

Establishing an Acting Regency:

A Countermeasure Necessitated to Protect the Interest of the
Hawaiian State

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Unable to deny the legal reality of the American occupation of the Hawaiian Kingdom, and in light of the absence of any legitimate government in the Hawaiian Islands since 1893, the author and Donald A. Lewis, both being Hawaiian subjects, took deliberate political steps that would create severe legal consequences not only upon the occupant State, but also themselves. On December 10th 1995, both established the first co-partnership firm under Hawaiian Kingdom law since 1893, and, in order to protect the legal interest of the Hawaiian State, they would establish an *acting* Regent on December 15th as an officer *de facto*. Established under the legal doctrine of necessity, the *acting* Regency would be formed under and by virtue of Article 33 of the Constitution and laws of the Hawaiian Kingdom as it stood prior to the landing of the U.S. troops on January 16th 1893. These include laws that existed prior to the revolution of July 6th 1887, which eventually caused the illegal landing of United States troops in 1893.

At the core of these acts taken in December 1995 was the political existence of the Hawaiian Kingdom. Bateman states the “duty correlative of the right of political existence, is obviously that of political self-preservation; a duty the performance of which consists in constant efforts to preserve the principles of the political constitution.”¹ Political self-preservation is adherence to the legal order of the State, whereas national self-preservation is where the principles of the constitution are no longer acknowledged, *i.e.* revolution.² The establishment of an *acting* Regent—an officer *de facto*, would be a political act of self-preservation, not revolution, and be grounded upon the legal doctrine of limited necessity. According to de Smith, a British constitutional scholar, deviations from a State’s constitutional order “can be justified on grounds of necessity.”³ He continues to explain that “State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order [and to] this extent it has been recognized as an implied exception to the letter of the constitution.”⁴ Lord Pearce in Privy Council, also states that there are certain limitations to the principle of necessity, “namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful...Constitution, and (c) so far as they are not intended to and do not run contrary to the policy of the lawful sovereign.”⁵ In *Chandrika Persaud v. Republic of Fiji*, Judge Gates took up the matter of the legal doctrine of necessity and drew from the decision in the *Mitchell*

¹ William O. Bateman, *Political and Constitutional Law of the United States of America* (G.I. Jones and Company, 1876), 22.

² *Id.*

³ Stanley A. de Smith, *Constitutional and Administrative Law* (Penguin Books, Ltd., 1986), 80.

⁴ *Id.*

⁵ *Madzimbamuto v. Lardner-Burke* (1969), 1 A.C. 645, 732.

case,⁶ which provided that the requisite conditions for the principle of necessity consists of:

1. An imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the State;
2. There must be no other course of action reasonably available;
3. Any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
4. It must not impair the just rights of citizens under the Constitution; and
5. It must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

Brookfield summarized the principle of necessity as the “power of a Head of State under a written Constitution extends by implication to executive acts, and also legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them.”⁷ Brookfield also explains “such powers are not dependent on the words of a particular Constitution, except in so far as that Constitution designates the authority in whom the implied powers would be found to reside.”⁸ The assumption by private citizens up the chain of constitutional authority in government to the office of Regent, as enumerated under Article 33 of the Constitution, is a *de facto* process born out of necessity. Cooley defines an officer *de facto* “to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law,” but rather “comes in by claim and color of right.”⁹ According to Chief Justice Steere, the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned.”¹⁰

The Hawaiian legal order is comprised of the 1864 Constitution, as amended, the Civil and Penal Codes, Hawaiian common law, and the statutes enacted by the Hawaiian Legislative Assembly up to its last session in 1886. Any failure, on the part of the *acting* Regency, to adhere to this legal order could result in legal responsibility, and if the *acting* Regency willfully fails to adhere to Hawaiian law, it could stand trial for the violation of law when the lawful government is restored in accordance with the 1893 Cleveland-Lili`uokalani agreement of restoration. The *acting* Regency will always have the onus of proof of its proceedings and lawfulness, which is in line with Chief Judge Cullinan’s statement in the *Mokotso case*, where “the burden of proof of legitimacy must always rest upon the new regime. No

⁶ *Mitchell v. Director of Public Prosecutions* (1986), L.R.C. (Const) 35, 88–89.

⁷ F.M. Brookefield, “The Fiji Revolutions of 1987,” *NEW ZEALAND LAW JOURNAL* (July 1988): 250, 251.

⁸ *Id.*

⁹ Thomas M. Cooley, *A Treatise on the Law of Taxation* (Callaghan and Company, 1876), 185.

¹⁰ *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

presumption of irregularity can operate in the regime's favour; indeed there must be a presumption of irregularity."¹¹ Herein lies the ostensible nature of the *acting* Regency whereby proof of legitimacy must always be made.

The *acting* Regency would not be affiliated in any way with the native Hawaiian independence movement that perceives sovereignty as a political aspiration rather than a legal reality, nor would it be affiliated with the United Nations' *Permanent Forum on Indigenous Issues* or the *Special Committee of 24 on Decolonization*. Instead, it would be established and operate on the legal presumption that sovereignty remains vested in the Hawaiian Kingdom since 1843 despite the effectiveness of prolonged occupation. Being a subject of international law, the territory of the Hawaiian Kingdom was never made a colony of the United States by cession or conquest. Rather, the Hawaiian Kingdom was occupied by the United States for military purposes—a legal situation akin to the German occupation of Luxembourg, the Soviet occupation of the Baltic States of Latvia, Lithuania and Estonia, and the U.S. occupations of Japan, Iraq and Afghanistan. The United States, however, treated the Hawaiian Islands as if it were an American colony in order to disguise the illegal nature of its occupation of an independent and neutral State. As there are three distinct systems of law in an occupied State: the indigenous law of the occupied, the laws of the occupier, and international law;¹² the *acting* Regency falls under the indigenous law of the occupied State, and, as government officers *de facto*, it cannot claim to represent the people *de jure*, but only, at this time, provisionally represent the legal order of the Hawaiian Kingdom as a result of the limitations imposed by the law of occupation and the doctrine of necessity.

Effect of Occupation on Contracts

At present, there are no laws of the occupant as a result of its deliberate failure to establish a Military Government in the islands since 1898, and all official acts performed by the provisional government, the Republic of Hawai'i, and the U.S. Government, on behalf of or concerning the Hawaiian Islands after the overthrow of the Hawaiian Kingdom government, are illegal and invalid. The only exceptions, according to the seminal *Namibia* case, are the registration of births, deaths and marriages.¹³ In effect, this renders all contracts entered into within Hawaiian territory since 1893 to the present "null and void," since "no valid contract can be made unless its object is one permitted by the law."¹⁴ According to Page, a "genuine contract is an agreement to which the law attaches obligation; that is, it is an agreement of such a nature that the law will give some remedy for a breach thereof."¹⁵ He adds, "Another form of expressing the same idea is to say that a contract is an agreement enforceable at law."¹⁶ Similarly, English law provides that a

¹¹ *Mokotso v. HM King Moshoeshoe II* (1989) LRC (Const) 24, 132.

¹² Gehard von Glahn, *Law Among Nations*, 6th ed. (Maxwell Macmillan Canada, Inc. 1992), 774.

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion of June 21, 1971, ICJ Reports, 1971.

¹⁴ William T. Brantly, *Law of Contract*, 2nd ed. (M. Curlander 1912), 212.

¹⁵ William Herbert Page, *The Law of Contracts*, 2nd ed. (The W.H. Anderson Company 1920), 61.

¹⁶ *Id.*

“void contract is one which is destitute of legal effect.”¹⁷ All contracts entered into within the territory of the Hawaiian Kingdom since December 18th 1893 have no legal effect. The Hawaiian Civil Code mandates 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, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.”¹⁸

The *acting* Regent’s primary purpose would be to, first, expose the illegality of the prolonged occupation within the framework of recognized international law as they apply to existing sovereign States and the laws of the Hawaiian Kingdom; second, to ensure that the United States comply with the Hague and Geneva Conventions and establish a military government in order to administer the laws of the Hawaiian Kingdom; and, third, to prepare for the restoration of the Hawaiian government *de jure*. The *acting* Regency would not operate as a government in exile, but rather operate within Hawaiian territory and serve the interests of the indigenous government permitted by the laws of occupation.¹⁹

Formation of the Perfect Title Company

On December 10th 1995, a general partnership was formed in compliance with an *Act to Provide for the Registration of Co-partnership Firms, 1880*.²⁰ The partnership was named the Perfect Title Company (PTC), and functioned as a land title abstracting company.²¹ Since the enactment of the 1880 Co-partnership Act, members of co-partnership firms within the Kingdom registered their articles of agreements in the Bureau of Conveyances, being a part of the Interior department of the Hawaiian Kingdom.²² This same Bureau of Conveyances continues to exist and is presently administered by the State of Hawai’i. The law requires a notary public to acknowledge all documents before being registered with the Bureau,²³ but there have been no lawful notaries public in the Islands since 1893. All State of Hawai’i notaries public are commissioned under and by virtue of U.S. law. Therefore, in order for the partners of PTC to get their articles of agreement registered in the Bureau of Conveyances in compliance with the 1880 co-partnership statute, the following protest was incorporated and made a part of PTC’s articles of agreement, which stated:

¹⁷ William Reynell Anson, *Principles of the English Law of Contracts and of Agency in its Relation to Contract*, 11th ed. (Clarendon Press 1906), 14.

¹⁸ *Compiled Laws of the Hawaiian Kingdom* (Hawaiian Gazette 1884), §6.

¹⁹ Gehard von Glahn, *The Occupation of Enemy Territory...A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press 1957), 132-138, and *Law Among Nations*, *supra* note 12, 790.

²⁰ *Compiled Laws*, *supra* note 18, 648-650.

²¹ Co-partnership Agreement establishing Perfect Title Company, December 10, 1995, document no. 95-153346, Hawai’i Bureau of Conveyances.

²² Co-partnership agreements establishing Quong Lee and Company (1880), Cosmopolitan Hotel Company (1882), and See Sing Rice Company, Hawai’i Bureau of Conveyances.

²³ Hawai’i Revised Statutes, §502-41.

Each partner also agrees that the business is to be operated in strict compliance to the business laws of the Hawaiian Kingdom as noted in the “Compiled Laws of 1884” and the “session laws of 1884 and 1886.” Both partners are native Hawaiian subjects by birth and therefore are bound and subject to the laws above mentioned. And it is further agreed by both partners that due to the filing requirements of the Bureau of Conveyances to go before a foreign notary public within the Hawaiian Kingdom, they do this involuntarily and against their will.²⁴

PTC commenced on December 10th 1995, but there was no *military* government to ensure PTC’s compliance with the co-partnership statute from that date. The registration of co-partnerships creates a contract between co-partnerships on the one hand, and the Minister of the Interior, representing the government, on the other. It is obligatory for co-partnerships to register their articles of agreement with the Minister of the Interior, and for the Minister of the Interior, it is his duty to ensure that co-partnerships maintain their compliance with the statute. This is a contractual relationship, whereby:

there must be a promise binding the person[s] subject to the obligation; and in order to give a binding force to the promise the obligation must come within the sphere of Agreement. There must be an acceptance of the promise by the person to whom it is made, so that by their mutual consent the one is bound to the other. A Contract then springs from the offer of a promise and its acceptance.²⁵

The registration of co-partnerships is the offer of the promise by its members to abide by the obligation imposed by the statute, and the acceptance of this offer by the Interior department creates a contractual relationship whereby “one is bound to the other.” Section 7 of the 1880 Co-partnership Act clearly outlines the obligation imposed upon the members of co-partnerships in the Kingdom, which states:

The members of every co-partnership who shall neglect or fail to comply with the provisions of this law, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefore, without the necessity of joining the other members of the co-partnership in any action or suit, and shall also be severally liable upon conviction, to a penalty not exceeding five dollars for each and every day while such default shall continue; which penalties may be recovered in any Police or District Court.²⁶

The partners of PTC desired to establish a legitimate co-partnership pursuant to Hawaiian Kingdom law and in order for the title company to exist as a legal co-partnership firm, the government had to be reestablished in an acting capacity in order to serve as a necessary party to the contractual relationship created under and by virtue of the statute. An acting official is “not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to

²⁴ Co-partnership Agreement establishing Perfect Title Company, December 10, 1995, document no. 95-153346, Hawai’i Bureau of Conveyances.

²⁵ Sir William R. Anson, *Principles of the Law of Contract* (Callaghan and Company 1880), 11.

²⁶ Compiled Laws, *supra* note 18, 649.

which he himself does not claim title.”²⁷ It is an official that temporarily assumes the duties and authority of government.

The last legitimate Hawaiian Legislative Assembly of 1886 was prevented from reconvening as a result of the 1887 revolution. The subsequent Legislative Assembly of 1887 was based on an illegal constitution, which altered existing voting rights, and led to the illegal election of the 1887 Legislature. As a result, there existed no legitimate Nobles in the Legislative Assembly when Queen Lili`uokalani ascended to the Office of Monarch in 1891, and therefore, the Queen was unable to obtain confirmation for her named successors from those Nobles of the 1886 Legislative Assembly as required by the 1864 Constitution. Tragically, when the Queen died on November 11th 1917, there were no lawful successors to the Throne. In the absence of a confirmed successor to the Throne by the Nobles of the Legislative Assembly, Article 33 of the Constitution of 1864 provides:

should a Sovereign decease...and having made no last Will and Testament, the Cabinet Council at the time of such decease shall be a Council of Regency, until the Legislative Assembly, which shall be called immediately, may be assembled, and the Legislative Assembly immediately that it is assembled shall proceed to choose by ballot, a Regent or Council of Regency, who shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.²⁸

Hawaiian law did not assume that the whole of the Hawaiian government would be made vacant, and, consequently, the law did not formalize provisions for the reactivation of the government in extraordinary circumstances. Therefore, a deliberate course of action was taken to re-activate the Hawaiian government by and through its executive branch as officers *de facto*. In view of such an extreme emergency, Oppenheimer states that, “a temporary deviation from the wording of the constitution is justifiable if this is necessary to conserve the sovereignty and independence of the country.”²⁹

When properly interpreted, the 1864 Constitution provides that the Cabinet Council shall be a Council of Regency until a proper Legislative Assembly can be convened to “elect by ballot some native Ali`i [Chief] of the Kingdom as Successor to the Throne.”³⁰ It further provides that the Regent or Council of Regency “shall administer the Government in the name of the King, and exercise all the Powers which are Constitutionally vested in the King.”³¹ The Constitution also provides that the Cabinet Council “shall consist of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom, and these shall be His Majesty's Special Advisers in the Executive affairs of the Kingdom.”³² Interpretation of these constitutional provisions allows for the Minister of Interior to assume the powers vested in the Cabinet Council in the absence of the

²⁷ *Black's Law*, 6th ed. (West Publishing Company 1990), 26.

²⁸ 1864 HAWN. CONST., Article 33.

²⁹ F.E. Oppenheimer, “Governments and Authorities in Exile,” *American Journal of International Law* 36 (1942): 581.

³⁰ 1864 HAWN. CONST. Article 22.

³¹ *Id.*, Article 33.

³² *Id.*, Article 42.

Minister of Foreign Affairs, the Minister of Finance and the Attorney General, and consequently serve as Regent. This is a similar scenario that took place in 1940 when German forces invaded Belgium and captured King Leopold. As a result, the Belgian cabinet became a government in exile and, as a council of Regency, assumed all powers constitutionally vested in the King. Oppenheimer explains:

As far as Belgium is concerned, the capture of the king did not create any serious constitutional problems. According to Article 82 of the Constitution of February 7, 1821, as amended, the cabinet of ministers have to assume supreme executive power if the King is unable to govern. True, the ministers are bound to convene the House of Representatives and the Senate and to leave it to the decision of the united legislative chambers to provide for a regency; but in view of the belligerent occupation it is impossible for the two houses to function. While this emergency obtains, the powers of the King are vested in the Belgian Prime Minister and the other members of the cabinet.³³

The 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances, which is within the Interior department.³⁴ The Minister of the Interior holds a seat of government as a member of the cabinet council, together with the other ministers. Article 43 of the Constitution provides that, “Each member of the King’s Cabinet shall keep an office at the seat of Government, and shall be accountable for the conduct of his deputies and clerks.” Necessity dictated that in the absence of any “deputies or clerks” of the Interior department, the partners of a registered co-partnership could assume the duty of the same because of the current state of affairs. Therefore, it was reasonable for the partners of this registered co-partnership to assume the powers vested in the Registrar of the Bureau of Conveyances in the absence of the same; then assume the powers vested in the Minister of Interior in the absence of the same; then assume the powers constitutionally vested in the Cabinet Council in the absence of the Minister of Foreign Affairs, the Minister of Finance and the Attorney General; and, finally assume the power constitutionally vested in the Cabinet as a Regency. A regency is defined as “the man or body of men intrusted with the vicarious government of a kingdom during the minority, absence, insanity, or other disability of the [monarch].”³⁵

Formation of the Hawaiian Kingdom Trust Company to Serve as a Proxy of the Hawaiian Kingdom Government

With the specific intent of assuming the “seat of Government,” the partners of PTC formed a second partnership called the Hawaiian Kingdom Trust Company (HKTC) on December 15th 1995.³⁶ The partners intended that this registered partnership would serve as a provisional surrogate for the Council of Regency. Therefore, and in light of the ascension process explained above, HKTC could then

³³ Oppenheimer, *supra* note 29, 569.

³⁴ Compiled Laws, *supra* note 18, §1249.

³⁵ *Black’s Law*, *supra* note 27, 1282.

³⁶ Co-partnership Agreement establishing the Hawaiian Kingdom Trust Company, December 15, 1995, document no. 96-000263, Hawai’i Bureau of Conveyances.

serve as officers *de facto* for the Registrar of the Bureau of Conveyances, the Minister of Interior, the Cabinet Council, and ultimately as the Council of Regency. Article 1 of HKTC 's deed of general partnership provided:

The above mentioned parties have agreed to form a general partnership under the firm name of Hawaiian Kingdom Trust Company in the business of administering, investigating, determining and the issuing of land titles, whether in fee, or for life, or for years, in such manner as Hawaiian law prescribes... The company will serve in the capacity of *acting* for and on behalf of the Hawaiian Kingdom government. The company has adopted the Hawaiian Constitution of 1864 and the laws lawfully established in the administration of the same. The company is to commence on the 15th day of December, A.D. 1995, and shall remain in existence until the absentee government is re-established and fully operational, upon which all records and monies of the same will be transferred and conveyed over to the office of the Minister of Interior, to have and to hold under the authority and jurisdiction of the Hawaiian Kingdom.³⁷

Thirty-eight deeds of trusts conveyed by Hawaiian subjects to HKTC acknowledged the trust as a company acting for and on behalf of the Hawaiian government and outlined the role of the trust company and its fiduciary duty it had to its beneficiaries.³⁸ HKTC was not only competent to serve as the *acting* cabinet council, but also possessed a fiduciary duty toward its beneficiaries to serve in that capacity until the government is re-established *de jure* in accordance with the terms of the 1893 Cleveland-Lili'uokalani agreement. According to Pomeroy:

Active or special trusts are those in which, either from the express direction of the language creating the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the *cestui que trustent* [beneficiary of a trust]. They may, except when restricted by statute, be created for every purpose not unlawful, and, as a general rule, may extend to every kind of property, real and personal.³⁹

From Trust Company to acting Regency

The purpose of HKTC was two fold; first, to ensure PTC complies with the co-partnership statute, and, second, provisionally serve as the government of the Hawaiian Kingdom, in particular, on behalf of its beneficiaries. What became apparent was the seeming impression of a conflict of interest, whereby the duty to comply and the duty to ensure compliance was vested in the same two partners of

³⁷ *Id.*

³⁸ See Deeds of Trust to the Hawaiian Kingdom Trust Company, a general partnership, Doc. no.'s 96-004246, 96-006277, 96-014116, 96-026387, 96-026388, 96-028714, 96-024845, 96-032930, 96-044551, 96-044550, 96-047382, 96-047380, 96-047379, 96-047381, 96-056981, 96-052727, 96-060519, 96-032728, 96-057667, 96-057668, 96-060520, 96-061209, 96-061207, 96-056980, 96-052729, 96-063384, 96-063385, 96-063382, 96-057664, 96-019923, 96-046712, 96-063386, 96-063382, 96-063383, 96-066996, 96-061208 and 96-046711, State of Hawai'i Bureau of Conveyances.

³⁹ John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* (Bancroft-Whitney Company 1907), 553.

two companies. Therefore, in order to avoid this apparent conflict of interest, the partners of both PTC and HKTC, reasoned that an *acting* Regent, having no interests in either company, should be appointed to serve as representative of the Hawaiian government. Since HKTC assumed to represent the interests of the Hawaiian government in an acting capacity, the trustees would therefore make the appointment. The trustees looked to Article XXXI, Chapter XI, Title 3 of the Hawaiian Civil Code, whereby the *acting* Regency would be constitutionally authorized to direct the executive branch of the government in the formation and execution of the reconvening of the Legislative Assembly, so that the government could procedurally move from provisional to *de jure*.⁴⁰

It was agreed that the author would be appointed to serve as *acting* Regent, but could not retain an interest in the two companies prior to the appointment. In that meeting, it was agreed upon and decided that Nai`a-Ulumaimalu would replace the author as trustee of HKTC and partner of PTC. The plan was to maintain the standing of the two partnerships under the co-partnership statute, and not have them lapse into sole-proprietorships. To accomplish this, the author would relinquish his entire one-half interest by deed of conveyance in both companies to Lewis; after which Lewis would convey a redistribution of interest to Nai`a-Ulumaimalu, whereby the former would hold a ninety-nine percent interest in the two companies and the latter a one percent interest in the same. In order to have these two transactions take place simultaneously without affecting the standing of the two partnerships, both deeds of conveyance would happen on the same day but won't take effect until the following day, February 28th 1996. These conveyances were registered in the Bureau of Conveyances in conformity with the 1880 Co-partnership Act.⁴¹

With the transactions completed, the Trustees then appointed the author as *acting* Regent on March 1st 1996, and thereafter filed a notice of this appointment with the Bureau of Conveyances.⁴² Thereafter, HKTC resumed its role as a general partnership within the meaning of the 1880 Co-partnership Act, and no longer served as “a company *acting* for and on behalf of the Hawaiian Kingdom government” and prepared for the dissolution of the company. On May 15th 1996, the Trustees conveyed by deed all of its right, title and interest acquired by thirty-eight deeds of trust to the *acting* Regent, and stipulated that the company would be dissolved in accordance with the provisions of its deed of general partnership on June 30th 1996.⁴³ The transfer and subsequent dissolution, was made in accordance with section 3 of the 1880 Co-partnership Act, which provides that “whenever any change shall take place in the constitution of any such firm...a statement of such change or dissolution shall also be filed in the said office of the Minister of the

⁴⁰ Compiled Laws, *supra* note 18, Title 3—Of the Legislative Department, 214-234.

⁴¹ Deed from David Keanu Sai to Donald A. Lewis, document no. 96-026389; Deed from Donald A. Lewis to Nai`a-Ulumaimalu, document no. 96-027002, State of Hawai`i Bureau of Conveyances.

⁴² Notice of Appointment of *Acting* Regent by the Trustees of the Hawaiian Kingdom Trust Company, a general partnership, document no. 96-035316, Hawai`i Bureau of Conveyances.

⁴³ Deed from the Hawaiian Kingdom Trust Company, a general partnership, to *Acting* Regent, document no. 96-067865, Hawai`i Bureau of Conveyances.

Interior, within one month from such...dissolution.”⁴⁴ On February 28th 1997, a Proclamation by the *acting* Regent announcing the restoration of the Hawaiian government was printed in the March 9th 1997 issue of the Honolulu Sunday Advertiser newspaper. The proclamation stated, in part, that the:

Hawaiian Monarchical system of Government is hereby re-established, [and the] Civil Code of the Hawaiian Islands as noted in the Compiled Laws of 1884, together with the session laws of 1884 and 1886 and the Hawaiian Penal Code are in full force. All Hawaiian Laws and Constitutional principles not consistent herewith are void and without effect.⁴⁵

Since the appointment of the *acting* Regent, there have been twenty-six commissions that filled vacancies of the executive and judicial departments. These governmental positions, as statutorily provided, comprise officers *de facto* of the Hawaiian government while under American occupation. Governmental positions that are necessary for the reconvening of the Legislative Assembly in accordance with Title III of the Civil Code would be filled by commissioned officers *de facto*. In September 1999, the *acting* Regent commissioned Peter Umialiloa Sai as *acting* Minister of Foreign Affairs, Kau`i P. Goodhue as *acting* Minister of Finance, and Gary V. Dubin, Esquire, as *acting* Attorney General. At a meeting of the Cabinet Council on September 10th 1999, it was determined by resolution “that the office of the Minister of Interior shall be resumed by David Keanu Sai, thereby absolving the office of the Regent, *pro tempore*, and the same to be replaced by the Cabinet Council as a Council of Regency, *pro tempore*, within the meaning of Article 33 of the Constitution of the Country.”⁴⁶ The author serves as Prime Minister⁴⁷ and chairman of the *acting* Council of Regency.

Democratic principles are suspended during occupations. Military government is imposed “either by reason of military necessity as a right under international law, or as an obligation under international law,” but regulated by The Hague and Geneva conventions.⁴⁸ The *acting* Regency was not established out of democratic principles, but out of necessity in order to serve as the provisional organ of the Hawaiian Kingdom and represent its interest during the occupation. It serves as a component of a military government yet to be established, and not the sole organ of the occupied State. The legitimacy of the *acting* Regency is derived strictly from law and legal principles of the Hawaiian Kingdom and functions under the limited legal doctrine of necessity. The right of Hawaiian nationals to reinstate their government, by its statutory provisions, is clear and unequivocal under the international principle of the continuity of the occupied State and its legal order.

⁴⁴ Compiled Laws, *supra* note 18, 649.

⁴⁵ Proclamation of *Acting* Regent declaring the Hawaiian Monarchical form of Government is re-established, February 28, 1997, published in the March 9, 1997 issue of the Honolulu Sunday Advertiser. Also recorded in its entirety in the Bureau of Conveyances as document no. 97-027541.

⁴⁶ Resolution establishing a Council of Regency, September 10, 1999.

⁴⁷ After the office of Premier (Prime Minister) was repealed by the 1864 Constitution, the term Prime Minister referred to the person who organized government in the Cabinet Council, whether that person was to be the Minister of the Interior, Minister of Foreign Affairs, Minister of Finance or the Attorney General.

⁴⁸ “United States Army and Navy Manual of Military Government and Civil Affairs,” *U.S. Army Field Manual 27-5*, 2 (December 22, 1843).

The Hawaiian government did not foresee the possibility of its territory subjected to prolonged occupation, where indoctrination and the manipulation of its political history affected the psyche of its national population. Therefore, it did not provide a process for reinstating the government, being the organ of the State, either in exile or within its own territory. But at the same time, it did not place any constitutional or statutory limitations upon the restoration of its government that could serve as a bar to its reinstatement—save for the legal parameters of necessity. The legal basis for the reassertion of Hawaiian governance, by and through a Hawaiian general partnership statute, is clearly extraordinary, but the exigencies of the time demanded it. In the absence of any Hawaiian subjects adhering to the statutory laws of the country as provided for by the country's constitutional limitations, the abovementioned process was established for the establishment of an *acting* Regency, pending the reconvening of the Legislative Assembly to elect by ballot a Regent or Regency *de jure* as provided for under Article 22 of the Constitution. Marek emphasizes that:

it is always the legal order of the State which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile; but never the delegation of the territorial State nor any rule of international law other than the one safeguarding the continuity of an occupied State. The relation between the legal order of the territorial State and that of the occupied State...is not one of delegation, but of co-existence.⁴⁹

Wolff states, “in so far as conditions provided for in the constitutional law cannot be complied with owing to the occupation of the country by the enemy, a dispossessed government can act without being compelled to fulfill those conditions.”⁵⁰ Also commenting on exiled governments, Marek explains that, “while the requirement of internal legality must in principle be fulfilled for an exiled government to possess the character of a State organ, minor flaws in such legality are easily cured by the overriding principle of its actual uninterrupted continuity.”⁵¹ Oppenheimer also provides that “such government is the only *de jure* sovereign power of the country the territory of which is under belligerent occupation.”⁵² It follows, *a fortiori*, that when an “occupant fails to share power with the lawful government under the auspices of international law, the latter is not precluded from taking whatever countermeasures it can in order to protect its interests during and after the occupation.”⁵³

⁴⁹ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed., (Librairie Droz 1968), 91.

⁵⁰ Ernst Wolff, “The International Position of Dispossessed Governments at Present in England,” *Modern Law Review* 6 (1942-1943): 215.

⁵¹ Marek, *supra* note 49, 98.

⁵² Oppenheimer, *supra* note 29, 568.

⁵³ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993), 212.

Native Tenant Rights and the Quieting of Title to Real Property

The willful failure of the U.S. to administer Hawaiian Kingdom law had a direct and profound impact on real estate transactions in the Islands that prevented titles from being lawfully conveyed. The failure of direct administration also prevented native tenants from dividing out their vested rights into fee-simple titles under the rules of the 1848 Great Mahele since the overthrow. According to Cooley, “defects in conveyances and contracts which render them inoperative arise from two causes;—1. Defect in legal capacity in the party making them; 2. Failure to observe some legal formality in their execution.”⁵⁴ Legal formalities under Hawaiian statute provides that “it shall not be lawful to record any conveyance...unless the same shall have been previously impressed with the Royal stamp,”⁵⁵ and in order “to entitle any conveyance...to be recorded, it shall be acknowledged by the party or parties executing the same, before the Registrar of Conveyances, or his agent, or some judge of a court of record, or notary public of this Kingdom, or before some minister, commissioner or consul of the Hawaiian Islands, or some notary public or judge of a court of record in any foreign country.”⁵⁶ Since January 17th 1893, there have been no legitimate officers, whether *de facto* or *de jure*, notarizing real estate transactions; nor were individuals complying with Hawaiian Kingdom laws, whether by choice or circumstance. According to Chief Justice Judd in *Lenehan v. Akana* (1884), if a conveyance, whether by deed or mortgage, “was not properly acknowledged it was not entitled to be recorded, and though spread upon the record it must be treated as a nullity.”⁵⁷

As a trust company, HKTC held a fiduciary duty toward its beneficiaries who possessed an undivided vested right in the *dominium* as members of the native tenant class, but as a provisional proxy of the government, HKTC had a corresponding duty to protect and acknowledge these rights, which are constitutionally vested. Freehold interests in fee-simple could not be transferred in the absence of the Hawaiian Kingdom government, whether by conveyance, will, or heirship. According to Hawaiian law, all land titles are subject to the following conditions in addition to the rights of native tenants.

1. To punish for high treason by forfeiture, if so the law decrees.
2. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.
3. To encourage and even enforce the usufruct of lands for the common good.
4. To provide public thoroughfares and easements, by means of roads, bridges, streets, &c., for the common good.
5. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.⁵⁸

⁵⁴ Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, 3rd ed. (Little, Brown and Company, 1898), 355.

⁵⁵ Compiled Laws, *supra* note 18, §1254.

⁵⁶ *Id.*, §1255.

⁵⁷ *Lenehan v. Akana*, 6 Hawai`i 538, 541 (1884).

⁵⁸ *Statute Laws of His Majesty Kamehameha III, vol. II* (Government Press 1847), 85.

The beneficiaries of HKTC not only possessed a vested right in the *dominium*,⁵⁹ but also the right to divide their interest in fee-simple, whenever they “shall desire such a division.”⁶⁰ The only bar to this right would be a valid fee-simple title recognizable under Hawaiian Kingdom law as provided in rule 5 of the Great Mahele.⁶¹ Hence, current claims to fee-simple titles would have to be investigated before any beneficiary or native tenant could divide out their interest. Because these rights are undivided in the entire territory of the Hawaiian Islands, a division by a native tenant could take place anywhere. On February 3rd 1996, the Trustees acting upon the vested rights of its beneficiaries passed a resolution announcing the quieting of all land titles in the Hawaiian Islands.⁶² The Trustees also adopted six principles to aide in the investigation of claims to fee-simple titles.⁶³ In order to bind PTC and its successors to the faithful performance of the “investigation and final ascertainment or rejection of all claimants of fee-simple titles,” both companies entered into a covenant of agreement on February 6th 1996.⁶⁴

Public Notice of Quieting Land Titles

The announcement of the quieting of all land titles in the Hawaiian Islands was published in the February 19th 1996, issue of the Pacific Business newspaper, the March issue of the *Ka Wai Ola o Oha* newspaper, and in the March 9th 1997, issue of the Honolulu Advertiser.⁶⁵ Claimants submitted evidence of their fee-simple title at the office of PTC between February 14th 1996 and February 14th 1998. On March 1st 1996, the *acting* Regent succeeded HKTC as a party to the covenant of agreement. Being the representation of the original warrantor of all lands in fee-simple—the Hawaiian government, the *acting* Regent was empowered to remedy rejected claims that have been properly investigated by PTC in accordance with the abovementioned *covenant of agreement*. It was later decided that remediation by purchase of “lease or a fee-simple grant at market value,” would be a matter for the *de jure* government to address. For claimants of the native tenant class, though, remediation was possible. In other words, only native tenants with a claim to fee-simple title that have been investigated by PTC were capable of remediation by the *acting* Regent.

⁵⁹ 1840 Constitution states “Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.”

⁶⁰ *Minutes of the Privy Council*, December 11, 1847, 129.

⁶¹ *Id.*

⁶² Resolution of the Trustees of the Hawaiian Kingdom Trust Company, a general partnership, attached as Exhibit A of the Agreement entered between the Hawaiian Kingdom Trust Company, a general partnership, and Perfect Title Company, a general partnership, February 3, 1996, document no 96-016046, Hawai'i Bureau of Conveyances.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Announcement of Notice to Quiet Title printed in the February 19, 1996 issue of the Pacific Business News, Honolulu.

Regarding the remediation for all other claimants not of the native tenant class, whether Hawaiian subjects or foreigners, the *de jure* government could follow the actions taken by the U.S. Supreme Court in the aftermath of the Civil War as it “exercised the prerogative power of the [returning] sovereign.”⁶⁶ According to Cooley, “When resistance to the federal government ceased, regard to the best interests of all concerned required that such governmental acts as had no connection with the disloyal resistance to government, and upon the basis of which the people had acted and had acquired rights, should be suffered to remain undisturbed. But all acts don in furtherance of the rebellion were absolutely void, and private rights could not be built up under, or in reliance upon them.”⁶⁷ In *Texas v. White*, the U.S. Supreme Court held that:

acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.⁶⁸

On March 1st 1996, the *acting* Regent issued a Proclamation confirming the quieting of all land titles in the Hawaiian Islands. The Proclamation stated, in part,

Whereas the aforementioned companies (Hawaiian Kingdom Trust Company and Perfect Title Company) have mutually entered into “Articles of Agreement,” duly registered as document no. 96-016046 in the Bureau of Conveyances, in the adjudication of each claim to fee-simple title,

Now, therefore, I David Keanu Sai, Regent of the Hawaiian Kingdom, by virtue of the authority in me vested, do hereby confirm this great act, with the following exception, to wit;

1st. Where the Hawaiian Kingdom Trust Company would issue patents in fee-simple or enter into lease agreements for individuals who qualify for the same, this shall now be done by the Office of the Regent, or in such person as will be lawfully delegated by the same.

2nd. Upon the completion of all investigative reports, the Hawaiian Kingdom Trust Company shall enter into the Bureau of Conveyances a notice of determination, for public record.⁶⁹

⁶⁶ Benvenisit, *supra* note 53, 72.

⁶⁷ Cooley, *supra* note 54, 190; see also Keppel v. Railroad Co., Chase’s Dec. 167; Cook v. Oliver, 1 Woods 437; Hatch v. Burroughs, 1 Woods 439; Thorington v. Smith, 8 Wall. 1; Horn v. Lockhart, 17 Wall. 570; Sprott v. United States, 20 Wall. 459; Ford v. Surget, 97 U.S. 594; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Wall. 439; Ford v. Surget, 97 U.S. 594.

⁶⁸ *Texas v. White*, 74 U.S. 700, 733 (1868).

⁶⁹ Proclamation of *acting* Regent confirming the quieting of all land titles, March 1, 1996, document no. 96-035328, Hawai’i Bureau of Conveyances.

Profound Impact on Real Estate Industry

PTC maintained a staff of thirteen employees comprising of title abstractors and secretarial services. On February 23rd 1996 at 10:59 a.m., Mr. Colin Malani filed the first claim to his fee-simple title and assigned claim no. 1. The final claim for investigation was submitted by Ms. Jan Lei Pa`alua on February 14th 1998 at 9:20 p.m., and assigned claim no. 611. PTC's investigations and findings exposed the ramifications of the illegal overthrow on the real estate industry—i.e. mortgages, promissory notes (loans) and title insurance. Mortgages being security instruments whereby a borrower (mortgagor) conveys an equitable interest in his real property to a lender (mortgagee) to ensure repayment of the loan. When the loan is paid in full, the mortgagee releases the mortgage back to the mortgagor thereby terminating the mortgage agreement; but if the mortgagor defaults on the repayment of the loan, the mortgagee is authorized under the mortgage agreement to foreclose on the property and sell it at auction. All monies received at the sale goes to pay off the loan, and any excess monies from the sale will be returned to the borrower. If a person was determined not to have a valid title in fee-simple, it renders him incapable of mortgaging the property as collateral to secure the repayment of the loan. In other words, a mortgage is dependent on title to the land being mortgaged, without which there is no mortgage. Without a valid mortgage, the lender is prevented from initiating foreclosure proceedings to recoup loss of money loaned, and thereby the loan is unsecured.

In order to protect the lender from this situation, the borrower is required to purchase a lender's title insurance policy before the lender accepts the mortgaged property and releases the monies loaned. Therefore, if an investigation finds that the mortgagor had no title to the mortgaged property in the first place, the insurance company is liable to pay off the loan according to the terms of the lender's policy, unless the investigation could be refuted. Title insurance is:

A policy issued by a title company after the searching the title, representing the state of that title and insuring the accuracy of its search against claims of title defects. ...This form of insurance is taken out by a purchaser of the property or one loaning money on mortgage, and is furnished by companies specially organized for the purpose, and which keep complete sets of abstracts or duplicates of the records, employ expert title-examiners, and prepare conveyances and transfers of all sorts.⁷⁰

After receiving the findings of the title reports done by PTC, the claimants approached their escrow companies where they purchased the title insurance policy. This put the escrow companies in a precarious position—refute PTC's title report or activate the title insurance to pay off the loan. The escrow companies did neither. In fact, Bruce Graham, an attorney specializing in real estate who sat on a panel with the author sponsored by the Hawai`i Developers Council, admitted to the author that PTC's reports could not be refuted.⁷¹ Unable to disprove PTC's reports, the title companies shifted focus away from the issue of title insurance and began to

⁷⁰ *Black's Law*, *supra* note 27, 806.

⁷¹ Symposium entitled, "Perfect Title Company: Scam or Restoration." Sponsored by the *Hawai`i Developers Council*, Hawai`i Prince Hotel, Honolulu, August 1997.

accuse PTC of advising their clients to stop making mortgage payments. This was completely nonsensical because without a fee-simple title there is no mortgage, which is the reason why title insurance is required to be purchased by a borrower in order to protect the lender.

John Jubinsky, general counsel for Title Guaranty, stated that Perfect Title's contentions are "palpable nonsense."⁷² He went on to argue that, "However they may view history, there is no escaping the fact that the territory of Hawaii existed and there is no escaping the fact that the state of Hawaii exists. If their theory were correct, tell me what that does to adoptions, divorces, marriage [and] the incarceration of criminals."⁷³ Charlotte Vick, spokeswoman for Finance Enterprises, parent company of Finance Factors, also expressed worry when she stated, "Our main concern is for the customers following this line of logic that Perfect Title suggests. They don't pay their mortgage and therefore lose their homes."⁷⁴ Lewis, PTC's President, responded, "I wouldn't want anyone to lose their home. What I'm saying is, the report we did shows that there is no title there...Obviously, if there is no title, there cannot be a mortgage."⁷⁵

PTC completed title investigations on properties that spanned across all the major islands, except for Lana'i and Ni'ihau. The Honolulu Star-Bulletin reported that, "Lawyers, lenders and others say Perfect Title's claims are causing confusion about property transactions and concern among absentee landowners from Japan and the mainland [continental U.S.]. Title Guaranty of Hawaii attorney John Jubinsky laments Perfect's findings as a scam that is 'starting to inflict serious damage.'"⁷⁶ On July 23rd 1997, editorial staff of the Honolulu Star-Bulletin called for the investigation of PTC, stating its "business practices should be examined by both the attorney general's office and federal authorities to determine if they are in compliance with the law. If not, appropriate charges should be brought against this bizarre operation."⁷⁷

The Inevitable Collision between Occupier and Occupied

On September 5th 1997, the Honolulu Police arrested Lewis, the author, and the company's secretary, Christine Chew, "for investigation of theft, racketeering and tax evasion," and seized all the company's records and computers.⁷⁸ According to the Honolulu Advertiser, the "arrests were the result of a joint investigation by the state attorney general's office and the Police Department."⁷⁹ All three were released the same day pending further investigation. Unable to substantiate these bizarre allegations, the State moved to secure grand jury indictments on December

⁷² "Title Firm Disdains Land Claims Made Since End of Monarch," *Honolulu Advertiser*, A1 (May 5, 1997).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ "Land Claim Chaos," *Honolulu Star-Bulletin*, A8 (January 27, 1997).

⁷⁷ "Judge's Welcome Blast on False Land Claims," *Honolulu Star-Bulletin*, A20 (July 23, 1997).

⁷⁸ "Perfect Title Workers Jailed, Records Taken," *Honolulu Star-Bulletin*, A1 (September 6, 1997).

⁷⁹ "Agents raid Perfect Title," *Honolulu Advertiser* A1 (September 6, 1997).

17th 1997, against Lewis and the author on one count each of attempted theft in the first degree, a class B felony.⁸⁰ Also indicted were PTC clients Michael and Carol Simfranca, husband and wife, on two counts each of attempted theft in the first degree and burglary in the first degree.⁸¹ The Grand Jury was convened by Dwight Nadamoto, Deputy Attorney General, representing the State of Hawai`i, and observed by Clifford Hunt, Independent counsel to the Grand Jury, and Paul Mau, Deputy Prosecuting Attorney for the City and County of Honolulu. Craig H. Uyehara, the complainant and person who claimed to own the realty in question, was an attorney for the State of Hawai`i Department of Commerce and Consumer Affairs, and Daniel Hanagami, a Lieutenant with the Honolulu Police department's white-collar crime unit, testified on behalf of the State of Hawai`i. All parties, including the complainant, were government employees of the State of Hawai`i.

The basis of the indictment alleged that the fee-simple title held by the Simafranca's was foreclosed and sold at auction to a realtor who subsequently sold the property to the Uyehara's, while Craig H. Uyehara was employed as an attorney for the State of Hawai`i's Department of Commerce and Consumer Affairs. Prior to the transference of the property at auction, the Simafranca's filed a claim on July 16th 1996, with PTC to investigate the validity of their fee-simple title, and assigned claim no. 64. The title report was concluded on August 5th 1996, and determined that the Simafranca's had no valid claim to a fee-simple title, because the fee-simple interest remained vested in James Austin, who died testate in 1894, and whose estate "remained subject to probate proceedings of a competent tribunal" under laws of the Hawaiian Kingdom.⁸² The self-proclaimed Republic of Hawai`i was not lawful and could not probate Austin's estate. After receiving the title report they submitted a claim with Title Guaranty of Hawai`i to either refute PTC's report or have the insurance policy they purchased payoff the remaining balance on the loan. Title Guaranty did not answer the letters sent to them by the Simafranca's and the so-called foreclosure and auction continued. On July 26th 1996, Leroy Ujimori conveyed, by commissioner's deed, the property to Myung Soo Hwang and I Sun Hwang, husband and wife.⁸³ The Hwang's in turn conveyed the property to Craig Hideki Uyehara and Sandra Ken Uyehara, husband and wife, on November 22nd 1996.⁸⁴

Of the Simafranca's, only Carol was a native tenant and she decided to remedy her claim by dividing out her undivided interest in the *dominium* and thereby received a fee-simple title on November 21st 1996, by warranty deed from the author, as *acting* Regent, to the same property that had been investigated. The deed was filed with the Bureau of Conveyances.⁸⁵ A warranty of seisin was also issued by the *acting* Regent on April 10th 1996, whereby the covenant of warranty

⁸⁰ HRS §705-500, and HRS §708-830.5.

⁸¹ *Id.*, §708-810(1)(c).

⁸² Notice of Investigation by Perfect Title Company, Claim no. 64, document no. 96-115252, Hawai`i Bureau of Conveyances.

⁸³ Document no. 2325618, July 26, 1996, Bureau of Conveyances.

⁸⁴ Document no. 2350251, November 22, 1996, Bureau of Conveyances.

⁸⁵ Warranty Deed to Mrs. Carol Simafranca, Claim no. 64, from the *acting* Regent, document no. 96-165697, Bureau of Conveyances.

was explicitly stated.⁸⁶ On January 6th 1997, the Uyehara's received a letter from the Simafranca's notifying them that they are the owners of the property, and if there are any questions on the warranty to contact the author. In the evening of January 10th, the Simafranca's traveled to their home and had a locksmith change the locks, and there they confronted the Uyehara's. A police officer was called to the scene, and, according to the Simafranca's, advised both parties to consult legal advice because this is a land title dispute. He did not arrest the Simafranca's for burglary or even criminal trespass.

Theft, a popular name for larceny, is the "fraudulent taking of *personal property* belonging to another (emphasis added)," not real property.⁸⁷ According to the well known treatise *Criminal Law and Its Administration*, larceny, which is the crime of theft, consists of five elements, namely: (1) the taking, (2) the carrying away, (3) personal property, (4) of another, and (5) with intent to steal.⁸⁸ In other words since personal property is moveable and real property is immovable, only the former can be the subject of theft, while the latter is a subject of trespass. Cook and Marcus explain:

The subject of larceny at common law is personal property. Interest in real property is not included, nor objects attached to the soil, such as trees and crops, at least so long as the severance and asportation are a continuous act. In *Bell v. State*, 63 Tenn. 424 (1874), the court offered this test: If when the property is severed by the thief, he leaves it on the ground, goes off, and after an interval of time returns and carries it away, so that the severance and asportation are two distinct acts, then he has committed larceny.⁸⁹

Most States of the United States, however, adopted by statute a more comprehensive definition of property than the common law by including real property in the definition of theft, which includes the State of Hawai'i.⁹⁰ A limitation to this inclusion of real property, though, was that since "real estate was immovable and fairly indestructible [it] could therefore safely be excluded from theft penalties. The real estate exception was extended...to exclude fixtures, growing of crops, and deeds from punishment for theft."⁹¹ Opposing and separate deeds of title to one in the same property was not the subject of theft, but rather deeds deriving from the owners of the property themselves, either through their agents or by deception. This view is consistent with the American Law Institute on this subject, where it "seems clear that a theft prosecution should be possible where the [criminal] actor, having power as a trustee, attorney, or otherwise to dispose of another's real estate, does so to his own benefit in violation of his trust."⁹² The institute also stated that, "the inclusion of real estate within the definition of 'property' also has the effect of

⁸⁶ Warranty of Seisin for Mrs. Carol Simafranca, Claim no. 64, from the *Acting Regent*, document no. 97-046415, Bureau of Conveyances.

⁸⁷ *Black's Law*, *supra* note 27, 1477.

⁸⁸ Fred E. Inbau, James R. Thompson, James B. Zagel, James P. Manak, *Criminal Law and Its Administration*, 5th ed. (The Foundation Press, Inc. 1990), 424.

⁸⁹ Joseph G. Cook & Paul Marcus, *Criminal Law* (Matthew Bender/Irwin 1995), 308.

⁹⁰ HRS §708-800.

⁹¹ American Law Institute, *Model Penal Code and Commentaries*, part II (The American Law Institute 1980), 166.

⁹² *Id.*, 166.

extending the theft provisions to situations where the actor secures title or other interest in real property [from the owner] by deception or threat.”⁹³ In *Marden v. Dorothy*, Justice O’Brien carefully describes how real property could be made the subject of theft. He explains:

It has always been supposed that real property could not be the subject of larceny, but this is evidently a mistake, if it be true, as the defendant’s counsel claims, that the false papers, which the judgment in this case has declared void and set aside, are to be given such legal effect as to divest the plaintiff of her property and convey it to the defendants. In that case the process of stealing real estate, if I may be permitted to use that expression, will be very simple and comparatively safe. All that will be necessary for the criminal to do, in order to feloniously appropriate to his own use the real property of another, is to fabricate a deed that shall contain the signature of the true owner, genuine if possible, by any trick or artifice, but, if not, then simulated, since that will be just as good. The next step will be to procure a notary to attach to it a false certificate that the owner acknowledged it before him, and then file it in the clerk’s office.⁹⁴

As provided in the grandjury transcripts, Nadamoto made the Simafranca’s deed from the author as *acting* Regent the subject of the attempted theft in the first degree when questioning both Craig Uyehara and Daniel Hanagami, and not a deed deriving from the Uyehara’s themselves through fraud or deception, which is how the theft statute was to be used.⁹⁵ He also suggests to the Grand Jury that Craig Uyehara was vested with the fee-simple title when PTC did the investigation, implying it took place without his consent. The Uyehara’s did not acquire their deed until November 22nd 1996, well after PTC’s investigation, and a day after the *acting* Regent conveyed the remedial deed to Carol Simafranca under her native tenant rights.

Nadamoto also told the grand jury that the changing of locks constituted burglary in the first degree. Locks, however, are fixtures that form a part of the realty, which are articles that a “tenant attaches to a dwelling house in order to render his occupation more comfortable or convenient, and which may be separated from it without doing substantial injury.”⁹⁶ And the “general rule is, that fixtures once annexed to the freehold become part of the realty.”⁹⁷ These locks, therefore, would fall under the *Bell v. State* severance test, but the Simafranca’s did not remove the locks, leave them on the ground, go off, and after return to carry it away. If the Simafranca’s were charged with attempted theft of the realty, which included all fixtures, then how could they have committed a second crime of burglary already covered in the first count? These indictments violated the basic elements of what constitutes theft and burglary. If there was to be any indictment, it should have been criminal trespass in the first degree, where a “person...knowingly enters or remains unlawfully in or upon premises that are fenced or enclosed in a manner designed to

⁹³ *Id.*

⁹⁴ *Marden v. Dorothy*, 54 Northwestern Reporter 726, 731 (1899); 160 NY 39.

⁹⁵ Grand Jury Transcripts, *State of Hawai’i v. Carol Simafranca*, criminal no. 97-3082 (December 17, 1997), 15.

⁹⁶ *Black’s Law*, 4th ed. (West Publishing Company 1968), 766.

⁹⁷ *Bowyer’s Law*, 3rd rev., vol. 1 (William S. Hein Company 1984), 1239.

exclude intruders.”⁹⁸ Lewis was acquitted, but the author was convicted of the so-called attempted theft charge, and the Simafrancas were both convicted of attempted theft and attempted burglary.

Despite the extravagance of these actions, it did not affect or alter, in any way, the profound effects of prolonged occupation on land titles in the Islands, nor the vested undivided rights of native tenants in the *dominium* “secured to them by the Constitution and laws of the Kingdom.”⁹⁹ Additionally, these proceedings constitute evidence of the willful failure of the U.S. to administer the laws of the Hawaiian Kingdom over individuals who were relying on these laws for their protection. The prosecution by the State of Hawai`i officials was a “grave breach” of the Geneva Conventions, IV, in particular, “willfully depriving a protected person of the rights of fair and regular trial.”¹⁰⁰ And by definition, this could be considered a “war crime” as defined by §2441(c)(1) of Title 18 of the U.S. Code.¹⁰¹

Ministerial Responsibility: Holding to Account the *acting* Regency

Another matter for the *acting* Regency to contend with due to the failure of the U.S. to administer the laws of the occupied State occurred on the Island of Hawai`i. On April 20th 1998, Lance Larsen, a Hawaiian subject, petitioned the *acting* Regent for redress of grievances pursuant to Article 4 of the Hawaiian Constitution. His petition stated:

My case involves “tickets” given to my parked car when I am not there. I own my car and my car does not have a license plate, safety or tax stickers and...the State of Hawai`i laws do not apply to me as a subject of the Kingdom of Hawai`i.

I have been driving with the laws of the kingdom on the back of my truck since Mar. 1997. Last state registration on the car was recorded in 1987. After confirmation of who I am by my genealogy, I have registered to vote and formed my business under the laws of the Kingdom of Hawai`i.

As a native Hawaiian subject I have stated in a good way who I am to the illegal state of Hawai`i officers and their higher ups and still they continue to ticket my car. I did not hurt, cause harm to, or kill anybody. I believe I am consciously, methodically and consistently harassed because of, who I proudly say I am and what it means for other native Hawaiian subjects who could end up in a similar situation. My adversaries are relatives, friends and supporters of the “illegally created State of Hawai`i” whose interest in me is based on the property and political connections they have had for over one hundred year old and is about to lose it all, is clearly based on fear and they react to fear in this was. As a native Hawaiian I am subject to uphold the

⁹⁸ HRS §708-813.

⁹⁹ *Kekiekie v. Edward Dennis*, 1 Hawai`i 69, 70 (1851).

¹⁰⁰ Article 147, Geneva Convention, IV, Relative to the Protection of Civilian Persons in Time of War, (12 August 1949).

¹⁰¹ 18 U.S. Code §2441(c)(1) provides that a war crime is “defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party.”

laws and constitutions of the Kingdom of Hawai'i and still my rights as a native Hawaiian subject is consistently violated.

I drive with the laws on the back of my truck as one way to educate the public of the laws of this land and to let the police know what laws I travel under. ...I am not an American, I was never naturalized as an American citizen and this is not our court and they are not of a competent judicial court of Hawaiian Kingdom law. I am caught in the middle of the deep blue sea and a beautiful land mass of foreigners in my homeland. I refuse to be thrown off of my islands, my homeland because someone else has said, "I have the power over you, because I said." All of this is contravention of Hawaiian Kingdom. When is enough, enough!!¹⁰²

The author, as *acting* Regent, responded by serving as an expert witness for Larsen in the Puna District Court, Island of Hawai'i, on June 18th 1999. The author's testimony regarding the continuity of the Hawaiian Kingdom and the illegality of U.S. laws within Hawaiian territory was in support of Larsen's counsel's motion to dismiss the case. After the testimony, Judge Sandra Schutte made the following statement to Larsen:

[Y]ou present a very hard issue, and I agree with your attorney that an issue regarding treaty law does not belong in State Court. It belongs in Federal Court. However, your traffic offenses are State Court offenses, and I am—I have to follow the law of the State of Hawaii.

[O]ur Supreme Court...has held in more than one instance that the District Court has jurisdiction over...traffic laws. The Court has held that...the Constitutions of the Kingdom of Hawaii do not apply anymore...

And based on this decision, I have to deny your motion to dismiss. ...But it is my understanding from our chambers conference that it's your intention to file an action in Federal Court, and you feel that Federal Court is more appropriate.

And I would agree with you that if there is an interpretation of the treaty, Federal Court should interpret that.

So what I'm going to do today is I'm going to deny the motion to dismiss and reset this trial and give you, Ms. Parks, 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.

Complaint for Injunctive Relief filed Against Hawaiian government

On August 4th 1999, Larsen filed a complaint for injunctive relief as a class action suit in the U.S. Federal Court in Honolulu against the *acting* Regency and the United States of America.¹⁰³ Larsen alleged that the *acting* Regency and the United States were in continual violation of the "1849 Treaty of Friendship, Commerce and Navigation between the same, and in violation of the principles of international law laid in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful

¹⁰² Memorial of Lance Larsen, *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, para. 58, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/memorial_larsen.htm>.

¹⁰³ Also added to the complaint were nominal defendants France, Denmark, Sweden, Norway, United Kingdom, Belgium, Netherlands, Italy, Spain, Switzerland, Russia, Japan, Germany, Portugal, Samoa and the United Nations, who were apprised of the complaint due to their treaty relations with the Hawaiian Kingdom.

imposition of American municipal laws over Plaintiff's person within the territorial jurisdiction of the Hawaiian Kingdom."¹⁰⁴ Larsen sought a permanent injunction from the U.S. Federal court against all judicial proceedings instituted against him "in Hawai'i State Courts, including the Hilo and Puna District Courts of the Third Circuit, and the Honolulu District Court of the First Circuit, until the International Title to the Hawaiian Islands can be properly adjudicated between Defendant United States of America and Defendant Hawaiian Kingdom at the Permanent Court of Arbitration at The Hague, Netherlands."¹⁰⁵ Despite the filing of the Federal lawsuit, law enforcement officials on the Island of Hawai'i continuously harassed Larsen and he submitted a second petition to the *acting* Regency on August 31st 1999. The petition 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, and upon my rights secured by the 1849 Treaty [of] Friendship, Commerce, and Navigation between the United States and the Hawaiian Kingdom.

[T]he Hawaiian Kingdom, by allowing the unlawful imposition of American municipal laws over my person within the territorial jurisdiction of the Hawaiian Kingdom, [is] in violation of the 1849 Treaty of Friendship, Commerce, and Navigation between the United States and the Hawaiian Kingdom.

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.¹⁰⁶

In willful disregard of the pending injunctive proceedings, Judge Schutte set trial for Larsen in the Puna District Court on October 4th 1999, and thereafter sentenced him to thirty days incarceration, seven of which were in solitary confinement. The severe action taken is another example of a State of Hawai'i government official violating the Geneva Convention and by definition, under U.S. law, could be considered a war crime.¹⁰⁷ While in prison, Larsen filed a Writ of Habeas Corpus with the Third Circuit Court, Hilo Division, State of Hawai'i, in order to preserve his nationality, his protest, and his hopes of obtaining release from the illegal imprisonment, but to no avail. Larsen's counsel, Ninia Parks, was also notified that the U.S. District Attorney's Office was preparing to request the Federal court to dismiss the complaint, whereby she requested a meeting with the *acting* Regency. In this meeting, the author conveyed to Parks that the *acting* Regency had no dispute with the United States regarding the continuity of the Hawaiian Kingdom because

¹⁰⁴ *Larsen v. United States et al.*, civil no. 99-00546 SPK-BMK, U.S. District Court for the District of Hawai'i, para. 142, 49, (visited October 2, 2008)
<http://www.alohaquest.com/arbitration/federal_complaint.htm>.

¹⁰⁵ *Id.*, 50.

¹⁰⁶ Larsen Memorial, *supra* note 102, para. 61.

¹⁰⁷ Geneva Convention, IV, *supra* note 100.

international law protects and maintains Hawai'i's sovereignty, and, therefore, there would be no need for arbitral proceedings to determine the "International Title to the Hawaiian Islands" as alleged in the complaint.

The *acting* Regency agreed with Parks that it does have a legal duty to protect the rights of all individuals within Hawaiian territory, which includes her client, but it's the United States that is liable, not the *acting* Regency, given the present circumstances of an illegal and prolonged occupation. The author conveyed to Parks that if her client still maintained that the *acting* Regency was nevertheless responsible, the council of Regency would give consent to binding arbitration before the Permanent Court of Arbitration in The Hague, Netherlands, whereby international laws would serve as the basis of determining any liability on the part of the *acting* Regency to Larsen.

Arbitral Proceedings Initiated at the Permanent Court of Arbitration

On October 13th 1999, Parks dismissed the United States and all nominal defendants from the complaint, and on October 29th, the *acting* Regency agreed to binding arbitration. Judge King approved the agreement,¹⁰⁸ and Larsen initiated arbitral proceedings at the Permanent Court of Arbitration on November 8th 1999.¹⁰⁹ In a special agreement entered into between Larsen and the *acting* Regency on January 25th 2000, the substance of the dispute between them was clarified, whereby

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?¹¹⁰

Larsen maintained that the "government of the Hawaiian Kingdom has a duty to protect the rights of Mr. Larsen, a Hawaiian subject, despite the continued occupation of the Hawaiian Islands by the United States of America," and, that the "government of the Hawaiian Kingdom, through its acting Regency, has not fulfilled this duty." But the *acting* Regency's position was "that the Claimant's rights under international law are being violated, but to what extent, is left to the Arbitral Tribunal to decide. That this decision must be made within fixed and established principles and laws pertaining to the matter, and that the Hawaiian Kingdom Government is not liable for redress of these violations under its present conditions

¹⁰⁸ Stipulated Settlement of Agreement Dismissing Entire Case Without Prejudice as to all Parties and all Issues and Submitting all Issues to Binding Arbitration, *Larsen v. United States et al.*, civil no. 99-00546 SPK-BMK, U.S. District Court for the District of Hawai'i, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/stipulated_settlement.htm>.

¹⁰⁹ Notice of Arbitration to Initiate Recourse to Arbitral Proceedings in Compliance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties or Which Only One is a State, November 8, 1999, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/notice_of_arbitration.htm>.

¹¹⁰ Special Agreement, January 25, 2000, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/special_agreement.htm>.

as an occupied State.”¹¹¹ In the *American Journal of International Law*, Bederman & Hilbert stated:

[a]t the center of the PCA proceeding was...that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States’ “unlawful imposition [over him] of [its] municipal laws” through its political subdivision, the State of Hawai‘i. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States committed against him.¹¹²

On March 3rd 2000, the *acting* Regency notified the U.S. State Department’s legal counsel in Washington, D.C., John Crook, of the arbitration proceedings. An invitation was extended for the United States to join the proceedings and the discussion was reduced to writing and made a part of the record at the Registry of the PCA.¹¹³ The intent of the offer was to provide the United States an opportunity to either refute the presumption of the continuity of the Hawaiian Kingdom, thereby asserting U.S. sovereignty over the Hawaiian Islands, or deny the allegations of Larsen that it violated his rights under the Hague and Geneva Conventions. If the Hawaiian Islands were legally a part of the U.S., as a component State of Hawai‘i, the U.S. would have demanded that the PCA terminate the arbitral proceedings on the basis that it was violating the duty of non-intervention in the political affairs of a sovereign State. This fundamental principle of sovereignty and its place in cases that come before international tribunals is spelled out in the Statute of the International Court of Justice. Article 62 of the Statute provides that “Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.”

The U.S. neither asserted its sovereignty over the Hawaiian Islands, nor did it consent to arbitration and respond to Larsen’s allegations. Rather, the U.S. notified the PCA that it had no intention to intervene, but instead requested permission from Larsen and the *acting* Regency for access to all pleadings and transcripts of the proceedings. The *acting* Regency and Larsen’s counsel, intending that the arbitration be transparent, willingly consented to the United States’ request and the U.S. Embassy in The Hague retrieved the necessary information throughout the proceedings. By choosing not to intervene or even demand that the arbitration cease, it can be argued that the U.S. could not show that it had “an interest of a legal nature” over the Hawaiian Islands.

Parks served as Larsen’s counsel, and the author served as lead agent for the Hawaiian government, assisted by Peter Umialiloa Sai, 1st deputy agent, Gary Victor Dubin, 2nd deputy agent, and Mrs. Kau‘i P. Goodhue, 3rd deputy agent. On May 28th

¹¹¹ Memorial of the Hawaiian Kingdom, May 25, 2000, para. 25, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/memorial_government.htm>.

¹¹² David Bederman & Kurt Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii” *American Journal of International Law* 95 (2001): 928.

¹¹³ “Letter confirming telephone conversation with U.S. State Department relating to arbitral proceedings at the Permanent Court of Arbitration, March 3, 2000.” Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 241-243.

2000, Mr. Keoni Agard, as appointing authority, notified the parties that the tribunal was duly constituted with Professor James Crawford serving as presiding arbitrator, together with Gavan Griffith and Professor Christopher Greenwood¹¹⁴ as associate members. Thereafter, the Permanent Court of Arbitration facilitated all matters between the parties and the arbitral tribunal. According to Hudson, the “Permanent Court of Arbitration is not in any sense a tribunal, though it is quite commonly referred to as ‘the Hague tribunal.’ Instead, it is a device for facilitating the creation of tribunals and a machinery for aiding in the conduct of arbitral proceedings.”¹¹⁵

As a result of the U.S.’s deliberate non-participation in the arbitration, Larsen faced a procedural matter that could jeopardize his case against the Hawaiian government. In Procedural Order no. 3, the Tribunal notified the parties that “there is a general principle that a non-national tribunal cannot deal with a dispute if its very subject matter will be the rights or duties of an entity not a party to the proceedings, or if as a necessary preliminary to dealing with a dispute it has to decide on the responsibility of a third party over which it has no jurisdiction.”¹¹⁶ The tribunal cited three cases from the International Court of Justice setting precedence on the matter—otherwise known as the indispensable third party rule. These cases include the *Case concerning Monetary Gold removed from Rome* (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and the United States of America);¹¹⁷ the *Case concerning Certain Phosphate Lands on Nauru* (Nauru v. Australia);¹¹⁸ and the *Case concerning East Timor* (Portugal v. Australia).¹¹⁹ The tribunal stated that it could not get to the merits of the dispute without first dealing with this procedural issue, and scheduled a preliminary round of pleadings¹²⁰ to be followed by oral hearings to be held at the PCA on December 7th, 8th and 11th 2000.¹²¹ On this subject, Bederman and Hulbert stated:

Because international tribunals lack the power of joinder that national courts enjoy, it is possible—as a result of procedural maneuvering alone—for legitimate international legal disputes to escape just adjudication. For example, in *Larsen*, the United States commanded an enviable litigation posture: even though the United States admitted its illegal overthrow of the Hawaiian Kingdom, it repeatedly refused to consent to international arbitration. Larsen was thus forced to engage in the artful pleading of a claim against his own, ostensible government. In a weird inversion of the

¹¹⁴ The United Nations General Assembly and the Security Council elected Professor Greenwood as a Judge on the fifteen-member panel of the International Court of Justice on November 7th 2008 for a term of nine years beginning February 6th 2009.

¹¹⁵ Manly O. Hudson, “The Permanent Court of Arbitration,” *American Journal of International Law* 27(3) (1933): 445.

¹¹⁶ Procedural Order no. 3, July 17, 2000, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/procedural_order_3.htm>.

¹¹⁷ I.C.J. Reports 1954, 19.

¹¹⁸ I.C.J. Reports 1992, 240.

¹¹⁹ I.C.J. Reports 1995, 90.

¹²⁰ Order no. 3, *supra* note 116.

¹²¹ Transcript of Oral Hearings before the Permanent Court of Arbitration, Peace Palace, The Hague, The Netherlands, December 7, 8, 11, 2000, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/transcript_001207.htm>.

normal principles of diplomatic protection, Larsen was compelled to argue that his own government failed to protect him.¹²²

After oral hearings, the Tribunal deliberated and later issued an Arbitral Award on February 5th 2001, in favor of the Hawaiian government. In its award, the Tribunal stated that the “dispute submitted to the Tribunal was a dispute not between the parties to the arbitration agreement but a dispute between each of them and a third party [the United States of America].”¹²³ As a result, “the Tribunal is precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America is not a party to the proceedings and has not consented to them.”¹²⁴ In other words, Larsen was precluded from maintaining his case against the Hawaiian government without the participation of the U.S. The Tribunal explained that it

cannot determine whether the Respondent [the Hawaiian government] has failed to discharge its obligations towards the Claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the Monetary Gold principle precludes the Tribunal from doing. As the International Court explained in the East Timor case, “the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case” (ICJ Reports, 1995, p. 90, para. 29).¹²⁵

The Tribunal, however, did keep the window open for the possibility of the parties to pursue the question of responsibility of the Hawaiian government under fact-finding instead, stating “[t]he Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.”¹²⁶ On March 23rd 2001, the parties jointly requested the Tribunal to be reconstituted into a Fact-finding Commission of Inquiry under the PCA.¹²⁷

Meeting with the Rwandan Ambassador in Brussels

Hawai'i's prolonged occupation by the United States is a serious breach of international law and according to the United Nations Charter, the “Security Council may investigate any...situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and

¹²² Bederman & Hilbert, *supra* note 112, 933.

¹²³ Lance Larsen vs. Hawaiian Kingdom, 119 International Law Reports 594 (2001). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 333.

¹²⁴ *Id.*, ILR, 598; HJLP, 338.

¹²⁵ *Id.*, ILR, 596; HJLP, 335.

¹²⁶ *Id.*, ILR, 597; HJLP, 336.

¹²⁷ “Agreement between the Parties to Request the Arbitral Tribunal to be Reconstituted as a Commission of Inquiry pursuant to the Permanent Court of Arbitration Optional Rules for Fact-finding Commission of Inquiry,” (visited October 2, 2008) <http://www.alohaquest.com/arbitration/letter_010323.htm>.

security;¹²⁸ and any member or non-member State “may bring [it] to the attention of the Security Council or of the General Assembly.”¹²⁹ On December 12th 2000, the day after oral hearings were held at the Permanent Court of Arbitration, a meeting took place in Brussels between Dr. Jacques Bihozagara, the Rwandan ambassador to Belgium, and the author with two deputy agents representing the Hawaiian government in the *Larsen* case. Bihozagara attended a hearing before the International Court of Justice on December 8th 2000, (*Democratic Republic of the Congo v. Belgium*), where he was made aware of the Hawaiian arbitration case that was also taking place across the hall in the Peace Palace.¹³⁰ After inquiring into the case, he called for the meeting and wished to convey that his government was prepared to bring to the attention of the United Nations General Assembly the prolonged occupation of the Hawaiian Kingdom by the United States.

Recalling his country’s experience of genocide and the length of time it took for the international community to intervene as a matter of international law, the Ambassador conveyed to the author that the illegal and prolonged occupation of Hawai`i was unacceptable and should not be allowed to continue. The initial excitement of the generosity of the Rwandan Ambassador was soon replaced with apprehension, and the *acting* Regency could not, in good conscience, accept the offer and place Rwanda in a position of re-introducing Hawai`i’s State continuity before the United Nations, when Hawai`i’s community, itself, remained ignorant of Hawai`i’s profound legal position. The author thanked the Ambassador for his government’s offer, but the timing was premature. The author conveyed to the Ambassador that the gracious proposal could not be accepted without placing Rwanda in a vulnerable position of possible political retaliation by the United States. The *acting* Regency, instead, would focus its attention on continued exposure of the occupation both at the national and international levels.¹³¹

Complaint filed with United Nations Security Council

In line with exposure on the international level, the *acting* Regency was successful in filing a complaint, as a non-member State, with the United Nations Security Council on July 5th 2001.¹³² Mindful of the United States’ veto power in the Security Council, the intent of the complaint was to apprise, and not necessarily initiate any proceedings—it was a request for recommendations. The filing of the complaint occurred while China served as President of the Security Council for the month of July 2001. After a detailed and lengthy telephone discussion with the

¹²⁸ U.N. CHARTER, Article 34.

¹²⁹ *Id.* Article 35.

¹³⁰ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Provisional Measures, Order, I.C.J. Reports 2000, 182.

¹³¹ Strategic Plan of the *acting* Council of Regency, (visited October 2, 2008) <http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf>.

¹³² Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2(1)(2002): 671-672; D. Keanu Sai, “American Occupation of the Hawaiian State: A Century Gone Unchecked,” *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 74-75.

Chinese legal counsel in New York City regarding the legal continuity of the Hawaiian State and the *Larsen case*—an assertion she was unable to deny—a courier from the Security Council headquarters was dispatched to the ground floor of the United Nations building to receive and log-in the Hawaiian complaint in accordance with Article 35(2) of the U.N. Charter.

Dumberry, who's article in the Chinese Journal of International Law addressed the Hawaiian complaint, stated, "Article 35(2) of the Charter only grants the right for States which are not members of the United Nations to bring disputes and situations 'to the attention' of the Security Council; it does not oblige the Security Council to actually "consider" the matter brought to its attention."¹³³ Despite the Security Council's failure to consider the matter, the complaint, nevertheless, was not challenged nor quashed by the United States, but instead, according to Dumberry, "the United States, which is a permanent member of the Security Council, has most certainly strongly objected to the inclusion of this Complaint on the agenda, and is likely to have lobbied other States to act in a similar fashion."¹³⁴ The following month, on August 30, 2001, the author submitted a General Declaration with the Registrar accepting jurisdiction of the International Court of Justice (ICJ), which stated, in part:

I have been instructed by my government to submit to the Registrar of the International Court of Justice, provided herein as an enclosure, my government's Declaration accepting jurisdiction of the International Court of Justice in accordance with the conditions prescribed by United Nations Security Council Resolution no. 9 (15 October 1946) in virtue of the powers conferred upon the Security Council by Article 35, paragraph 2, of the Statute of the International Court of Justice.¹³⁵

In September of 2001, the Hawaiian government approached Larsen's counsel and requested the proceedings at the Permanent Court of Arbitration be terminated so that the legal interests of the parties in the *Larsen case* could be consolidated under the principle of diplomatic interposition. The request was on condition that the Hawaiian Kingdom represents Larsen at the United Nations level, to include the ICJ, thus raising Larsen's dispute from a private interest to a dispute between States.¹³⁶ In other words, the Hawaiian government would represent Larsen in international proceedings against the United States to be hereafter determined. An agreement to settle was reached on September 21st 2001, and filed

¹³³ *Id.*, Dumberry, 671.

¹³⁴ *Id.* 672.

¹³⁵ General Declaration Accepting Jurisdiction of the International Court of Justice, August 29, 2000. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 505-507.

¹³⁶ Examples of private interests becoming state interests in proceedings before the International Court of Justice include: *Anglo-Iranian Oil Co.* (United Kingdom v. Iran), 19 International Law Reports 507 (July 22, 1952); *Ambatielos* (Greece v. United Kingdom), 20 International Law Reports 547 (May 19, 1953); *Nottebohm Case* (Liechtenstein v. Guatemala), 22 International Law Reports 349 (April 6, 1955); *Interhandel Case* (Switzerland v. United States), 27 International Law Reports 475 (March 21, 1959); and *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 1961 International Court of Justice Rep. 8 (April 10).

with the Registry of the Permanent Court of Arbitration terminating the proceedings.¹³⁷

While focus then is on states, in particular Hawai`i and the U.S., it is their governments, however, that serve as their agents. Since the U.S. government is represented in international law by the President's diplomatic representatives and/or military, the commander of the U.S. Pacific Command headquartered on the Island of O`ahu, in the absence of any diplomatic representatives in the Hawaiian Islands, is the highest ranking officer of the U.S. government recognizable under international law. As mentioned earlier, the author provided the legal basis and reasoning of establishing an *acting* Regency in order to provisionally represent the interests of the Hawaiian State, and organized to be a necessary component of a military government that has yet to be established. Notwithstanding the failure of the U.S. to establish a military government, the *acting* Regency assumed the duties and obligations that the Hawaiian government has to its treaty partners and to those individuals, whether nationals or aliens, residing within its territory. With an open agenda of compliance to international laws and the laws of the Hawaiian Kingdom, the *acting* Regency took specific actions to ensure that it complied with all relevant duties and obligations imposed by law, whether domestic or international.

Hawaiian Government's Compliance with National and International Law

In accordance with the principle of exhausting domestic remedies, the *acting* Regent took deliberate steps to provide for remediation of the prolonged occupation at the U.S. Supreme Court. The International Court of Justice, ruled "that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law. ...Before resort may be had to an international court...it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."¹³⁸ On November 17th 1997, a petition for a writ of mandamus was filed against President William Jefferson Clinton.¹³⁹ Mandamus, deriving from mandate or command, is "the name of a writ...which issues from a court of superior jurisdiction, and is directed to...an executive...commanding the performance of a particular act."¹⁴⁰ By constitutional provision, the Court has the capacity to hear cases on appeal, which is discretionary, and original when a case is initiated. According to the U.S. Constitution, "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the

¹³⁷ "Agreement between Lance Paul Larsen and the Hawaiian Kingdom for the settlement of the case in the Permanent Court of Arbitration concerning alleged liabilities of the Hawaiian Kingdom government." Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 284-285, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/agreement_to_settle.htm>.

¹³⁸ *Interhandel Case* (Switzerland v. United States of America), 1959, I.C.J. 6, 27 (Mar. 21).

¹³⁹ Petition for Writ of Mandamus (1997), *acting* Regent of the Hawaiian Kingdom against the President of the United States of America, case no. 97-969, United States Supreme Court.

¹⁴⁰ *Black's Law*, *supra* note 27, 961.

other cases...the Supreme Court shall have appellate jurisdiction.”¹⁴¹ The petition was filed under the Supreme Court’s original jurisdiction and sought to compel the United States President to execute the treaties entered into between the U.S. and the Hawaiian Kingdom.

Petition for Writ of Mandamus filed with the U.S. Supreme Court

On December 12th 1997, the Clerk of the Supreme Court deliberately misfiled the petition under its appellate jurisdiction when it was apparent that there was no lower court decision being appealed. The following month on January 9th, the Solicitor General filed a waiver, which stated that the government “waives its right to file a response to the petition in this case, unless requested to do so by the court.”¹⁴² Undeterred by the deliberate misfiling of the case, the petition was amended on February 12th 1998.

That pursuant to the rules set forth in the United States Supreme Court for Extraordinary Writs under Title 28, section 1651, United States Code, and in compliance with the Treaty of Friendship, Commerce and Navigation, 1850, and the Convention of 1887, between the Hawaiian Kingdom and the United States of America, the PETITIONER requests the Court to mandate the President of the United States, namely, the Honorable William Jefferson Clinton, to;

1. Acknowledge the treaty obligations of the United States of America as mandated under Article VI, §2 of the United States Constitution.

2. Immediately execute the laws of the Hawaiian Kingdom, being the Civil Code of the Hawaiian Islands as noted in the Compiled Laws of 1884, together with the session laws of 1884 and 1886 and the Hawaiian Penal Code, for the control and management of public affairs and the protection of the public peace until terms of transition and complete withdrawal have been negotiated and agreed upon.

3. Require all officers under the government of the State of Hawai’i and its municipal corporations to sign oaths of allegiance to the Government of the Hawaiian Kingdom in accordance with §430 and §431 of the Civil Code of the Hawaiian Kingdom, Compiled Laws, 1884, p. 105, and thereafter continue to exercise their functions and perform the duties of their respective offices in compliance with the Civil and Penal Codes of the Hawaiian Kingdom.

4. That this Court order the Respondent to guarantee that all Hawaiian laws and Constitutional principles of the Hawaiian Kingdom shall be in force until amended by the Legislative Council to be hereafter convened under and by virtue of the laws of the Hawaiian Kingdom, and in particular, the Constitution of 1864.

5. That this Court order the Respondent to dispatch an Envoy Plenipotentiary to Honolulu, Island of O`ahu, to establish negotiations with the Petitioner and to assist in the ongoing transition and reinstatement of the constitutional Government in accordance with “established” laws of the

¹⁴¹ U.S. CONST., Article III, section 2.

¹⁴² United States Supreme Court, case no. 97-969, *Waiver filed by the Solicitor General*.

Hawaiian Kingdom and in compliance with the treaties that exist between the two nations.

6. That this Court issue a Writ of Prohibition to all legislative, executive and judicial officers of the United States of America within the territorial jurisdiction of the Hawaiian Kingdom, including all legislative, executive and judicial Officers of the State of Hawai`i and all of its municipal corporations, ordering them all to cease and desist from any of their activities, until the terms of transition and reinstatement of the constitutional Government of the Hawaiian Kingdom, aforementioned, have been negotiated and agreed upon.

7. That this Court award monetary reparations to the PETITIONER for all the harm that has been inflicted upon the Hawaiian Kingdom and its subjects by the United States government, aforesaid, to be held in trust by the PETITIONER for the Hawaiian Kingdom and its subjects, until such time as the Government of the Hawaiian Kingdom is completely re-established.

8. That this Court grant such other and further relief as is just and equitable.¹⁴³

Strangely, the petition went before the Justices on three separate occasions despite the fact that there was no case being appealed. After the third conference, which was held on March 23rd 1998, the petition was denied without explanation.¹⁴⁴ A petition for a rehearing was filed, but this attempt proved futile.¹⁴⁵

A second attempt to resolve the illegal occupation within the United States Supreme Court was made on August 6th 1998, when a Complaint for Treaty violations,¹⁴⁶ with accompanying motions and attachments, were hand delivered to the Clerk by the author, as *acting* Regent. Explicit instructions were given to the Clerk that these documents were to be filed under the Court's original jurisdiction on the basis of Article III, §2 of the United States Constitution and 28 U.S.C. §1251(b)(1). On August 12th 1998, the Deputy Clerk, Francis J. Lorson, notified the *acting* Regent by correspondence that the "motion for leave to file a bill of complaint and appendix were received August 6, 1998, and must be returned."¹⁴⁷ In a telephone conversation between Lorson and Francis A. Boyle, legal adviser to the *acting* Regent, the deputy Clerk admitted that he was acting pursuant to verbal instructions issued to him by the Justices of the Court. Lorson suggested that a *Motion to Direct the Clerk of the Court to file Complaint* be filed and that the Justices would take it up accordingly. What was strange about this motion is that it sought to compel the Clerk to follow the procedures he was tasked to follow in the first place. According to the Supreme Court Rules, the "Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with

¹⁴³ Amended Petition for Writ of Mandamus, case no. 97-969, United States Supreme Court, p. 23.

¹⁴⁴ United States Supreme Court, case no. 97-969, *Order of March 23, 1998*.

¹⁴⁵ Petition for Rehearing for Writ of Mandamus, case no. 97-969, United States Supreme Court.

¹⁴⁶ Motion for Leave to File a Bill of Complaint, Complaint, and Memorandum in Support (1998), by David Keanu Sai, *acting* Regent of the Hawaiian Kingdom against the President of the United States of America, United States Supreme Court, and Appendix.

¹⁴⁷ Motion to Direct the Clerk of the Court to File a Motion for Leave to File a Bill of Complaint, Complaint, and Memorandum in Support (1998), United States Supreme Court, para. 7.

these Rules.”¹⁴⁸ Procedurally, the complaint complied with the rules, but for the intervention of the Justices, the Clerk’s suggestion of a motion to compel him to follow the rules of the court is not just odd but ludicrous.

Nevertheless, the *acting* Regent filed a *Motion to Direct the Clerk of the Court to file Complaint* on October 8th 1998. In its Motion the *acting* Regent requested “that this Court (1) grant Plaintiffs’ Motion to Direct the Clerk of the Court to file Motion for Leave to File a Bill of Complaint, Complaint, Memorandum in Support and Appendix thereto, (2) grant leave requested in Plaintiff’s Motion for Leave to file a Bill of Complaint, and (3) grant relief requested in Plaintiffs’ Bill of Complaint.”¹⁴⁹ The motion was assigned docket no. M-26, and was denied on May 18th 1998 without explanation.¹⁵⁰ If the complaint was frivolous and the treaties were no longer binding on the U.S., the court could have rendered it so, but only after pleadings and arguments were heard. The actions taken by the Court is in reaction to the strength of the complaint and what it called for. In view of the thwarted attempts to get the U.S. to comply with international law, the *acting* Regency exhausted all possible remedies within the U.S. legal system, and is justified in pursuing remedies at the international level.

Hawaiian-Swiss Treaty

The *acting* Regency reasoned that if it sought to have the U.S. comply with international laws, it, too, must be in compliance with any duties and obligations that are inherent in the assumption of governance under a military occupation or specifically imposed by statute or treaty. Of primary importance were the treaties the Hawaiian Kingdom has with Austria, Belgium, Denmark, England, France, Germany, Hungary, Italy, Japan, Netherlands, Norway, Portugal, Russia, Spain, Sweden, and Switzerland. These treaties provide for the protection of the persons and properties of their citizenry while residing in the Hawaiian Kingdom, with free and easy access to the Hawaiian courts of justice in the pursuit and defense of their rights. Herein lies the obligation imposed upon the Hawaiian government, which the *acting* Regency was unable to fulfill as a result of foreign occupation and the maintenance of a puppet government in violation of international law. On more than one occasion, Niklaus Schweizer, serving as Swiss Honorary Consul to the Hawaiian Islands under the pretense of the American Treaty, did admit to the Hawaiian Kingdom, by its *acting* Regent, the continued existence of the Hawaiian-Swiss treaty of 1864. The joint resolution, as a U.S. domestic law, had no effect on Hawaiian treaties with other foreign States. Article XIII of the treaty provides:

The stipulations of the present treaty shall take effect in the two countries from the hundredth day after the exchange of the ratifications. The treaty shall remain in vigor for ten years, dating from the day of the said exchange. In case neither of the contracting parties shall have notified twelve months before the end of the said period its intention to terminate the same, this

¹⁴⁸ Rule 1, Rules of the Supreme Court of the United States.

¹⁴⁹ Motion to Direct, *supra* note 147, paragraph 18.

¹⁵⁰ Order of May 18, 1998, United States Supreme Court, case no. M-26.

treaty will continue obligatory till the expiry of a year, reckoning from the day on which either of the contracting parties shall give notice of its termination.¹⁵¹

Presently, there exists no official record of notification by either the Swiss government or the Hawaiian Kingdom government expressing any desire to initiate the termination clause of the said Hawaiian-Swiss Treaty. The treaty was never officially terminated in accordance with Article XIII, and in the absence of any notice of termination the treaty remains binding on both the Swiss and *acting* Regency of the Hawaiian Kingdom. Recognition of consular agents is provided under Article VII, which states:

It shall be free for each of the two contracting parties to nominate Consuls, Vice-Consuls or Consular Agents, in the territories of the other. But before any of these officers can act as such, he must be acknowledged and admitted by the government to which he is sent, according to the ordinary usage, and either of the contracting parties may except from the residence of consular officers such particular places as it may deem fit.¹⁵²

As a result, the *acting* Regency delivered an official exequatur under the seal of the Hawaiian government affording diplomatic recognition of the Swiss Consulate in accordance with Hawaiian law on April 29th 1999.¹⁵³ With similar circumstances, exequaturs were also delivered to the Consulates of Belgium, England, France, Germany, Italy, Japan, Norway, and Portugal on the same day. Article X, section 459 of the Hawaiian Civil Code acknowledges diplomatic and consular agents of foreign nations and states in part, “No foreign consul, or consular or commercial agent shall be authorized to act as such, or entitled to recover his fees and perquisites in the courts of this Kingdom, until he shall have received his exequatur.”¹⁵⁴ Article III of the 1864 Hawaiian-Swiss Treaty also provides:

The citizens of each of the contracting parties shall enjoy on the territory of the other the most perfect and complete protection for their persons and their properties. They shall in consequence have free and easy access to the tribunals of justice for their claims and the defense of their rights, in all cases and in every degree of jurisdiction established by the law.¹⁵⁵

On April 29th 1999, in light of Article II of the 1864 Hawaiian-Swiss Treaty, the *acting* Regent, in Privy Council assembled, resolved to grant, to the Swiss Confederation a Limited Power of Attorney.¹⁵⁶ This Limited Power of Attorney authorized the Swiss Government to act in cooperation with the *acting* Regency in order to protect Swiss citizens while they are within the territory of the Hawaiian Kingdom. The Hawaiian government was not a fully functioning body and was unable to afford the “most perfect and complete protection” for Swiss citizens. A power of attorney “is an authority under hand and seal empowering the person

¹⁵¹ *Treaties and Conventions Concluded Between the Hawaiian Kingdom and other Power, since 1825* (Elele Book, Card and Job Print 1887), 87.

¹⁵² *Id.*, 86.

¹⁵³ *Compiled Laws, supra* note 18, §458.

¹⁵⁴ *Id.*, 112.

¹⁵⁵ *Treaties and Conventions, supra* note 151, 84.

¹⁵⁶ Memorial of the Hawaiian Kingdom, May 25, 2000, para. 309, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/memorial_government.htm>.

named therein to do some act on behalf of the principal, which otherwise could only be done by the principal himself. It is either general or special [limited].”¹⁵⁷ More specifically, it is the unlawful imposition of United States’ municipal laws, within the territorial jurisdiction of the Hawaiian Kingdom that is preventing the Hawaiian government from fulfilling its obligation under Article III of the Hawaiian-Swiss Treaty.

By limited power of attorney, the Swiss Consul was granted “full power to serve together with the [*acting* Regency]...for the benefit of...Swiss citizens, while within the limits of this kingdom.”¹⁵⁸ Moreover, the limited power of attorney was granted “upon the express condition that the [Swiss government] will assist the [*acting* Regency] in the re-establishment of its governmental functions, and as soon as the [*acting* Regency] is fully operational and is able to provide the most constant and complete protection for the Swiss citizens while they reside within the territory of the Hawaiian Islands in accordance with Article III of the Treaty of Friendship, Commerce and Navigation entered into with the Swiss Confederation on July 20, 1864, and the Law of Nations, the [*acting* Regency] will cancel this Limited Power of Attorney and assume its role as the Constitutional Government of the Hawaiian Kingdom as if its continuity had not been interrupted.”¹⁵⁹

As requested by the *acting* Regency, the Limited Power of Attorney was hand delivered by Niklaus Schweizer to the Swiss Government in Berne, Switzerland. Accompanying the diplomatic package a letter dated May 4th 1999, was addressed to Ruth Dreifuss, President of the Swiss Confederation, notifying her of the *acting* Regent’s reasoning for the action taken. The diplomatic correspondence stated, in part, that:

in consequence of the difficulties in which we now find ourselves involved, and our opinion of the impossibility of complying with the stipulations articulated in the Treaty made between our two nations, in particular, Article III, which provides protection of Swiss citizens and their properties, We do hereby vest in the Government of the Swiss Confederation, by its President, and through the agency of its officers created by its laws, a Limited Power of Attorney to act in cooperation with the Hawaiian Kingdom pursuant to Title II of the Administration of the Government, Civil Code of the Hawaiian Islands, Compiled Laws 1884, pp. 6 thru 215 for the benefit of the subjects of the same and the citizens and subjects of foreign States, while within the limits of this kingdom, which includes Swiss citizens, except so far as exception is made by the laws of nations in respect to Ambassadors or others.¹⁶⁰

For the same reasons, the *acting* Regent also granted Limited Powers of Attorney to the States of Belgium, Denmark, England, France, Germany, Italy, Japan, Netherlands, Norway, Portugal, Russia, Spain, Sweden, and the United States of

¹⁵⁷ Hugh Chisholm and James Louis Garvin, *The Encyclopedia Britannica*, 11th ed., vol. XXII (The Encyclopedia Britannica Company 1911), 224.

¹⁵⁸ Swiss Limited Power of Attorney, April 29, 1999.

¹⁵⁹ *Id.*

¹⁶⁰ Letter from *acting* Regent to Swiss President, May 4, 1999.

America, despite its history of deliberate non-compliance, on July 16th.¹⁶¹ The Hawaiian Kingdom also sent letters of correspondence to the aforementioned governments apprising them of the governmental and diplomatic situations that exists within the Hawaiian Kingdom and the reasoning of the grants. These actions were in line with the purpose and intent of fulfilling the Hawaiian Kingdom's treaty obligations and international responsibilities to protect foreign nationals within the territorial jurisdiction of the Hawaiian Kingdom, that also include U.S. citizens. The *acting* Regency also submitted ratification of the 1907 Hague Convention for the Pacific Settlement of International Disputes to the Dutch government on July 5th 1999. The following week on July 13th, the *acting* Regency also ratified the 1969 Vienna Convention on the Law of Treaties and sent the ratification to the United Nations Secretary General, Kofi Anan.

The *Le Temps* newspaper, based in the Swiss capital of Berne, reported the following story on the Swiss Limited Power of Attorney on October 9th 1999, which was translated from the French language.¹⁶²

Would Switzerland have found a role in its proportion in the Pacific? One could believe it when reading the latest issue of the journal of the International Monarchist League, based in London, which points at "ongoing discussions" between Berne and the Hawaiian Crown about the re-establishment of diplomatic relations between the two entities. On last 5 May, David Keanu Sai, the self-proclaimed regent of the Hawaiian crown overthrown by the United States in 1893 furthermore conferred upon Switzerland the power to judge Swiss nationals residing in Hawai'i, currently the fiftieth American State. A unique privilege, due to the existence of a treaty "of friendship, settlement and commerce" signed in 1864 between Switzerland and King Kamehameha, and never terminated in good and due form. From Honolulu, Swiss consul Niklaus Schweizer confirms the existence of negotiations with diverse autonomist movements, but he estimates that the re-establishment of diplomatic relations with Hawai'i will not happen immediately. "Naturally, Switzerland will not act against the United States", he explains, while specifying that the problem of the status of the islands needs to be resolved "between the United States and Hawai'i." He nevertheless recognizes that the pro-independence cause disposes of good jurisdictional arguments: The American annexation was not confirmed in appropriate constitutional forms. Furthermore, in 1893, "all Hawaiians except for some missionaries supported the queen," Lili'uokalani, the last monarch to have reigned over the islands. Indeed, Switzerland keeps all options open. It has not officially declared the treaty of 1864 void, even if the latter is for the moment "without effect". It maintains polite contacts with the pro-independence representatives. In case if... "Since France has given more autonomy to its possessions," explains Niklaus Schweizer, "things are moving in the Pacific."

¹⁶¹ Memorial of the Hawaiian Kingdom, May 25, 2000, para. 312, (visited October 2, 2008) <http://www.alohaquest.com/arbitration/memorial_government.htm>.

¹⁶² Sylvain Besson, "La Suisse au secours du roi des îles Hawaï (Switzerland helping the king of the Hawaiian Islands)," *Le Temps* (October 9, 1999).

Legal Opinion Regarding Women Suffrage

In order to prepare for the ultimate convening of the Legislative Assembly, the *acting* Regent issued a proclamation of national voter registration on February 13th 1998, which was printed in the March 1998 issue of the Hawaiian News. The proclamation, stated, in part, that

before the elections shall take place to reconvene the House of Representatives, a registration of voters within the Realm must first take place beginning on the 14th day of February, A.D. 1998, and extending to a time to be hereafter determined, so that subjects of the Kingdom may be apprised of their constitutional rights and voter qualifications; and that all back taxes to be paid by qualified voters, in accordance with law, shall be computed at a rate of one dollar (\$1.00) for each and every year the qualified voter and his predecessors have been absent from the Constitutional Government of the Hawaiian Kingdom since the 17th day of January, A.D. 1893, to the date of the qualified voter's registration.¹⁶³

The following month on March 12th at a public meeting held in Honolulu on the island of O`ahu, a female subject of the Kingdom brought to the attention of the Regent's office that there is no provision in the law that bars female subjects from voting in the election for Representatives of the Kingdom. She asserted that although the "voter qualification" statute specifically relates to the male gender, provides, in part, that "every word importing the masculine gender only, may extend to and include females as well as males."¹⁶⁴ Based upon the dubious nature of the election statute regarding gender, a legal opinion was drafted by the Regency affirming that female subjects do possess the right to vote. The legal opinion concluded:

The issue here is not a question of whether Hawaiian women can or cannot participate in the election of Representatives or serving as a candidate for the House of Representatives, but whether there is any provision in the election laws that preclude Hawaiian women from participating. If no such provision exists, as the case be, then Hawaiian women do have a right to participate in the electoral process under their political right, and that the male gender referred to in the "qualifications of electors" does not preclude the female gender, provided the female is a subject of the Kingdom, of the age of 20 and is neither an idiot, an insane person, or a convicted felon.¹⁶⁵

Amended Complaint to be filed with U.N. Security Council

The United Nations, in theory at least, "is endowed with collective responsibility both for enforcing the law in extreme cases...and, more generally, for safeguarding peace... Serious international breaches have become 'public' events, which concern the whole international community."¹⁶⁶ According to the U.N.

¹⁶³ Proclamation of *Acting* Regent declaring a National Voter Registration, February 13, 1998, published in the March 1998 issue of the Hawaiian News.

¹⁶⁴ Compiled Laws, *supra* note 18, §15

¹⁶⁵ Legal Opinion on Suffrage of Female subjects, March 12, 1998, (visited October 2, 2008) <<http://hawaiiankingdom.org/info-suffrage.shtml>>.

¹⁶⁶ Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986), 246.

Charter, the Security Council is conferred “primary responsibility for the maintenance of international peace and security,” and pursuant to Article 27(3), the U.S., as a party to the wrongful act, shall abstain from participating in the proceedings. The other permanent members of the Council, *i.e.* the Republic of China, France, the Union of Soviet Socialist Republics, and the United Kingdom of Great Britain and Northern Ireland, are precluded from utilizing their veto powers on the Security Council to forestall remediation, because according to the 2001 *Articles on Responsibility of States for International Wrongful Acts*, no “State shall recognize as lawful a situation created by a serious breach”¹⁶⁷ of an obligation involving “a gross or systematic failure of the responsible State to fulfill the obligation.”¹⁶⁸

On July 5th 2001, the Hawaiian government filed a complaint with the U.N. Security Council, but it did not call for its intervention. Rather, it was a request “to investigate the Hawaiian Kingdom question, in particular, the merits of [the] complaint, and to recommend appropriate procedures or methods of adjustment.”¹⁶⁹ According to Dumberry, “the Complaint did fulfill the procedural requirements of Article 35(2) of the Charter,” but he stated that the U.S. “most certainly strongly objected to the inclusion of this Complaint on the agenda, and is likely to have lobbied other States to act in a similar fashion.”¹⁷⁰ Notwithstanding the alleged actions taken by the U.S., the complaint, nevertheless, remained procedurally unabated, and the Hawaiian government did reserve in the complaint “the right to present supplementary arguments and observations.”¹⁷¹ By virtue of this reservation, on March 1st 2008, the author, as agent for the Hawaiian government, notified Russian Ambassador Vitaly Churkin, President of the Security Council for the month of March of the Hawaiian government’s intent to amend the complaint.¹⁷² The letter stated:

Having received no notice or record of the original complaint being quashed, I wish to inform the Security Council of my intention, on behalf of the acting Government, to amend the above-mentioned complaint in accordance with the above-mentioned provisions and pursuant to the *Articles on Responsibility of States for International Wrongful Acts* (2001).¹⁷³

On December 29th 2008, the author registered with the Bureau of Conveyances a Notice of Intent to Amend the Hawaiian Complaint and the Hawaiian Kingdom Government’s claim to Government and Crown lands, also known as ceded

¹⁶⁷ Responsibility of States for International Wrongful Acts (2001), Article 41.

¹⁶⁸ *Id.*, Article 40.

¹⁶⁹ U.N. Security Council Complaint, July 5, 2001, para. 5.1 (visited October 2, 2008) <http://hawaiiankingdom.org/pdf/Hawaiian_UN_Complaint-only.pdf>.

¹⁷⁰ Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2(1)(2002): 672.

¹⁷¹ U.N. Complaint, *supra* note 169, para. 5.2.

¹⁷² David Keanu Sai, “A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its Use and Practice in Hawai’i today,” *Journal of Law and Social Challenges* 10 (Fall 2008): 165.

¹⁷³ Notification of Intent to Amend Hawaiian Complaint, March 1, 2008.

lands.¹⁷⁴ The purpose of amending the complaint is to ensure that the United States of America comply with the international laws of occupation by establishing a military government to administer the laws of the Hawaiian Kingdom and to comply with the 1893 Cleveland-Lili'uokalani Agreement of Restoration of the Hawaiian Kingdom Government *de jure* at the end of the occupation. All official acts performed by the provisional government and the Republic of Hawai'i after the Cleveland-Lili'uokalani Agreement of Restoration of December 18th 1893; and all actions done by the United States of America and its surrogates, the Territory of Hawai'i and the State of Hawai'i, for and on behalf of the Hawaiian Kingdom since the occupation began on August 12th 1898, cannot be recognized as legal and valid except for the registration of births, deaths and marriages, because the United States of America is without title to the territory of the Hawaiian Kingdom. All Government and Crown lands that have been sold without lawful authority by the occupant State and/or its surrogates can be reclaimed by the Hawaiian Kingdom Government and the Commissioners of Crown Lands from the purchasers without payment of compensation under the legal effects of *postliminium*.¹⁷⁵ Clients of Perfect Title Company, whose lands were illegally foreclosed on, can also reclaim their lands under *postliminium* "from the purchaser without payment of compensation."¹⁷⁶

On February 25th 2009, the author briefed Colonel James Herring, Army Staff Judge Advocate, 8th Theater Sustainment Command, and his staff officers at the Wheeler, AAF, Courthouse on the history of the Hawaiian Kingdom, its continued existence as sovereign State under prolonged occupation, and the continued violations of international law. The following month on March 7th, a formal protest was sent to Admiral Keating, Commander of the United States Pacific Command, against the constant violations of Hawaiian State sovereignty, its neutrality, and the Hague and Geneva Conventions since August 12th 1898. The protest enumerated some of the violations of international law to be:

- Failure to restore the Hawaiian Kingdom Government pursuant to the 1893 Cleveland-Lili'uokalani Agreement of Restoration (Treaty)
- Occupation of a Neutral State (Article 1, Hague Conv., V)
- Failure to establish a military government to administer Hawaiian Kingdom law on August 12th 1898 (Article 43 Hague Conv. IV)
- Mass migration of U.S. citizens during the occupation (Article 49 Geneva Conv.)
- Unlawful deportation or transfer or unlawful confinement of Hawaiian subjects; conscription of Hawaiian subjects to serve in the armed forces

¹⁷⁴ Affidavit of David Keanu Sai, document no. 208-194055, State of Hawai'i Bureau of Conveyances.

¹⁷⁵ Lassa Oppenheim, *International Law*, vol. II, 3rd ed. (1921), §283. According to Oppenheim, "If the occupant has performed acts which, according to International Law, he was not competent to perform, *postliminium* makes the invalidity of these illegitimate acts apparent. Therefore, if the occupant has sold immovable State property [Crown and Government lands], such property may afterwards be claimed from the purchaser, whoever he is, without compensation. If he has given offices to individuals, they may afterwards be dismissed. If he has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment of compensation."

¹⁷⁶ *Id.*

of the United States; depriving Hawaiian subjects of the rights of fair and regular trial under Hawaiian Kingdom law; and extensive destruction and appropriation of property (Article 147 Geneva Conv.)

- Violation of Usufructuary of Public Lands (Article 55 Hague Conv. IV)
- Destruction of Hawaiian historical and religious sites (Article 56 Hague Conv. IV)

The protest concluded by stating “this is a serious matter with profound political, legal and economic ramifications not just for the Hawaiian Kingdom, but the United States of America and the world community of States at large. [The] purpose for filing this protest is not adversarial, at the present, but rather notice of the violations and to initiate dialogue that seeks resolution in compliance with international law.” As an injured State, the amended complaint will include these notices and seek the active intervention of the United Nations and its member States pursuant to the *State Responsibility for International Wrongful Acts* (2001). Article 43 provides:

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - a. The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - b. What form reparation should take in accordance with the provisions of part two.¹⁷⁷

Conclusion

The *acting* Regency was established to serve as a component of the military government representing the legal interests of the Hawaiian Kingdom, together with foreign consuls that represent the legal interest of their particular citizenry while residing in the Islands. By design, the military government will be multinational and is directly connected, through these foreign diplomats, to specific member States of the United Nations who possess the limited power of attorneys granted by the *acting* Regency.¹⁷⁸

¹⁷⁷ Responsibility of States, *supra* note 167, Article 41.

¹⁷⁸ Memorial of the Hawaiian Kingdom, *supra* note 161.