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AMERICAN OCCUPATION OF THE HAWAIIAN STATE: A CENTURY UNCHECKED

DAVID KEANU SAI*

I. INTRODUCTION

II. THE HISTORY OF THE HAWAIIAN STATE AND THE PROLONGED AMERICAN OCCUPATION

A. Recognition of Hawai`i as an Independent State

B. United States violation of Hawaiian State sovereignty

C. United States' violation of Hawaiian Neutrality

D. Explosion of U.S. National Population during Occupation

E. United States' violation of the Law of Occupation to Date

III. THE HAWAIIAN KINGDOM AT THE PERMANENT COURT OF ARBITRATION

A. The Larsen Case

B. Arbitral Award

C. Hawaiian Kingdom lodges Complaint with United Nations Security Council

D. Hawaiian Kingdom Accepts Jurisdiction of International Court of Justice

IV. EMPLOYING REALIST THEORY TO UNDERSTAND THE ACTIONS TAKEN BY THE ACTING HAWAIIAN GOVERNMENT

A. Key Elements of Classical Realist Theory

B. Reverse Power Relation Differential

V. CONCLUSION

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I. INTRODUCTION

Following the example set by the *1971 Alaska Native Claims Settlement Act*, in 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,"[1] it has become common practice for aboriginal Hawaiians to associate themselves with both the plight and the status of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated in their pursuit of sovereignty. This Hawaiian movement has operated within the ethnic or tribal model of the Native American movement in the United States. It soon became a part of the international indigenous movement. Osorio writes

> Ka Lahui Hawai`i (KLH), the elder organization in the sovereignty movement at sixteen years, is, in 2003, also the largest, with close to 20,000 citizens. KLH's constitution is based on a nation-within-nation model similar to that of several Native American governments that have treaty relationships and federal recognition with the United States. At the same time, KLH has sought international support through the Unrepresented Peoples Organization (UNPO) and has worked together with other Natives to craft a Declaration of the Rights of Indigenous Peoples within the United Nations.[2]

In 1993, the U.S. government, apologizing only to the native Hawaiian people, rather than subjects of the Hawaiian Kingdom, for the United States role in the overthrow of the Hawaiian government,[3] thus implying that only ethnic Hawaiians constituted the Kingdom,[4] fertilized the incipient ethnocentrism of the movement. The Resolution provided that

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[1] *Hawaiians: Organizing Our People*, a pamphlet produced by the students in "ES221—The Hawaiians" in the Ethnic Studies Program at the University of Hawai'i, at Manoa, in May1974, p. 37. The pamphlet is available in the Hamilton Library at the University of Hawai'i at Manoa.

[2] Jonathan Kamakawiwo`ole Osorio, "Ku`e and Ku`oko`a: History, Law, and Other Faiths," in Sally Engle Merry & Donald Brenneis' (eds.) *Law & Empire in the Pacific: Fiji and Hawai`i*, (Santa Fe: School of American Research Press, 2003), 218. Reprint at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 96-97.

[3] See U.S. Apology Resolution for the Illegal Overthrow of the Hawaiian Kingdom, 107 Stat. 1510. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 235-240.

[4] According to the 1890 census done by the Hawaiian Kingdom, the population comprised 48,107 Hawaiian nationals and 41,873 Aliens. Of the Hawaiian national population 40,622 were ethnic Hawaiian and 7,495 were not ethnically Hawaiian. This latter group of Hawaiian nationals comprised, but were not limited, to ethnic Chinese, varied ethnicities of Europeans, Japanese, and Polynesians. According to Hawaiian law a person born on Hawaiian territory acquired Hawaiian nationality, but international law prevents the citizenry of the occupying State from acquiring the nationality of the occupied State, which includes migrants who arrived in Hawai`i during the American occupation.

"Congress…apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of 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."[5] The Resolution also created a vacuum for many in the movement to pursue a native Hawaiian nation that centers on Hawaiian ethnicity and culture. Consistent with the Resolution in 2003, Senator Daniel Akaka submitted Senate Bill 344, also known as the Akaka Bill, to the 108th Congress. The Bill's stated 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 aboriginal, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance."[6]

The Akaka Bill's definition of native Hawaiians as indigenous peoples and their right to self-determination is tempered 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 the U.S. delegations 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." The Council also directed the "U.S. delegation should support use of the term 'internal self-determination' in both the UN and OAS declarations on indigenous rights, defined as follows:

> 'Indigenous peoples have 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. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-

[5] Apology Resolution, *supra* note 3, 1513.

[6] S. 344, 108th Cong. §19 (2003).

> members, as well as ways and means for financing these autonomous functions.'"[7]

If the U.S. Congress admitted its involvement in the overthrow of the Hawaiian Kingdom government was indeed illegal, the quintessential question that should be asked is, "What is the legal status of the Hawaiian Kingdom?" before discussing the creation of a new nation, which would only exist under the mandate of U.S. sovereignty. In other words given that a recognized State has legal sovereignty, how did the United States alienate Hawaiian sovereignty under international law. This answer is critical and would determine whether one should act upon a sovereignty already achieved and employ international law as nationals of the Hawaiian State for redress, or seek autonomy within the U.S. State and employ U.S. domestic laws as an "indigenous peoples." To answer this question we need to step aside from indigenous politics and enter the realm of international law and politics, which, in Political Science, is commonly referred to as International Relations. In this realm, established States are the primary actors and the domestic laws of the United States have no bearing on the Hawaiian-U.S. situation since they apply only to U.S. State territory.

One year following the 1993 Apology resolution, James Anaya authored a law review article concerning the illegal overthrow of the Hawaiian Kingdom and the legal status of 20th century native Hawaiian self-determination. He concluded, "Despite the injustice and illegality of the United States' forced annexation of Hawaii, it arguably was confirmed pursuant to the international law doctrine of effectiveness. In its traditional formulation, the doctrine of effectiveness confirms *de jure* sovereignty over territory to the extent it is exercised *de facto*, without questioning the events leading to the effective control."[8] Anaya cited two international law scholars,[9] Oppenheim and Hall, to support his contention. A more careful reading, though, shows that Oppenheim explains that the doctrine of effectiveness only applies when a recognized State occupies territories not the dominion of another State. Hall concurs with this description of the doctrine. If the Hawaiian Kingdom was an internationally recognized State at the time of the forced annexation, Anaya's assertion is a misreading of Oppenheim and Hall.

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[7] "Resolution of the U.S. National Security Council' position on Indigenous peoples," (18 January 2001), available at http://www1.umn.edu/humanrts/usdocs/indigenousdoc.html.

[8] James Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs," *Georgia Law Review* 28 (1994): 329.

[9] See Lassa Oppenheim, *International Law*, 3rd Ed., (London; New York: Longmans, Green & Co., 1920), 384; and William Hall, *A Treatise on International Law*, (Oxford: Clarendon Press, 1924), 125-6.

Oppenheim clarifies that "[o]nly such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a State."[10] These native communities that Oppenhem makes reference to became the subjects of colonization, and are known today as *indigenous peoples* or *populations*, which Anaya describes as,

> the rubric of indigenous peoples or populations is generally understood to refer to culturally cohesive groups that...suffer inequities within the states in which they live as the result of historical patterns of empire and conquest and that, despite the contemporary absence of colonial structures in the classical form, suffer impediments or threats to their ability to live and develop freely in their original homelands.[11]

Many writers[12] have relied upon Anaya's article on native Hawaiian self-determination, which is one of the reasons why the Hawaiian situation

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[10] *Id.*, Oppenheim, 383.

[11] Anaya, *supra* note 8, 339.

[12] See; ARTICLE: "With a Very Great Blame on Our Hearts": n1 Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, *American Indian Law Review* 27(2002): 1; COMMENT: "Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims," *American Indian Law Review* 22 (1998): 509; ARTICLE: "Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act," *Arizona State Law Journal* 29 (1997): 25; COMMENT: "Ho'olahui: The Rebirth of A Nation," *Asian Law Journal* 5 (1998): 247; ARTICLE: "The New Deal Origins of American Legal Pluralism," *Florida State University Law Review* 29 (2001): 189; NOTE: "Irreconcilable Rights and the Question of Hawaiian Statehood," *Georgia Law Journal* 89 (2001): 501; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; Recent Developments: "Not because they are Brown, but because of Ea n1: Rice v. Cayetano, 528 U.S. 495 (2000)," *Harvard Journal of Law and Public Policy* 24 (2001): 921; NOTE: "International Law as an Interpretive Force in Federal Indian Law," *Harvard Law Review* 116 (2003): 1751; ARTICLE: "People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law," *Indian Law Journal* 71 (1996): 673; ARTICLE: "Law, Language and Statehood: The Role of English in the Great State of Puerto Rico," *Law and Inequality Journal of Theory and Practice* 17 (1999): 359; ARTICLE: "Pluralisms: The Indian New Deal As A Model," *Margins* 1 (2001): 393; ARTICLE: "What is a Community? Group Rights and the Constitution: The Special Case of African Americans," *Margins* 1 (2001): 51; ARTICLE: "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec," *McGill Law Journal* 45 (2000): 155; ARTICLE: "Not Because They are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose," *Michigan Journal of Race and Law* 7 (2002): 317; NOTE: "Ua Mau Ke Ea O Ka Aina: Voting Rights and the Native Hawaiian Sovereignty Plebiscite," *Michigan Journal of Race and Law* 3 (1998): 475; NOTE: "Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status," *North Carolina Law Review* 79 (2001): 812; ARTICLE: "Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations," *New York University Annual Survey of American Law* 58 (2003): 659; Part Three: "'Traditional' Legal Perspective: State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization," *Oklahoma City*

has not been addressed within the discourse of international law, which applies to established States, but rather has been pigeon-holed in colonial/post-colonial discourse and the rights of indigenous peoples, which only serves to reify U.S. sovereignty over the Hawaiian Islands—a claim that international law and Hawaiian history fails to support.

In this article I will explain why the international arbitration took place and how the *acting* government,[13] representing the Hawaiian State in these proceedings, could use international law to expose the prolonged occupation of Hawaiian territory by the United States of America. Section II traces the history of the Hawaiian State and the circumstances of the American occupation. Within this context, section III identifies the steps and actions taken by the *acting* government during and after the arbitration proceedings. Section IV discusses Classical Realist Theory to understand the actions taken by the *acting* government, and the employment of, what I call, *reverse power relation differential*, as a viable alternative to be employed by a reemerging State that has been under prolonged occupation—especially in this case, where the memory by the international community of its international statehood has been the subject of erasure over time. Finally, I conclude that given the dynamics

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University Law Review 23 (1998): 353; COMMENT: "Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy," *Santa Clara Law Review* 41 (2001): 509; "Fifth Annual Tribal Sovereignty Symposium: 'Save the Whales' v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order," *St. Thomas Law Review* 13 (2000): 155; COMMENT: "Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments," *Tulane Journal of International and Comparative Law* 10 (2002): 307; ARTICLE: "Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations," *University of Detroit Mercy Law Review* 76 (1999): 745; COMMENT: "Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual, n1," *University of Hawai`i Law Review* 24 (2002): 693; RECENT DEVELOPMENT: "The Akaka Bill: The Native Hawaiians' Race For Federal Recognition," *University of Hawai`i Law Review* 23 (2001): 857; ARTICLE: "Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai`i," *University of Hawai`i Law Review* 18 (1996): 623; ARTICLE: "Cultures In Conflict In Hawai`i: The Law and Politics of Native Hawaiian Water Rights," *University of Hawai`i Law Review* 18 (1996): 71; ARTICLE: "The Kamehameha Schools/Bishop Estate and the Constitution," *University of Hawai`i Law Review* 17 (1995): 413; SYMPOSIUM: "Native Americans and the Constitution: Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society?," *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 357; ARTICLE: "Rethinking Alliances: Agency, Responsibility and Interracial Justice," *UCLA Asian Pacific American Law Journal* 3 (1995): 33; "SYMPOSIUM RACE AND THE LAW AT THE TURN OF THE CENTURY: Righting Wrongs," *UCLA Law Review* 47 (2000): 1815; ARTICLE: "Empire Forgotten: The United States's Colonization of Puerto Rico," *Villanova Law Review* 42 (1997): 1119; ARTICLE: "The Political Status of the Native Hawaiian People," *Yale Law & Policy Review* 17 (1998): 95.

[13] The foundation upon which the *acting* Hawaiian government was established can be found in Section 5 of Annex 2 (Dominion of the Hawaiian Kingdom), attached to the Hawaiian Complaint filed with the United Nations Security Council, July 5, 2001. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 397-406.

of the American occupation and the *Larsen case*, the *acting* government is preparing to engage the United States, on behalf of Mr. Larsen, before an international forum.

In the absence of any evidence extinguishing Hawaiian State*hood* since the 19th century, the *1907 Hague Regulations* not only imposes the duty and obligations of the occupier, but maintains and protects the international personality of the occupied *State*, notwithstanding the effectiveness of the American occupation.[14] In addition, Crawford, who served as President of the Tribunal in the *Larsen case*, concluded that illegal 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."[15]

II. THE HISTORY OF THE HAWAIIAN STATE AND THE PROLONGED AMERICAN OCCUPATION

The United Nations standard in defining a State is provided in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States." This codified definition of a State derives from Woolsey's 19th century definition, which is "a community of persons living within certain limits of territory, under a permanent organization which aims to secure the

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[14] Krystinia Marek, *Identity and Continuity of States in Public International Law*, *2nd Ed.*, (Geneva: Librairie Droz, 1968), 102. Regarding the principle of effectiveness in international law, Prof. 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."

[15] James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979), 417.

prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the government."[16]

Accepted as a rule of international law since the 19th century, a nation may possess the qualifications of a State, but the recognition aspect of the State is crucial and vital. The recognition of statehood must come from already established States within the Family of Nations, which have signaled their admittance of the new State into the exclusive family. "International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. It is exclusively through recognition that a State becomes an International Person and a subject of International Law."[17] Once a State is recognized it exists as a coequal in the Family.

A. *Recognition of Hawai`i as an Independent State*

Examples of nations achieving 19th century statehood recognition include: Greece (by Great Britain, France and Russia) in 1830; Belgium (by Great Britain, Austria, France, Prussia and Russia) in 1831;[18] Hawai`i (by Belgium, United States, Great Britain, and France) in 1843; and Turkey (by Great Britain, Austria, France, Prussia, Sardinia and Russia) in 1856.[19] Regarding the recognition of Hawaiian Statehood, the British and French Governments entered into a joint declaration on November 28, 1843 at the Court of London. The declaration 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] 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

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[16] Theodore Woolsey, *Introduction to the Study of International* Law, (New York: C. Scribner's Sons, 1878), 34.

[17] Lassa Oppenheim, *International Law, 1st Ed.*, (London; New York: Longmans, Green & Co., 1905), 108.

[18] Oppenheim, *supra* note 9, 73.

[19] *Id.*, 74. Oppenheim identifies the Ottoman Empire as Turkey by stating "In the Peace Treaty [1856], Turkey is expressly received as a member into the Family of Nations." Article VII of the 1856 Treaty of Paris concerning Turkish independence states "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of All the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (Concert) of Europe. Their Majesties engage, each on his part, to respect the Independence and the Territorial Integrity of the Ottoman Empire; Guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest."

> 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.[20]

Both the Hawaiian Kingdom and Turkey serve as examples of the Law of Nations transcending the Eurocentric and Christian-based community of States that began its formation since the 1648 Peace Treaty of Westphalia. Hawai`i was the first non-European State to be admitted into the Family of Nations, and Turkey was the first non-Christian State. Oppenheim, in his 1920 treatise, identified forty-one sovereign States as members of the Family of Nations in the 19th century,[21] notwithstanding his mistaken omission of the Hawaiian State. These states included,

> Austria-Hungary, Belgium, Bolivia, Chile, Colombia, Costa Rica, Denmark, Dominican Republic (Santo Domingo), Ecuador, El Salvador (San Salvador), France, Germany, Great Britain, Greece, Guatamala, Haiti, Honduras, Italy, Japan, Liberia, Lichtenstein, Luxemburg, Montenegro, Netherlands (Holland), Nicaragua, Norway-Sweden, Paraguay, Peru, Portugal, Roumania, Russia, Serbia, Spain, Switzerland, Turkey, Uruguay, United States of America, United States of Argentina, United States of Brazil, United States of Mexico, United States of Venezuela.

According to state discourse, once recognition of the State is achieved it possesses exlusive authority in the administration of its territory, commonly referred to as sovereignty. The sovereignty of a recognized State in the 19th century entailed:

> the uncontrolled exclusive exercise of the powers of the state; that is, both of the power of entering into relations with other states, and of the power of governing its own subjects. This power is supreme within a certain territory, and supreme over its own subjects wherever no other sovereignty has jurisdiction.[22]

These attributes of State sovereignty are consistent with the more contemporary definition provided by Brownlie as "(1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising

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[20] 1843 Anglo-Franco Declaration, Executive Documents of the United States House of Representatives, 53d Congress, 1894-95, Appendix II, Foreign Relations, (1894), 120. Hereinafter "Executive Documents," available at http://libweb.hawaii.edu/libdept/hawaiian/annexation/blount.html. (accessed 1 June 2004). Repinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

[21] Oppenheim, *supra* note 9, 188-191.

[22] Woolsey, *supra* note 16, 35.

from customary law and treaties on the consent of the obligor."[23] Thus, international law protects the legal status of an already established State from the unilateral acts made against it by any of its coequals in the Family of Nations without its consent.

As a recognized State, the Hawaiian Kingdom entered into extensive diplomatic and treaty relations with other States.[24] In particular, the Hawaiian Kingdom has five treaties with the United States of America: December 20, 1849,[25] May 4, 1870,[26] January 30, 1875,[27] September 11, 1883,[28] and December 6, 1884.[29] Treaties are contracts entered between two nations, but whether the contract is regulated by the Law of Nations is entirely dependent upon the status of the parties being States, as "[t]he Law of Nations is a law for the intercourse of states with one another, not a law of individuals."[30] Furthermore "the Law of Nations is a law between, not above, the several states, and is, therefore…called International Law."[31]

Having been established as a recognized State and bona fide member of the Family of Nations, Hawai`i was regarded in the 19th century as a legal person of equal sovereignty with other States. The Tribunal, in *Larsen* held at the Permanent Court of Arbitration, recognized Hawaiian Statehood in its Arbitral Award, when it held, *inter alia*, "in the nineteenth century the Hawaiian Kingdom existed as an independent

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[23] Ian Brownlie, *Principles of Public International Law*, *4th Ed.*, (Oxford: Clarendon Press, 1990), 287.

[24] Great Britain (Nov. 16, 1836 and July 10, 1851), The Free Cities of Bremen (Aug. 7, 1851) and Hamburg (Jan. 8, 1848), France (July 17, 1839), Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Germany (March 25, 1879), France (Oct. 29, 1857), Japan (Aug. 19, 1871), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 16, 1862), Russia (June 19, 1869), Samoa (March 20, 1887), Switzerland (July 20, 1864), Spain (Oct. 29, 1863), Sweden and Norway (July 1, 1852). These treaties can be found in their original form at the Hawai`i State Archives, Honolulu, Hawaiian Islands.

[25] 9 Stat. 178. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115-122.

[26] 16 Stat. 1113. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 123-125.

[27] 19 Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126-128.

[28] 23 Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129-133.

[29] 25 Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134-135.

[30] Oppenheim, *supra* note 9, 2.

[31] *Id.*

State recognised as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[32] Hawai`i became a full member of the Universal Postal Union on January 1st 1882. At the time it was occupied it maintained more than ninety Legations and Consulates throughout the world.[33]

The principle of State equality before international law is "an invariable quality derived from their International Personality. Whatever inequality may exist between States as regards their size, population, power, degree of civilization, wealth, and other qualities, they are nevertheless equals as International Persons."[34] Oppenheim also cautions that "legal equality must not be confounded with political equality."[35] And further notes that "Great Powers do not enjoy any superiority of right, but only a priority of action."[36]

B. *United States' violation of Hawaiian State sovereignty*

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 in the governmental overthrow and prepare for the annexation of the Hawaiian Islands to the United States. A treaty was signed on February 14, 1893, between a provisional government established and as a result of U.S. intervention, and the Secretary of State James Blaine. President Benjamin Harrison then submitted the treaty to the United States Senate for ratification. The election for the U.S. President was held in 1892 and resulted in Grover Cleveland defeating the incumbent Benjamin Harrison. Cleveland's inauguration was not until March 1893, and having 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, withdrew the treaty. Cleveland then appointed James H. Blount, a former U.S. Representative from Georgia and former chair of the House Committee on Foreign Affairs, as

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[32] *Larsen Case (Lance Larsen vs. Hawaiian Kingdom)*, 119 International Law Reports (5 February 2001) 581. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 244-283.

[33] See Thomas G. Thrum, "Hawaiian Register and Directory for 1893," *Hawaiian Almanac and Annual* (1892): 140-141.

[34] Oppenheim, *supra* note 9, 196.

[35] *Id.*, 198.

[36] *Id.*, 199.

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.[37] 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 he described the United States government's actions as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress."[38] Thus he acknowledged that through such acts the government of a peaceful and friendly people was overthrown. Cleveland 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"[39] and called for the restoration of the government of the Hawaiian Kingdom. Cleveland's action is in line with Marek's explanation that

> 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.[40]

President Cleveland declined to resubmit the annexation treaty to the Senate. He also failed to follow through in his commitment to reinstate Hawai`i's constitutional government, *restitutio in integrum*, more as a result of U.S. national domestic political reasons than international legal obligations. The Hawaiian Kingdom was thrown into civil unrest as a result of the U.S. illegal 1893 intervention. Five years lapsed before Cleveland's presidential successor, William McKinley, entered into a second treaty of annexation with the same individuals who participated in the illegal overthrow with the U.S. legation in 1893, and who called themselves the Republic of Hawai`i. This second treaty was signed on June 16, 1897 in Washington, D.C., and submitted to the Senate for approval.

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[37] See "Report of James Blount," Executive Documents, *supra* note 20, 567. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 136-192.

[38] *Id,* "President Cleveland's Message," 456. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 201-213, 211.

[39] *Id.*

[40] Marek, *supra* note 14, 64.

Her Majesty Queen Lili`uokalani was in the United States and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest in the U.S. State Department on June 18, 1897, that stated, *inter alia*, that this second attempt to procure a treaty of annexation

> ...ignores, not only all professions of perpetual amity and good faith made by the United States in former treaties with the sovereigns representing the Hawaiian people, but all treaties made by those sovereigns with other and friendly powers, and it is thereby in violation of international law.
> ...by treating with the parties claiming at this time the right to cede said territory of Hawai`i, the Government of the United States receives such territory from the hands of those whom its own magistrates (legally elected by the people of the United States, and in office in 1893) pronounced fraudulently in power and unconstitutionally ruling Hawai`i.[41]

The Presidents of Hawaiian national organizations in the islands also filed additional protests in the U.S. State Department. These political organizations were the Men and Women's Hawaiian Patriotic League (Hui Aloha `Aina), and the Hawaiian Political Association (Hui Kalai`aina). In addition, a petition of 21,169 signatures of Hawaiian nationals protesting annexation was filed with the U.S. Senate.[42] On account of these protests, the Senate was unable to garner enough votes to ratify the 1897 treaty.

C. *United States' violation of Hawaiian Neutrality*

On April 25, 1898, the U.S. Congress declared war on Spain and made it retroactive to April 21. The following day, President McKinley issued a proclamation that stated, "[i]t being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."[43] In *The Paquete Habana*, the U.S. Supreme Court explained that "the proclamation clearly manifests the general policy of the government to conduct the war in accordance

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[41] "Protest of Queen Lili`uokalani, June 17, 1897, U.S. State Department," available at http://libweb.hawaii.edu/libdept/hawaiian/annexation/protest/liliu5.html. (accessed 1 June 2004). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 227-229, 229.

[42] See "Hawaiian Patriotic League's Petition Against Annexation of Hawaii, September 11, 1897," available at http://libweb.hawaii.edu/libdept/hawaiian/annexation/petition.html. (accessed 1 June 2004).

[43] 30 Stat. 1770.

with the principles of international law sanctioned by the recent practice of nations."[44]

Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After U.S. Admiral Dewey defeated the Spanish Fleet in the Philippines on May 1, 1898, the *U.S.S. Charleston*, a protected cruiser, was re-commissioned on May 5, 1898, and ordered to lead a convoy of 2,500 troops to reinforce Admiral 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, taking on 1,943 tons of coal before it left the islands on the 4th of June.[45] 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.[46]

As soon as it became apparent that the so-called Republic of Hawai`i had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged with the Republic by H. Renjes, Spanish Vice-Counsel in Honolulu on June 1, 1898. U.S. 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 8.[47] 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.[48]

The 1871 Treaty of Washington between the United States and Great Britain[49] addressed the issue of State neutrality by providing, *inter alia*, 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 military supplies or arms, or the recruitment of men."

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[44] *The Paquete Habana*, (1900) 175 U.S. 712.

[45] U.S. Minister to Hawai`i Harold Sewall to U.S. Secretary of State William R. Day, No. 167, 4 June 1898, Dispatches, Hawai`i Archives.

[46] *Id.*, No. 175, 27 June 1898.

[47] *Id.*, No. 168, 8 June 1898.

[48] *Id.*

[49] 17 Stat. 863.

Because of U.S. intervention in 1893 and the subsequent creation of puppet governments, the United States took complete advantage of its own creation in the islands during the Spanish-American war and violated Hawaiian neutrality. Marek states

> 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.[50]

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.[51]

On July 6, 1898, the United States Congress passed a joint resolution purporting to annex the Hawaiian State. President McKinley signed the resolution the following day. U.S. Representative Thomas H. Ball, of Texas, characterized the effort to annex the Hawaiian State by joint resolution as "a deliberate attempt to do unlawfully that which can not be lawfully done."[52] Regarding this decision, United States constitutional scholar Westel Willoughby wrote,

> 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." [53]

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[50] Marek, *supra* note 14, 114.

[51] Thomas A. Bailey, "The United States and Hawaii During the Spanish-American War," *The American Historical Review* 36, issue 3 (April 1931): 557.

[52] United States Congressional Record, 55th Congress, 2nd Session, vol. XXXI, 5975.

[53] Westel Willoughby, *The Constitutional Law of the United States, 2nd Ed.*, (New York: Baker, Voorhis and Co., 1929), 427.

The joint resolution also attempted to abrogate the international treaties the Hawaiian Kingdom had with other States by stating that "the existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations." In 1996, a legal opinion from the U.S. Department of Justice rebuked the notion that congressional acts are superior to international treaties, and opined that "the unilateral modification or repeal of a provision of a treaty by Act of Congress, although effective as a matter of domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision."[54] The opinion also quoted a 1923 letter from then Secretary of State Charles Evan Hughes (later Chief Justice of the U.S. Supreme Court) to the Secretary of the Treasury. Hughes wrote that

> a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which is established by our legislative and judicial decisions and may be inconsistent with an existing Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is arbitration in which international rules of action and obligations would be the subject of consideration.[55]

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 in the Philippines and Guam, 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 in 1893. Even more disturbing is that the United States Senate, in secret session on May 31, 1898, admitted to violating Hawaiian neutrality. The Senate admission of violating international law was made more than a month before it voted to pass the so-called annexation resolution on July 6th. Senator Henry Cabot Lodge stated that,

> ...the [McKinley] Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received and complications

[54] Christopher Schroeder, "Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligation Under an Existing Treaty," *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 19 (1995): 393.

[55] "Letter from the Secretary of State to the Secretary of the Treasury, Feb. 19, 1923," quoted in Green Haywood Hackworth, *Digest of International Law* 5 (1943): 194-195.

> with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity.[56]

The transcripts of these secret hearings were suppressed for more than seventy years and could not be accessed by the public until the last week of January 1969, after a historian noted there were gaps in the Congressional Records.[57] The Senate later 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."

In this secret session, one of the topics discussed was the admitted violation of Hawaiian neutrality by the McKinley Administration and the liability it incurred due to the precedent set by the United States in the *Alabama claims* arbitration against Great Britain just after the American Civil War.[58] These actions show clear intent, *in fraudem legis*, to mask the violation of international law by a disguised annexation. Marek asserts that "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."[59]

Since 1900, Hawai`i has played a role in every U.S. armed conflict. Because of this, it has been used as the headquarters, since 1947, of the single largest combined U.S. military presence in the world, the U.S. Pacific Command.[60] Brigadier General Macomb, U.S. Army

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[56] Secret Session of the U.S. Senate, 31 May 1898, 55th Congress, 2nd Session, 156. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 230-284, 280.

[57] "Secret Debate on U.S. Seizure of Hawaii Revealed," *Honolulu Star-Bulletin newspaper*, (1 February 1969), A1-2.

[58] See Caleb Cushing, *The Treaty of Washington: its Negotiation, Execution, and the Discussions Relating Thereto*, (New York: Harper & Brothers, 1873), 280. The *Alabama claims* arbitration centered on the damages incurred by warships built for the Confederate Navy in Liverpool, England. One of these ships, the *C.S.S. Alabama*, captured fifty-eight Union merchant ships before it was finally sunk in a sea battle against the U.S.S. *Kearsarge* in 1864. In 1871, under the Presidency of Ulysses S. Grant, the United States was able to secure Great Britain's consent to submit the dispute to arbitration in Geneva, Switzerland. The Tribunal determined that Great Britain violated its neutrality under international law and found the British government liable to the United States in the amount of $15,500,000.00 in gold.

[59] Marek, *supra* note 14, 110.

[60] U.S. Pacific Command was established in the Hawaiian Islands as a unified command on January 1, 1947, as an outgrowth of the command structure used during World War II, *available at* http://www.pacom.mil/ 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,

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."[61] U.S. Territorial Governor Wallace Rider Farrington also stated, "Every day is national defense in Hawai`i."[62]

D. *Explosion of U.S. National Population during Occupation*

The last census done in the Hawaiian Kingdom in 1890 listed the entire population at 89,990. Here follows the breakdown by nationality:

Hawaiian nationals.....48,107
- Aboriginals (pure/part).....40,622
- Hawaiian born foreigners.....7,495
  - Portuguese.....4,117
  - Chinese and Japanese.....1,701
  - Other White foreigners.....1,617
  - Other nationalities.....60

Aliens.....41,873
- United States nationals.....1,928
- Chinese nationals.....15,301
- Japanese nationals.....12,360
- Portuguese nationals.....8,602
- British nationals.....1,344
- German nationals.....1,034
- French nationals.....70
- Polynesians.....588
- Other nationalities.....60

According to the United States Census of the population in the Hawaiian Islands from 1900 to 1950, migration from the continental U.S. and its

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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.

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

[62] I.Y. Lind, "Ring of Steel: Notes on the Militarization of Hawai`i," *Social Process in Hawai`i* 31, (1984-85), 25.

territories in fifty years totaled 293,379.[63] Here follows the breakdown by year.

1900	4,290
Other U.S. territories or possessions	6
Continental U.S	4,284
1910	11,674
Puerto Rico	3,510
Philippine Islands	2,372
Other U.S. territories or possessions	104
Continental U.S	5,688
1920	32,322
Puerto Rico	2,581
Philippine Islands	18,728
Other U.S. territories and possessions	56
Continental U.S	10,957
1930	85,282
Puerto Rico	2,181
Philippine Islands	52,672
Other U.S. territories and possessions	238
Continental U.S	30,191
1940	92,211
Puerto Rico	1,848
Philippine Islands	35,778
Other U.S. territories and possessions	361
Continental U.S	54,224
1950	67,600
Puerto Rico	1,178
American Samoa	463
Other U.S. territories and possessions	319
Continental U.S	65,640

On April 30, 1900, the U.S. Congress passed *"An Act to Provide a Government for the Territory of Hawaii.*[64] Regarding U.S. nationals, section 4 of the 1900 Act stated that

> 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

[63] "Table 18. Country of Birth, for Hawai'i, Urban and Rural, 1950, and for Hawai'i, 1900 to 1940," *U.S. Census of Population: 1950, Department of Commerce*, 52-18.

[64] 31 Stat. 141.

> 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.

In addition to this Act, the 14th Amendment of the United States Constitution also provided that individuals born in the Hawaiian islands since 1900 would acquire U.S. citizenship. It states, in part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[65] Under these American municipal laws, the putative U.S. national population exploded in the Hawaiian Kingdom from a meager 1,928 out of a total population of 89,990, in 1890, to 423,174 out of a total population of 499,794 in 1950.[66] In 1890, the aboriginal Hawaiian constituted 85% of the Hawaiian national population, whereas in 1950, the aboriginal Hawaiian population, now being categorized as U.S. nationals, numbered 86,091[67] out of 423,174, being a mere 20%.

Beginning in 1900, the putative U.S. nationals in the occupied *State* of the Hawaiian Kingdom sought inclusion of the Territory of Hawai`i as an American State in the United States union. The first statehood bill was introduced in Congress in 1919, but was not able to pass because the U.S. Congress did not view the Hawaiian Islands as a fully incorporated territory, but rather as a territorial possession. This attitude by the United States toward Hawai`i is what prompted the legislature of the Territory of Hawai`i to enact a "Bill of Rights," on April 26, 1923,[68] asserting the Territory's right to U.S. Statehood. Beginning with the passage of this statute, a concerted effort by the American nationals residing in the Hawaiian Kingdom sought U.S. Statehood. By 1950 the U.S. migration allegedly reached a total 293,379. These migrations stand in direct violation of Article 49 of the Fourth Geneva Convention, which provides that the "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[69]

The object of U.S. Statehood was finally accomplished in 1950 when two special elections were held amongst the occupier's population for 63

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[65] On the subject of the occupying State unilaterally imposing its national laws within the territory of the occupied State, e.g. see Feilchenfeld, *infra* note 86.

[66] "Table 8, Race and Nativity, by sex, for Hawaii, Urban and Rural, 1950 and for Hawaii, 1900 to 1950," *supra* note 63, 52-13.

[67] *Id.*

[68] Act 86 (H.B. No. 425), 26 April 1923.

[69] See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. Hereinafter "Fourth Geneva Convention."

delegates to draft a constitution for the State of Hawaii in convention. Registered voters constituted 141,319, and votes cast for the delegates were 118,704.[70] A draft constitution for the State of Hawaii was ratified by a vote of 82,788 to 27,109 on November 7, 1950. On March 12th, 1959, the U.S. Congress approved the statehood bill and it was signed into law on March 18th, 1959.[71] In a special election held on June 27th, 1959, three propositions were submitted to vote. First, "Shall Hawaii immediately be admitted into the Union as a State?"; second, "The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved March 18, 1959, and all claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States"; third, "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 Hawaii are consented to fully by said State and its people." The U.S. nationals accepted all three propositions by 132,938 votes to 7,854. On July 28th, 1959, two U.S. Hawaii Senators and one Representative were elected to office, and on August 21, 1959, the President of the United States proclaimed that the process of admitting Hawaii as a State of the U.S. Union was complete. On September 17, 1959, the permanent representative of the United States to the United Nations reported to the Secretary General that the Hawaiian Islands had become the 50th State of the U.S. Union. The entire process was dependent upon U.S. Congressional authority and not international law.

Every action taken within the territory of the Hawaiian Islands by the United States since January 17, 1893 directly violates the 1849 Hawaiian-American treaty, in particular, Article VIII:

> and each of the two contracting parties engage that the citizens or subjects of the other residing in their respective States shall enjoy their property and personal security, in as full and ample manner of their own citizens or subjects, of the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively.[72]

In 1988, Kmiec, *acting* Assistant Attorney General, Office of Legal Counsel for the Department of Justice, raised questions about Congress's authority to annex the Hawaiian Islands by municipal legislation. He concluded that it was "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate

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[70] "Population and Voting Data by County, Territory of Hawai'i, 1900-1950," *University of Hawai'i*, (28 October 1955).

[71] 73 Stat. 4.

[72] 1849 Hawaiian-American Treaty, *supra* note 25.

precedent for a congressional assertion of sovereignty over an extended territorial sea."[73] Consistent with the question of Congress's legal ability to annex the Hawaiian Islands, the Opinion also raises questions of Congressional authority concerning the 1959 Statehood Act and the boundaries of the State of Hawai'i as provided in the second proposition of the special election held on June 27, 1959. Kmiec could not find that Congress has authority to establish boundaries for a State that is beyond the United States' territorial sea. Kmiec opined,

> the Supreme Court in *Louisiana* recognized that this power [of Congress to admit new states into the union] includes 'the power to establish state boundaries.' 363 U.S. at 35. The Court explained, however, that it is not this power, but rather the President's constitutional status as the representative of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect.[74]

Craven, also concluded "the [1959] plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them."[75]

E. *United States' violation of the International Law of Occupation to date*

In discussing the occupation of a neutral State, the Arbitral Tribunal in *Coenca Brothers vs. Germany* (1927) concluded "the occupation of Salonika by the armed forces of the Allies constitutes a violation of the neutrality of that country."[76] Later, in the *Chevreau case* (1931), the Arbitrator concluded that the status of the British forces while occupying

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[73] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 12 (1988): 262.

[74] *Id.*

[75] Dr. Matthew Craven, Reader in International Law, University of London, SOAS, authored a legal opinion for the *acting* Hawaiian Government concerning the continuity of the Hawaiian Kingdom, and the United States' failure to properly extinguish the Hawaiian State under international law (12 July 2002), para. 5.3.6. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 311-347, 341.

[76] *France vs. Great Britain*, 7 Mixed Arbitral Tribunals, (1928), 686.

Persia—a neutral State in the First World War—was analogous to "belligerent forces occupying enemy territory."[77] Feilchenfeld asserts

> Section III of the Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. 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."[78]

Therefore, the United States forces, while occupying Hawai`i, being a neutral State, fell under the rules set forth in the 1907 Hague Convention, IV, Respecting the Laws and Customs of War on Land.[79] Oppenheim also states 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."[80]

Article 43 of the 1907 Hague Convention, IV, delimits the power of the occupant and serves as a fundamental bar upon its free agency within an occupied neutral State. Although the United States signed and ratified the Hague Regulations,[81] which was subsequent to the intervention and occupation of the Hawaiian Kingdom in 1898, the "text of Article 43 was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law."[82] Graber also states "nothing distinguishes

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[77] *Chevreau case, American Journal of International Law* 27 (1933): 153.

[78] Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Washington: Carnegie Endowment for International Peace, 1942), 8.

[79] Czar Nicholas II of Russia called for the first multilateral Peace Conference in August of 1898 to begin the codification of the Laws of War. During the summer of 1899 the conference convened and was attended by representatives of twenty-six *States* who met at The Hague, Netherlands. A subsequent Peace Conference was later convened by Great Britain in 1907 at The Hague, and attended by forty-four *States* that further clarified the Laws of War. The text of Article 43 remained unchanged in both the 1899 and 1907 Conventions.

[80] Lassa Oppenheim, *International Law*, *7th Ed.*, (New York: David McKay Co., 1948-1952), 241.

[81] Signed at The Hague October 18, 1907; ratification advised by the U.S. Senate March 10, 1908; ratified by the President of the United States February 23, 1909; ratification deposited with the Netherlands Government November 27, 1909; proclaimed February 28, 1910.

[82] Eyal Benvinisti, *The International Law of Occupation*, (New Jersey: Princeton University Press, 1993), 8.

the writing of the period following the 1899 Hague code from the writing prior to that code."[83] Benvinisti explains that the

> foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. From the principle of inalienable sovereignty over a territory spring the constraints that international law imposes upon the occupant. The power exercising effective control within another's sovereign territory has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign.[84]

One distinction between *sovereignty* and *authority* is that the former is inalienable and belongs to the occupied State, while the latter is temporary and is an administrative role acted upon by the occupant State. The United States government's failure to adhere to the commands of international law regarding occupation is not evidence proving the termination of the Hawaiian State anymore than possession of stolen property proves the possessor to be a true owner. On this note, Benvenisti states,

> modern occupants came to prefer, from a variety of reasons, not to establish such a direct administration. Instead, they would purport to annex or establish puppet states or governments, make use of existing structures of government, or simply refrain from establishing any form of direct administration. In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogates' activities, and when using surrogate institutions, would deny any international responsibility for the latter's actions. Acknowledgment of the status of the occupant is the first and the most important initial indication that the occupant will respect the law of occupation. Such an acknowledgement is also likely to restrict the occupant's future actions and limit its claims regarding the ultimate status of that territory.[85]

By acknowledging the status of the United States as an occupant, Feilchenfeld's comment can be better appreciated when he writes,

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[83] Doris Graber, *The Development of the Law of Belligerent Occupation 1863-1914*, (New York: Columbia University Press, 1949), 143.

[84] Benvinisti, *supra* note 82, 5.

[85] *Id.*

> under Article 43 of the Hague Regulations the occupant must respect the laws in force in the country 'unless absolutely prevented.' A total displacement of national laws and the introduction at large of the national law of the occupant would violate Article 43 and also the rules on the maintenance of fundamental institutions.[86]

In other words, all U.S. municipal laws imposed within the territory of the Hawaiian State, since 1898 to the present, are a direct violation of Article 43 of the Hague Regulations. Furthermore, Article 47 of the Fourth Geneva Convention provides that "the benefit under the Convention shall not be affected by any change introduced, as a result of the occupation of a territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."[87] Marek explains that Article 47 enumerates two measures, which, in this particular case, can be applied to the Hawaiian-American situation.

> One is premature annexation... In other words, even in an illegally annexed occupied territory the Convention retains its validity, thereby not only continuing to protect the civilian population, but, it is submitted, further emphasizing the separate identity and continuity of the occupied State, without which such protection would not be possible. The second is any interference by the occupant with the existing institutions or government, that is to say with the existing and continuing legal order of the occupied State. It is precisely here that the possibility of a puppet government is clearly included. Should any such changes result in the creation by the occupant of a puppet government or puppet State, this fact will be non-existent in the eyes of the Convention, which will continue to apply in the occupied territory. That territory will consequently retain the legal status it enjoyed before the occupation and prior to the changes in question.[88]

International laws of occupation mandate an occupying government to 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. 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

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[86] Feilchenfeld, *supra* note 78, 89.

[87] Fourth Geneva Convention, *supra* note 69.

[88] Marek, *supra* note 14, 118.

possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country."

In a recent article published in the *Chinese Journal of International Law* concerning the *Larsen case*, Dumberry also notes that the law of occupation

> as defined in the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, 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.[89]

III. THE HAWAIIAN KINGDOM AT THE PERMANENT COURT OF ARBITRATION

In 2001 the *American Journal of International Law* published a commentary by Bederman & Hilbert on the *Larsen case*.[90] As part of the legal team, we were well aware of the impact this case would cause on the international plane concerning *justiciability of indispensable third parties*, which in this case was the United States of America, and the use of the United Nations Commission on International Trade Law rules in non-commercial contracts. But the substantive issue of what the *Larsen case* represented far surpassed these juridical issues that have to be wrestled with by future litigants in the international courts.

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[89] Patrick Dumberry, "The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law," *Chinese Journal of International Law* 2, issue 1 (2002): 682.

[90] David J. Bederman & Kurt R. Hilbert, "Arbitration—UNCITRAL Ruless—justiciability and indispensable third parties—legal status of Hawaii" *American Journal of International Law* 95 (2001): 927. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 82-91. Bederman & Hilbert state "Hawaiians never directly relinquished to the United States their claim of inherent sovereignty either as a people or over their national lands." (928). However, it is not clear what the authors meant by using the term *inherent sovereignty* as contradistinguished from *state sovereignty*, which is used to describe the legal competence of the Hawaiian State. The term *inherent sovereignty* has no juridical meaning on the international plane, but it is a term used within the United States to identify the limited sovereignty of the Native American Indian tribes when compared to the States of the American Union. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991): "Indian tribes are 'domestic dependent nations,' which exercise *inherent sovereign authority* over their members and territories." This language was also inserted in the 1993 Congressional Resolution apologizing only to native Hawaiians on behalf of the United States for the illegal overthrow of the Hawaiian Kingdom on January 17, 1893 (U.S. Public Law 103-150). The 1993 Apology Resolution erroneously categorize the native Hawaiians as an Indian tribe and not as part of the nationals of an occupied state. *Brownlie* states "In general, 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state." Brownlie, *supra* note 23, 290.

Central to the *Larsen case* was the continued existence of the Hawaiian Kingdom as an independent State under international law, and the prolonged occupation of its territory by the United States of America. In the latter part of the 19th century, international law provided only two modes of territorial acquisition in which one State could acquire the territory of another State when not at war with each other, namely: (1) treaty of cession,[91] or (2) prescription,[92] which is a claim similar to adverse possession whereby an international tribunal must validate and confirm title of the claimant State. The United States' claim to the Hawaiian Islands does not fall under any of the foregoing modes of acquisition. Instead, the United States relies on its Congressional authority. Since 1898, United States municipal laws have been imposed within the territory of the Hawaiian State without its consent. Oppenheim explains that "the Law of Nations and Municipal Law differ…regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of a State and the relations between this State and those individuals. International Law, on the other hand, regulates relations between the member-States of the Family of Nations."[93] He concludes that "just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law."[94]

A. *The Larsen Case*

The *Larsen case* was a consequence of the failure of the United States to abide by the international laws of occupation. In particular, the failure on the part of the United States, as an occupant State, to administer the laws of the occupied State in accordance with Article 43 of the 1907 Hague Convention, IV. Under Article II of the Special Agreement to arbitrate, the issue to be determined by the Tribunal was defined as follows:

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

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[91] Oppenheim, *supra* note 9, 376-82.

[92] *Id*, 400-3.

[93] *Id.*, 25.

[94] *Id.*

As Professor James Crawford, SC, President of the Arbitral Tribunal, stated, "thus the issue *in rem*, the point is that, if the Hawaiian Kingdom continues to exist, its existence is *in rem.* It is not *in personam.* The Hawaiian Kingdom does not exist solely in the opinion of Mr. Larsen. It exists."[95] Bederman & Hilbert assert,

> [a]t the center of the PCA proceeding was…that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawai`i. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States committed against him.[96]

B. *Arbitral Award*

In its award, the Tribunal stated that the "dispute submitted to the Tribunal was a dispute not between the parties to the arbitration agreement but a dispute between each of them and a third party [the United States of America]."[97] As a result, "the Tribunal is precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America is not a party to the proceedings and has not consented to them."[98] The Tribunal explained it

> cannot determine whether the Respondent [the *acting* government] has failed to discharge its obligations towards the Claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the Monetary Gold principle precludes the Tribunal from doing. As the International Court explained in the East Timor case, "the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case" (ICJ Reports, 1995, p. 90, para. 29).[99]

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[95] See transcripts of the oral hearings at the Permanent Court of Arbitration, *Larsen vs. the Hawaiian Kingdom*, 11 December 2000, 167, available at http://www.alohaquest.com/arbitration/transcript_001207.htm

[96] Bederman & Hilbert, *supra* note 90, 928.

[97] Larsen Case, *supra* note 32, 594.

[98] *Id.*, 598.

[99] *Id.*, 596.

The Tribunal, however, did keep the window open for the possibility of the parties to pursue the question of responsibility of the *acting* government under fact-finding instead, stating "[t]he Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts."[100] On March 23, 2001, the parties jointly requested the Tribunal to be reconstituted into a Fact-finding Commission of Inquiry under the PCA.[101]

C. *Hawaiian Kingdom Lodges Complaint with United Nations Security Council*

While the fact-finding proceedings were pending, the *acting* government acted upon the legal interests of the Hawaiian State by filing a Complaint with the United Nations Security Council on July 5, 2001. The Complaint was filed under the council presidency of China in accordance with Article 35(2) of the United Nations Charter, which provides that "a State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter."

Under the provision set forth in Article 36(1) of the U.N. Charter, the Security Council was requested to investigate the Hawaiian Kingdom question, in particular, the merits of the complaint, and to recommend appropriate procedures or methods of adjustment.[102] Mindful of the veto power on the Council of the United States, the intent of the complaint was to apprise, and not necessarily initiate any proceedings—it was a request for recommendations. The filing of the complaint occurred while China served as President of the Security Council for the month of July 2001. After a detailed and lengthy telephone discussion with the Chinese legal counsel in New York City regarding the legal continuity of the Hawaiian State and the *Larsen case*—an assertion she was unable to deny—a courier from the Security Council headquarters was dispatched to the ground floor of the United Nations building to receive and log-in

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[100] *Id.*, 597.

[101] "Agreement between the Parties to Request the Arbitral Tribunal to be Reconstituted as a Commission of Inquiry pursuant to the Permanent Court of Arbitration Optional Rules for Fact-finding Commission of Inquiry," *available at* http://www.AlohaQuest.com/arbitration/letter_010323.htm

[102] "Hawaiian Kingdom Complaint filed with the United Nations Security Council," available at http://hawaiiankingdom.org/united-nations.shtml. Reprinted without annexes, at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 286-449.

the Hawaiian complaint in accordance with Article 35(2) of the U.N. Charter.

D. *Hawaiian Kingdom Accepts Jurisdiction of International Court of Justice*

The following month, the *acting* government submitted a General Declaration with the Registrar accepting jurisdiction of the International Court of Justice (ICJ). The cover letter, dated August 30, 2001, stated, *inter alia*,

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

Both the Security Council Complaint and the ICJ Declaration were subjects of a law review article published in the Chinese Journal of International Law.[103] In September of 2001, the *acting* government approached Larsen's counsel and requested the proceedings at the Permanent Court of Arbitration be terminated so that the legal interests of the parties in the *Larsen case* could be consolidated under the principle of diplomatic interposition. The request was on condition the Hawaiian Kingdom take up Larsen's case at the United Nations level, including the ICJ, thus raising Larsen's dispute from a private interest to a dispute between States.[104] In other words, the *acting* government would represent Larsen in international proceedings against the United States. An agreement to settle was reached on September 21, 2001 and filed with the Registry of the Permanent Court of Arbitration who thereafter terminated the proceedings.[105] Bederman & Hilbert concede that the dispute in the *Larsen case* is legitimate.

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[103] Dumberry, *supra* note 89, 671-5.

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

[105] "Agreement between Lance Paul Larsen and the Hawaiian Kingdom for the settlement of the case in the Permanent Court of Arbitration concerning alleged liabilities of the Hawaiian Kingdom government." Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 284-285.

> Because international tribunals lack the power of joinder that national courts enjoy, it is possible—as a result of procedural maneuvering alone—for legitimate international legal disputes to escape just adjudication. For example, in *Larsen*, the United States commanded an enviable litigation posture: even though the United States admitted its illegal overthrow of the Hawaiian Kingdom, it repeatedly refused to consent to international arbitration. Larsen was thus forced to engage in the artful pleading of a claim against his own, ostensible government. In a weird inversion of the normal principles of diplomatic protection, Larsen was compelled to argue that his own government failed to protect him.[106]

IV. EMPLOYING REALIST THEORY TO UNDERSTAND THE ACTIONS TAKEN BY THE *ACTING* HAWAIIAN GOVERNMENT

Existing treatises on International Law and Politics have ignored the Hawaiian State of the 19th century, or simply assumed it was extinguished by United States municipal legislation under the doctrine of effectiveness. To ignore this context omits a range of factors, which International Law and Classical Realist Theory (CRT) is able to provide, including not only the critical issue of why the Hawaiian State continues to exist under international law, but also how the Hawaiian State, in a realist school of thought, can use international law and certain organs at the international venue to its advantage and expose the American occupation. "Classical realists theory contains essentially two points of focus: international systems level of analysis and the state..."[107] Public international law, which is a law between established States, provides the rules or peremptory norms (*jus cogens*), and the realist acts upon these peremptory norms to pursue a particular political course of action. CRT can be employed to understand the actions taken by a State that has been under prolonged occupation, and the theory is able to discern between municipal law and international law—a crucial factor in the Hawai`i-U.S. relation. Between 1843 and 1898, the relationship between the two States was reciprocal, but from 1898 to the present the United States has been unilaterally exerting its municipal legislation over the Hawaiian Islands without first extinguishing the Hawaiian State under international law.[108]

Realist theory "consists in ascertaining facts and giving them meaning

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[106] Bederman & Hilbert, *supra* note 90, 933.

[107] James E. Dougherty & Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations: A Comprehensive Survey 5th Ed.*, (New York: Longman, 2001), 63.

[108] Craven, *supra* note 75.

through reason."[109] Central to the CRT school of thought is the self-preservation of the State, which is employed as part of the State's national interest to include objectives and techniques that can be strategically and tactically played out. Morganthau, a classical realist, explained that in order to

> give meaning to the factual raw material of foreign policy, we must approach political reality with a kind of rational outline, a map that suggests to us the possible meanings of foreign policy. In other words, we put ourselves in the position of a statesman who must meet a certain problem of foreign policy under certain circumstances, and we ask ourselves what the rational alternatives are from which a statesman may choose who must meet this problem under these circumstances (presuming always that he acts in a rational manner), and which of these rational alternatives this particular statesman, acting under these circumstances, is likely to choose.[110]

A. *Key Elements of Classical Realist Theory*

Dougherty & Pfaltzgraff[111] identify six key elements in the CRT school of thought as: (1) the international system is based on States as the key actors; (2) States exist in a condition of legal sovereignty in which nevertheless there are gradations of capabilities, with greater and lesser States as actors; (3) international politics is a struggle for power in an anarchic setting in which nation-States inevitably rely on their own capabilities to ensure their survival; (4) States are unitary actors and that domestic politics can be separated from foreign policy; (5) States are rational actors characterized by a decision-making process leading to choices based on national interest; and (6) the concept of power.

To the classical realist, power depends on economic, political and military capabilities of a State, but for the Hawaiian State—being without economic, political or military capabilities due to prolonged occupation—it is its legal sovereignty that cannot be affected by the conventional power wielding of the United States, and for that reason limits the conflictual relationship within the juridical framework. Dougherty & Pfaltzgraff also assert that "power is situational, or dependent on the issue, object, or goal for which it is employed."[112] In other words, power is employed differently depending on the situation. For the *acting* government, the situation is prolonged occupation, but the

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[109] Hans J. Morgenthau, *Politics Among Nations, 6th Ed.* (New York: Alfred A. Knopf, Inc., 1985), 4.

[110] *Id.*, 5.

[111] Dougherty & Pfaltzgraff, *supra* note 107, 63-4.

[112] *Id.*, 75.

legal presumption when asserting occupation is the continued existence of the Hawaiian State, which is its legal sovereignty. Brownlie adds that the "sovereignty of and equality of states represent the basic constitutional doctrine of the laws of nations, which governs a community consisting primarily of states having a uniform legal personality."[113]

B. *Reverse Power Relation Differential*

Because legal parity of States is the presumption, and not the exception, under international law, the dynamics of power will change if an already established State reemerges as a player in the international system and employs self-help. Emphasis is not upon *what* the reemerging State will assert, but rather on the *capability* of the receiving unit, in this case the United States or an international organization, to *deny* what the reemerging State is asserting. In other words, power, in this sense, is not what is *exerted*, but rather what is *acquired* from the reaction of the receiving unit. Therefore, it is the Hawaiian State, itself, that is the object of power within the international system, and the wielding of this object could indeed force the receiving unit to do something it wouldn't normally do. This is what I will call a *reverse power relation differential*, which can only be tactically employed when the asserting unit is in control of a particular situation it chooses to engage in and is able to respond to the reaction of the receiving unit in a manner that benefits the asserting unit—a form of passive aggression. When the re-emerging State employs *reverse power relation differential*, it must be a rational actor "characterized by a decision-making process leading to choices based on national interest,"[114] and ever mindful that "international politics is a struggle for power in an anarchic setting in which nation-states inevitably rely on their own capabilities to ensure their survival."[115] As States and international institutions rely on international law as the basis of their own existence, this tactic, when properly employed, has a profound effect upon a receiving unit, which cannot afford to be put in a position as to deny its very own existence under international law. This is a powerful tactic when employed properly.

An example of employing *reverse power relation differential* occurred in the early stages of the arbitration, where it was recommended by the Secretary General of the PCA that in order to maintain the integrity of the arbitration proceedings the *acting* government should provide a formal invitation for the United States to join in the arbitration. This action would elicit one of two responses that would be crucial to the proceedings. Firstly, if the United States had legal sovereignty over the

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[113] Brownlie, *supra* note 23.

[114] Dougherty & Pfaltzgraff, *supra* note 107, 64.

[115] *Id.*, 63.

Hawaiian Islands, via it being the fiftieth State of its union, it could demand that the PCA terminate these proceedings citing intervention by the international court upon U.S. sovereignty without its consent. This would have set in motion a separate hearing by the PCA where the *acting* government would be able respond to the U.S. claim.[116] Secondly, if the United States chose not to intervene, this non-action would indicate to the court that it doesn't have a presumption of sovereignty or "interest of a legal nature" over the Hawaiian Islands.

On March 3, 2000, the *acting* government notified the U.S. State Department's legal counsel in Washington, D.C., Mr. John Crook of the arbitration proceedings. An invitation was extended for the United States to join in and the discussion was reduced to writing and made a part of the record at the Registry of the PCA.[117] Thereafter, the United States notified the Secretary General of the PCA that it had no intention to intervene and requested that the parties to the arbitration consent to the United States' access to all pleadings and transcripts of the proceedings. The *acting* government and Larsen's counsel, intending that the arbitration be transparent, willingly consented to the United States' request and the U.S. Embassy in The Hague retrieved the necessary information throughout the proceedings. Here the *acting* government was able to get the United States to do something it wouldn't normally do by employing the *reverse power relation differential.*

V. CONCLUSION

The recent Iraqi conflict and subsequent occupation has greatly enhanced the political and legal climate of the international community. The conflict has triggered open discussion, at every level, of States rights as defined by the international laws of war and occupation. This dialogue of States rights has now made the 1907 Hague Regulations and the 1949 Geneva Convention a common language spoken worldwide. Second, Hawai`i played a major role in the Iraqi conflict, because a large number of the U.S. military engaged in the fighting in Iraq came out of the

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[116] Article 62 of the Statute of the International Court of Justice provides "l. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request." The Tribunal in the *Larsen case* relied upon decisions of the International Court Justice to guide them concerning justiciability of third States, e.g. Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (1953-1954); East Timor (Portugal v. Australia) (1991-1995) and Certain Phosphate Lands in Nauru (Nauru v. Australia) (1989-1993). In the event that the United States chose to intervene to prevent the *Larsen case* from going further because it had "an interest of a legal nature which may be affected by the decision," it is plausible that the Tribunal would look to Article 62 of the Statute for guidance.

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

United States Pacific Command (PACOM), headquartered in Hawai`i, and attached to the United States Central Command (CENTCOM) for combat operations. These included sixty thousand troops from the 1st Marine Expeditionary Force, and forty-seven warships,[118] nine of which were based at Pearl Harbor, Hawai`i.[119] This is yet another example of Hawaiian neutrality being consistently violated by the United States since the Spanish-American War, 1898.

Given the prolonged occupation of the Hawaiian Islands and the presumed continuity of the Hawaiian State, in the absence of any evidence to the contrary, the U.S. has continuously violated Hawaiian neutrality in many major conflicts to date and has utilized Hawaiian territory and its seaports to become the superpower it is today. Hawaiian territory not only serves as the headquarters for the largest and oldest of the nine unified military commands of the U.S. Department of Defense in the world, it also reluctantly serves as a prime target. Under the international laws of occupation, the emphasis is always directed upon the regime of the occupier and not upon the nationals of the occupied State. This reasoning is to ensure the occupier's compliance with the laws of occupation—a compliance that has gone unchecked for over a century.

Scheffer asserts that the victim or victims of an occupier's violation of international law "could bring an action in U.S. federal courts against officials of the [occupant State] under the Alien Tort Statute provided that the occupying power is the alleged responsible party and the jurisdictional requirements of that law are satisfied."[120] The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[121] In *Ex parte* Quirin, the U.S. Supreme Court explained that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of…individuals."[122]

In addition to civil liability, Scheffer adds that "[t]he War Crimes Act of 1996, as amended at least with respect to certain crimes that may arise

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[118] See GlobalSecurity.org, "U.S. Forces Order of Battle – 7 April," at http://www.globalsccurity.org/military/ops/iraq_orbat_toe.htm (accessed 7 April 2003).

[119] These ships include four Submarines (USS Honolulu, USS Cheyenne, USS Columbia, and the USS Pasadena), two Destroyers (USS Fletcher and the USS Paul Hamilton), one Cruiser (USS Chosin), and two Frigates (USS Crommelin and the USS Reuben James).

[120] David J. Scheffer, "Beyond Occupation Law," *American Journal of International Law* 97 (2003): 858.

[121] 28 U.S.C. 1350.

[122] *Ex parte Quirin*, 317 U.S. 27.

during an occupation, also creates a new basis for criminal liability under U.S. law."[123] And on the international plane, he also explains that the government of an occupied State

> may even find reason to seek to challenge the [occupant State] before the International Court of Justice over alleged violations of occupation law and to seek reparations, particularly if the occupation extends over a long period of time. The occupying power[] also may be exposed to bilateral or multilateral diplomatic or economic retaliation for their decisions and actions that must comply with the high standards of occupation law.[124]

Aside from these legal and political revelations, the discourse is shifting from an indigenous optic that has operated within the American State apparatus and its municipal legislation, to one of a Hawaiian State optic that operates within the framework of International Relations between established States and international law. All else aside, though, the *acting* government is preparing to engage the United States, on behalf of *Larsen*, before an international court, which will bring to the forefront a basic fundamental question—the legal competency of whether or not the *acting* government can serve as the provisional organ of the Hawaiian State in its representation of *Larsen*.

"Diplomatic" or *de facto* recognition cannot be sought by the *acting* government from other States, but rather, it is limited to pursue "juristic" recognition of *de facto* officers that assumed the reins of a *de jure* government whose legal order has been maintained by an objective rule of international law. Recognition of a *de facto* government is political and acts of pure policy by States,[125] because they attempt to change or alter the legal order of an already established and recognized personality—whereas, juristic recognition of *de facto* officers does not affect the legal of order of a State that has been the subject of prolonged occupation. It is within this context that the *acting* government, as *de facto* officers, cannot claim to represent the people *de jure*, but only, at this time, represent the legal order of the Hawaiian State as a result of the limitations imposed by the laws of occupation and the duality of two legal orders existing in one in the same territory.[126] Therefore, given the legal complexity of the Hawaiian-American situation, it is only sound and prudent that an international court provide an independent constitutive review of the formation of the *acting* government devoid of politics.

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[123] Scheffer, *supra* note 123, 859.

[124] *Id.*

[125] See Marek, *supra* note 14, p. 158.

[126] See Dumberry, *supra* note 89.