason for the Japanese attack on Hawaiian soil on December 7, 1941.

55. Further, Hawaiian subjects, who were indoctrinated in the belief that they were American nationals, served in many American conflicts throughout the world to date, and many of whom ultimately gave their lives for a country not of their own. Presently, the military installations throughout the Hawaiian Islands, continue to place the Hawaiian Kingdom and its nationals in perilous danger. These actions by the United States of America constitutes an international crime as defined by the International Law Commission.

## **2. The United States is Obligated to discontinue Violation.**

56. §901(c) of the Foreign Relations Law of the United States (1986), in regards to the discontinuance of an international violation states:

"The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative, or judicial) that caused the violation; abstention from further violation; or performance of an act that the state was obligated but failed to perform. For instance, **there is an obligation to repeal a law illegally annexing a foreign territory...**" (emphasis added) <sup>45</sup>

57. In regard to the obligations for all States, the International Law Commission on State Responsibility has determined that:

"An international crime committed by a State entails an

obligation for every other State:

- (a) not to recognize as lawful the situation created by the crime;
- (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
- (c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
- (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime." <sup>46</sup>

58. Therefore, the international obligation of the United States is two fold: *first*, to comply with the 1907 Hague Conventions IV and V, as they relate to the occupation of a neutral State, together with the ultimate withdrawal of the United States Government from the territory of the Hawaiian Kingdom; and, *second*, to the treaty obligations entered into with the Hawaiian Kingdom, as well as all treaties made by the Hawaiian Kingdom with other independent States.

### **3. The Hawaiian Kingdom Requests the Arbitral Tribunal for the Indication of Interim Measures of Protection.**

59. Article 26(1) of the UNCITRAL rules of arbitration provides, in part, that:

"At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute..."

60. The Hawaiian Kingdom Government respectfully requests that the Arbitral Tribunal indicate that:

"The United States Government, to include the State of Hawai'i as its organ, should take all measures at its disposal to ensure its compliance with the 1907 Hague Conventions IV and V as they are applicable to the territorial dominion of the Hawaiian Kingdom, and should inform the Secretary General of the United Nations, or some duly authorized body, of all the measures which it has taken in implementation of that Order."

61. Although the United States of America is not a party to these arbitral proceedings, it has been put on notice to join in the arbitration as evidenced in Annex 84 of the Respondent's Memorial. This action taken by the Respondent Hawaiian Kingdom Government, with the consent of the Claimant, was a deliberate attempt to have the United States of America put forward its arguments before an International Tribunal as it relates to Hawaiian statehood and the violation of the Claimant's rights. To date, the United States of America, has not provided notice to the Respondent Hawaiian Kingdom Government of their intention to join in the arbitration to provide justification of its actions, or to challenge the jurisdiction of this duly constituted

Arbital Tribunal. The United States has consistently exhibited this form of conduct toward the Hawaiian Kingdom as evidenced in paragraphs 271 to 302 of the Respondent's Memorial.

62. Jurisdiction of this Arbitral Tribunal for the indication of interim measures of protection is provided by the 1907 Hague Conventions IV and V on, respectively, the Laws and Customs of War on Land and the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and the 1849 Hawaiian-American Treaty of Friendship, Commerce and Navigation.<sup>47</sup>

**4. The Arbitral Tribunal can Order Interim Measures of Protection for the Hawaiian Kingdom from violations by the United States even though the latter has not joined in these proceedings.**

63. Similar to the Respondent's unilateral request for the indication of interim measures of protection against the United States of America, the United States in the case concerning U.S. Diplomatic and Consular Staff in Tehran (1980) at the International Court of Justice, made the same such request. There the Court granted the United States its relief against Iran, even though Iran did not join in the proceedings.

64. On November 29, 1979 the United States of America had instituted proceedings at the International Court of Justice against Iran in a case arising out of the situation at its Embassy in Tehran and Consulates at Tabriz and Shiraz, and at the same time requested the indication of provisional measures.<sup>48</sup>

65. On December 15, 1979 the order indicating provisional measures was granted, pending the Court's final decision, to wit:

"A. (i) The Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulate be restored to the possession of the United States authorities under their exclusive control, and should ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) The Government of the Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) The Government of the Islamic Republic of Iran should, as from that moment, afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled under the treaties in

force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

B. The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution. <sup>49</sup>

66. Iran took no part in the proceedings instituted by the United States of America, either by the filing of pleadings or submissions. <sup>50</sup> In the absence of Iran, a Memorial was filed by the United States and oral hearings before the International Court of Justice were scheduled for March 18, 19 and 20, 1980. <sup>51</sup>

67. On May 24, 1980, Judgment was entered for and on behalf of the United States of America which declared, in part:

"...that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law." <sup>52</sup>

68. In regard to *international responsibility* that Court found:

"...that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963, the 1955 Treaty, and the applicable rules of general international law, has incurred responsibility towards the United States. As a consequence, there is an obligation on the part of the Iranian State to make reparation for the injury caused to the United States. Since, however, the breaches are still continuing, the form and amount of such reparation cannot yet be determined." <sup>53</sup>

69. Article 3 of the Draft Articles of *State Responsibility* explains the elements of an internationally wrongful act of a State as:

"(a) conduct consisting of an action or omission is attributable to the State under international law; and  
(b) that conduct constitutes a breach of an international obligation of the State." <sup>54</sup>

70. The United States of America cannot plead ignorance of the actions taken by the Hawaiian Kingdom Government as it relates to the international obligation of States, as well as the violation of the Claimant's rights as a Hawaiian subject. Therefore it must be construed as acquiescence, on the part of the United States, acknowledging the continued existence of Hawaiian statehood and the violation of the Claimant's rights by a political subdivision established under United States law.

### **CHAPTER III. Claimant's Submissions and the Task of the Arbitral Tribunal.**

#### **A. The Special Agreement.**

71. The task of the Arbitral Tribunal in this case is described in the clear terms of Article II of the Special Agreement of January 25, 2000:

"The Arbitral Tribunal is asked to determine, on the basis of the Hague Conventions IV and V of 18 October 1907, and the rules and principles of international law, whether the rights of the Claimant under international law as a Hawaiian subject are being violated, and if so, does he have any redress against the Respondent Government of the Hawaiian Kingdom?"<sup>5</sup>

#### **B. The Submissions of the Parties.**

72. The Submissions of the Parties are not incompatible with the Special Agreement. Both the Claimant and the Respondent ask the Tribunal to declare that the Claimant's rights as a Hawaiian subject are being violated under international law, but both differ on the matter of redress. The Claimant requests the Arbitral Tribunal to declare that the Claimant has "...redress against the Respondent Government of the Hawaiian Kingdom..."<sup>56</sup> The Hawaiian Kingdom Government requests the Arbitral Tribunal to declare that the "...Claimant does not have a right to redress against the Hawaiian Kingdom Government for these violations,"<sup>57</sup> but rather the "...Party responsible for the violations of the Claimant's rights, as a Hawaiian subject, is the United States Government."<sup>58</sup>

73. These formulations are compatible with the Special Agreement in that there is no derogation from the Arbitral Tribunal's mandate to determine if the Claimant has "...any redress against the Respondent Government of the Hawaiian Kingdom."<sup>59</sup> However, in light of these proceedings, an international crime has been exposed to the grave detriment of all the inhabitants of the Hawaiian Kingdom, and has been allowed to illegally continue for over one hundred (100) years. The Claimant is but one of many Hawaiian subjects, who are beginning to understand and ultimately exercise their civil and political rights they constitutionally possess, as well as foreign nationals, to include American citizens, who also understand their rights secured by the divers treaties and conventions between the Hawaiian Kingdom and their nations.

## SUBMISSIONS

Having regard to the considerations set forth in the Memorial and Counter-Memorial, to include the request for interim measures of protection, presented on behalf of the Hawaiian Kingdom Government and maintaining without change the submissions presented in the Memorial,

May it please the Arbitral Tribunal to adjudge and declare that:

1. The Claimant's rights, as a Hawaiian subject, are being violated under international law;
2. The Claimant does not have a right to redress against the Hawaiian Kingdom Government for these violations; and
3. The Party responsible for the violations of the Claimant's rights, as a Hawaiian subject, is the United States Government.

Date: Honolulu, Island of O'ahu, Hawaiian Kingdom, June 22, 2000.

Respectfully submitted,

David Keanu Sai, *Acting* Minister of Interior  
AGENT

Peter Umialiloa Sai, *Acting* Minister of  
Foreign Affairs,  
1st DEPUTY AGENT

Gary Victor Dubin, *Acting* Attorney General  
2nd DEPUTY AGENT

Kau'i P. Goodhue, *Acting* Minister of Finance  
3rd DEPUTY AGENT

## ENDNOTES

1. See Claimant's Memorial, paragraphs 38.
2. *Ibid.*, Annex 32.
3. See Pukui and Elbert, *Hawaiian Dictionary* (1971). *Lahui Kanaka* is defined as: Nation, people, tribe, multitude, p. 176; *Maoli* is defined as: Native, indigenous, genuine, true, real, p. 222; and *Kanaka Maoli* is defined as: Hawaiian person, p. 118.
4. *Supra.* note 2, paragraph 4 of the Tribunals Recognitions and Findings.
5. See Annex 1, section 5.
6. See Respondent's Memorial, paragraphs 80-82.
7. *Ibid.*, paragraph 163.
8. *Ibid.*, paragraphs 170-171.
9. *Ibid.*, paragraph 39.
10. *Ibid.*, Annex 9. *The Roster Legislatures of Hawai'i* provides a listing of members of the Legislative Assembly and Cabinet Ministers who were ethnically aboriginal Hawaiian as evidenced by their surnames. Non-native surnames could also refer to aboriginal Hawaiians because the native population was also ethnically diverse. *Example:* John Cummins, who served as Minister of Foreign Affairs under His Majesty King David Kalakaua, was half aboriginal Hawaiian and half Caucasian, but had a Caucasian surname.
11. *Supra.* note 9, paragraphs 194-209.
12. See Oxford Companion to Law (1980), definition of *Law*, p. 719.
13. *Supra.* note 4, paragraph 61.
14. *Supra.* note 11, paragraph 378. Paragraph 378 of the Respondent's Memorial was incorrectly typed. The second sentence should read "During His Excellency's testimony, he explained how, pursuant to international law and treaties regarding the Hawaiian Kingdom, Claimant's rights are protected under the laws of the Hawaiian Kingdom." This oversight is corrected and incorporated in the referenced quote of this Counter-Memorial.
15. See *Black's Law Dictionary, 4th Ed. (1968)*, p. 394.
16. *Supra.* note 10, *1864 Constitution, Article 1*, p. 88.

17. Ibid., *Article 13*, p. 89.
18. Ibid., *Article 14*, p. 89.
19. Ibid.
20. *Supra.* note 13, paragraph 58.
21. See Pollock, *First Book of Jurisprudence*, p. 110.
22. *Supra.* note 20, paragraph 59.
23. Ibid., paragraph 60.
24. Ibid., paragraph 61.
25. Ibid.
26. Ibid., paragraph 62.
27. *Supra.* note 14, paragraph 382.
28. Ibid., paragraph 384.
29. Ibid., Annex 6, *Chapter XVI - Of Proceedings in Special Cases, section 926*, p. 271
30. *Supra.* note 28, paragraph 239.
31. See Vamvoukos, *Termination of Treaties in International Law (1985)*, p. 301.
32. See *United States Constitution, Article II, section 2*, which gives to the U.S. President the power "...by and with the consent of the Senate, to make treaties, provided two thirds of the Senators present concur."
33. See United States Congressional Record, 55th Congress, 2nd Session, vol. XXXI, pp. 4600.
34. Ibid.
35. See Annex 2, pp. 5771-5772.
36. Ibid.
37. Ibid.

38. See Annexes 2; 3; 4; and 5.
39. See A. Berriedale Keith, *Wheaton's International Law (1944)*, p. 234.
40. See Brownlie, *Principles of Public International Law (1979)*, p. 83.
41. *Supra.* note 30, Annex 81.
42. See *Article 19, section 2, Draft Articles of State Responsibility*, provisionally adopted by the Draft Committee of the United Nation's International Law Commission.
43. *Ibid.*, Section 3(a).
44. See *7 M.A.T., (1928)*, pp. 686-687.
45. See *2 Restatement of the Law: The Foreign Relations Law of the United States, American Law Institute (1986)*, §901(c), p. 340.
46. *Supra.* note 41, Article 53.
47. *Supra.* note 30, paragraphs 151-153.
48. See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran, (1979-1981)*, International Court of Justice.
49. *Ibid.*, *Provisional Measures, Order of 15 December 1979.*
50. *Ibid.*, *Judgment of 24 May 1980.*
51. *Ibid.*
52. *Ibid.*, *Operative Part of Judgment, paragraph 1.*
53. *Ibid.*, *(d) International Responsibility.*
54. *Supra.* note 42, Article 3.
55. *Supra.* note 40.
56. *Supra.* note 26, Submissions.
57. *Supra.* note 46, Submissions.
58. *Ibid.*

59. *Supra.* note 54.

DECLARATION OF DAVID KEANU SAI

I, DAVID KEANU SAI, declare:

1. I am the Agent for the Respondent Hawaiian Kingdom Government in the Lance Paul Larsen vs. the Hawaiian Kingdom arbitration case at the Permanent Court of Arbitration. I make this Declaration in support of Respondent's Counter-Memorial and based upon my personal knowledge unless otherwise stated.
2. Attached hereto as Annex "1" is a true and correct copy of the United Nations General Assembly Resolution 1514 (XV), *Declaration on the granting of independence to colonial countries and peoples*, December 14, 1960.
3. Attached hereto as Annex "2" is a true and correct copy of the United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Saturday, June 11, 1898*, vol. XXXI, pp. 5769-5797.
4. Attached hereto as Annex "3" is a true and correct copy of the United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Monday, June 13, 1898*, vol. XXXI, pp. 5827-5851.
5. Attached hereto as Annex "4" is a true and correct copy of the United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *House of Representatives, Wednesday, June 15, 1898*, vol. XXXI, 5967-6021.
6. Attached hereto as Annex "5" is a true and correct copy of the United States Congressional Record: containing the Proceedings and Debates of the 55th Congress, 2nd Session, *Senate, Monday, June 20, 1898*, vol. XXXI, pp. 6138-6162.

Date: Honolulu, Island of O'ahu, Hawaiian Kingdom, June 22, 2000.

David Keanu Sai, *Acting* Minister of Interior  
AGENT