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

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Abstract

On January 17, 2007, a bill was re-introduced in the U.S. Senate to grant tribal sovereignty to Native Hawaiians as the indigenous people of Hawai'i, a similar status afforded Native American tribes on the continental United States. The difference, however, is that Native Hawaiians were citizens of an internationally recognized sovereign State, whereas Native Americans were a dependent nation within a sovereign State. Great Britain and France were the first to recognize Hawai'i's sovereignty in 1843 by proclamation and the United States in 1849 by treaty. This paper questions the hegemonic assumptions about the history of law and politics in the Hawaiian Islands by providing an analysis and comparison between Hawaiian State sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today.

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I. Introduction

When the Senate opened its 2007 session, Senator Daniel Akaka (D-Hawai'i) re-introduced a bill entitled "The Native Hawaiian Government Reorganization Act of 2007" (S. 310). This piece of legislation was brought before the Senate on January 17 to mark the one hundred and fourteenth anniversary of the United States' overthrow of the Hawaiian Kingdom government. The bill's purpose is to form a native Hawaiian governing entity in order to negotiate with the State of Hawai'i and the Federal government on behalf of the native people of the Hawaiian Islands. According to Senator Akaka, the bill "would provide parity in federal policies that empower other indigenous peoples, American Indians, and Alaskan Natives, to participate in a government-to-government relationship with the United States."[1] An earlier version of the bill (S. 147) failed to receive enough votes in the Senate in June 2006. The act, otherwise known as the "Akaka Bill," is a by-product of a 1993 resolution passed by Congress in apology to native Hawaiians for the 1893 overthrow of the Hawaiian Kingdom.[2]

The Akaka Bill provides that the "Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States," and that the native Hawaiians are "the native people of the Hawaiian archipelago that is now part of the United States, [and] are indigenous, native people of the United States."[3] The bill, like the 1993 resolution, assumes the native Hawaiian population to be an indigenous people *within* the United States similar to Native Americans, and served as the foundation of political thought regarding native Hawaiians' relationship with the Federal and State governments. In the seminal case *Cherokee Nation v. Georgia*, the Supreme Court recognized Native American tribes as "domestic dependent nations," and not independent and sovereign States.[4] The court explained:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign

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1. Press Release, Office of Senator Daniel Akaka, Akaka Bill Introduced in Senate and House (Jan. 17, 2007), http://akaka.senate.gov/public/index.cfm?FuseAction=PressReleases.Home (follow "2007" hyperlink; then follow hyperlink for press release title).

2. S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993), *reprinted in* 1 HAW. J.L. & POL. 290 (Summer 2004) [hereinafter *Apology*].

3. Native Hawaiian Government Reorganization Act, S. 310, 110th Cong. (2007).

4. *See* Cherokee Nation v. State of Georgia, 30 U.S. 1, 17 (1832).

> nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[5]

As an alternative viewpoint to that which takes for granted U.S. sovereignty exercised by virtue of the plenary power of Congress over indigenous peoples situated within its territory, this article challenges the hegemonic assumptions about the history of law and politics in the Hawaiian Islands. The author does so by providing an analysis of Hawaiian sovereignty under international law since the nineteenth century. This includes an analysis of the current erroneous identification of native Hawaiians as an indigenous group of people within the United States, rather than nationals of an extant sovereign, but occupied, State. This countervailing thesis will be carried out on five levels: (1) the sovereignty of the Hawaiian Islands as a subject of international law; (2) United States' history of violating Hawaiian sovereignty and ultimate occupation of the islands; (3) the administration of Hawaiian Kingdom law by the United States as mandated under the international laws of occupation; (4) the rise of Hawaiian Indigeneity and the sovereignty movement; and (5) righting the wrong and the mandate for restitution. Finally, the paper concludes by urging scholars and practitioners in the fields of political science, history and law to rigorously engage the subject of Hawaiian sovereignty without being confined to apologist formalities or political leanings.

The Hawaiian Kingdom, of which the native Hawaiian population comprised the majority of the citizenry, has consistently been portrayed in contemporary scholarship as a vanquished aspirant that ultimately succumbed to U.S. power through colonization and superior force. Recent works such as Professor Sally Merry's Colonizing Hawai'i: the Cultural Power of Law (2000), Professor Jonathan Osorio's Dismembering Lahui [the Nation] (2002), Robert Stauffer's Kahana: How the Land was Lost (2004), and Professor Noenoe Silva's Aloha Betrayed: Native Hawaiian Resistance to American Colonialism (2004) evidence this paradigmatic view and portray the Hawaiian Kingdom as a failed experiment that could not compete with nor survive against dominant western powers.[6] This

5. *Id.*

6. SALLY MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (Princeton University Press 2000); JONATHAN OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (University of Hawai'i Press 2002); ROBERT STAUFFER, KAHANA: HOW THE LAND WAS LOST (University of Hawai'i Press 2004); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (Duke University Press 2004). *See also* David Keanu Sai, *Kahana: How the Land Was Lost*, 15 (1) THE

point of view frames the U.S. takeover of the Hawaiian Islands as *fait accompli*—a history no different than other western, colonial takeovers of indigenous people and their lands throughout the world. Merry, whose theoretical framework is colonial/post-colonial, fashions the nineteenth century Hawaiian Kingdom into an imperialistic dichotomy of conflicting cultures and people. Osorio concluded that, the Hawaiian Kingdom "never empowered the Natives to materially improve their lives, to protect or extend their cultural values, nor even, in the end, to protect that government from being discarded," because the system itself was foreign and not Hawaiian.[7] Stauffer stated that, "the government that was overthrown in 1893 had, for much of its fifty-year history, been little more than a *de facto* unincorporated territory of the United States . . . [and] the kingdom's government was often American-dominated if not American-run."[8] Silva concluded that the overthrow "was the culmination of seventy years of U.S. missionary presence."[9] These views only serve to bolster a history of domination by the United States that further relegates the native Hawaiian, as an indigenous group of people, to a position of inferiority and at the same time elevates the United States to a position of political and legal superiority, notwithstanding the United States' recognition of the Hawaiian Kingdom as a co-equal sovereign State and a subject of international law. Indigenous sovereignty, being a subject of United States domestic law, had become the lens through which Hawai'i's legal and political history is filtered.

Since the hearing of the *Lance Larsen vs. Hawaiian Kingdom* case at the Permanent Court of Arbitration (1999-2001),[10] however, scholarship has begun to shift this paradigm from an intrastate — within the context of U.S. law and politics, to an interstate point of view — as between two internationally recognized political units.[11] It is through this shift that

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CONTEMPORARY PACIFIC: A JOURNAL OF ISLAND AFFAIRS 237 (2005) (book review).

7. *See* OSORIO, *supra* note 6, at 257.

8. *See* STAUFFER, *supra* note 6, at 73.

9. *See* Silva, supra note 6, at 202.

10. *See* Lance Larsen vs. Hawaiian Kingdom, 119 INT'L L. REP. 566 (2001), *reprinted in* 1 HAW. J.L. & POL. 299 (Summer 2004).

11. Works on this topic include: David Bederman & Kurt Hilbert, *Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii* 95 AM. J. INT'L L. 927 (2001); 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*, 2(1) CHINESE J. INT'L L. 655 (2002); David Keanu Sai, *American Occupation of the Hawaiian State: A Century Gone Unchecked*, 1 HAW. J.L. & POL. 46 (Summer 2004); Kanalu Young, *An Interdisciplinary Study of the term "Hawaiian"*, 1 HAW. J.L. & POL. 23 (Summer 2004); Matthew Craven, *Hawai'i, History, and International Law*, 1 HAW. J.L. & POL. 6 (Summer 2004); Jonathan Osorio, *Ku`e and Ku`oko`a: History, Law, And Other Faiths*, *in* LAW

scholars are now revisiting contemporary assumptions regarding the history of the Hawaiian Islands. As the Hawaiian State gains more attention as a subject of international law, a comprehensive overview of the history of the Hawaiian Islands since the nineteenth century is necessary. This would ensure that misinterpretations, whether by chance or design, can be corrected in light of accurate theoretical frameworks.

II. Hawaiian Sovereignty

In 2001, the Permanent Court of Arbitration in The Hague acknowledged that the Hawaiian Islands, in the nineteenth century, "existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States."[12] Furthermore, in 2004, the Ninth Circuit Court of Appeals also acknowledged the status of the Hawaiian Islands in the nineteenth century as a "coequal sovereign alongside the United States."[13] In order, though, to fully appreciate and understand the terms "independent State" and "coequal sovereign," we need to know these terms as they were understood then. Sovereignty in the nineteenth century was understood to be of two forms — internal and external, and defined in Henry Wheaton's renowned 1836 treatise of international law.

> Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws . . . External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies.[14]

The terms state, government and sovereignty are not synonymous in international law, but rather are distinct from each other. A state is a "body of people occupying a definite territory and politically organized"[15] under one government, being the "agency of the state,"[16] that exercises

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& EMPIRE IN THE PACIFIC, FIJI AND HAWAI'I 213 (Sally Engle Merry and Donald Brenneis, eds., 2003); Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001*, 2 HAW. J.L. & POL. 1 (Summer 2006); Kamana Beamer, *Mapping the Hawaiian Kingdom: A Colonial Venture?*, 2 HAW. J.L. & POL. 34 (Summer 2006); Umi Perkins, *Teaching Land and Sovereignty—A Revised View*, 2 HAW. J.L. & POL. 97 (Summer 2006).

12. *See Larsen, supra* note 10, at 581.
13. Kahawaiola'a v. Norton, 386 F.3d 1271, 1282 (9th Cir. 2004).
14. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 27 (Clarendon Press 1936).
15. BLACK'S LAW DICTIONARY 1407 (6th ed. 1990).
16. *Id.* at 695.

sovereignty, which is the "supreme, absolute, and uncontrollable power by which an independent state is governed."[17] In other words, sovereignty, both internal and external, is an attribute of an independent State, while the government exercising sovereignty is the State's physical agent. In the sixteenth century, French jurist and political philosopher Jean Bodin stressed the importance that "a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state."[18] Nineteenth century political philosopher Professor Frank Hoffman also emphasizes that a government "is not a State any more than a man's words are the man himself," but "is simply an expression of the State, an agent for putting into execution the will of the State."[19] Professor Quincy Wright, a twentieth century American political scientist, also concluded that, "international law distinguishes between a government and the state it governs."[20] Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and Saddam Hussein (Iraq) in 2003, whereby the former has been a recognized sovereign State since 1919,[21] and the latter since 1932.[22]

With regard to the recognition of external sovereignty, there are two aspects — recognition of sovereignty and the recognition of government. External sovereignty cannot be recognized without the initial recognition of the government representing the State, and once recognition of sovereignty is granted, Professor Lassa Oppenheim asserts that it "is incapable of withdrawal"[23] by the recognizing States. Professor Georg Schwarzenberger also asserts, that "recognition estops [precludes] the State which has recognized the title from contesting its validity at any future time."[24] Therefore, recognition of a sovereign State is a political act with

17. *Id.* at 1396.

18. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 56 (B. Blackwell 1955).

19. FRANK SARGENT HOFFMAN, THE SPHERE OF THE STATE OR THE PEOPLE AS A BODY-POLITIC 19(G.P. Putnam's Sons, 1894)

20. Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) AM. J. INT'L L. 299, 307 (Apr. 1952).

21. Manley O. Hudson, *Afghanistan, Ecuador, and the Soviet Union in the League of Nations*, 29 AM. J. INT'L L. 109, 110 (1935).

22. Manley O. Hudson, *The Admission of Iraq to Membership in the League of Nations*, 27 AM. J. INT'L L. 133 (1933).

23. LASSA OPPENHEIM, INTERNATIONAL LAW 137 (3d ed. 1920).

24. Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51(2) AM. J. INT'L L. 308, 316 (1957).

legal consequences.[25] The recognition of governments, though, which could change form through constitutional or revolutionary means subsequent to the recognition of State sovereignty, is a purely political act and can be retracted by another government for strictly political reasons. Cuba is a clear example of this principle, where the U.S. withdrew the recognition of Cuba's government under President Fidel Castro, but at the same time this political act did not mean Cuba ceased to exist as a sovereign State. In other words, sovereignty of an independent State, once established, is not dependent upon the political will of other governments, but rather the objective rules of international law. According to Wheaton:

> The recognition of any State by other States, and its admission into the general society of nations, may depend . . . upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever be its ruler, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.[26]

Since Hawai'i existed as a co-equal sovereign alongside the United States of America in the nineteenth century, international laws — not United States domestic laws regarding indigenous sovereignty of a native people, provide the basis upon which to determine whether or not the Hawaiian State continues to exist, despite the illegal overthrow of its government on January 17, 1893.

A. International Recognition of Hawaiian State Sovereignty

By 1849, the Hawaiian Islands was the first Polynesian nation to be recognized as an independent and sovereign State by the British, French and the United States of America. Great Britain and France explicitly and formally recognized Hawaiian sovereignty on November 28, 1843 by joint proclamation at the Court of London, and the United States followed on December 20, 1849 with recognition by treaty.[27] The Anglo-French proclamation stated:

> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands [Hawaiian Islands]

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25. GERHARD VON GLAHN'S, LAW AMONG NATIONS 85 (6th ed. 1992).

26. *See* WHEATON, *supra* note 14, at 15.

27. Treaty with the Hawaiian Islands, 9 Stat. 977 (1849), *reprinted in* 1 HAW. J.L. & POL. 115 (Summer 2004) [hereinafter *1849 Treaty*]. In 1842, President John Tyler did recognize the independence of the Hawaiian Islands, but did so without any formal declaration or treaty.

> of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands as an *Independent State*, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed (emphasis added).[28]

As a recognized State, the Hawaiian Islands became a full member of the Universal Postal Union on January 1, 1882, maintained more than ninety legations and consulates throughout the world,[29] and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States.[30] Regarding the United States, the Hawaiian Kingdom entered into five treaties: 1849 Treaty of Friendship, Commerce and Navigation;[31] 1875 Treaty of Reciprocity;[32] 1883 Postal Convention Concerning Money Orders;[33] and the 1884 Supplementary Convention to the 1875 Treaty of Reciprocity.[34] The Hawaiian Islands was also recognized within the international community as a neutral State, a status expressly noted in treaties with the Kingdom of Spain in 1863 and the Kingdom of Sweden and Norway in 1852. Article XXVI of the 1863 Hawaiian-Spanish treaty provides:

> All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, *in time of war the neutrality of the Hawaiian Islands*, and to use her good offices with all the other powers having treaties with the

28. United States House of Representatives, 53d Cong., Executive Documents on Affairs in Hawaii: 1894-95, 120 (Government Printing Office 1895), *reprinted in* 1 HAW. J.L. & POL. 114 (Summer 2004) [hereinafter *Executive Documents*].

29. THOMAS THRUM, *Hawaiian Register and Directory for 1893, in* HAWAIIAN ALMANAC AND ANNUAL 140, 140 (1892).

30. These treaties, except for the 1875 Hawaiian-Austro/Hungarian treaty, which is at the Hawai'i State Archives, can be found in TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE HAWAIIAN KINGDOM AND OTHER POWERS, SINCE 1825 (1887): Belgium (Oct. 4, 1862) at 71; Bremen (Mar. 27, 1854) at 43; Denmark (Oct. 19, 1846) at 11; France (July 17, 1839; Mar. 26, 1846; Sept. 8, 1858), at 5, 7 and 57; French Tahiti (Nov. 24, 1853) at 41; Germany (March 25, 1879) at 129; Great Britain (Nov. 13, 1836 and March 26, 1846) at 3 and 9; Great Britain's New South Wales (Mar. 10, 1874) at 119; Hamburg (Jan. 8, 1848) at 15; Italy (July 22, 1863) at 89; Japan (Aug. 19, 1871; Jan. 28, 1886) at 115 and 147; Netherlands (Oct. 16, 1862) at 79; Portugal (May 5, 1882) at 143; Russia (June 19, 1869) at 99; Samoa (Mar. 20, 1887) at 171; Spain (Oct. 9, 1863) at 101[hereinafter *1863 Spanish Treaty*]; Sweden and Norway (Apr. 5, 1855) at 47; *and* Switzerland (July 20, 1864) at 83.

31. *See 1849 Treaty*, *supra* note 27.

32. 19 Stat. 625 (1875), *reprinted in* 1 HAW. J.L. & POL. 126 (Summer 2004).

33. 23 Stat. 736 (1883), *reprinted in* 1 HAW. J.L. & POL. 129 (Summer 2004).

34. 25 Stat. 1399 (1884), *reprinted in* 1 HAW. J.L. & POL. 134 (Summer 2004).

> same, to induce them to adopt the same policy toward the said Islands.[35] (emphasis added)

International law in the nineteenth century provided that only by way of conquest, whether by treaty or subjugation,[36] or by treaty of cession could an independent States' entire and complete sovereignty be extinguished, thereby merging the former State into that of a successor State. The establishment of the United States is a prime example of this principle at work through a voluntary merger of sovereignty. After the revolution, Great Britain recognized the former thirteen British colonies as "free Sovereign and independent States" in a confederation by the 1782 Treaty of Paris,[37] but these States later relinquished their external sovereignties in 1789 into a single federated State, which was to be thereafter referred to as the United States of America. The United States was the successor State of the thirteen former sovereign States by voluntary merger or cession.

B. United States' Violation of Hawaiian State Sovereignty

After two failed attempts to acquire the Hawaiian Islands by a treaty of cession in 1893 and 1897 through a puppet government installed through military intervention, the United States President, with the authority of Congress, unilaterally seized the Hawaiian Islands for military purposes during the Spanish-American war on August 12, 1898. Political action taken by Queen Lili'uokalani and the Hawaiian citizenry prevented the

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35. *See 1863 Spanish Treaty*, *supra* note 30, at 108.

36. Oppenheim defines subjugation as ancillary to the conquest of a State during war. "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives title, and is a mode of acquiring territory." The United States was not at war with Hawai`i, only Spain, but seized Hawai`i's territory as a base for military operations against Spain. Subjugation, as a mode of acquiring territory in the nineteenth century, could only be applied to countries at war with each other and not applied to neutral countries occupied by one belligerent State in order to wage the war against the other belligerent State. *See* OPPENHEIM, *supra* note 23, at 394.

37. Article I of the 1782 Treaty of Paris provided that, "His Britannic Majesty acknowledges the said United States, Viz New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors, relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented, It is hereby agreed and declared that the following are, and shall be their Boundaries, viz." WILLIAM MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 205 (The Macmillan Company 1923).

United States from acquiring the country's sovereignty through fraud and deception, but it could not prevent the seizure and subsequent occupation of the islands for military purposes.

On January 16, 1893, United States resident Minister John L. Stevens met and conspired with a small group of individuals to overthrow the constitutional government of the Hawaiian Kingdom. His part of the conspiracy was to land U.S. troops to assist a small group of businessmen and prepare for the annexation of the Hawaiian Islands to the United States by cession and not conquest. A treaty was signed on February 14, 1893, between a provisional government established as a result of U.S. intervention, and Secretary of State James Blaine. President Benjamin Harrison thereafter submitted the treaty to the United States Senate for ratification in accordance with the U.S. Constitution. The election for the U.S. Presidency, which had already taken place in 1892, resulted in Grover Cleveland defeating the incumbent Benjamin Harrison, but Cleveland's inauguration would not be until March 1893. After entering office, Cleveland received notice by a Hawaiian envoy commissioned by Queen Lili'uokalani that the overthrow and so-called revolution derived from illegal intervention by U.S. diplomats and military personnel. He withdrew the treaty from the Senate, and appointed James H. Blount, a former U.S. Representative from Georgia and former Chairman of the House Committee on Foreign Affairs, as special commissioner to investigate the terms of the so-called revolution and to report his findings.

The Blount investigation found that the United States Legation assigned to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government with the ultimate goal of transferring the Hawaiian Islands to the United States from an installed government.[38] Blount reported that, "in pursuance of a prearranged plan, the Government thus established hastened off commissioners to Washington to make a treaty for the purpose of annexing the Hawaiian Islands to the United States."[39] The report also detailed the culpability of the United States government in violating international laws, and Hawaiian State territorial sovereignty. On December 18, 1893 President Grover Cleveland addressed the Congress and described the United States' action as an "act of war, committed with the participation of a diplomatic representative of the

38. *See Executive Documents*, *supra* note 28, at 567, *reprinted in* 1 HAW. J.L. & POL. 136 (Summer 2004).

39. *Id.* at 587, *reprinted in* 1 HAW. J.L. & POL. 167 (Summer 2004).

United States and without authority of Congress."[40] Clevelands' address also acknowledged that, through such acts, the government of a peaceful and friendly people was overthrown. He further stated that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair,"[41] and committed to Queen Lili'uokalani that the Hawaiian government would be restored.

> It is a well-known rule of customary international law that third States are under a clear duty of non-intervention and non-interference in civil strife within a State. Any such interference is an unlawful act, even if, far from taking the form of military assistance to one of the parties, it is merely confined to premature recognition of the rebel government.[42]

Though President Cleveland refused to resubmit the annexation treaty to the Senate, he failed to follow through in his commitment to re-instate the constitutional government as a result of partisan wrangling in the U.S. Congress.[43] In a deliberate move to further isolate the Hawaiian Kingdom from any assistance from other countries, and to reinforce and protect the puppet government installed by U.S. officials, the Senate and House of Representatives each passed similar resolutions in 1894 strongly warning other countries "that any intervention in the political affairs of these islands by any other Government will be regarded as an act unfriendly to the United States."[44] The Hawaiian Kingdom was thrown into civil unrest as a result. Four years lapsed since the overthrow before Cleveland's presidential successor, William McKinley, entered into a second treaty of cession with the same individuals who participated in the illegal overthrow with the U.S. Legation in 1893, and were now calling themselves the Republic of Hawai'i. This second treaty was signed on June 17, 1897 in Washington, D.C., but would "be taken up immediately upon the convening of Congress next December."[45]

Queen Lili'uokalani was in the United States at the time of the signing of the treaty and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest with the United States Department of State on June 17, 1897. The Queen stated, in

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40. *Id.* at 456, *reprinted in* 1 HAW. J.L. & POL. 201 (Summer 2004).

41. *Id.*

42. KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 64 (2d ed. 1968).

43. 3 RALPH KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893: THE KALAKAUA DYNASTY 647 (University of Hawai'i Press 1967).

44. 26 CONG. REC. 5499 (1894).

45. *Hawaiian Treaty to Wait; Senator Morgan Suggests that It Be Taken Up at This Session Without Result*, N.Y. TIMES, July 25, 1897, at 3.

part:

> I, Lili'uokalani of Hawai'i, by the will of God named heir apparent on the tenth day of April, A.D. 1877, and by the grace of God Queen of the Hawaiian Islands on the seventeenth day of January, A.D. 1893, do hereby protest against the ratification of a certain treaty, which, so I am informed, has been signed at Washington by Messrs. Hatch, Thurston, and Kinney, purporting to cede those Islands to the territory and dominion of the United States. I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.[46]

Hawaiian political organizations in the Islands also filed additional protests with the Department of State in Washington, D.C. These organizations were the Men and Women's Hawaiian Patriotic League (Hui Aloha 'Aina), and the Hawaiian Political Association (Hui Kalai'aina).[47] In addition, a petition of 21,169 signatures of Hawaiian subjects protesting annexation was filed with the Senate when it convened in December 1897.[48] As a result of these protests, the Senate was unable to garner enough votes to ratify the so-called treaty, but events would quickly change as war loomed over the horizon. The Queen and her people would find themselves at the mercy of the United States military once again, as they did when U.S. troops disembarked the *U.S.S. Boston* in Honolulu harbor without permission from the Hawaiian government on January 16, 1893. However, the legal significance of these protests would serve as a fundamental bar to any future claim the United States may assert over the Hawaiian Islands by acquisitive *prescription*. "*Prescription,*" according to Professor Gerhard von Glahn, "means that a foreign state occupies a portion of territory claimed by a state, encounters no protest by the 'owner,' and exercises rights of sovereignty over a long period of time."[49]

An example of a claim to *"prescription"* can be found in the *Chamizal* arbitration, in which the United States claimed prescriptive title to Mexican land. The Rio Grande River that separated the U.S. city of El Paso and the Mexican city of Juarez moved, through natural means, into Mexican territory thereby creating six hundred acres of dry land on the

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46. LILI'UOKALANI, HAWAI'I'S STORY BY HAWAI'I'S QUEEN 354 (Charles E. Tuttle Co., Inc. 1964), *reprinted in* 1 HAW. J.L. & POL. 227 (Summer 2004).

47. TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I 268 (Tom Coffman/Epicenter 1999).

48. *See* SILVA, *supra* note 6, at 145-159. *See also* COFFMAN, *supra* note 47, at 273-287.

49. *See* VON GLAHN, *supra* note 25, at 371.

U.S. side of the river.[50] Over the protests of the Mexican government who called for the renegotiation of the territorial boundaries established since the 1848 treaty of Guadalupe Hidalgo that ended the Mexican-American War, the State of Texas granted land titles to

> American citizens; the United States Government . . . erected . . . a custom-house and immigration station; the city authorities of El Paso . . . erected school houses; the tracks as well as stations and warehouses, of American owned railroads and street railway have been placed thereon.[51]

In 1911, an arbitral commission established by the two States rejected the United States' claim to prescriptive title and ruled in favor of Mexico. Professor Ian Brownlie, drawing from the 1911 award, confirmed that, "possession must be peaceable to provide a basis for prescription, and, in the opinion of the Commissioners, diplomatic protests by Mexico prevented title arising." Brownlie further concludes that, "failure to take action which might lead to violence could not be held to jeopardize Mexican rights."[52] In other words, protests by the Queen and Hawaiian subjects loyal to their country had a significant legal effect in barring the U.S. from any possible future claim over Hawai'i by *prescription* — failure to continue the protests, which could lead to violence, was found not to jeopardize vested rights.

On April 25, 1898, Congress declared war on Spain and on the following day, President McKinley issued a proclamation which stated in part, "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."[53] The Supreme Court later explained that, "the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations."[54] Clearly, the McKinley administration was ensuring, before the international community, that the war would be conducted in compliance with international law.

Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After Commodore George Dewey defeated the Spanish Fleet in the Philippines on May 1, 1898, the *U.S.S. Charleston*, a protected cruiser, was re-

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50. *"El Chamizal" Dispute Between the United States and Mexico,* 4(4) AM. J. INT'L L. 925 (1910).

51. *Id.* at 926.

52. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 157 (4th ed. 1990); *see also Chamizal Arbitration Between the United States and Mexico,* 5 AM. J. INT'L L. 782 (1911).

53. Proclamation No. 8, 30 Stat. 1770 (Apr. 26, 1898).

54. The Paquete Habana, 175 U.S. 712 (1900).

commissioned on May 5, 1898, and ordered to lead a convoy of 2,500 troops to reinforce Dewey in the Philippines and Guam. These troops were boarded on the transport ships of the *City of Peking*, the *City of Sidney* and the *Australia*. In a deliberate violation of Hawaiian neutrality during the war as well as international law, the convoy, on May 21st, set a course to the Hawaiian Islands for re-coaling purposes. The convoy arrived in Honolulu on June 1st and took on 1,943 tons of coal before it left the islands on the 4th of June.[55] A second convoy of troops bound for the Philippines, on the transport ships the *China*, *Zelandia*, *Colon*, and the *Senator*, arrived in Honolulu on June 23rd and took on 1,667 tons of coal.[56] During this time, the supply of coal for belligerent ships entering a neutral port was regulated by international law.

Major General George Davis, Judge Advocate General for the U.S. Army, notes that "during the American Civil War, the British Government [as a neutral State] (on January 31, 1862) adopted the rule that a belligerent armed vessel was to be permitted to receive, at any British port, a supply of coal sufficient to enable her to reach a port of her own territory, or nearer destination."[57] The Philippine Islands were not U.S. territory, but the territory of Spain. As soon as it became apparent that the so-called Republic of Hawai'i, a puppet government of the U.S. since 1893, had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged by H. Renjes, Spanish Vice-Counsel in Honolulu on June 1, 1898. Minister Harold Sewall, from the U.S. Legation in Honolulu, notified Secretary of State William R. Day of the Spanish protest in a dispatch dated June 8th.[58] Renjes declared:

> In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America.[59]

The 1871 Treaty of Washington between the United States and Great Britain addressed the issue of State neutrality during war, and provided that, a "neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purposes of the renewal or augmentation of

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55. Dispatch from Harold Sewall, U.S. Minister to Hawai'i, to William R. Day, U.S. Secretary of State, No. 167 (June 4, 1898) (on file with the Hawai'i State Archives) [hereinafter *Sewall to Day*].

56. *Id.* at No. 175 (June 27, 1898).

57. GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 430, note 3 (Harper & Brothers Publishers 1903).

58. *See Sewall to Day*, *supra* note 54, at No. 168 (June 8, 1898).

59. *Id.*

military supplies or arms, or the recruitment of men."[60] Consistent with the 1871 Treaty, Major General Davis, states that as "hostilities in time of war can only lawfully take place in the territory of either belligerent, or on the high seas, it follows that neutral territory, as such, is entitled to an entire immunity from acts of hostility; it cannot be entered by armed bodies of belligerents, because such an entry would constitute an invasion of the territory, and therefore of the sovereignty, of the neutral."[61] In an article published by the *American Historical Review* in 1931, Bailey stated, "although the United States had given formal notice of the existence of war to the other powers, in order that they might proclaim neutrality, and was jealously watching their behavior, she was flagrantly violating the neutrality of Hawaii."[62] Bailey continued,

> [t]he position of the United States was all the more reprehensible in that she was compelling a weak nation to violate the international law that had to a large degree been formulated by her own stand on the Alabama claims. Furthermore, in line with the precedent established by the Geneva award, Hawaii would be liable for every cent of damage caused by her dereliction as a neutral, and for the United States to force her into this position was cowardly and ungrateful. At the end of the war, Spain or cooperating power would doubtless occupy Hawaii, indefinitely if not permanently, to insure payment of damages, with the consequent jeopardizing of the defenses of the Pacific Coast.[63]

Due to U.S. intervention in 1893 and the subsequent creation of a puppet government, the United States took complete advantage of its own creation in the islands during the Spanish-American War and violated Hawaiian neutrality. Professor Krystyna Marek argues that:

> Puppet governments are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.[64]

After the defeat of the Spanish Pacific Squadron in the Philippines, Congressman Francis Newlands (D-Nevada), submitted a joint resolution for the annexation of the Hawaiian Islands to the House Committee on Foreign Affairs on May 4, 1898.[65] Six days later, hearings were held on

60. Treaty between the United States and Great Britain, 17 Stat. 863 (1871).

61. *See* DAVIS, *supra* note 57, at 429.

62. T.A. Bailey, *The United States and Hawaii During the Spanish-American War,* 36(3) AM. HIST. REV. 557 (Apr. 1931).

63. *Id.*

64. *See* MAREK, *supra* note 42, at 114.

65. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30

the Newlands Resolution, and in testimony submitted to the Committee, U.S. Naval Captain Alfred Mahan explained the military significance of the Hawaiian Islands to the United States. Captain Mahan stated:

> It is obvious that if we do not hold the islands ourselves we cannot expect the neutrals in the war to prevent the other belligerent from occupying them; nor can the inhabitants themselves prevent such occupation. The commercial value is not great enough to provoke neutral interposition. In short, in war we should need a larger Navy to defend the Pacific coast, because we should have not only to defend our own coast, but to prevent, by naval force, an enemy from occupying the islands; whereas, if we preoccupied them, fortifications could preserve them to us. In my opinion it is not practicable for any trans-Pacific country to invade our Pacific coast without occupying Hawaii as a base.[66]

General John Schofield of the U.S. Army also provided testimony to the Committee that justified the seizure of the Islands. He stated:

> We got a preemption title to those islands through the volunteer action of our American missionaries who went there and civilized and Christianized those people and established a Government that has no parallel in the history of the world, considering its age, and we made a preemption which nobody in the world thinks of disputing, provided we perfect our title. If we do not perfect it in due time, we have lost those islands. Anybody else can come in and undertake to get them. So it seems to me the time is now ripe when this Government should do that which has been in contemplation from the beginning as a necessary consequence of the first action of our people in going there and settling those islands and establishing a good Government and education and the action of our Government from that time forward on every suitable occasion in claiming the right of American influence over those islands, absolutely excluding any other foreign power from any interference.67

On May 17, 1898, Congressman Robert Hitt (R-Illinois) reported the Newlands Resolution out of the House Committee on Foreign Affairs, and debates ensued in the House until the resolution was passed on June 15th.[68] However, on March 31st, long before the resolution reached the Senate on June 16th, the Senators had already begun engaging the topic of annexation. During a debate on the Revenue Bill for the maintenance of the war, the topic of the annexation caused Senator David Turpie (D-Indiana) to propose a motion which had the Senate entering into secret executive session. According to Senate rule thirty-five, the galleries were therefore ordered cleared and the doors closed to the public. The significance of these session transcripts, however, would later prove their

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Stat. 750 (1898).

66. 31 CONG. REC. 5771 (1898).

67. *Id.*

68. *Id.* at 6019.

importance.[69]

C. United States' Annexation by Congressional Resolution

From June 16th to July 6th, the resolution of annexation was in the Senate chambers, where the final test of whether or not the annexationists could succeed in their scheme would take place. Under international law, only by treaty, whether by cession or conquest, can an owner State, as the grantor, transfer its territorial sovereignty to another State, the grantee, "since cession is a bilateral transaction."[70] A joint resolution of Congress, on the other hand, is not only a unilateral act, but also municipal legislation whereby international law has imposed "strict territorial limits on national assertions of legislative jurisdiction."[71] Therefore, in order to give the impression of conformity to cessions recognizable under international law, the House resolution embodied the text of the failed treaty. On this note, Senator Augustus Bacon (D-Georgia) sarcastically remarked that, the

> . . . [the] friends of annexation, seeing that it was impossible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.[72]

Regarding Congressional authority to annex, the proponents relied on Article IV, section 3 of the U.S. Constitution, which provides that, "New States may be admitted by the Congress into this Union." Annexationists in both the House and Senate relied on the precedent set by the 28th Congress when it annexed Texas by joint resolution on March 1, 1845.[73] Opponents, however, argued that the precedent is misplaced because Texas was admitted as a State, whereas Hawai'i was not being annexed as a State, but rather, as a territory. Supporters of annexation, like Senator Stephen Elkin (R-West Virginia), reasoned that if Congress could annex a State, why could it not annex territory?[74] Thus, on July 6, 1898, the United States Congress passed the joint resolution purporting to annex Hawaiian territory, and President McKinley signed the resolution on the following day, which proclaimed that the cession of the Hawaiian Islands had been

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69. Associated Press, *Secret Debate on U.S. Seizure of Hawaii Revealed*, HONOLULU STAR-BULLETIN, Feb. 1, 1969, at A1.

70. *See* OPPENHEIM, *supra* note 23, at 376.

71. GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 493 (3d ed. 1996).

72. *See* CONG. REC., *supra* note 66, at 6150.

73. CONG. GLOBE, 28th Cong., 2d Sess. 372 (1845).

74. *See* CONG. REC., *supra* note 66, at 6149.

"accepted, ratified, and confirmed."[75]

Like a carefully rehearsed play, the annexation ceremony of August 12, 1898, between the self-proclaimed Republic of Hawai'i and the United States, was scripted to appear to have the semblance of international law.[76] On a stage fronting 'Iolani Palace in Honolulu, the following exchange took place between U.S. Minister Harold Sewell and Republic President Sanford Dole.[77]

> Mr. SEWELL: "Mr. President, I present to you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States. This joint resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."
>
> Mr. DOLE: A treaty of political union having been made, and the cession formally consented to and approved by the Republic of Hawaii, having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands.
>
> Mr. SEWALL: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government.

The event of annexation, through cession, is a matter of legal interpretation, and according to Professor Hans Kelsen, a renowned legal scholar, what transforms an "event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation."[78] He goes on to state that, the "legal meaning of this act is derived from a 'norm' [standard or rule] whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation."[79] The norm, in this particular case, is U.S. constitutional and international law, and whether or not Congress could annex foreign territory.

It is a constitutional rule of American jurisprudence that its legislative branch, the Congress, is not part of the treaty making power, only the

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75. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, *supra* note 65.

76. *See Apology*, *supra* note 2.

77. LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 253 (The Hawaiian Gazette Co., Ltd. 1904).

78. HANS KELSEN, PURE THEORY OF LAW 3 (University of California Press 1967).

79. *Id.* at 4.

Senate when in executive session.[80] In other words, without proper ratification there can be no cession of territorial sovereignty recognizable under international law, and the joint resolution is but a mere example of the legislative branch attempting to assert its authority beyond its constitutional capacity. Douglas Kmiec, *acting* U.S. Assistant Attorney General, explains that because "the President — not the Congress — has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for international law purposes if it possesses a specific constitutional power."[81]

United States governance is divided under three separate headings of the U.S. Constitution. Article I vests the legislative power in the Congress, Article II vests the executive power in the President, and Article III vests the judicial power in various national courts, the highest being the Supreme Court. Of these three powers, only the President has the ability to extend his authority beyond U.S. territory, as he is "the constitutional representative of the United States in its dealings with foreign nations."[82] The joint resolution, therefore, was not only incapable of annexing the Hawaiian Islands because it had no extra-territorial force, but it also violated the terms of Article VII of the so-called treaty, which called for ratification to be done "by the President of the United States, by and with the advice and consent of the Senate."[83] A *joint resolution* is a legislative action of Congress, while a Senate *resolution of ratification* is an executive action in concurrence with the President by virtue of his authority under Article II, not under Article I of the U.S. Constitution. Article II, section 2 provides that the President "shall have the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur."[84] A clear and relevant example of a senate resolution in executive session took place in 1850, when the U.S. Senate ratified the Hawaiian-American Treaty of Friendship, Commerce and Navigation. Senator William King (D-Alabama) submitted the following resolution of ratification that passed by unanimous consent:

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80. U.S. CONST. art. II, § 2, cl. 2.

81. Douglas Kmiec, Department of Justice, *Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, *in* 12 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 238, 250 (1988).

82. United States v. Louisiana, 363 U.S. 1, 35 (1960).

83. HENRY E. COOPER, REPORT OF THE MINISTER OF FOREIGN AFFAIRS TO THE PRESIDENT OF THE REPUBLIC OF HAWAI'I 3 (Honolulu Star Press 1898); *see also* THURSTON, *supra* note 77, at 245.

84. *Id.* at 727.

> Resolved (two thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty of friendship, commerce, and navigation between the United States of America and His Majesty the King of the Hawaiian Islands, concluded at Washington the 20th day of December, in the year eighteen hundred and forty-nine.[85]

Senator King's resolution was the standard form to date for ratification of international treaties, and it is clearly formatted so it could not be misconstrued to be a law or legislative action.[86] Although the joint resolution of annexation did incorporate the text of the treaty, it was, nevertheless, a Congressional law and not a resolution of ratification as proclaimed by Minister Sewell at the annexation ceremonies in Honolulu.[87] A Senate *resolution of ratification* is not a legislative act, but an executive function under the President's treaty making power. The resolution is the evidence of the "advise and consent of the senate" required under Article II, section 2 of the U.S. Constitution. Only the President and not the Congress, according to Kmiec, has the "constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[88]

Another blow to the annexation scheme was the reliance on Texas as a precedent for congressional authority to extend U.S. sovereignty and jurisdiction beyond U.S. territory. In fact, Congressman Hugh Dinsmore (D-Arkansas) correctly stated in debate that Texas was never annexed by joint resolution.[89] To clarify this, Professor William Adam Russ, Jr., a history scholar and political scientist, notes the manner in which Texas was admitted as a state, and concludes the annexationists' use of Texas was an "absurdity."[90] Russ explains that,

> [t]he resolution merely signified the willingness of the United States to admit Texas as a state if it fulfilled certain conditions, such as acceptance of annexation. Obviously, if Texas refused, there would be neither annexation of a territory nor admission of a state. Moreover, there was a time limit that Texas had to present to Congress a duly ratified state constitution on or before January 1, 1846. The Texan

85. 8 UNITED STATES SENATE, 31ST CONG., EXECUTIVE JOURNAL OF THE SENATE OF THE UNITED STATES 120 (1849).

86. When the Senate Foreign Relations Committee reports out the treaty, the Committee also proposes a resolution of ratification usually in this form: *Resolved, (two-thirds of the Senators present concurring, therein), That the Senate advise and consent to the ratification of [or accession to] the [official treaty title]*. *See* S. REP. NO. 106-71, at 123 (2001).

87. *See* THURSTON, *supra* note 77.

88. *See* KMIEC, *supra* note 81, at 242.

89. *See* CONG. REC., *supra* note 66, at 5778.

90. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC, 1894-1898, AND ITS STRUGGLE TO WIN ANNEXATION 327 (Associated Universities Presses, 1992).

> Congress adopted the joint resolution on June 21, 1845, accepting the American offer. A special convention which met on July 4, 1845, accepted annexation and wrote a state constitution. In October, 1845, the people in a referendum not only ratified the constitution but also voted to accept annexation. Thus annexation was, in effect, accepted three times. On December 28, 1845, a bill to admit the new state was signed by President Polk, and formal admission took place on February 19, 1846, with the seating of Texan members in both houses of Congress.[91]

If one were to look at this within the interpretive context of international law — a law between and not within independent states, there is serious doubt whether Texas was a State of the Union through Congressional legislation. On April 12, 1845, Texas entered into a treaty of annexation with the United States, but the Senate, like it did with Hawai'i, failed to ratify the proposed cession.[92] The failure to ratify, no doubt, was attributed to the fact that Mexico did not recognize "the independence or separate existence of Texas," and maintained that Texas was still Mexican.[93] What followed since, in the eyes of international law, was the legislation of two separate Congresses conversing across the great divide of two separate territorial sovereignties, that of Texas via Mexico and the United States. It wasn't until the end of the Mexican-American War that a peace treaty was signed on February 2, 1848, whereby Mexico formally released its sovereignty over its northern territories, which included the Texan territory, and accepted the Rio Grande as the new boundary separating itself from Texas as a State of the American Union.[94] This raises a problem as to what the legal status of the so-called State of Texas was during the time between its formal admission into the United States on February 19, 1846 and the final proclamation of the Treaty of Peace with Mexico on July 4, 1848. According to William Adam Russ, the solution to this paradox,

> . . . is to say that Congress (precedent or no precedent) enacts into law whatever it can get a majority of its members, a majority of the people, and a majority of the Supreme Court, to believe is constitutional at any

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91. *Id.*

92. 4 HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 697, 699 (Government Printing Office, 1934).

93. *Id.*

94. Article V of the 1848 Treaty of Peace provides: "The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or Opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico..." Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mexico, art. V, Feb. 2, 1848, 9 Stat. 922.

> one time. In other words, legality or constitutionality consists in what the Congress and/or the Court may believe is legal or constitutional today; tomorrow the decision may be different. [95]

Many government officials and constitutional scholars were at a loss in explaining how a joint resolution could have extra-territorial force in annexing Hawai'i, a foreign and sovereign State, because during the 19th century, as Gary Born states, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction."[96] In 1824, in *The Apollon*, the U.S. Supreme Court illustrated this view by asserting that, "the legislation of every country is territorial,"[97] and that the "laws of no nation can justly extend beyond its own territory," for it would be "at variance with the independence and sovereignty of foreign nations."[98] The court also explained that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction."[99] Consequently, Congressman Thomas H. Ball (D-Texas) characterized the annexation of the Hawaiian State by joint resolution as "a deliberate attempt to do unlawfully that which can not be lawfully done."[100] From the U.S. Justice Department's Office of Legal Counsel, Kmiec also concluded that it was "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."[101] And Professor Westel Willoughby, a constitutional scholar and political scientist, summed it all up when he stated:

> The constitutionality of the annexation of Hawai'i, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act . . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force — confined in its operation to the territory of the State by whose legislature it is enacted.[102]

As a legislative body empowered to enact laws that are limited to governing U.S. territory, Congress could no more annex the Hawaiian

95. *See* RUSS, *supra* note 90, at 330.

96. *See* BORN, *supra* note 71, at 493.

97. Rose v. Himely, 8 U.S. 241, 279 (1808).

98. The Apollon, 22 U.S. 362, 370 (1824).

99. *Id.*

100. *See* CONG. REC., *supra* note 66, at 5975.

101. *See* KMIEC, *supra* note 81, at 262.

102. WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 427 (Baker, Voorhis & Co. 2d ed. 1929).

Islands in 1898 as matter of military necessity during the Spanish-American War than it could annex Afghanistan today as a matter of military necessity during the American war on terrorism. Without a treaty of cession, the sovereignty of the Hawaiian State remains unaffected by foreign legislation of any State.

D. Intent of the Newlands Resolution

The true intent and purpose of the 1898 joint resolution of annexation would not be known until the last week of January 1969, after a historian noted there were gaps in the congressional records. The transcripts of the Senate's secret session 70 years earlier were made public after the Senate passed a resolution authorizing the U.S. National Archives to open the records. The Associated Press in Washington, D.C. reported that "the secrecy was clamped on during a debate over whether to seize the Hawaiian Islands—called the Sandwich Islands then—or merely developing leased areas of Pearl Harbor to reinforce the U.S. fleet at Manila Bay."[103] Concealed by the debating rhetoric of congressional authority to annex foreign territory, the true intent of the Senate, as divulged in these transcripts, was to have the joint resolution serve merely as consent, on the part of the Congress, for the President to utilize his war powers in the occupation and seizure of the Hawaiian Islands as a matter of military necessity.

On May 31, 1898, just a few weeks after the defeat of the Spanish fleet in Manila Bay in the Philippines, and with the knowledge that Hawaiian neutrality had deliberately been violated by the McKinley administration, the Senate entered into its secret session. On this day, Senator Henry Cabot Lodge (R-Maine) argued that, the "Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity."[104] According to William Edward Hall, "the rights of occupation may be placed upon the broad foundation of simple military necessity,"[105] but occupation by necessity is a belligerent right limited to States at war with each other. Hall also states that,

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103. Associated Press, *Secret Debate on U.S. Seizure of Hawaii Revealed*, HONOLULU STAR-BULL., Feb. 1, 1969, at A1.

104. *Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898*, 1 HAW. J. L. & POL. 230, 280 (2004) [hereinafter *Senate Transcripts*].

105. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 559 (Oxford Univ. Press 8th ed. 1904).

> [i]f occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war.[106]

The Senate would take full advantage of their perceived right of belligerency in the war against Spain and justify the occupation of the Hawaiian Islands as a matter of necessity and self-preservation.[107]

At the time of the Spanish-American War, authorities on U.S. military occupations included the seminal case *Ex parte Milligan*, and U.S. Army 1st Lieutenant William E. Birkhimer's publication "Military Government and Martial Law." In 1892, Birkhimer wrote the first of three editions that distinguished between military government and martial law — the "former is exercised over enemy territory; the latter over loyal territory of the State enforcing it."[108] Birkhimer sought to expound on what Chief Justice John Marshall noted in his dissenting opinion in *Ex parte Milligan* regarding military government and martial law that exist under U.S. law.[109] According to Birkhimer, the distinction is important whereby "military government is . . . placed within the domain of international law, while martial law is within the cognizance of municipal law."[110]

After careful review of the transcripts of the secret session, it is very likely that the Senators, particularly Senator John Morgan (D-Alabama), were not only familiar with Birkhimer's publication, but also with Chief Justice Marshall's statement regarding the establishment of a military government on foreign soil. Marshall stated that military government is established "under the direction of the President, with the express or implied sanction of Congress."[111] Relevant passages from Birkhimer on this subject include:

> . . . The instituting military government in any country by the commander of a foreign army there is not only a belligerent right, but often a duty. It is incidental to the state of war, and appertains to the law of nations.
>
> . . . The commander of the invading, occupying, or conquering army rules the country with supreme power, limited only by international law, and the orders of his government.

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106. *Id.*

107. *See* CONG. REC., *supra* note 66.

108. WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 1 (Hudson 1892).

109. *Ex parte* Milligan, 71 U.S. 2, 142 (1866).

110. *See* BIRKHIMER, *supra* note 108.

111. *Id.*

> . . . As commander-in-chief the President is authorized to direct the movements of the naval and military forces, and to employ them in the manner he may deem most effectual to harass, conquer, and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States.

Senator Morgan, an ardent annexationist, knew first hand the limitation of exercising sovereignty beyond a State's borders when he served as a member of the Senate's Foreign Relations Committee in 1884. In 1882, the American schooner *Daylight* was anchored outside the Mexican harbor of Tampico when a Mexican gunship collided with the *Independencia* during a storm.[112] The Mexican authorities took the position that any claim for damages by the owners of the schooner should be prosecuted through its own tribunals and not through diplomatic channels, but the United States emphatically denied this claim.[113] U.S. Secretary of State Frederick Frelinghuysen explained to Senator Morgan in a letter that, it was the "uniform declaration of writers on public law [that] in an international point of view, either the thing or the person made the subject of the jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits."[114]

As evidenced in Morgan's exchange with Senator William Allen (P-Nebraska) in the secret session, the joint resolution was never intended to have any extra-territorial force, but was simply an "enabler" for the President to occupy the Hawaiian Islands.[115] In other words, it was not a matter of U.S. constitutional law, but merely served as an "express sanction" of the Congress to support the President as their commander-in-chief in the war against Spain. Morgan, who was fully aware of the two failed attempts to annex Hawai'i by a treaty of cession, attempted to apply a perverse reasoning of military jurisdiction over the Hawaiian Islands. The term annexation, as used in these transcripts, was not in the context of affixing or bringing together two separate territories. Instead, it was a matter of arrogating Hawaiian territory for oneself without right, but

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112. 6 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 679 (U.S. Gov't Printing Off. 1906).

113. *Id.*

114. Letter from Frederick Frelinghuysen, Secretary of State, to Senator John Morgan (May 17, 1884), *reprinted in Papers Relating to the Foreign Relations of the United States* 359 (U.S. Gov't Printing Off. 1885). It was later determined by a General Claims Commission (United States and Mexico) convened to hear the *Daylight Case*, docket no. 353 (1927), that it did occur "in Mexican waters and Mexican law is applicable. The law in force in Mexico at the time of the collision contained no presumption in favor of ships at anchor or in favor of sailing ships in collision with steamers." *Judicial Decisions Involving Questions of International Law*, 21 AM. J. INT'L L. 791 (1927).

115. *See Senate Transcripts*, *supra* note 104.

justified, in his eyes, under the principle of military necessity.

> Mr. ALLEN: I do not desire to interrupt the Senator needlessly, but I want to understand his position. I infer the Senator means that Congress shall legislate and establish a civil government over territory before it is conquered and that that legislation may be carried into execution when the country is reduced by force of our arms?
>
> Mr. MORGAN: What I mean is, the President having no prerogative powers, but deriving his powers from the law, that Congress shall enact a law to enable him to do it, and not leave it to his unbridled will and judgment.
>
> Mr. ALLEN: Would it not be just as wise, then, to provide a code of laws for the government of a neutral territory in anticipation that within five or six months we might declare war against that power and reduce its territory?
>
> Mr. MORGAN: I am not discussing the wisdom of that.
>
> Mr. ALLEN: Would it not be exceptional because we have never before had a foreign war like this, or anything approximating to it. All I am contending for at this time, and all I intend to contend for at any time, is that the President of the United States shall have the powers conferred upon him by Congress full and ample, but that he shall understand that they come from Congress and do not come from his prerogative, or whatever his powers may be merely as the fighting agent of the United States, the Commander-in-Chief of the Army and Navy of the United States.
>
> Mr. ALLEN: That would arise from his constitutional powers as Commander-in-Chief of the Army and the Navy.
>
> Mr. MORGAN: No; his constitutional powers as Commander-in-Chief of the Army and the Navy are not defined in that instrument. When he is in foreign countries he draws his powers from the laws of nations, but when he is at home fighting rebels or Indians, or the like of that, he draws them from the laws of the United States, for the enabling power comes from Congress, and without it he cannot turn a wheel. [116]

These transcripts are as integral to the Newlands Resolution as if it were written in the resolution itself. According to Justice Noah Swayne of the U.S. Supreme Court in 1874, "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."[117] The intent of the Senate was to utilize the President's war powers and not the congressional authority to annex. Ironically, it was the U.S. Supreme Court in *Territory of Hawai'i v. Mankichi* that resounded this principle and, in particular, referenced Swayne's statement when the court was faced with the question of whether or not the Newlands Resolution extended the U.S.

116. *Id.* at 269-70.

117. Smythe v. Fiske, 90 U.S. 374, 380 (1874).

Constitution over the Hawaiian Islands.[118] Unfortunately, due to the injunction of secrecy imposed by the Senate in 1898 regarding these transcripts, the Supreme Court had no access to these records when it arrived at its decision in 1903. Thus, the Supreme Court created a legal fiction to be used as a qualifying source for the Newlands Resolution's extra-territorial effect. According to L.L. Fuller, a legal fiction "may sometimes mean simply a false statement having a certain utility, whether it was believed by its author or not," and "an expedient but false assumption."[119] The utility of *Mankichi* would later prove useful when questions arose regarding the annexation of territory by legislative action.[120] Because Congressional legislation could neither annex Hawaiian territory, nor affect Hawaiian sovereignty, there is a strong legal basis that Hawai'i remained a sovereign state under international law when the U.S. unilaterally seized the Hawaiian Islands by way of a joint resolution. According to Professor Eyal Benvenisti, this legal basis stems from "the principle of inalienable sovereignty over a territory," which "spring the constraints that international law imposes upon the occupant."[121]

E. American Occupation of the Hawaiian Islands

While Hawai'i was clearly not a participant in the hostilities of the Spanish-American War, the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain, as well as fortifying the islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed on January 17, 1893. "Though the resolution was passed July 7, [1898] the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States."[122] Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony, and "in particular they protested the fact that it was occurring against their will."[123]

The "power exercising effective control within another's sovereign

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118. Territory of Hawai'i v. Mankichi, 190 U.S. 197, 212 (1903).

119. L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 369 (1930).

120. Christopher Schroeder, Department of Justice, *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations under an Existing Treaty, in* 20 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 389, 398 n.19 (1996).

121. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 5-6 (Princeton Univ. Press 1993).

122. *See Mankichi, supra* note 118, at 209-10.

123. *See* COFFMAN, *supra* note 47, at 322.

territory has only temporary managerial powers," and, during "that limited period, the occupant administers the territory on behalf of the sovereign."[124] The actions taken by the McKinley administration, with the consent of the Congress by joint resolution, clearly intended to mask the violation of international law as if the annexation took place by treaty. As Marek states, "a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State."[125] In fact, President McKinley proclaimed that the Spanish-American War would "be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice,"[126] and acknowledged the constraints and protection international laws provided to all sovereign states, whether belligerent or neutral. As noted by Senator Henry Cabot Lodge during the Senate's secret session, Hawai'i, as a sovereign and neutral state, was no exception when it was occupied by the United States during its war with Spain.[127] Article 43 of the 1899 Hague Regulations, which remained the same under the 1907 amended Hague Regulations, delimits the power of the occupant and serves as a fundamental bar on its free agency within an occupied neutral State.[128] Although the United States signed and ratified both Hague Regulations, which post-date the occupation of the Hawaiian Islands, the "text of Article 43," according to Benvenisti, "was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law."[129] Professor Doris Graber also states, that "nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code."[130] Consistent with this understanding of the international law of occupation during the Spanish-American War, Professor Munroe Smith reported that the "military

124. *See* BENVENISTI, *supra* note 121, at 6.

125. *See* MAREK, *supra* note 42, at 110.

126. The Paquette Habana, 175 U.S. 677, 712 (1899).

127. *See Senate Transcripts*, *supra* note 104.

128. The United States signed the 1899 Hague Regulations respecting Laws and Customs of War on Land at The Hague on July 29th 1899 and ratified by the Senate March 14th 1902. *See* Hague Convention II, Jul. 29, 1899, 32 Stat. 1803. The 1907 Hague Regulations respecting Laws and Customs of War on Land was signed at The Hague October 18th 1907 and ratified by the Senate March 10th 1908. *See* Hague Convention IV, Oct. 18, 1907, 36 Stat. 2277. The United States also signed the 1907 Hague Regulations respecting the Rights and Duties of Neutral Powers at The Hague on October 18th 1907 and ratified by the Senate on March 10th 1908. *See* Hague Convention V, Oct. 18, 1907, 36 Stat. 2310.

129. *See* BENVENISTI, *supra* note 121, at 8.

130. DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION: 1863-1914, 143 (Columbia University Press 1949).

governments established in the territories occupied by the armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials."[131] This instruction to apply the local laws of the occupied State is the basis of Article 43 of the Hague Regulations.

With specific regard to occupying neutral territory, the Arbitral Tribunal, in its 1927 case, *Coenca Brothers vs. Germany*, concluded that "the occupation of Salonika by the armed forces of the Allies constitutes a violation of the neutrality of that country."[132] Later, in the 1931 case, *In the matter of the Claim Madame Chevreau against the United Kingdom*, the Arbitrator concluded that the status of the British forces while occupying Persia (Iran) — a neutral State in the First World War — was analogous to "belligerent forces occupying enemy territory."[133] Oppenheim observes that an occupant State on neutral territory "does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory."[134] Although the Hague Regulations apply only to territory belonging to an enemy, Professor Ernst Feilchenfeld states, "it is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation."[135] Despite the fact that Hawai'i was a neutral state at the time of its occupation during the Spanish-American War, the law of occupation is not only applied with equal force and effect, but the occupier is also greatly shorn of its belligerent rights in Hawaiian territory as a result of the Islands' neutrality.

F. International Laws of Occupation

Since 1900, the U.S. migration to Hawai'i, predominantly military personnel, has grown exponentially.[136] Because of its military presence and strategic location, Hawai'i has played a role in nearly every U.S. armed conflict. In 1911, Brigadier General Montgomery Macomb, U.S. Army

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131. Munroe Smith, *Record of Political Events*, 13(4) POL. SCI. Q. 745, 748 (Dec. 1898).

132. Coenca Brothers v. Germany, Greco-German Mixed Arbitral Tribunal, Case No. 389 (1927), *reprinted in* ANN. DIG. PUB. INT'L L CASES, YEARS 1927 AND 1928 570, 571 (Longmans, Green and Co. 1931).

133. *In the Matter of the Claim Madame Chevreau Against the United Kingdom*, 27 AM. J. INT'L L. 153, 160 (1933).

134. LASSA OPPENHEIM, INTERNATIONAL LAW 241 (7th ed. 1948-52).

135. ERNST FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 8 (Carnegie Endowment for International Peace 1942).

136. *See U.S. Census*, *infra* note 152.

Commander, District of Hawai'i, stated, "O'ahu is to be encircled with a ring of steel, with mortar batteries at Diamond Head, big guns at Waikiki and Pearl Harbor, and a series of redoubts from Koko Head around the island to Wai'anae."[137] U.S. Territorial Governor Wallace Rider Farrington in 1924 also stated, "Every day is national defense in Hawai'i."[138] Most notably, Hawai'i has been the headquarters, since 1947, for the single largest combined U.S. military presence in the world, the U.S. Pacific Command.[139]

Notwithstanding the magnitude of the United States' malfeasance that has taken place since the American occupation during the Spanish-American War, international law mandates that an occupying government administer the laws of the occupied State during the occupation, in a role similar to that of a trustee (occupying State) and beneficiary (occupied State) relationship.[140] Thus, it cannot impose its own domestic laws without violating international law. This principle is clearly laid out in Article 43 of the Hague Regulations, which states, "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country." Referring to the American occupation of Hawai'i, Patrick Dumberry states:

> . . . the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore,

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137. William Addleman, *History of the United States Army in Hawai'i, 1849-1939*, 9 (Hawaii War Records Depository, Hamilton Library, University of Hawaii, Manoa).

138. Ian Lind, *Ring of Steel: Notes on the Militarization of Hawai'i*, 31 SOC. PROCESS IN HAW. 25 (1984-85).

139. U.S. Pacific Command was established in the Hawaiian Islands as a unified command on 1 January 1947, as an outgrowth of the command structure used during World War II. Located at Camp Smith, which overlooks Pearl Harbor on the island of O'ahu, the Pacific Command is headed by a four star Admiral who reports directly to the Secretary of Defense concerning operations and the Joint Chiefs of Staff for administrative purposes. That Admiral is the Commander-in-Chief, Pacific Command. The Pacific Command's responsibility stretches from North America's west coast to Africa's east coast and both the North and South Poles. It is the oldest and largest of the United States' nine unified military commands, and is comprised of Army, Navy, Marine Corps, and Air Force service components, all headquartered in Hawai'i. Additional commands that report to the Pacific Command include U.S. Forces Japan, U.S. Forces Korea, Special Operations Command Pacific, U.S. Alaska Command, Joint Task Force Full-Accounting, Joint Interagency Task Force West, the Asia-Pacific Center for Security Studies, and the Joint Intelligence Center Pacific in Pearl Harbor. U.S. Pacific Command, http://www.pacom.mil (last visited Mar. 28, 2008).

140. *See* BENVENISTI, *supra* note 121, at 6; *See* VON GLAHN, *supra* note 25, at 785-794; *and* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY; A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 95-221 (University of Minnesota Press 1957).

> the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.[141]

According to Professor Gerhard von Glahn, there are three distinct systems of law that exist in an occupied territory: "the indigenous law of the legitimate sovereign, to the extent that it has not been necessary to suspend it; the laws (legislation, orders, decrees, proclamations, and regulations) of the occupant, which are gradually introduced; and the applicable rules of customary and conventional international law."[142] Hawai'i's sovereignty is maintained and protected as a subject of international law, in spite of the absence of a diplomatically recognized government since 1893. In other words, the United States should have administered Hawaiian Kingdom law as defined by its constitution and statutory laws, similar to the U.S. military's administration of Iraqi law in Iraq with portions of the law suspended due to military necessity.[143] A U.S. Army regulation on the law of occupation recognizes not only the sovereignty of the occupied State, but also bars the annexation of the territory during hostilities because of the continuity of the invaded State's sovereignty. In fact, U.S. Army regulations on the laws of occupation not only recognize the continued existence of the sovereignty of the occupied State, but,

> . . . confers upon the invading force the means of exercising control for the period of occupation. *It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.* The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.[144] (emphasis added)

When appropriate legal and political theoretical frameworks are used it becomes clear that the United States cannot claim to be the successor State of the Hawaiian Kingdom under international law. Current scholarship on this subject has been plagued by *presentism* that reinforces the present with the past, and Professor Frederick Olafson warns that, "by tying interpretation so closely to the active and parochial interests of the interpreter" current scholarship has ironically "opened the door to a willful

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141. *See* Dumberry, *supra* note 11, at 682.

142. *See* VON GLAHN, *supra* note 25, at 774.

143. David J. Scheffer, *Beyond Occupation Law*, 97(4) AM. J. INT'L L. 842-860 (Oct. 2003).

144. "The Law of Land Warfare", *U.S. Army Field Manual 27-10* §358 (July 1956).

exploitation of the past in the service of contemporary interests."[145] To break this cycle, legal scholars and political scientists should utilize alternative theoretical frameworks, which seek to explain Hawai'i's relationship with the United States and not limit the scholarship to mere critique. Furthermore, in the absence of any evidence extinguishing Hawai'i's sovereignty during or since the nineteenth century, international law not only impose duties and obligations on an occupier, but also maintains and protects the international personality of the occupied State, notwithstanding the effectiveness and propaganda attributed to prolonged occupation.[146] Professor James Crawford explains that, belligerent occupation "does not extinguish the State. And, generally, the *presumption* — in practice a strong one — is in favor of the continuance, and against the extinction, of an established State."[147] Therefore, as stated by Professor Matthew Craven, a Professor of International Law who has done extensive research on the continuity of the Hawaiian State, "the continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States."[148]

G. Congress Establishes Civil Government

Notwithstanding the blatant violation of Hawai'i's sovereignty since January 16, 1893, the U.S. never intended to comply with international

145. Frederick Olafson, *Interpretation and the Dialectic of Action*, 69 (20) J. OF PHILOSOPHY 718, 719 (1972).

146. Regarding the principle of effectiveness in international law, Marek explains, "A comparison of the scope of the two legal orders, of the occupied and the occupying State, co-existing in one and the same territory and limiting each other, throws an interesting light on one aspect of the principle of effectiveness in international law. In the first place: of these two legal orders, that of the occupied State is regular and 'normal', while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness. It can produce legal effects outside the occupied territory and may even develop and expand, not be reason of its effectiveness, but solely on the basis of the positive international rule safeguarding its continuity. Thus, the relation between effectiveness and title seems to be one of inverse proportion: while a strong title can survive a period of non-effectiveness, a weak title must rely heavily, if not exclusively, on full and complete effectiveness. It is the latter which makes up for the weakness in title. Belligerent occupation presents an illuminating example of this relation of inverse proportion. Belligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned." *See* MAREK, *supra* note 42, at 102.

147. A presumption is a rule of law where the finding of a basic fact will give rise to the existence of a presumed fact, until it is rebutted. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 701 (Oxford Press, 2d ed. 2006).

148. Matthew Craven, *Continuity of the Hawaiian Kingdom*, 1 HAW. J.L. & POL. 508, 512 (Summer 2004).

laws when it annexed Hawai'i by joint resolution, and proceeded to treat the Hawaiian Islands as if it were an incorporated territory by cession. On April 30, 1900, the U.S. Congress passed an act establishing a civil government to be called the Territory of Hawai'i.[149] Regarding U.S. nationals, section 4 of the 1900 Act stated:

> . . . all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.[150]

In addition to this Act, the Fourteenth Amendment of the United States Constitution was applied to individuals born in the Hawaiian Islands.[151] Under these U.S. laws, the putative population of U.S. "citizens" in the Hawaiian Kingdom exploded from a meager 1,928 (not including native Hawaiian nationals) out of a total population of 89,990 in 1890, to 423,174 (including native Hawaiians, who were now "citizens" of the U.S.) out of a total population of 499,794 in 1950.[152] The native Hawaiian population, which accounted for 85% of the total population in 1890, accounted for a mere 20% (only 86,091 of 423,174) of the total population by 1950.[153]

According to international law, the migration of U.S. citizens to these islands, which included both military personnel and civilians, is a direct violation of Article 49 of the Fourth Geneva Convention, which provides that the occupying power shall not "transfer parts of its own civilian population into the territory it occupies."[154] Benvenisti asserts that the purpose of Article 49 "is to protect the interests of the occupied population, rather than the population of the occupant."[155] Benvinisti also goes on to state that civilian migration and settlement in an occupied State is questionable under Article 43 of the Hague Regulations, since it cannot be

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149. An Act to Provide a Government for the Territory of Hawaii, 31 Stat. 141 (1900).

150. *Id.*

151. *See* Territory of Hawai`i v. Mankichi, *supra* note 118; The 14th Amendment states, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST., amend. XIV, § 1.

152. United States Bureau of the Census, *General characteristics—Hawai`i*, 18 (U.S. Government Printing Office 1952) [hereinafter *U.S. Census*].

153. *Id.*

154. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

155. *See* BENVENISTI, *supra* note 121, at 140.

"deemed a matter of security of the occupation forces, and it is even more difficult to demonstrate its contribution to 'public order and civil life.'"[156]

Shortly after the 1900's, when the American citizens who migrated to the Territory of Hawaii began to settle and reside there, there began an attempt to transform the Islands into a state of the American union. "For most people," according to Tom Coffman, "the fiction of the Republic of Hawaii successfully obscured the nature of the conquest, as it does to this day. The act of annexation became something that just happened."[157] The first statehood bill was introduced in Congress in 1919, but failed, as Congress did not view the Hawaiian Islands as an incorporated territory at the time.[158] This puzzled the advocates for statehood in the islands who assumed the Hawaiian Islands were a part of the United States since 1898, but they were unaware of the Senate's secret session that clearly viewed Hawai'i to be an occupied state and not an incorporated territory acquired by a treaty of cession.[159] Thus, the legislature of the imposed civil government in the Islands, without any knowledge of the Senate secret session transcripts, enacted a "Bill of Rights," on April 26, 1923, asserting their perceived right of becoming an American State of the Union.[160] Beginning with the passage of this statute, a concerted effort was made by residents in the Hawaiian Islands to seek entry into the Federal union. The object of American statehood was finally accomplished in 1950 when two special elections were held in the occupied kingdom. As a result of the elections, 63 delegates were elected to draft a constitution that was then ratified on November 7, 1950.[161]

On March 12, 1959, the U.S. Congress approved the statehood bill. It was signed into law on March 15, 1959,[162] and in a special election held on June 27, 1959, three propositions were submitted to vote.

1. [Whether Hawai'i should] immediately be admitted into the Union as a State;
2. The boundaries of the State of Hawai'i shall be as prescribed in the Act of Congress approved March 18, 1959, and all

156. *Id.*

157. *See* COFFMAN, *supra* note 47, at 322.

158. *Cessation of the transmission of information under Article 73 e of the Charter: communication from the Government of the United States of America*, G.A. Res. 14/I, Annex, U.N. Doc. A/4226, 100 (Sept. 24, 1959) [hereinafter *Cessation of Info.*].

159. *See Senate Transcript*, *supra* note 104.

160. Act 86 (H.B. No. 425), Territory of Hawai'i, 26 April 1923.

161. *See Cessation of Info.*, *supra* note 158, at 100.

162. An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States;

3. All provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawai'i are consented to fully by said State and its people.[163]

The residents in the Islands accepted all three propositions by 132,938 votes to 7,854. On July 28, 1959, two U.S. Hawai'i Senators and one Representative were elected to office, and on August 21, 1959, President Dwight Eisenhower proclaimed that the process of admitting Hawai'i as a State of the Federal Union was complete.[164]

In 1988, Kmiec, of the Office of Legal Counsel within the Department of Justice raised questions concerning not only the legality of congressional action in annexing the Hawaiian Islands by joint resolution, but also Congress' authority to establish boundaries for the State of Hawai'i that lie beyond the territorial seas of the United States' western coastline. Although he acknowledged congressional authority to admit new states into the union and its inherent power to establish state boundaries, Kmiec did caution that it was the "President's constitutional status as the representative of the United States in foreign affairs," not Congress, "which authorizes the United States to claim territorial rights in the sea for the purpose of international law."[165] Likewise, congressional legislation, absent a treaty of cession, creates no legal basis for any U.S. claim of sovereignty over the Hawaiian Islands, even under acquisitive prescription.

G. United States Misrepresents Hawai'i before the United Nations

In 1946, prior to the passage of the Statehood Act, the United States once again misrepresented the relationship which existed between the federal government and the Hawaiian Islands. In a report to the United Nations, the United States Ambassador to the U.N. identified Hawai'i as a non-self-governing territory, in accordance with Article 73(e), which had been under the administration of the United States since 1898.[166] The problem, however, is that Hawai'i should never have been placed on the

163. *See Cessation of Info., supra* note 158, at 100.

164. *Id.*

165. *See* KMIEC, *supra* note 81, at 252.

166. G.A. Res. 66(I), U.N. GAOR, 14th Sess., U.N. Doc. A/64 (Dec. 14, 1946).

list in the first place, as it had already achieved self-governance as a "sovereign independent State" since 1843 — a recognition explicitly granted by the United States itself in 1849 and confirmed more recently by the 9th Circuit Court of Appeals in 2004.[167] One explanation for this discrepancy may be that Hawai'i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States' prolonged occupation of an independent and sovereign State for military purposes. The reporting of Hawai'i as a non-self-governing territory also coincided with the United States establishment of the headquarters for the Pacific Command (PACOM) on the Island of O'ahu.[168] If the United Nations had been aware of Hawai'i's continued legal status as an occupied neutral State, the United States would have been prevented from maintaining their military presence.

The initial Article 73(e) list was comprised of non-sovereign territories under the control of sovereign States such as Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and the United States. In addition to Hawai'i, the U.S. also reported their territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands.[169] The U.N. General Assembly, in a resolution entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter," defined self-governance in three forms: a sovereign independent State; free association with an independent State; or integration with an independent State.[170] None of the territories on the list of non-self-governing territories, with the exception of Hawai'i, were recognized sovereign States.

Notwithstanding past misrepresentations of Hawai'i before the United Nations by the United States, there are two truths that still remain. First, inclusion of Hawai'i on the United Nations list of non-self-governing territories was an inaccurate depiction of a sovereign state whose rights had been violated; and, second, Hawai'i remains a sovereign and independent State despite the illegal overthrow of its government in 1893 and the prolonged occupation of its territory for military purposes since 1898.

Previously, international relations, as a sub-discipline of political science, was not used as a tool to investigate and/or to understand the

167. *See* Kahawaiola'a v. Norton, 386 F.3d 1271, 1282 (9th Cir. 2004).

168. *See* U.S. Pacific Command, *supra* note 139.

169. *See* G.A. Res. 66(I), *supra* note 166.

170. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter*, G.A. Res. 1541(XV), U.N. GAOR, 15th Sess., 948 plen. mtg., U.N. Doc. (Dec. 15, 1960).

overthrow of the Hawaiian Kingdom government. Instead, the overthrow and the events that have transpired since then were confined to the framework of United States domestic politics and laws that systematically consigned the Hawaiian situation from an issue of State sovereignty under international law, to a race-based political platform within the legal order of the United States. This situation has been maintained, until now, behind the reified veil of U.S. sovereignty over the Hawaiian Islands. Furthermore, Native Hawaiians are *not* an indigenous people within the United States with the right to internal self-determination, but rather comprise the majority of the citizenry of an occupied State with a right to end the prolonged occupation of their country.

III. Hawaiian Indigeneity and the Sovereignty Movement

The *Hawaiian sovereignty* movement appears to have grown out of a social movement in the islands in the mid 20th century. According to Lawrence Fuchs, a Professor of American Studies, "the essential purpose of the haole [foreigner] elite for four decades after annexation was to control Hawaii; the major aim for the lesser haoles was to promote and maintain their privileged position."[171] Within the growing sovereignty movement, "[m]ost Hawaiians," he continues, "were motivated by a dominant and inclusive purpose — to recapture the past."[172] Native Hawaiians at the time were experiencing a sense of revival of Hawaiian culture, language, arts and music — euphoria of native Hawaiian pride. Momi Kamahele states that, "the ancient form of hula experienced a strong revival as the Native national dance for our own cultural purposes and enjoyment rather than as a service commodity for the tourist industry."[173] Professor Sam No'eau Warner points out that the movement also resulted in the revitalization of "the Hawaiian language through immersion education."[174] Furthermore, Michael Dudley and Keoni Agard credit John Dominis Holt and his 1964 book On Being Hawaiian for igniting the resurgence of native Hawaiian consciousness.[175] Within its pages, Holt asserted:

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171. LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 68 (1961).

172. *Id.*

173. Momi Kamahele, *'Ilio'ulaokalani: Defending Native Hawaiian Culture*, 26(2) AMERASIA J. 39, 40 (2000).

174. Sam L. No'eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, *in* THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 133 (Leanne Hinton and Ken Hale eds., Academic Press 2001).

175. MICHAEL DUDLEY & KEONI AGARD, A CALL FOR HAWAIIAN SOVEREIGNTY 107 (1993).

> I am a part-Hawaiian who has for years felt troubled concern over the loss of Hawaiianness or ethnic consciousness among people like ourselves. So much that came down to us was garbled or deliberately distorted. It was difficult to separate truth from untruth; to clarify even such simple matters for many among us as the maiden name of a Hawaiian grandmother, let alone know anything at all of the Hawaiian past.[176]

Historian Tom Coffman explains that, upon arriving in Hawai'i in 1965, he realized that, "the effective definition of history had been reduced to a few years. December 7th 1941, was practically the beginning of time, and anything that might have happened before that was prehistory."[177] Moreover, he admits that when he wrote his first book in 1970 he used Statehood in 1959 as an important benchmark in Hawaiian history.[178] The first sentence in chapter one of this book read, the "year 1970 was only the eleventh year of statehood, so that as a state Hawaii was still young, still enthralled by the right to self-government, still feeling out its role as America's newest state."[179] He later recollected in a subsequent book:

> Many years passed before I realized that for Native Hawaiians to survive as a people, they needed a definition of time that spanned something more than eleven years. The demand for a changed understanding of time was always implicit in what became known as the Hawaiian movement or the Hawaiian Renaissance because Hawaiians so systematically turned to the past whenever the subject of Hawaiian life was glimpsed.[180]

The native Hawaiian community had been the subject of extreme prejudice and political exclusion since the United States imposed its authority in the Hawaiian Islands in 1898, and the history books that followed routinely portrayed the native Hawaiian as passive and inept. After the overthrow of the Hawaiian Kingdom, according to Holt, the self-respect of native Hawaiians had been "undermined by carping criticism of 'Hawaiian beliefs' and stereotypes concerning our being lazy, laughing, lovable children who needed to be looked after by more 'realistic' adult oriented caretakers came to be the new accepted view of Hawaiians."[181] This stereotyping became institutionalized, and is evidenced in the writings by Gavan Daws, who, in 1974, wrote:

> The Hawaiians had lost much of their reason for living long ago, when

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176. JOHN DOMINIS HOLT, ON BEING HAWAIIAN 7 (4th ed. 1995).

177. *See* COFFMAN, *supra* note 47, at xii.

178. *Id.*

179. TOM COFFMAN, CATCH A WAVE: A CASE STUDY OF HAWAI'I'S NEW POLITICS 1 (1973).

180. *See* COFFMAN, *supra* note 47, at xxii.

181. *See* HOLT, *supra* note 176, at 7.

> the kapus were abolished; since then a good many of them had lost their lives through disease; the survivors lost their land; they lost their leaders, because many of the chiefs withdrew from politics in favor of nostalgic self-indulgence; and now at last they lost their independence. Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization.[182]

Although the Hawaiian Renaissance movement originally had no clear political objectives, it did foster a genuine sense of inquiry and thirst for an alternative Hawaiian history that was otherwise absent in contemporary history books. According to Silva, "When the stories can be validated, as happens when scholars read the literature in Hawaiian and make the findings available to the community, people begin to recover from the wounds caused by that disjuncture in their consciousness."[183] As a result, Native Hawaiians began to draw meaning and political activism from a history that appeared to parallel other native peoples of the world who had been colonized, but the interpretive context of Hawaiian history was, at the time, primarily historical and not legal. State sovereignty and international laws were perceived not as a benefit for native peoples, but were seen as tools of the colonizer. According to Professor James Anaya, who specializes in the rights of indigenous peoples, "international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order."[184]

A. Native Hawaiians Associate with Plight of Native Americans

Following the course Congress set under the 1971 Alaska Native Claims Settlement Act,[185] under which "the United States returned 40 million acres of land to the Alaskan natives and paid $1 billion cash for land titles they did not return,"[186] it became common practice for Native Hawaiians to associate themselves with the plight of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated by Europe or the United States. The Hawaiian Renaissance gradually branched out to include a political wing often referred to as the "sovereignty movement," which evolved into political resistance of U.S. sovereignty. As certain native Hawaiians began to organize, Professor Linda Tuhiwai Smith observed that this political movement "paralleled the

182. GAVAN DAWS, SHOAL OF TIME 291 (1974).
183. *See* SILVA, *supra* note 6, at 3.
184. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 22 (2000).
185. 43 U.S.C. §1601 (2000).
186. *See* DUDLEY & AGARD, *supra* note 175, at 109.

activism surrounding the civil rights movement, women's liberation, student uprisings and the anti-Vietnam War movement."[187]

In 1972, an organization called A.L.O.H.A. (Aboriginal Lands of Hawaiian Ancestry) was founded to seek reparations from the United States for its involvement in the illegal overthrow of the Hawaiian Kingdom government in 1893.[188] Frustrated with inaction by the United States, however, it joined another group called *Hui Ala Loa* (Long Road Organization) and together they formed *Protect Kaho'olawe 'Ohana* (P.K.O.) in 1975.[189] P.K.O. was organized to stop the U.S. Navy from utilizing the island of Kaho'olawe, off the southern coast of Maui, as a target range, by openly occupying the island in defiance of the U.S. military. As a result of P.K.O.'s activism, the Navy terminated its use of Kaho'olawe in 1994. Another organization called *'Ohana O Hawai'i* (Family of Hawai'i), which was formed in 1974, even went to the extreme of proclaiming a declaration of war against the United States of America.[190]

This political movement also served as the impetus for native Hawaiians to participate in the State of Hawai'i's Constitutional Convention in 1978, which created an Office of Hawaiian Affairs (O.H.A.).[191] O.H.A. recognizes two definitions of aboriginal Hawaiian: the term "native Hawaiian" with a lower case "n," and "Native Hawaiian" with an upper case "N," both of which were established by the U.S. Congress.[192] The former is defined by the 1921 Hawaiian Homes Commission Act as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778,"[193]

187. LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES, 113 (1999).

188. *See* DUDLEY & AGARD, *supra* note 175, at 109.

189. *Id.* at 113.

190. *Id.*

191. Article XII, section 5 of the State of Hawai'i Constitution states: "There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members." Office of Hawaiian Affairs, Planning and Research Office, *Native Hawaiian Data Book 1996*, Appendix. http://www.oha.org/databook/databook1996_1998/go-app.98.html (last visited Apr. 9, 2008).

192. Planning and Research Office, Office of Hawaiian Affairs, *Native Hawaiian Data Book 1996*, Appendix, http://www.oha.org/databook/databook1996_1998/go-app.98.html (last visited Mar. 28, 2008).

193. Hawaiian Homes Commission Act, 1920, Pub. L. No. 34, 42 Stat. 108 [hereinafter

while the latter is defined by the 1993 Apology Resolution as "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i."[194] The intent of the Apology Resolution was to offer an apology to all Native Hawaiians, without regard to blood quantum, while the Hawaiian Homes Commission Act's definition was intended to limit those receiving homestead lots to be "not less than one-half."[195] O.H.A. services both definitions of Hawaiian.[196] As a governmental agency, O.H.A.'s mission is to:

> . . . malama (protect) Hawai'i's people and environmental resources and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.[197]

The sovereignty movement created a multitude of diverse groups, each having a separate agenda as well as varying interpretations of Hawaiian history. Operating within an ethnic or tribal optic stemming from the Native American movement in the United States, the sovereignty movement eventually expanded itself to become a part of the global movement of indigenous people who reject colonial "arrangements in exchange for indigenous modes of self-determination that sharply curtail the legitimacy and jurisdiction of the State while bolstering indigenous jurisdiction over land, identity and political voice."[198] Professor Haunani-Kay Trask, an indigenous peoples rights advocate, argues that "documents like the Draft Declaration [of Indigenous Human Rights] are used to transform and clarify public discussion and agitation."[199] Specifically,

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Hawaiian Homes Commission Act].

194. *See Apology*, *supra* note 2.

195. *See Hawaiian Homes Commission Act*, *supra* note 193.

196. Since 2000, the Office of Hawaiian Affairs have been challenged on federal constitutional grounds that the program is race-based and violates the equal protection clause of the U.S. constitution. These cases included Rice v. Cayetano, 528 U.S. 495 (2000), Carroll v. Nakatani, 188 F. Supp. 2d 1219 (D. Haw. 2001), Arakaki v. State of Hawai'i, 314 F.3d 1091 (9th Cir. 2002), and Arakaki v. Lingle, 305 F. Supp. 2d 1161 (D. Haw. 2004). Of these cases, only Rice v. Cayetano and Arakaki v. State of Hawai'i were successful in removing a racial qualification of native Hawaiian ancestry necessary for voting and running for office as a trustee of the Office of Hawaiian Affairs. The federal court dismissed the other two cases after determining that the plaintiffs did not have standing to sue the State of Hawai'i.

197. Office of Hawaiian Affairs, http://www.oha.org (follow "About OHA" hyperlink; then follow "Mission" hyperlink).

198. DUNCAN IVISON, PAUL PATTON & WILL SANDERS, POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 89 (2000).

199. Haunani-Kay Trask, *Settlers of Color and "Immigrant" Hegemony: "Locals" in*

Trask states that "legal terms of reference, indigenous human rights concepts in international usage, and the political linkage of the non-self-governing status of the Hawaiian nation with other non-self-governing indigenous nations move Hawaiians into a world arena where Native peoples are primary and dominant states are secondary, to the discussion."[200]

This political wing of the renaissance is not in any way connected to the legal position that the Hawaiian Kingdom continued to exist as a sovereign State under international law, but rather, it is consumed with the history of European and American colonialism and the prospect of decolonization. Currently, Hawaiian sovereignty is not viewed as a legal reality, but a political aspiration. Professor Noel Kent states that, the "Hawaiian sovereignty movement is now clearly the most potent catalyst for change," and "during the late 1980s and early 1990s sovereignty was transformed from an outlandish idea propagated by marginal groups into a legitimate political position supported by a majority of native Hawaiians."[201] Nevertheless, the movement was not legal, but political in nature, and political activism relied on the normative framework of the developing rights of indigenous peoples within the United States and at the United Nations. At both these levels, indigenous peoples were viewed not as sovereign states, but rather "any stateless group" residing within the territorial dominions of existing sovereign states.[202]

B. United States Apology and Introduction of the Akaka Bill

In 1993, the U.S. government, maintaining an indigenous and historically inaccurate focus, apologized only to the Native Hawaiian people, rather than the citizenry of the Hawaiian Kingdom, for the United States' role in the overthrow of the Hawaiian government.[203] This implied that only ethnic Hawaiians constituted the kingdom, and fertilized the incipient ethnocentrism of the sovereignty movement. The resolution provided that:

> Congress . . . apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of

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Hawai'i, 26(2) AMERASIA J. 1, 17 (2000).

200. *Id.*

201. NOEL KENT, HAWAII: ISLANDS UNDER THE INFLUENCE 198 (University of Hawaii Press 1993).

202. Jeff J. Corntassel and Tomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination,"* 17(2) HUMAN RIGHTS QUARTERLY 343, 347 (1995).

203. *See Apology*, *supra* note 2.

> Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.[204]

The congressional apology rallied many Native Hawaiians, who were not fully aware of the legal status of the Hawaiian Islands as a sovereign state, in the belief that their situation had similar qualities to Native American tribes in the 19th century. The resolution reinforced the belief of a native Hawaiian nation grounded in Hawaiian indigeneity and culture, rather than an occupied State under prolonged occupation. Consistent with the Apology Resolution, in 2003, Senator Daniel Akaka (D-Hawai'i) submitted Senate Bill 344 (S. 344), also known as the Akaka Bill, to the 108th Congress. The Bill, however, failed to reach the floor of the Senate for vote. It was re-introduced by Senator Akaka on January 17, 2007 (S. 310). According to Akaka, the bill's purpose is to provide "a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance."[205]

According to Professor Rupert Emerson, a political scientist, there are two major periods when the international community accepted self-determination as an operative right or principle.[206] President Woodrow Wilson and others first applied the principle to nations directly affected by the "defeat or collapse of the German, Russian, Austro-Hungarian and Turkish land empires" after the First World War.[207] The second period took place after the Second World War, with the United Nations' focusing on disintegrating overseas empires of its member states, "which had remained effectively untouched in the round of Wilsonian self-determination."[208] These territories have come to be known as Mandate, Trust, and Article 73(e) territories under the United Nations Charter. By erroneously categorizing Native Hawaiians as a stateless people, the principle of self-determination would underlie the development of legislation such as the Akaka Bill.

C. U.S. National Security Council Defines Indigenous Peoples

The Akaka Bill's identification of Native Hawaiians as an indigenous

204. *Id.* at 1513.
205. S. 310, 110th Cong. § 19 (2007).
206. Rupert Emerson, *Self-Determination*, 65(3) AM. J. INT'L L. 459, 463 (Jul. 1971).
207. *Id.*
208. *Id.*

people with a right to self-determination is informed by the U.S. National Security Council's position on indigenous peoples. On January 18, 2001, the Council made known its position to its delegations assigned to the "U.N. Commission on Human Rights," the "Commission's Working Group on the United Nations (UN) Draft Declaration on Indigenous Rights," and to the "Organization of American States (OAS) Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations." The Council directed these delegates to "read a prepared statement that expresses the U.S. understanding of the term internal 'self-determination' and indicates that it does not include a right of independence or permanent sovereignty over natural resources." [209] The Council also directed these delegates to support the use of the term *internal self-determination* in both the U.N. and O.A.S. declarations on indigenous rights, and defined Indigenous peoples as having "a right of internal self-determination." By virtue of that right, "they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development."[210] This resolution sought to constrain the growing political movement of indigenous peoples "who aspire to rule their territorial homeland, or who claim the right to independent statehood under the doctrine of self-determination of peoples."[211]

The Akaka Bill falsely identifies native Hawaiians and their right to self-determination through this definition given by the U.S. National Security Council. Furthermore, after four generations of occupation, indoctrination has been so complete that the power relationship between occupier and occupied has become blurred if not effaced. Today, amnesia of the sovereignty of the Hawaiian State has become so pervasive that colonization and decolonization, as social and political theories, has dominated the work of legal scholars and political scientists regarding Hawai'i.

D. Contrast between Hawaiian State Sovereignty and Hawaiian Indigeneity

International laws, as an interpretative context, provides an alternative view to the political and legal history of the Hawaiian Islands, which has

209. National Security Council, United States, *U.S. National Security Council, Position on Indigenous Peoples* (2001), http://www1.umn.edu/humanrts/usdocs/indigenousdoc.html (last visited Mar. 28, 2008).

210. *Id.*

211. Milton J. Esman, *Ethnic Pluralism and International Relations*, 17(1-2) CAN. REV. STUD. NATIONALISM 83, 88 (1990).

been consigned under U.S. State sovereignty and the right to internal self-determination of indigenous peoples. By comparing and contrasting the two concepts of Hawaiian State sovereignty and Hawaiian Indigeneity, one can see inherent contradictions and divergence of thought and direction.

Hawaiian State Sovereignty	*vs.*	Hawaiian Indigeneity
Self-governing		Non-self-governing
Independent		Dependent
Sovereignty Established		Sovereignty Sought
Citizenship (multi-ethnic)		Indigenous (mono-ethnic)
Occupation		Colonization
De-Occupation		De-Colonization

The legal definition of a *colony* is "a dependent political economy, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother country."[212] According to Professor Albert Keller, who specialized in colonial studies, *colonization* is "a movement of population and an extension of political power," and therefore must be distinguished from migration.[213] The former is an extension of sovereignty over territory not subject to the sovereignty of another State, while the latter is the mode of entry into the territory of another sovereign State. Keller goes on to state that the "so-called 'interior colonization' of the Germans [within a non-German State] would naturally be a misnomer on the basis of the definition suggested."[214] This is the same as suggesting that the migration of United States citizens into the territory of the Hawaiian Kingdom constituted American colonization and somehow resulted in the creation of an American colony. The history of the Hawaiian Kingdom has fallen victim to the misuse of this term by contemporary scholars in the fields of post-colonial and cultural studies. These scholars have lost sight of the original use and application of the terms colony and colonization, and have remained steadfast in their conclusion that the American presence in the Hawaiian Islands was and is currently colonial in nature. This has been the source of much confusion in the way of legal or political solutions. Professor Slavoj Zizek critically suggests that in post-colonial studies, the use of the term colonization "starts to function as a hegemonic notion and is elevated to a

212. *See* BLACK'S LAW DICTIONARY, *supra* note 15, at 265.

213. ALBERT GALLOWAY KELLER, COLONIZATION: A STUDY OF THE FOUNDING OF NEW SOCIETIES 1 (Ginn & Company 1908).

214. *Id.* at 2.

universal paradigm, so that in relations between the sexes, the male sex colonizes the female sex, the upper classes colonize the lower classes, and so on."[215] In cultural studies he argues that it "effectively functions as a kind of *ersatz*-philosophy, and notions are thus transformed into ideological universals."[216]

In the legal and political realm, the fundamental difference between the terms *colonization/de-colonization* and *occupation/de-occupation*, is that the colonized must negotiate with the colonizer in order to acquire state sovereignty (e.g. India from Great Britain, Rwanda from Belgium, and Indonesia from the Dutch). Under the latter, State sovereignty is presumed and not dependent on the will of the occupier (e.g. Soviet occupation of the Baltic States, and the American occupation of Afghanistan and Iraq). *Colonization/de-colonization* is a matter that concerns the internal laws of the colonizing State and presumes the colony is not sovereign, while *occupation/de-occupation* is a matter of international law relating to already existing sovereign States. Craven concludes:

> For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization. All they might hope for at that level is formal recognition of their vulnerability and continued political marginalization rather than the status accorded under international law to a nation belligerently occupied.[217]

Thus, when Hawaiian scholars and sovereignty activists, in particular, consistently employ the terms and theories associated with colonization and indigeneity, they are reinforcing the very control they seek to oppose. Hawaiian State sovereignty and the international laws of occupation, on the other hand, not only presume the continuity of Hawaiian sovereignty, but also provides the legal framework for regulating the occupier, despite a history of its non-compliance. As a matter of state sovereignty, and not self-determination of a stateless people, international law is the appropriate legal framework, not only to understand Hawai'i's prolonged occupation, but also to provide the basis for resolution through reparations.

IV. Righting the Wrong

Restitution, together with compensation and satisfaction, are forms of reparations afforded to an injured party, and can be imposed either

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215. SLAVOJ ZIZEK, INTERROGATING THE REAL 92 (Continuum 2005).

216. *Erstaz* is German for an imitation or substitute. *Id.*

217. *See* Craven, *supra* note 11, at 8.

singularly or collectively depending on the circumstances of the case. There are two recognized systems that provide reparations to an injured party — *remedial justice* where the injured party is a State, and *restorative justice* where the injured party or parties are individuals within a State. Remedial justice addresses compensation and punitive actions, while restorative justice uses reconciliation that attends "to the negative consequences of one's action through apology, reparation and penance."[218] International law is founded on remedial justice, whereas individual States, sometimes with the assistance of the United Nations, employ or facilitate varying forms of restorative justice within their territorial borders where "previously divided groups will come to agree on a mutually satisfactory narrative of what they have been through, opening the way to a common future."[219] The Guatemalan Historical Clarification Commission is an example of a restorative justice system which was "established in 1996 as part of the UN-supervised peace accord."[220] The Commission's function was to describe "the nature and scope of human rights abuses during the 30-year civil war, 1975-1995."[221] An example of remedial justice can be found in the 1927 seminal *Chorzow Factory* case (Germany v. Poland), which was heard before the Permanent Court of International Justice in The Hague, Netherlands, and described by Professor Dinah Shelton as "the cornerstone of international claims for reparation, whether presented by states or other litigants."[222] In that case, the court set forth the basic principles governing reparations after breaching an international obligation. The court stated:

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international

218. ANDREW SCHAAP, POLITICAL RECONCILIATION 13 (Routledge 2005).

219. JOHN TORPEY, POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 25 (Rowman & Littlefield 2003).

220. MARK R. AMSTUTZ, THE HEALING OF NATIONS: THE PROMISE AND LIMITS OF POLITICAL FORGIVENESS 27 (Rowman & Littlefield Publishers 2005).

221. *Id.*

222. Dinah Shelton, *Righting Wrongs: Reparations in the Articles of State Responsibility*, 96 AM. J. INT'L L. 833, 836 (2003).

law.[223]

For the past century, scholars have viewed the overthrow of the Hawaiian government as irreversible and the annexing of the Hawaiian Islands as an extension of U.S. territory legally brought about by a congressional resolution. As a benign verb, the term 'annexation' conjures up synonyms such as affix, append, incorporate or bring together. But careful study of the annexation reveals that it was not benign, but a malign act of arrogation on the part of the United States to seize the Hawaiian Islands without legal restraints. Hawai'i's territory was occupied for military purposes, and in the absence of any evidence extinguishing Hawaiian sovereignty (e.g. a treaty of cession or conquest), international laws not only impose duties and obligations on an occupier, but maintains and protects the international personality of the occupied State, despite the overthrow of its government. As an operative agency of the United States, the U.S. government "is that part of a state which undertakes the actions that, attributable to the state, are subject to regulation by the application of the principles and rules of international law."[224]

Professor Ian Brownlie, a renowned scholar of international law, asserts that if "international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law."[225] *Restitutio in integrum* is the basic principle and primary right of redress for states whose rights have been violated,[226] for "it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[227] Sir Gerald Fitzmaurice argues that the "notion of international responsibility would be devoid of content if it did not involve a liability to 'make reparation in an adequate form.'"[228] When an international law has been violated, the American Law Institute's *Restatement of the Foreign Relations Law of the United States* emphasizes the "forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific

223. Germany v. Poland (*Chorzow Factory*), 1928 P.C.I.J. (ser. A), No. 17 at 47.

224. *See* VON GLAHN, *supra* note 25, at 94.

225. *See* BROWNLIE, *supra* note 52, at 287.

226. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 211 (Oxford University Press 1983).

227. *See Chorzow Factory, supra* note 223, at 29.

228. GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE VOL. 1 6 (Grotius 1986).

performance of an undertaking."[229] According to Crawford:

> In the case . . . of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. Even so, ancillary measures (the return of persons and property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.[230]

The underlying function of reparations, through remedial justice, is therefore to restore the injured State to that position as if the injury had not taken place.

A. Articles on State Responsibility for International Wrongful Acts

In 1948, the United Nations established the International Law Commission (ILC), comprised of legal experts from around the world that would fulfill the Charter's mandate of "encouraging the progressive development of international law and its codification."[231] State responsibility was one of fourteen topics selected for codification, and the I.L.C. began its work in 1956. Codification, according to Brownlie, "involves the setting down, in a comprehensive and ordered form, of rules or existing law and the approval of the resulting text by a law-determining agency."[232] After nearly half a century, the I.L.C. finally completed the *Articles on Responsibility of States for Internationally Wrongful Acts* on August 9, 2001, and was faced with two options for action by the United Nations. According to Crawford, who served as the I.L.C.'s *Special Rapporteur* for the articles and was a member of the Commission since 1992, the articles could be the subject of "a convention on State responsibility and some form of endorsement or taking note of the articles by the General Assembly."[233]

Members of the Commission were divided on the options and decided upon a two-stage approach that would first get the General Assembly to take note of the articles, which were annexed to a resolution. After some reflection, the commission also thought that maybe a later session of the General Assembly would be best to consider the appropriateness and

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229. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §901 (1987).

230. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 215 (Cambridge University Press 2002).

231. *Id.* at 1.

232. *See* BROWNLIE, *supra* note 52, at 30.

233. *See* CRAWFORD, *supra* note 230, at 58.

feasibility of a convention.[234] Crawford suggested that by having the General Assembly initially take note of the Articles by resolution, it could "commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law."[235] According to Professor David Caron, a legal scholar of international law, the significance of the "work of the ILC is similar in authority to the writings of highly qualified publicists," which is a recognized source of international law.[236] In his fourth report on State Responsibility, Crawford stated that "States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers."[237] There are two conceptual premises that underlie the articles of State responsibility:

1. The importance of upholding the rule of law in the interest of the international community as a whole; and
2. Remedial justice as the goal of reparations for those injured by the breach of an obligation.[238]

The codification of international law on State responsibility has been hailed as a major achievement "in the consolidation of the rule of law in international affairs." This is especially true because it "ventured out into the 'hard' field of law enforcement and sanctions, which has been classically considered the Achillean heel of international law."[239] Shelton also lauds, in particular, Article 41's mandate that States not only cooperate in order to bring to an end a serious breach of international law, but that States shall not "recognize as lawful a situation created by a serious breach."[240] Despite her view that the articles represent "the most far-

234. G.A. Res. 59/35 of Dec. 2, 2004. *See* CRAWFORD, *supra* note 230, at 59.

235. Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517, para. 26. *See* CRAWFORD, *supra* note 230, at 59.

236. Daniel Bodansky, John R. Crook, David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 867 (2002); *see also* BROWNLIE, *supra* note 226, at 25.

237. Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517, para. 22. *See* CRAWFORD, *supra* note 230, at 59. It should be noted that Professor Crawford's fourth report to the ILC on April 23, 2001, was submitted just three months after serving as President of the Arbitral Tribunal, together with Professor Christopher Greenwood, QC, and Gavan Griffith, QC, in the *Lance Larsen v. Hawaiian Kingdom* case at the Permanent Court of Arbitration. The arbitral award was announced on February 5, 2001; *see Larsen, supra* note 10.

238. *See* Bodansky, Crook, Caron, *supra* note 236, at 838.

239. Lauri Mälksoo, *State Responsibility and the Challenge of the Realist Paradigm: The Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia*, 3 BALTIC YEARBOOK OF INT'L LAW 57, 58 (2003).

240. *See* Shelton, *supra* note 222, at 842.

reaching examples of the progressive development of international law,"[241] she admits it also highlights "the need to identify the means to satisfy injured parties while ensuring the international community's interest in promoting compliance."[242] In 1991, the United Nations Security Council specifically addressed and established a means to satisfy injured parties who suffered from an international wrongful act by a State.

After the first Gulf War, the Security Council established the United Nations Compensation Commission as "a new and innovative mechanism to collect, assess and ultimately provide compensation for hundreds of thousands — or even millions — of claims against Iraq for direct losses stemming from the invasion and occupation of Kuwait."[243] According to United Nations' Secretary General Kofi Annan,

> the Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.[244]

Iraq's invasion and occupation of Kuwait was a violation of Kuwait's territorial integrity and sovereignty, and therefore considered an international wrongful act. It wasn't a dispute so intervention of an international court or arbitral tribunal was not necessary.

An internationally wrongful act must be distinguished from a dispute between States. According to the Articles of State Responsibility, an international wrongful act consists of "an action or omission . . . attributable to the State under international law; and . . . constitutes a breach of an international obligation of the State."[245] A dispute, on the other hand, is "a disagreement on a point of law or fact, a conflict of legal views or of interests"[246] between two States. Conciliation, arbitration and judicial settlement settle legal disputes that seek to assert existing law, while negotiation, enquiry and mediation provide for the settlement of political disputes that deal with competing political or economic

241. *Id.*

242. *Id.* at 856.

243. John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L. L. Law 144 (1993).

244. The United Nations established a website for the *United Nations Compensation Commission*. The website is an excellent resource of information regarding the claims by states, individuals and businesses against Iraq as well as selected publications. United Nations Compensation Commission, http://www2.unog.ch/uncc/ (last visited Mar. 28, 2008).

245. *See* CRAWFORD, *supra* note 230, at 81.

246. Great Britain v. Greece (*Mavrommatis Palestine Concessions*), 1924 P.C.I.J. (ser. A) No. 2, at 11.

interests.[247] A claim by a State[248] of an internationally wrongful act becomes a dispute, whether legal or political, once the respondent State opposes the claim; but an internationally wrongful act is not dependent on a State's opposing claim, especially if the breach involves the violation of a peremptory norm or *jus cogens*.[249] Crawford explains:

> Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself.[250]

In similar fashion, Hawai'i could find satisfaction through a compensation commission established by the United Nations Security Council that would be capable of addressing the subject of reparations and the effects of a prolonged occupation. In these next sections, I will argue that Hawai'i does not have a dispute with the United States regarding the illegal overthrow of the Hawaiian government and the prolonged occupation of its territory, and therefore, as an international wrongful act, the appropriate venue for remedy could be the Security Council and not an international court or arbitral tribunal, a case similar to the Kuwaiti-Iraqi situation.

B. Negotiating Settlement: 1893 Cleveland-Lili'uokalani Agreement of Restoration

When United States forces and its diplomatic corps overthrew the Hawaiian Kingdom government in 1893 with its aim towards extending its territory through military force, it constituted a serious breach of the Hawaiian State's dominion over its territory and the corresponding duty of non-intervention. Non-interference was a recognized general rule of

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247. UNITED NATIONS CHARTER, Article 33.

248. According to Brownlie, a "state presenting an international claim to another state, either in diplomatic exchanges or before an international tribunal, has to establish its qualifications for making the claim, and the continuing viability of the claim itself, before the merits of the claim come into question." *See* BROWNLIE, *supra* note 52, at 477.

249. Article 69 of the 1969 Vienna Convention on the Law of Treaties defines a "peremptory norm or general international law [as] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *See Vienna Convention on the Law of Treaties* (1969), United Nations, *Treaty Series*, vol. 1155, p. 331.

250. *See* CRAWFORD, *supra* note 230, at 162.

international law, or peremptory norm, in the 19th century as it is now, unless the interference was justifiable under the right of the intervening State's self-preservation.[251] But in order to qualify a State's intervention, the danger to the intervening State "must be great, distinct, and imminent, and not rest on vague and uncertain suspicion."[252] The Hawaiian Kingdom posed no threat to the preservation of the United States and after investigating the circumstances that led to the overthrow of the Hawaiian government on January 17, 1893, President Cleveland determined that "the military occupation of Honolulu by the United States . . . was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[253] He concluded:

> [the] lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.[254]

On the responsibility of State actors, Oppenheim states that "according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages."[255]

On November 13, 1893, U.S. Minister Albert Willis requested a meeting with the Queen at the U.S. Legation, "who was informed that the President of the United States had important communications to make to her."[256] Willis explained to the Queen of the "President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."[257] The President concluded that the "members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government . . . by the indefensible encouragement and assistance of our diplomatic representative."[258] Thus, they were rightfully subject to the pains and penalties of treason under Hawaiian law. The Queen was then

251. WHEATON, *supra* note 14, at 100.
252. *See* KENT, *supra* note 201, at 24.
253. *See Executive Documents*, *supra* note 28, at 452.
254. *Id.* at 455.
255. *See* OPPENHEIM, *supra* note 23, at 252.
256. *See Executive Documents*, *supra* note 28, at 1242.
257. *Id.*
258. *Id.* at 457.

asked, "[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government?"[259] She responded, "[t]here are certain laws of my Government by which I shall abide. My decision would be, as the law directs, that such persons should be beheaded and their property confiscated to the Government."[260] The Queen referenced Chapter VI, section 9 of the Penal Code, which states, "[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government." When asked again if she would reconsider the President's request, she responded, "[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated."[261] The interview soon came to a close and Willis submitted his report to U.S. Secretary of State Walter Gresham in Washington, D.C.

In a follow-up instruction sent to Willis on December 3, 1893, Gresham directed the U.S. Minister to continue to negotiate with the Queen.[262] Gresham acknowledged that the President had a duty "to restore to the sovereign the constitutional government of the Islands," but it was dependent upon an unqualified agreement of the Queen to assume all administrative obligations incurred by the Provisional Government, grant full amnesty to those individuals instrumental in setting up or supporting the Provisional Government, and to recognize the lawfulness of the so-called 1887 constitution.[263] Gresham directed Willis to convey to the Queen that should she "refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf."[264]

C. Constitutional Constraints upon the Agreement to Settle

In *Knote v. United States*, Justice Loring correctly stated that the word amnesty has no legal significance in the common law, but arises when applied to rebellions that bring about the rules of international law.[265] He added that amnesty is the synonym for oblivion and pardon,[266] which is

259. *Id.* at 1242.
260. *Id.*
261. *Id.*
262. *Id.* at 1192.
263. *Id.*
264. *Id.*
265. Knote v. The United States, 10 Ct. Cl. 387, 407 (1875).
266. *Id.*

"an act of sovereign mercy and grace, flowing from the appropriate organ of the government."[267] As President Cleveland's request for a grant of general amnesty from the Queen was essentially tied to the Hawaiian crime of treason, three questions naturally arise. When did treason actually take place? Was the Queen constitutionally empowered to recognize the 1887 constitution as lawful? And was the Queen empowered under Hawaiian constitutional law to grant a pardon?

The leaders of the provisional government committed the crime of treason in 1887 when they forced a constitution upon the Queen's predecessor, King Kalakaua, at the point of a bayonet, and organized a new election of the legislature while the lawful legislature remained in term, but out of session. As U.S. Special Commissioner James Blount discovered in his investigation, the purpose of the constitution was to offset the native voting block by placing it in the controlling hands of foreigners where "large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote . . .."[268] He concluded these elections "took place with the foreign population well armed and the troops hostile to the crown and people."[269] With the pending retake of the political affairs of the country by the Queen and loyal subjects, the revolutionaries of 1887 found no other alternative but to appeal to the United States resident Minister John Stevens to order the landing of United States troops in order to provide for their protection with the ultimate aim of transferring the entire territory of the Hawaiian Islands to the United States. By soliciting the intervention of the United States troops for their protection, these revolutionaries effectively rendered their 1887 revolution unsuccessful, and transformed the matter from a rebellion to an intervening state's violation of international law.[270] The 1864 Constitution, as amended, the civil code, penal code, and the session laws of the Legislative Assembly enacted before the 1887 revolution, comprised the legal order of the Hawaiian state and remained the law of the land during the revolution and throughout the subsequent intervention by the United States since January 16, 1893.

Prior to the 1887 revolution, the Queen was confirmed as the lawful

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267. *Ex parte* Law, 35 Ga. 285, 296 (S.D. Ga. 1866); *see also* Davies v. McKeeby, 5 Nev. 369, 373 (1870).

268. *See Executive Documents*, *supra* note 28, at 579.

269. *Id.*

270. United States doctrine at the time considered rebellions to be successful when the revolutionaries are (1) in complete control of all governmental machinery, (2) there exists no organized resistance, and (3) acquiescence of the people. *See* I John Bassett Moore, *A Digest of International Law* 139 (Washington: Gov't Printing Off., 1906).

successor to the throne of her brother King Kalakaua on April 10, 1877,[271] in accordance with Article 22 of the Hawaiian constitution, and, therefore, capable of negotiating on behalf of the Hawaiian Kingdom the settlement of the dispute with the United States. As chief executives, both the Queen and President were not only authorized, but limited in authority by a written constitution. Similar to United States law, Hawaiian law vests the pardoning power in the executive by constitutional provision, but where the laws differ, though, is who has the pardoning power and when can that power be exercised. Under the U.S. Constitution, the President alone has the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"[272] but under the Hawaiian constitution, the Monarch "by and with the advice of His Privy Council, has the power to grant reprieves and pardons, *after conviction*, for all offences, except in cases of impeachment (emphasis added)."[273] As a constitutional monarchy, the Queen's decision to pardon, unlike the President, could only come through consultation with Her Privy Council, and the power to pardon can only be exercised once the conviction of treason had already taken place and not before.

The Hawaiian constitution also vests the law making power solely in the Legislative Assembly comprised of the "[t]hree Estates of this Kingdom . . . vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together."[274] Any change to the Constitution (e.g. the Queen's recognition of the 1887 Constitution), must be first proposed in the Legislative Assembly and, if later approved by the Queen, then it would "become part of the Constitution of [the] country."[275] From a constitutional standpoint, the Queen was not capable of recognizing the 1887 Constitution without first submitting it for consideration to the Legislative Assembly convened under the lawful constitution of the country; nor was she able to grant amnesty to prevent the criminal convictions of treason, but only after judgments have already been rendered by Hawaiian courts. Another constitutional question would be whether or not the Queen would have the power to grant a full pardon without advice

271. Art. 22 of the Hawaiian Constitution provides: "...the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life..." ROBERT C. LYDECKER, ROSTER LEGISLATURES OF HAWAII: 1841-1918, 138 (The Hawaiian Gazette Co., Ltd. 1918).

272. U.S. CONST. art. II, § 2.

273. HI CONST. art. 27.

274. *Id.* art. 45.

275. *Id.* art. 80.

from Her Privy Council. If not, which would be the case, a commitment on the part of the Queen could have strong consideration when Her Privy Council is ultimately convened once the government is restored.

On December 18, 1893, after three meetings with Willis, the Queen finally agreed with the President and provided the following pledge that was dispatched to Gresham on December 20, 1893. An agreement between the two Heads of State had finally been made for settlement of the international dispute and restoration of the government.

> I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.[276]

The Queen's declaration was dispatched to Washington by Willis and represented the final act of negotiation and settlement of the dispute that arose between the United States and the Hawaiian Kingdom on January 16, 1893. In other words, the dispute was settled and all that remained for the United States President was to restore the Hawaiian Kingdom government, whereupon the Queen was to grant amnesty, after the criminal convictions of the failed revolutionaries, and assume administrative obligations of the so-called provisional government. But despite the Queen's reluctant recognition of the 1887 Constitution, Hawaiian constitutional law prevents it from having any legal effect, unless it was first submitted to a lawfully convened Legislative Assembly, which is highly unlikely given its illicit purpose. Furthermore, the United States' duty to restore the government

276. *Executive Documents*, *supra* note 28, at 1269.

was not dependent on an agreement with the Queen to grant amnesty and to recognize the 1887 Constitution, but rather a recognized mandate founded in the principles of international law. The push for amnesty, in particular, by the United States was political, not legal, and, no doubt, was to mitigate the severity of criminal punishment inflicted on the failed revolutionaries, which included U.S. citizens.[277]

Notwithstanding the constitutional limitations and legal constraints placed upon the Queen as Head of State, the agreement to pardon did represent, in a most trying and difficult time for the Queen, the spirit of "mercy and grace" offered to a cabal of criminals who would later defy the offer of pardon, and seek protection of the United States under the guise of annexation. These criminals never intended to be an independent state, whether as a provisional government that would "exist until terms of union with the United States of America have been negotiated and agreed upon,"[278] or when they changed their name to the so-called Republic of Hawai'i that authorized its President "to make a Treaty of Political or Commercial Union [with] . . . the United States, subject to the ratification of the Senate."[279] These subsequent actions taken by the revolutionaries would no doubt have a profound effect on whether or not the offer of a pardon is still on the table, even when they are criminally tried in absentia by a restored Hawaiian government.

D. United States Breach of the 1893 Cleveland-Lili'uokalani Agreement

In the United States, Congress took deliberate steps to prevent the President from following through with his obligation to restore, which included hearings before the Senate Foreign Relations Committee headed by Senator John Tyler Morgan, a pro-annexationist and its Chairman in 1894. These Senate hearings sought to circumvent the requirement of international law, where "a crime committed by the envoy on the territory of the receiving State must be punished by his home State."[280] While the Senate has no legal effect beyond the territorial borders of the United States, Morgan's purpose was to vindicate the illegal conduct and actions of the U.S. Legation and Naval authorities under U.S. law. Four republicans endorsed the report with Morgan, but four democrats submitted

277. "An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom." Haw. Penal Code chapt. VI, § 3.

278. *See* LYDECKER, *supra* note 271, at 187.

279. *Id.* at 198.

280. *See* OPPENHEIM, *supra* note 23, at 252.

a minority report declaring that while they agree in exonerating the commander of the USS Boston, Captain Wiltse, they could not concur in exonerating "the minister of the United States, Mr. Stevens, from active officious and unbecoming participation in the events which led to the revolution in the Sandwich Islands on the 14th, 16th, and 17th of January, 1893."[281] By contradicting Blount's investigation, Morgan intended, as a matter of congressional action, to bar the President from restoring the government as was previously agreed upon with the Queen because there was a strong fervor of annexation among many members of Congress. Cleveland's failure to fulfill his obligation of the agreement allowed the provisional government to gain strength, and on July 4, 1894, they renamed themselves the Republic of Hawai'i. For the next three years, they would maintain their authority by hiring mercenaries and force of arms, arresting and imprisoning Hawaiian nationals who resisted their authority with the threat of execution, and tried the Queen on fabricated evidence with the purpose of her abdicating the throne.[282] In 1897, the Republic signed another treaty of cession with President Cleveland's successor, William McKinley, but the Senate was unable to ratify the treaty on account of protests by the Queen and Hawaiian nationals. On August 12, 1898, McKinley unilaterally annexed the Hawaiian Islands for military purposes during the Spanish-American War under the guise of a Congressional joint resolution.

These actions taken against the Queen and Hawaiian subjects are directly attributable and dependent upon the non-performance of President Cleveland's obligation, on behalf of the United States, to restore the Hawaiian government. This is a grave breach of his agreed settlement with the Queen as the Head of State of the Hawaiian Kingdom. The 1893 Cleveland-Lili'uokalani international agreement is binding upon both parties as if it were a treaty, because, as Oppenheim asserts, since "there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty."[283] According to Hall, "a valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain

281. 6 S. COMM. ON FOREIGN RELATIONS, 53D CONG., COMPILATION OF REPORTS OF THE COMM. ON FOREIGN RELATIONS 1789-1901 363 (1894).

282. Two days before the Queen was arrested on charges of misprision of treason, Sanford Dole, President of the so-called Republic of Hawai'i, admitted in an executive meeting on January 14, 1894, that "there was no legal evidence of the complicity of the ex-queen to cause her arrest..." *Minutes of the Executive Council of the Republic of Hawai'i* 159 (on file in the Hawai'i State Archives).

283. *See* OPPENHEIM, *supra* note 22, at 661.

from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance clearly indicated."[284]

E. The Function of the Doctrine of Estoppel

The principle that a State cannot benefit from its own wrongful act is a general principle of international law referred to as estoppel.[285] The rationale for this rule derives from the maxim *pacta sunt servanda* — every treaty in force is binding upon the parties and must be performed by them in good faith,[286] and "operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment."[287] According to I.C. MacGibbon, a legal scholar in international law, underlying "most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation."[288] To ensure consistency in State behavior, the Permanent Court of International Justice, in a number of cases, affirmed the principle "that a State cannot invoke its municipal law as a reason for failure to fulfill its international obligation."[289] This principle was later codified under Article 27 of the 1969 Vienna Convention on the Law of Treaties, whereby "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[290]

In municipal jurisdictions there are three forms of estoppel — estoppel by judgment as in matters of court decisions; estoppel by deed as in matters of written agreement or contract; and estoppel by conduct as in matters of statements and actions. Professor D.W. Bowett states that these forms of estoppel, whether treated as a rule of evidence or as substantive law, is as much a part of international law as they are in municipal law, and due to the diplomatic nature of States relations, he expands the second form of estoppel to include estoppel by "Treaty, Compromise, Exchange of Notes, or other Undertaking in Writing."[291] Brownlie states that because estoppel in international law rests on principles of good faith and consistency, it is

284. *See* HALL, *supra* note 105, at 383.

285. D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 181 (1957).

286. Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331.

287. *See* Bowett, *supra* note 285, at 201.

288. I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L. Q. 468 (1958).

289. *Id.* at 473.

290. Vienna Convention on the Law of Treaties, art. 27, 1155 U.N.T.S. 331.

291. *See* Bowett, *supra* note 285.

"shorn of the technical features to be found in municipal law."[292] Bowett enumerates the three essentials establishing estoppel in international law:

1. The statement of fact must be clear and unambiguous.
2. The statement of fact must be made voluntarily, unconditionally, and must be authorized.
3. There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[293]

It is self-evident that the 1893 Cleveland-Lili'uokalani agreement meets the requirements of the first two essentials establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidenced in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27, 1893. As stated in the memorial:

> And while waiting for the result of [the investigation], with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government. The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.[294]

Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the second treaty of annexation signed in Washington, D.C., on June 16, 1897, between the McKinley administration and the self-proclaimed Republic of Hawai'i. These protests were received and filed in the office of Secretary of State John Sherman and continue to remain a record of both dissent and evidence of reliance upon the conclusion of the investigation by President Cleveland and his obligation and commitment to *restitutio in integrum* — restoration of the Hawaiian government. A memorial of the Hawaiian Patriotic League that was filed with the United States Hawaiian Commission for the creation of the territorial government appears to be the last public act of reliance made by a large majority of the Hawaiian citizenry.[295] The Commission was established on July 9, 1898 after President McKinley

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292. *See* BROWNLIE, *supra* note 52, at 641.
293. *See* Bowett, *supra* note 285, at 202.
294. *See Executive Documents*, *supra* note 28, at 1295.
295. *See* Smith, *supra* note 131, at 752.

signed the joint resolution of annexation on July 7, 1898, and held meetings in Honolulu from August through September. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language[296] and the other in English,[297] stated, in part:

> WHEREAS: By memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed to the President, the Congress and the People of the United States, to refrain from further participation in the wrongful annexation of Hawaii; and
>
> WHEREAS: The Declaration of American Independence expresses that Governments derive their just powers from the consent of the governed:
>
> THEREFORE, BE IT RESOLVED: That the representatives of a large and influential body of native Hawaiians, we solemnly pray that the constitutional government of the 16th day of January, A.D. 1893, be restored, under the protection of the United States of America.

There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the Hawaiian government, and the 1893 Cleveland-Lili'uokalani international agreement is the evidence of final settlement. As such, the United States cannot benefit from its non-performance of its obligation of restoring the Hawaiian Kingdom government under the 1893 Cleveland-Lili'uokalani agreement over the reliance held by the Queen and Hawaiian subjects in good faith and to their detriment. Therefore, the United States is estopped from asserting any of the following claims, unless it can show that the 1893 Cleveland-Lili'uokalani agreement had been fulfilled. These claims include:

1. Recognition of any pretended government other than the Hawaiian Kingdom as the lawful government of the Hawaiian Islands;
2. Annexation of the Hawaiian Islands by joint resolution in 1898;
3. Establishment of a U.S. territorial government in 1900;
4. Administration of the Hawaiian Islands as a non-self-governing territory since 1898 pursuant to Article 73(e) of the U.N. Charter;
5. Admission of Hawai'i as a State of the Federal Union in 1959; and,
6. Designating Native Hawaiians as an indigenous people situated within the United States.

The failure of the United States to restore the Hawaiian Kingdom

296. *Memoriala A Ka Lahui*, KE ALOHA AINA, Sept. 17, 1898, at 3.

297. *What Monarchists Want*, THE HAWAIIAN STAR, Sept. 15, 1898, at 3.

government is a "breach of an international obligation," and, therefore, an international wrongful act as defined by the 2001 Articles of State Responsibility for International Wrongful Acts. The severity of this breach has led to the unlawful seizure of Hawaiian independence, imposition of a foreign nationality upon the citizenry of an occupied State, mass migrations and settlement of foreign citizens, and the economic and military exploitation of Hawaiian territory — all stemming from the United States government's perverse view of military necessity in 1898. In a 1999 report for the United Nations Centennial of the First International Peace Conference, Professor Christopher Greenwood stated:

> Accommodation of change in the case of prolonged occupation must be within the framework of the core principles laid down in the Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.[298]

Despite the egregious violations of Hawaiian sovereignty by the United States since January 16, 1893, the principle of estoppel not only serves as a shield that bars the United States from asserting any legal claim over the Hawaiian Islands, but also a shield that protects the continued existence of the Hawaiian Kingdom, the nationality of its citizenry, and its territorial integrity as they existed in 1893

F. United Nations Security Council Apprised of the Occupation

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 security;"[299] and any member or non-member State "may bring [it] to the attention of the Security Council or of the General Assembly."[300]

On December 12, 2000, the day after oral hearings were held at the Permanent Court of Arbitration, a meeting took place in Brussels between Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned

298. CHRISTOPHER GREENWOOD, INTERNATIONAL HUMANITARIAN LAW (LAWS OF WAR): REVISED REPORT PREPARED FOR THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE, PURSUANT TO UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS A/RES/52/154 AND A/RES/53/99, 47 (1999).

299. United Nations Charter, art. 34.

300. Id. art. 35.

to Belgium, and the author and two deputy agents representing the acting government of the Hawaiian Kingdom in the *Larsen* case.[301] Ambassador Bihozagara attended a hearing before the International Court of Justice on December 8, 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.[302] 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 finally intervene as a matter of international law, Ambassador Bihozagara conveyed to the author that the illegal and prolonged occupation of Hawai'i was unacceptable and should not be allowed to continue. Despite the excitement of the offer, apprehension soon took its hold and the acting government could not, in good conscience, accept the offer and put 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 Ambassador Bihozagara for his government's offer, but the timing was premature. The author conveyed to the ambassador that the gracious offer could not be accepted without placing Rwanda in a vulnerable position of possible political retaliation by the United States, but that the acting government should instead focus its attention on continued exposure of the occupation both at the national and international levels.[303]

In line with exposure on the international level, the *acting* government was successful in filing a complaint, as a non-member State, with the United Nations Security Council under the Presidency of China on July 5, 2001.[304] Dumberry, who's article in the Chinese Journal of International Law addressed the Hawaiian complaint, stated, "Article 35(2) of the

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301. The foundation upon which the *acting* Hawaiian government was established can be found in the Memorial of the Hawaiian Kingdom, *Larsen* case, paragraphs 219-248, http://www.AlohaQuest.com/arbitration/pdf/Memorial_Government.pdf (last visited July 7, 2008); see also Section V, Annex 2 (Dominion of the Hawaiian Kingdom), Hawaiian Complaint filed with the United Nations Security Council, July 5, 2001, paragraphs 5.1-5.34, http://hawaiiankingdom.org/pdf/Hawaiian_UN_Attach2.pdf (last visited July 7, 2008), *reprinted in* 1 Haw. J.L. & Pol. 341, 452-464 (Summer 2004).

302. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000, p. 182.

303. Strategic Plan of the *acting* Council of Regency, http://hawaiiankingdom.org/pdf/HK_Strategic_Plan.pdf (last visited July 1, 2008).

304. *See* Dumberry, *supra* note 11, at 671-672. *See* also Sai, *supra* note 11, at 74-75.

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."[305]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."[306] As the Hawaiian complaint remained procedurally unabated, Russian Ambassador Vitaly Churkin, who served as President of the Security Council, was notified by letter dated March 1, 2008 of the acting government's intent to amend the Hawaiian complaint pursuant to the 2001 *Articles on Responsibility of States for International Wrongful Acts*. The amended complaint will seek the active intervention of the United Nations and its member States.

V. Conclusion

State sovereignty "is never held in suspense,"[307] but is vested either in the State or in the successor State, and in the absence of any "valid demonstration of legal title, or sovereignty, on the part of the United States," sovereignty, both external and internal, remains vested in the Hawaiian State. Therefore, despite the lapse of time, the 1893 Cleveland-Lili'uokalani Agreement remains legally binding on the United States, and the continuity of the Hawaiian Kingdom as a sovereign State is grounded in the very same principles that the United States and every other State have relied on for their own legal existence. In other words, to deny Hawai'i's sovereignty would be tantamount to denying the sovereignty of the United States and the entire system the world has come to know as international relations. And, recalling U.S. Secretary of State Thomas Francis Bayard's frequently quoted 1887 statement of the rule of law regarding the position of the United States and international obligations, we are reminded that,

> If a government could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to

305. *Id.* at 671.

306. *Id.* at 672.

307. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936).

demands for the fulfillment of international duties.[308]

In this article, I have attempted to chart out the overarching themes that address the events of the overthrow in historical, legal and contemporary relevance. Through this narrative, it is undeniable that the United States government, through its agencies since 1893, has manipulated and obfuscated these events for its benefit over and above the rights of the Hawaiian Kingdom and its nationals under international law. Professor Kanalu Young, a Hawaiian historian at the University of Hawai'i at Manoa, argues that:

> American scholars developed a military occupation-based historiography predicated on their own misrepresentations of the indigenous and national Hawaiian pasts and their own last century of illegal control here. Selected nineteenth-century primary and secondary sources were then contoured to the needs of the occupier government apparatus to provide school children with knowledge that indoctrinated as it educated.[309]

It is crucial at this stage to continue this type of research so that eventually Hawai'i and the world community at large will have a clearer understanding of these historical events and the profound impact it has today. Rather than focusing attention on reconciling the present, resources and efforts should be redirected in order to develop and foster a reckoning of Hawai'i's history — a reconciliation of the past. Thus, Professor Young advocates "a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity."[310] The challenge for other scholars and practitioners in the fields of political science, history and law is to distinguish between the rule of law and the politics of power. Rigorous and diligent study into the Hawaiian-American situation is not only warranted by the current legal and political challenges facing Native Hawaiians that the Akaka Bill seeks to quell, it is a matter of what is right and just. The ramifications of this study cannot be underestimated, and its consequences are, no doubt, far-reaching. They span from the political and legal to the social and economic venues situated in both the national and international levels. Therefore, in light of the severity of this needed research, analytical rigor is at the core and must not fall victim to political affiliations, partisanship or just plain bias.

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308. Correspondence from Thomas Bayard, Secretary of State, to Thomas Connery, U.S. Charge d'Affaires to Mexico (November 1, 1888) (found in *Foreign Relations of the United States* 751, 753).

309. *See* Young's *Kuleana: Toward a Historiography of Hawaiian National Consciousness*, *supra* note 11, at 32.

310. *Id.* at 1.