HAWAI`I, HISTORY AND INTERNATIONAL LAW

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I. INTRODUCTION

In his Lectures on the Philosophy of History, Hegel famously remarked that "only those peoples can come under our notice which forms a state."[1] In his own terms, his point would seem to have been that the State constituted the fruition of history – the ideal in which human subjectivity might gain its fullest expression, and the idea through which all history is to be understood.[2] But the remark may equally be taken as having a different resonance: that it is only through becoming a State that a political community may effectively assert its own historical existence—to insist upon that history being told, explicated and recognized, and to assert by reason of that history its own position in the world. This is, of course, not to say that history is to be understood exclusively as political history—excluding rival social, economic or cultural histories—nor that the past of subordinate social groups are not "historical." Rather, it asserts that becoming a State endows a people with an identifiable political history, brings that history to the forefront, and disallows it from being overwritten by narratives that submerge their history or otherwise denies their political identity.

For those active in Hawai`i—for the sovereignty groups and others keen on reinstalling a government representing the Kingdom of Hawai`i—this

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[1] Patrick Gardiner, *Theories of History: Readings from Classical and Contemporary Sources*, (Glencoe, Illinois: Free Press, 1959), 67.

[2] Carr was similarly to assert as late as 1961 that: "when more an more people emerge into social and political consciousness, become aware of their respective groups as historical entities having a past and a future, and enter into history." E.H. Carr, *What is History?* (London: Penguin, 1961), 149.

emphasis upon political history is all the more evident. For them, recapturing the history of the Kingdom—understanding its place in the world—is central to the assertion of a political identity that might otherwise be subsumed within that of the United States as a whole. It allows, in particular, resistance both to the fact of the United States' occupation and settlement of the Islands and to the marginalization of the movement's ambitions within the broader field of U.S. politics.

II. POLITICS V. CULTURE

For the sovereignty movement the fact that the Hawaiian Kingdom existed as an independent State recognized by other European powers for most of the 19th Century, seems to provide, in its own right, reason to interrogate the legitimacy of its subsequent occupation and incorporation into the United States. It invites a series of obvious questions: did the United States acquire sovereignty over the Islands? Alternatively, is the United States merely a belligerent occupant? Was the right of sovereignty enjoyed by the Kingdom of Hawaii in the 19th Century effectively extinguished by the occupation, or the subsequent "exercise of self-determination?" Or does it continue today albeit in suspended form? The political history of the Kingdom appears to give the movement some political agency that might otherwise be denied.

In the second place, an emphasis upon the political history of Hawaii serves also as a way to resist an exoticization and depoliticisation of the Hawaiian sovereignty movement. Absent any sense of its political history, the Hawaiian sovereignty movement would naturally find itself identified as one representing an indigenous people. Much as work has progressed within the United Nations with a view to advancing the interests of indigenous peoples, it is clear that any such identification bears a certain cost. Initially, indigenous peoples are necessarily required to forge their identity by reference to culture and ethnicity. As the UN working definition of indigenous peoples puts it, indigenous peoples are

> non-dominant sectors of society... determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[3]

Two things stand out: the fact of "non-dominance"; and, the preservation of cultural/ethnic particularity. They are seen to be opposed—the preservation of cultural/ethnic particularity being a defense against the inevitable consequences of non-dominance. Being indigenous, in other

[3] Martinez Cobo, J.R., *A Study of the Discrimination Against Indigenous Peoples*, (UN, New York 1987) (doc.E/CN.4/Sub.2/1986/7/Add.4), Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UNHCR, Geneva at paras. 379 & 380.

words, means to position oneself against the overriding threat of assimilation, and the resort to cultural particularity is seen to be the first and last line of defense. What goes uninterrogated, here is the line of thought developed by Said, Babha, and other others, who question the way in which culture may be constructed for purposes of legitimating authority. As Said put it, in his study of 19th Century literature on the "Orient":

> [t]he Orient was Orientalized not only because it was discovered to be "Oriental" in all those ways considered common-place by an average nineteenth-century European, but also because it could be—that is, submitted to being—made Oriental.[4]

Said, drawing upon Foucault and Gramsci, argued that the discourse of cultural difference was run through with hegemonic intent: the cultural identity of the Orient was being elaborated within the West as a way of justifying a claim to coercive authority by, and cultural superiority of, the Occident. Babha similarly offers the suggestion that whilst "the cultural" is frequently seen as a source of conflict (in the nature of a "clash of civilizations"); it might more properly be understood as the outcome of "discriminatory practices" the production of which has tended to operate as "a sign of authority."[5] Non-dominance and cultural particularity, on such an understanding, may reinforce one another when operating as a generalized discourse as to the status of particular groups or communities: indigenous peoples being rendered politically subordinate because of their cultural particularity.

This point becomes all the more evident when articulating the formal consequences of an identification as an indigenous minority within international law. Whilst is now well accepted that indigenous minorities enjoy certain rights—whether as individual members or collectively—this is not such as to grant them any identifiable political standing. Minorities, as it is commonly put, have no right to secessionary "self-determination"—at most, this may be a concession granted by a beneficent government. For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization. All they might hope for at that level is formal recognition of their vulnerability and continued political marginalization rather than the status accorded under international law to a nation belligerently occupied.

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[4] Edward Said, *Orientalism,* (New York: Pantheon, 1978), 6.

[5] Homi Babha, *The Location of Culture,* (London: Routledge, 1994), 114.

III. THE PROBLEMS OF HISTORY

If the political history of Hawai`i—its history as an independent State in the 19th Century—seems to offer the sovereignty movement something it may not obtain by arguments from culture or ethnicity, it necessarily brings into question the terms of international law under which its existence was first recognized and then denied. Central to any claim to sovereignty by those purporting to represent the Kingdom of Hawai`i, however, is the assumption that its legal title—its claim to be regarded as enjoying a continued sovereignty even in face of U.S. occupation and control—has not been extinguished by subsequent events. Such an argument would have to overcome three obvious difficulties: first that the U.S. "acquisition" of Hawai`i at the end of the 19th Century seemed all too consistent with the terms of international law at that time—not only was resort to war not prohibited, but there was widespread acceptance of the idea that conquest itself could provide a valid basis for title to territory. Second, even if the original annexation was, in some respect or other, inconsistent with the terms of international law at that time, the subsequent effective occupation of its territory and absence of protest would, in any case, seem to confirm the fact of U.S. sovereignty. Opposing that title after the elapse of a century would, if nothing else, smack of utopianism. Finally, it might be argued that Hawai`i, as a registered Non-Self-Governing territory, exercised its self-determination pursuant to the terms of article 73 of Chapter XI of the United Nations Charter in the form of a plebiscite held in 1959 in which the vast majority of the population voted to remain part of the United States. The United Nations endorsed the results of that plebiscite and removed Hawai`i from the list of Non-Self-Governing Territories.[6]

Of these three difficulties, the first assumes particular prominence. Only if the annexation was unlawful—or in some way compromised the sovereignty of the Hawaiian people—might one proceed to examine the subsequent legitimacy of the occupation or question the procedural regularity of the plebiscite as an expression of self-determination. Certainly there are issues to be taken up in respect of both. Claims to sovereignty based on acquisitive prescription (adverse possession) have been remarkably rare, and, for the most part, have either been dismissed[7] or narrowly construed as a way of acquiring title to territory. Since 1945 furthermore, its applicability as regards the possession of territory consequent to the use or threat of force would be all the more suspect given the peremptory status of the prohibition in article 2(4) of the UN Charter. Similarly, whilst residents of Hawai`i were certainly given the opportunity to express their willingness or otherwise to join the United

[6] United Nations General Assembly, General Assembly Resolution 1469 (XIV) (1959).

[7] See Judge Moreno Quintana in his dissenting opinion in the *Rights of Passage* case. ICJ Rep. 1960, 6.

States in the plebiscite of 1959,[8] to cast this as a valid exercise of self-determination overlooks the plebiscite's obvious deficiencies—the lack of effective choice,[9] the failure to take into account the influence of demographic changes as a result of settlement in Hawai`i, and the failure to give recognition to the earlier existence of the Hawaiian Kingdom.[10] The plebiscite, if anything, seemed to work as an ideological cover for existing doubts as to the legitimacy of U.S. claims to sovereignty. However, neither of these arguments would gain much purchase absent doubts concerning the annexation and putative extinction of the Hawaiian Kingdom in 1898.

The main difficulty concerning a return to the context and circumstances surrounding the annexation of Hawaii in 1898 is the insistence, pursuant to doctrine of inter-temporal law (as articulated by Arbitrator Huber in the Island of Palmas case),[11] of determining the legality of an act in light of the law existing at that time.[12] This requires not merely stepping back in order to ascertain the specific moments and events that were central to the narrative of annexation, but and more importantly, trying to understand those events in light of contemporaneous understandings of international law. The past has to be interpreted in accordance with the prevailing ideas of the past before it comes to have meaning for the present. This takes the conventional problematic of history—that of representing the "factuality" of the past as a constraint upon the activity of the historian—one step further: it is not the facts alone with which international lawyers directly engage, but the facts as understood by contemporaneous diplomats and lawyers to be relevant or important at that time. It is, in other words, not the history of the annexation itself that is important, but the story of that story—the story of attitudes towards annexation within 19th Century policy and practice, of how international

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[8] On 18 March 1959, the United States Congress established an Act to Provide for the admission of the State of Hawai`i into the Union setting down, in section 7(b) the terms by which this should take place. This specified that: "At an election designated by proclamation of the Governor of Hawai`i ... there shall be submitted to the electors, qualified to vote in said election, for adoption or rejection, the following propositions: 1. Shall Hawai`i immediately be admitted into the Union as a State?" 73 Stat. 4.

[9] General Assembly Resolution 1514 (XV) (1960) makes clear, that a decision in case of integration should be made "with full knowledge of the change in their status... expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."

[10] The identification of Hawai`i as a "Non-Self-Governing Territory" was itself controversial insofar as article 73 of the Charter which governs the terms of the "sacred trust", refers to peoples "who have not yet attained a full measure of self-government."

[11] *Island of Palmas Case (Netherlands v. United States)*, 2 R.I.A.A. 829 (1928). Reprinted at *American Journal of International Law* 22 (1928): 909.

[12] *Id.* per Huber ("a juridical fact must be appreciated in light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled.")

lawyers reconciled the possibility of State extinction with the belief that law emanated from sovereign consent.

A second, associated difficulty is that the doctrine of inter-temporal law seems to work only when one can be relatively sure as to the consistency of view on a particular point. Inconsistency on numerous points of international law is evident not only as between various different schools of thought both in space and time, but also internally within any one articulated position. Most current accounts of 19th Century law and practice tend towards the view that annexation was a perfectly legitimate mode of acquiring territory, it was by no means obvious that this was a position uniformly adopted throughout the profession as regards the forcible absorption of one (recognized) State into another. For the same reason, the evident conflict between various competing principles—such as sovereign equality and the right to engage in war—was never unequivocally settled in 19th Century legal thought such that an answer to the legality of the annexation of any particular territory could be indisputably determined. The ambivalences of legal thought at that time are all the more apparent in case of the circumstances surrounding the annexation of Hawai`i.

IV. HAWAIIAN STATEHOOD AND ITS IMPLICATIONS

The recognition given to the Kingdom of Hawai`i as an independent State under the terms of international law in the middle of the 19th Century was, in many respects, exceptional. As has frequently been noted, the rise of positivism and the associated rejection of the natural law leanings of early commentators (such as Grotius and Pufendorf) led many 19th Century lawyers to posit international law less in terms of a "universal" law of nations and more in terms of an international public law of European (and North American) States.[13] According to this view, international law was gradually extended during the course of that Century to other portions of the globe primarily in virtue of imperialist ambition and colonial practice - much of the remainder was regarded as simply beyond the purview of international law. The recognition of "new" States was therefore granted once they had achieved the "standard of civilization"—which broadly meant the adoption of secular codes of law modeled upon European jurisprudence and the reform of legal and administrative systems.[14] For some States—such as the Ottoman Empire—this meant, bizarrely enough, their formal reintroduction into the family of nations, notwithstanding the fact that that formal

[13] See e.g., T. J. Lawrence, *Principles of International Law, 4th ed.,* (London: McMillan, 1913), 83; Paul Pradier-Fodéré, *Traité de droit international public Européen et Americain,* (1885).

[14] See generally, Gerrit Gong, *The Standard of Civilization,* (Oxford: Clarendon, 1984).

recognition, was preceded by legal and diplomatic relations with other Western powers that extended back several centuries.[15]

In the latter half of the 19th Century, Hawaii was one of the few political communities outside Europe and the Americas that had been formally recognized as an independent State. The others tended to be communities either of settlers, such as Liberia and the Orange Free State, or large independent States with whom there had existed longstanding and extensive relations (such as China, Siam, the Ottoman Empire and Japan) for whom formal recognition was slowly forthcoming. Hawai`i, by contrast, was neither a major trading partner with whom some level of international discourse was inevitable, nor a community of Western settlers for whom the quality of being "civilized" was a given.

Hawai`i was recognized by a number of Western powers (including Belgium, Great Britain,[16] France,[17] and the United States,[18]) and was encouraged to receive and dispatch diplomatic agents to more than 15 States (including Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden and Norway and the United States)[19] this recognition fairly unequivocally placed it within the family of nations as recognized by international lawyers at the time. For those who cared to name the powers in question, Hawai`i was rarely omitted from the list. Hawai`i's acceptance into the

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[15] See generally Charles H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, (Oxford: Clarendon, 1967); Charles H. Alexandrowicz, *Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries*, 100 Hague Recueil (1960), 203.

[16] "Anglo-Franco Proclation of Hawaiian Statehood, 28 November 1843," Executive Documents of the United States House of Representatives, 53rd Congress, 1894-95, Appendix II, Foreign Relations, (1894), 64. Hereinafter "Executive Documents" available at http://libweb.hawaii.edu/libdept/hawaiian/annexation/blount.html. (accessed 22 July 2004). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

[17] Id.

[18] Message from the President of the United States respecting the trade and commerce of the United States with the Sandwich Islands and with diplomatic intercourse with their Government, Dec. 19th 1842. The Apology Resolution of 1993, however, maintains that the U.S. "recognized the independence of the Kingdom of Hawai`i, extended full and complete diplomatic recognition to the Hawaiian Government 'from 1826 until 1893."

[19] In addition to establishing formal diplomatic relations with other States, the Hawaiian Kingdom entered into an extensive range of treaty relations with those States. Treaties were concluded with the United States (Dec. 23rd 1826, Dec. 20th 1849, May 4th 1870, Jan. 30th 1875, Sept. 11th 1883, and Dec. 6th 1884), Britain (Nov. 16th 1836 and July 10th 1851), the Free Cities of Bremen (Aug. 7th 1851) and Hamburg (Jan. 8th 1848), France (July 17th 1839), Austria-Hungary (June 18th 1875), Belgium (Oct. 4th 1862), Denmark (Oct. 19th 1846), Germany (March 25th 1879), France (Oct. 29th 1857), Japan (Aug. 19th 1871), Portugal (May 5th 1882), Italy (July 22nd 1863), the Netherlands (Oct. 16th 1862), Russia (June 19th 1869), Samoa (March 20th 1887), Switzerland (July 20th 1864), Spain (Oct. 29th 1863), and Sweden and Norway (July 1st 1852). Furthermore, the Hawaiian Kingdom became a full member of the Universal Postal Union on January 1st 1882.

family of nations did not entirely make clear the consequences that were to follow from that recognition.

Formally speaking, the consequences of being regarded a sovereign, and independent state were not entirely obvious. Certainly States were entitled to send and receive diplomatic representatives and insist upon their proper treatment. They were also competent to enter into binding engagements with other powers and seek reparation for any breach. They also enjoyed "territorial sovereignty" in the sense of exclusive competence in relation to matters internal, subject only to consensual agreement to the contrary. What Statehood did not seem to mean, however, was any guarantee as to the existence or demise of states. The existence of states continued to be treated as a professional *a priori*—something that pre-figured the existence of international law, and over which international law had little control. The function of recognition, in other words, was not to "bring into being" a political community, but rather to accept that community into the family of nations. Just as international law did not create States, nor did it guarantee their existence: so long as war continued to be permitted as a method of pursuing foreign relations, the annexation of territory seemed also to be an inevitable consequence. If, furthermore, the annexation of territory was a legitimate mode of acquiring territorial sovereignty, so also would it be the case that a state would cease to exist once the entirety of its territory had been annexed by another.

Curiously enough, however, Western powers were prompted on several occasions to affirm and commit themselves to the honoring of Hawaiian independence. In 1842, for example, Secretary of State Webster declared, in a letter to Hawaiian agents that:

> the government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the Islands as a conquest or for purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.[20]

Similarly, Britain and France declared, in a joint declaration in 1843, that they considered "the Sandwich Islands as an independent State" and vowed "never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed."[21] When Captain Paulet procured a document

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[20] "Letter of 19 December 1842." Basset Moore and Francis Wharton, *A Digest of International Law*, (Washington: G.P.O. 1906) I, 476. This point was reiterated subsequently by President Tyler in a message to Congress, Id. 476-477.

[21] "Anglo-Franco Proclation of Hawaiian Statehood, 28 November 1843," Executive Documents, *supra* note 16.

of Cession of the Islands from the Hawaiian King in 1843 and occupied the Islands for five months, protests were received from the United States and the occupation arrangements swiftly withdrawn.[22] Similarly, when in 1849, French forces took possession of government property in Honolulu, Secretary of State Webster sent a sharp missive to his French counterpart declaring the actions "incompatible with any just regard for the Hawaiian Government as an independent State" and calling upon France to "desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands."[23]

V. SOVEREIGNTY AND ANNEXATION

On the face it, the affirmations of Hawaiian independence appear to have been cast in terms of a substantive notion of sovereignty: sovereignty seemed to imply a right of independence that would be violated by conquest, occupation, or settlement of the Islands. Hawai`i, it might be thought, was immune from annexation in virtue of its recognition as an independent sovereign state. What was less clear, however, was how this could in any way be reconciled with the prevalent idea that States could acquire territory by way of conquest—that sovereignty was, ultimately, no defense against the realities of war or its aftermath.

Several explanations might seem to offer themselves in this respect. First of all, as a contextual issue, the political configuration of the balance of power in the early 19th Century seemed to make it inconceivable that imperial expansion would actually take place within the compass of Europe. In fact, it was a period marked by the predominance of free trade ideals that, in some sense at least, were resistant to imperial expansion in a general sense. Whilst the annexation of Australia, New Zealand, Western Canada, Fiji and much of India by Britain during the period between 1820 and 1860 seemed to undermine the rhetoric of "trade not rule,"[24] this was not such as to immediately undermine the assumption that fully sovereign states (in the sense understood at the time) were immune from wholesale conquest. In fact, leaving aside the complex territorial acquisitions that were to accompany the unification of Germany and Italy, there were no obvious cases prior to 1914 in which a fully sovereign state within Europe was to be wholly absorbed by another. The forcible annexation of territory occured elsewhere and normally in respect of communities regarded as somehow less than fully sovereign. From a contextual viewpoint, the rights of sovereignty and the fact of annexation did not seem to be inexorably opposed.

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[22] Walter F. Judd, *Hawai`i Joins the World*, (Honolulu: Mutual Publishing, 1998).

[23] "Letter from Daniel Webster to William Rives, 19 June 1851," Executive Documents, *supra* note 21, 97.

[24] J. Gallagher J. and R. Robinson, "The Imperialism of Free Trade," *Economic History Review* 6 (1953), 1.

As an accompaniment to this, international lawyers had not, even by the 19th Century, entirely shaken off the natural law associations of the notion of sovereignty.[25] The idea that States had certain "fundamental" or "natural" rights was still common currency even for those who professed to sharply distinguish positive law from politics or morality. Thus one finds Phillimore arguing in 1879 that Sovereign States enjoyed certain natural rights that included, amongst other things, free choice of government, territorial inviolability, self-preservation, free development of natural resources, and of absolute jurisdiction over all persons and things within the territory of the State.[26] Hall, writing in 1898, echoes this:

> The legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it.[27]

A desire for simple aggrandizement of territory did not fall within these terms, and in any case, the right of independence was regarded as so fundamental that any action against it "must be looked upon with disfavor."[28] Following, however, the annexation of a number of recognized sovereign states such as Hawaii, the Transvaal, and Korea in the late 19th Century—and perhaps more influentially the dismantlement of the Dual Monarchy in 1919—the idea of sovereignty slowly came to be dissociated from any association with "natural rights." Following the decisions of the Permanent Court of International Justice in the *Wimbledon* and *Nationality Decrees Cases*, sovereignty came to be understood as largely descriptive of those rights and obligations that a State might enjoy at any particular moment under the terms of international law—sovereignty and its corollaries such as domestic jurisdiction or territorial integrity became relativised, and stripped of any essential meaning within the framework of a superintendent legal order. It was the legal order that determined the content of sovereignty, not the other way round.

A third explanation associated, once again, with the supposition that international law was a predominantly European endeavor, is that the exchanges concerning the status of Hawai`i had far more to do with the ongoing relationship between the Great Powers than with any particular

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[25] Even in 1924, Hall remarks that the ultimate foundation of international law is found in an assumption that States "possess rights and are subject to duties corresponding to the facts of their postulated nature" William Edward Hall, *A Treatise on International Law, 8th ed.*, (Oxford: Clarendon Press, 1924), 50.

[26] See Robert Phillimore, *Commentaries upon International Law, 3rd ed.*, (London: Butterworths, 1879) I, 216.

[27] William Edward Hall, *A Treatise on International Law, 4th ed.*, (Oxford: Clarendon Press, 1895), 298.

[28] *Id.*

concern for Hawai`i itself. The promises to respect Hawaiian independence and preserve its political integrity seemed to say, perhaps, less about any intrinsic qualities of the Kingdom, and somewhat more about the apparent strategic imperative of its independence. Britain, France and the United States all had economic or other interests in the Pacific that needed protection, any one of which might have been threatened by the co-optation of the Hawaiian Islands by another power. The insistence upon Hawaiian sovereignty, in other words, seemed to be less concerned with what Hawai`i might legitimately claim under the terms of international law, and rather more to do with the need to ensure that Hawai`i would not become the flashpoint and give rise to inter-power conflict. Hawaii had no more claim to the honoring of those promises than it had to the maintenance of the territorial *status quo* within Europe itself.

The response of other powers to the U.S. annexation of Hawai`i in 1898 is instructive in that respect. Although the Japanese minister in Washington had raised certain concerns as regards the position of Japanese laborers emigrating to the Islands under the Hawaiian-Japanese Convention of 1888, and had insisted that "the maintenance of the status quo" was essential to the "good understanding of the powers having interests in the Pacific", it subsequently withdrew its opposition to annexation subject to assurances as regards the treatment of Japanese subjects.[29] No other state objected to the fact of annexation and it was perhaps the absence of such objection that was so significant.

Whilst it is true that few international lawyers engaged in any direct way with the idea that Hawai`i was largely an object rather than an active subject of international law, such an idea certainly finds some resonance in the arguments of certain international lawyers, such as Lawrence, Lorrimer and Westlake. Those scholars, amongst several others in the late 19th Century, began to engage with what they saw to be the dominant position of the Great Powers. For Lawrence, Britain, France, Austria, Russia and Prussia "exercised a kind of superintendence over certain European questions under the name of Great Powers", as did the United States in relation to the Americas. This did not give them any greater rights in relation to "ordinary matters" but, he observed, "collectively they act in the question over which they have gained control pretty much as the committee of a club."[30] The recognition of power differentials as a way of grounding international law in political reality meant, for Lawrence and Lorrimer that the notion of sovereign equality was little more than a "transparent fiction." For them, no doubt, the annexation of Hawai`i was merely representative of the hegemonic dominance of the Great Powers in general—a dominance that must, perforce, be reflected in the terms of international law.

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[29] Moore, *supra* note 20, 504-509.

[30] Lawrence, *supra* note 13, 66. See generally, Gerry Simpson, *Great Powers and Outlaw States,* (Cambridge: Cambridge University Press, 2004), 91-131.

Running through each of these three explanations for the affirmation of the Hawaiian right to independence one finds international legal thought in a considerable state of flux on the issue of the relationship between the priority of sovereignty and the possibility of annexation. In one view, the idea of a conflict between the right of existence and the right of war was almost inconceivable. Only once that idea came to be called into question by the actual annexation of recognized States such as Hawai`i would the idea of sovereignty be redefined in a way that excluded the notion that States' existence was guaranteed by the legal order. On another view, the conflict was to be wholly configured by reference to the realities of power—no one State had a right to exist and annexation was an unpleasant fact of life. Attempting to qualify the fact of title emanating from the annexation of territory would be to misconstrue the realities of the world in which international law was located. In either case, the argument that Hawaiian sovereignty was violated by its effective annexation by the United States, and that it remained intact after that moment, could only be maintained if one avoided the express cultural bias that had crept into international law during the latter half of the 19th Century. Protecting small Island clusters in the mid Pacific was not what many international lawyers believed that international law was about at that time.

VI. The Annexation of Hawai`i and the Issue of Process

The facts giving rise to the occupation and control of the Kingdom of Hawai`i by the U.S. government are, no doubt, susceptible to various interpretations. It is relatively clear, however, that U.S. intervention in the Islands first took place in 1893 under the guise of the protection of the U.S. legation and consulate and "to secure the safety of American life and property."[31] U.S. troops landed on the Island of Honolulu on 16 January and, under their protection, a Provisional Government was established by a group of insurgents. On the following day, and once Queen Lili`uokolani had abdicated her authority in favor of the United States, U.S. minister Stevens formally recognized *de facto* the Provisional Government of Hawai`i. The Provisional Government then proceeded to draft and signs a "treaty of annexation" on 14 February 1893 and dispatched it to Washington D.C. for ratification by the U.S. Senate.

According to the first version of events as explained by President Harrison when submitting the draft treaty to the Senate, the overthrow of the Monarchy "was not in any way prompted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili`uokolani which put in serious peril not only the large and preponderating interests of the United States in the

[31] See "Order of 16 January 1893," Executive Documents, *supra* note 21, 208.

Islands, but all foreign interests."[32] It was further emphasized in a report of Mr. Foster to the President that the U.S. marines had taken "no part whatever toward influencing the course of events"[33] and that recognition of the Provisional Government had only taken place once the Queen had abdicated, and once it was in effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of government. This version of events was to be contradicted in several important respects shortly.

Following receipt of a letter of protest sent by Queen Lili`uokolani, newly installed President Cleveland withdrew the Treaty of Annexation from the Senate and dispatched U.S. Special Commissioner James Blount to Hawai`i to investigate. The investigations of Mr. Blount revealed that the presence of American troops, who had landed without permission of the existing government, were "used for the purpose of inducing the surrender of the Queen, who abdicated under protest [to the United States and not the provisional government] with the understanding that her case would be submitted to the President of the United States."[34] It was apparent, furthermore, that the Provisional Government had been recognized when it had little other than a paper existence, and "when the legitimate government was in full possession and control of the palace, the barracks, and the police station."[35] On December 18th 1893, President Cleveland addressed Congress on the findings of Commissioner Blount. He emphasized that the Provisional Government did not have "the sanction of either popular revolution or suffrage" and that it had been recognized by the U.S. minister pursuant to prior agreement at a time when it was "neither a government de facto nor de jure."[36] He concluded as follows:

> Hawai`i was taken possession of by United States forces without the consent or wish of the Government of the Islands, or of anybody else so far as shown, except the United States Minister. Therefore, the military occupation of Honolulu by the United States... was wholly without justification, either of an occupation by consent or as an occupation necessitated by dangers threatening American life or property.

Given the "substantial wrong" that had been committed, he concluded that 'the United States could not, under the circumstances disclosed,

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[32] "Message from the President of the United States, 15 February 1893," Executive Documents, *supra* note 21, 198.

[33] *Id.*, 198-205.

[34] Moore, *supra* note 20, 499.

[35] *Id.*, 498-99.

[36] *Id.*, 501.

annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods."[37]

It is fairly clear then, that the position of the U.S. government in December 1893 was that its intervention in Hawai`i was an aberration which could not be justified either by reference to U.S. law or international law. Importantly, it was also emphasised that the Provisional Government had no legitimacy for purposes of disposing of the future of the Islands "as being neither a government *de facto* nor *de iure*.". At this stage there was an implicit acknowledgement of the fact that the U.S. intervention not only conflicted with specific U.S. commitments to the Kingdom (particularly article 1 of the 1849 Hawaiian-American Treaty which provides that "[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and successors"), but also with the terms of general international law which prohibited intervention save for purpose of self-preservation, or in accordance with the doctrine of necessity.[38]

This latter interpretation of events has since been confirmed by the U.S. government. In its Apology Resolution of 23 November 1993 the U.S. Congress and Senate admitted that the U.S. Minister (John Stevens) had "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawai`i, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawai`i", and that in pursuance of that conspiracy had "caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16th 1893." Furthermore, it is admitted that recognition was accorded to the Provisional government without the consent of the Hawaiian people, and "in violation of treaties between the two nations and of international law", and that the insurrection would not have succeeded without U.S. diplomatic and military intervention.

Despite admitting the unlawful nature of its original intervention, the U.S., however, did nothing to remedy its breach of international law and was unwilling to assist in the restoration of Queen Lili`uokolani to the throne even though she had acceded to the U.S. proposals in that regard. Rather it left control of Hawai`i in the hands of the insurgents it had put in place and who clearly did not enjoy the popular support of the Hawaiian people.[39] Following a proclamation establishing the Republic of Hawai`i by the insurgents in 1894—the overt purpose of which was to enter into a Treaty of Political or Commercial Union with the United

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[37] "President Cleveland's Message," 456. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 201-213, 210.

[38] Ian Brownlie, *International Law and the Use of Force by States*, (Oxford: Oxford University Press, 1963), 46-7.

[39] See, Rich Budnick, *Stolen Kingdom: An American Conspiracy*, (Honolulu: Aloha Press, 1992).

States[40]--*de facto* recognition of the Republic was affirmed by the U.S.[41] and the incoming President McKinley signed a second Treaty of Annexation in Washington. Despite further protest on the part of Queen Lili`uokolani and other Hawaiian organisations, the Treaty was submitted to the U.S. Senate for ratification in 1897. On this occasion, the Senate declined to ratify the treaty. After the breakout of the Spanish-American War in 1898, however, and following advice that occupation of the Islands was of strategic military importance, the U.S. Congress passed a Joint Resolution purporting to annex Hawai`i.[42] A proposal requiring Hawaiians to approve the annexation was defeated in the U.S. Senate. Following that resolution, U.S. troops occupied Hawai`i and subjected to direct rule by the U.S. administration under the terms of the Organic Act of 1900. President McKinley later characterised the effect of the Resolution as follows:

> by that resolution the Republic of Hawai`i as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions vested in the United States...[43]

As, has been remarked earlier, no state other than Japan objected to the fact of annexation. There are several points of contention that might be raised, with the benefit of hindsight, as regards the process by which the United States annexed Hawai`i. To view it as a consensual merger in the manner articulated in the Apology Resolution all too easily elides the evident involvement of the United States in the usurpation of the Queen and its hasty recognition of the Republican government (in sharp contrast to its recognition policy as practiced in other contexts). Similarly, to view the annexation in the terms under which international lawyers were accustomed to treat it, raises similar problems. In nearly every instance, the assumption was always that annexation followed from the existence of a state of war and would be brought to a close by the conclusion of a treaty of peace. Doctrinal conflict, such as existed, divided scholars between those who believed annexation followed from the fact of defeat and subsequent occupation,[44] and those who believed it to follow from a cession in the form of a treaty of peace.[45] This had certain consequences

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[40] Article 32 Constitution of the Republic of Hawai`i.

[41] "Letter from U.S. Minister Albert Willis to Francis Hatch, 5 July 1894," Executive Documents, *supra* note 21, 1374.

[42] 30 Stat.750.

[43] Moore, *supra* note 20, 511.

[44] E.g. Lawrence, *supra* note 13, 165 ('Title by conquest differs from title by cession in that the transfer of territory is not effected by treaty, and from title by prescription in that there is a definite act or series of acts other than mere possession, out of which title arises.') See also, Baker S., *Halleck's International Law, 3rd ed.*, (London, K. Paul, Trench, and Treubner, 1893) II, 468.

for the successors in title, but had little obvious relevance as to the legality of particular forms of annexation. The fact that war did not accompany the annexation of Hawai`i no doubt would have confused them—at least for the purposes of determining where to place the example in their array of practice. In addition, it is for that reason that most contemporary authors probably accepted the U.S. view that the annexation was, in reality a consensual merger.

Subsequent authors have suggested, from time to time, that armed conflict was a *sine qua non* for the effective annexation of territory. Bindschedler suggests, in this regard, and by reference to the purported annexation of Bosnia-Herzegovina by Austria-Hungary in 1908, that:

> unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal. It makes no difference that the territory involved may already be under the firm control of the State declaring the annexation.[46]

The reason for this, no doubt, was the tendency to view international law as being comprised of two independent sets of rules applicable respectively in peacetime and in war (a differentiation which is no longer as sharp as it once was). A State of war had several effects at the time including not merely the activation of the laws and customs of war, but also the invalidation or suspension of existing treaty obligations.[47] This would appear to mean that in absence of armed conflict, the U.S. would have been unable to avoid its commitments under the 1849 Treaty with Hawai`i, and would therefore be effectively prohibited from annexing the Islands by unilateral act.

Plausible as this might seem to an international lawyer dealing with the systemic intricacies of international law in the 21st Century it is by no means obvious that 19th Century international lawyers would have been so concerned about the issue of process. What was central to the articulation of international law in the 19th Century was the fact of state practice. In the digests of international law such as those of Moore or Whiteman, the annexation of Hawaii is merely reported—no critical comment or review is offered, no assessment of the relative plausibility of the U.S. position. It is cited purely for purposes of informing the public of the variety of means by which territory might be acquired. International lawyers, after all, saw their role as one of building international law and, in view of the absence of coercive mechanisms for its enforcement, placing it as close to actual diplomatic practice as possible without losing sense of its normative appeal. The idea that a

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[45] Phillimore, *supra* note 26, at 328, seems to assume the position that conquest is viewed as a derivative mode of acquiring title.

[46] R. Bindschedler, "Annexation," *Encyclopedia of Public International Law*, III, 19, 20.

[47] Brownlie, *supra* note 37, 26-40.

particular event would, in absence of protest from other states, be regarded as unlawful was almost inconceivable. The annexation of Hawai`i was merely something to be recorded, something that went to describe how European nations understood the terms of their own discipline, not something that the average international lawyer residing within Europe or elsewhere would see in any way as inconsistent with the terms of international law.

VII. CONCLUSION

In some respects my argument, thus far, centers upon a contradiction. The resurrection of the political history of Hawai`i, as distinct from the history of its people as an ethnic or cultural community, seems to be of critical value to sovereignty movements as a way of counteracting, or opposing, their political marginalization. It allows them to speak as political agents without having to concede the legitimacy of their subordination. For the same reason, interrogating the political history of Hawai`i and the framing role of international law in the 19th Century offers less by way of emancipation than might be desired. Yes, the Kingdom of Hawai`i was a recognized power, a member of the family of nations, but this was barely such as to ensure its continued existence in face of intervention and occupation by the United States. International law at the time did not merely implicate itself in matters of politics pure and simple, it was deeply imbued with cultural and ethnic associations that tied the idea of sovereignty to the triumph of European civilization. That Hawai`i was able to acquire membership in the selective club was perhaps more surprising than its subsequent annexation.

If a point of critique is to be found, in this respect, it should not be sought in an engagement with international law as understood by international lawyers at that time—in attempting to find justice in a system whose sense of justice was largely obedient to the prerogatives of European powers. Rather that critical engagement should perhaps more properly be directed towards the way in which the United States, in conjunction with other European powers, effectively managed a system of law that was both palpably discriminatory and systematically unjust. Rather than treat history, as the sovereignty movement would have it, as a political history of constitutional moments, legislative prowess and pacific relations with other states, the 19th Century history of international law reflects all that a pure political history would seek to avoid—the celebration of culture, ethnicity, nationalism, and its deployment as a means of cementing the predominance of Western political power.